Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality

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Abstract

The by-laws of South African municipalities are full of provisions criminalising the poor. For example, begging and sleeping in the open is prohibited in many cities. Hawking goods or providing services is restricted. Many of these by-laws are rarely enforced while others are enforced to provide a sense of security among the privileged by removing undesirable persons from the streets. Action against the poor is often presented as being taken in their interest; the homeless should live in shelters, beggars should find employment. But it is through the action against them that many lose their livelihood and what little they own. Clearly more could be done to assist the vulnerable. However, criminalisation is not a solution. The paper traces the colonial history of vagrancy laws and their relationship to by-laws criminalising outside living and survival strategies of poor persons in the four largest metropolitan areas in South Africa: Johannesburg, Tshwane (Pretoria), eThekwini (Durban) and Cape Town. It shows how vagrancy legislation and related by-laws have been, and are being, used for social control of the poor, who have throughout history been viewed as a threat to the elite. The article further explores the constitutionality of anti-poor by-laws and the prospects of a constitutional challenge before the courts.

Keywords: by-laws; petty offences; homelessness; begging; street trading; loitering

1. Introduction

'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'[1] The French Nobel laureate Anatole France wrote this about France in the 1890s, but the 'majestic equality' is alive and well in the South Africa more than twenty years after a hard-won freedom that came with a promise of a better future for all.

The law in many parts of the country views beggars, 'illegal' street traders and others trying to make their living in public spaces as criminals. The same applies to 'loiterers' and those forced by circumstance to sleep in the streets. These poor persons are made criminals through municipal by-laws. The extent of enforcement of such by-laws varies from municipality to municipality, but the objective is to create sanitised public spaces in the name of security, an approach that judging from news reports and social media appeals to a large segment of the general public.[2]

This article explores by-laws affecting four categories of vulnerable persons in South Africa: the homeless, 'loiterers', beggars and persons conducting trade without the necessary permits. It examines current municipal by-laws with a focus on the four major metropolitan municipalities in South Africa: Johannesburg, Tshwane, Cape Town and eThekwini. It traces anti-poor provisions in municipal by-laws criminalising loitering, street vending, begging and homelessness to colonial and

[1] '[L]a majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain'; A France *Le Lys Rouge* (1896) 118.

[2] See for example Groundup 'Bedfordview beggars face crackdown' (25 October 2017) *Daily Maverick* <https://www.dailymaverick.co.za/article/2017-10-25-groundup-bedfordview-beggars-face-crackdown/#.Wtb2F9NuYWo>.

apartheid-era legislation, which municipalities have decided to keep alive despite their discriminatory nature in a deeply unequal society.

When the history of current measures criminalising the poor is considered, they are often viewed as having their origin in English vagrancy laws, in particular the 1824 Vagrancy Act.[3] While the link with English legislation is evident in existing criminal law throughout Anglophone Africa,[4] the historical trajectory in South Africa is more complex. While there have been some historical studies on the origins of the Cape, Natal and Transvaal vagrancy statutes, the link between these, pass laws and current by-laws has not been previously explored.

2. Social control of the poor

Society wants to protect itself against the vagrant, defined by the Oxford Dictionary as 'a person without a settled home or regular work who wanders from place to place and lives by begging'. The vagrant and other persons trying to eke out a living in public spaces without authorisation are labelled as a threat and viewed as dangerous. They are accused of stealing, causing traffic accidents and standstills, spreading disease and being a general nuisance.

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[3] 5 Geo IV C.83: An Act for the Punishment of idle and disorderly Persons, and Rogues and Vagabonds, in that Part of Great Britain called England [21st June 1824].

[4] See, for example, the provisions on idle and disorderly persons in the Penal Code of Botswana s 179; Criminal Code of The Gambia s 166; Criminal Code (Supplementary Act) of Mauritius s 26; Criminal Code Act of Nigeria s 249; Penal Code Act of Uganda s 167. See also L Muntingh & K Petersen 'Punished for being poor: evidence and arguments for the decriminalisation and declassification of petty offences' (2015) Civil Society Prison Reform Initiative report <pettyoffences.org/?mdocs-file=4055>

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The starting point for analysing the control of this marginalised group of persons is property. Jeremy Waldron notes:

> The rules of property give us a way of determining, in the case of each place, who is allowed to be in that place and who is not. For example, if a place is governed by a private property rule, then there is a way of identifying an individual whose determination is final on the question of who is and who is not allowed to be in that place […] An individual who is in a place where he is not allowed to be may be removed, and he may be subject to civil or criminal sanctions for trespass or some other similar offense.[5]

The position even with regard to private property is less absolute than what is illustrated by this quote.[6] However, in general, a property owner has the right to determine who may make use of his or her property.

But what about public spaces? Waldron refers to 'common places' such as sidewalks and parks, which though their use may be regulated 'are relatively open at most times to a fairly indeterminate range of uses by anyone'.[7] He also notes that certain private property, such as shopping malls, may be publicly regulated.[8] Waldron, writing in the early 1990s on the situation in the United States, notes increasing regulation of the use by the homeless of common places to the extent of

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[5] J Waldron 'Homelessness and the issue of freedom' (1991) 39 *UCLA Law Review* 296.

[6] See P Dhilwayo 'A constitutional analysis of access rights that limit landowners' right to exclude' (2017) unpublished LLD thesis, Stellenbosch University. See also *V&A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* (4543/03) [2003] ZAWCHC 75; [2004] 1 All SA 579 (C) (23 December 2003), a case that is also discussed below.

[7] Waldron (note 5 above) 298.

[8] Ibid.

constituting 'callous and tyrannical' exercise of power by the privileged.[9] This is hardly new. Anti-vagrancy laws existed across the Western world from medieval times.[10] Many have been repealed in recent decades or struck down by courts as overly vague, but some remain on the statute book. Begging remains prohibited in many states across the world.[11]

In the past, those guilty of vagrancy or begging were often put to work in working colonies or poor houses. Today, fines are the most common penalty, with a sentence of imprisonment for those who cannot pay the fine. However, the main effect of turning survival strategies into offences is not a fine but the risk of arrest and confiscation of property. There is an international movement for the decriminalisation of petty offences, as these types of offences are often referred to. The African Commission on Human and Peoples' Rights has adopted the Principles on the Declassification and Decriminalization of Petty Offences in Africa.[12] At the United Nations level, the Committee on Racial Discrimination, in its 2014 concluding observations on the United States, expresses its concern over 'criminalization of

[9] Ibid 301.

[10] See, for example, AL Beier & P Ocobock (eds) *Cast Out: Vagrancy and Homelessness in Global and Historical Perspective* (2008).

[11] However, there have also been positive developments, such as the High Court of Delhi in August 2018 striking down the prohibition of begging as unconstitutional, see W.P.(C) 10498/2009 & CM APPL. 1837/2010 <http://hlrn.org.in/documents/HC_Delhi_Decriminalisation_of_Begging.pdf>.

[12] African Commission on Human and Peoples' Rights 'Principles on the decriminalisation of petty offences in Africa' <http://www.achpr.org/files/instruments/decriminalisation-petty-offences/principles_on_the_decriminalisation_of_petty_offences_efpa.pdf>. See also the Commission's Ouagadougou 'Declaration and plan of action on accelerating prisons and penal reforms in Africa', which calls for decriminalisation of petty crimes in order to reduce prison overcrowding <http://www.achpr.org/instruments/ouagadougou-planofaction>

homelessness through laws that prohibit activities such as loitering, camping, begging and lying down in public spaces' and calls on the state to '[o]ffer incentives to decriminalize homelessness, including by providing financial support to local authorities that implement alternatives to criminalization, and withdrawing funding from local authorities that criminalize homelessness'.[13]

The French Marxist philosopher Henri Lefebvre coined the phrase of the 'right to the city' 50 years ago, on the eve of the student uprisings of May 1968. Marius Pieterse has given his interpretation of this concept in the context of contemporary South Africa and argues that, '[T]he right to the city shifts the attention to the local government as the embodiment of public power in the everyday urban realm.'[14] This reflects, as will be discussed later in this article, how municipalities in South Africa has become more powerful in the constitutional era. It is the argument of this article that this power comes with responsibility and that municipalities must seriously reflect on the consequences of their by-laws for the urban poor. This is necessary because some of them may violate the Bill of Rights. It should also be noted that this is not only a question of rights but also of what Wessel Le Roux refers to as 'street democracy'. He notes that, 'The street, much like politics, requires constant exposure

[13] United Nations Committee on the Elimination of Racial Discrimination 'Concluding observations on the combined seventh to ninth periodic reports of the United States of America' (2014) <https://tbinternet.ohchr.org/Treaties/CERD/Shared Documents/USA/CERD_C_USA_CO_7-9_18102_E.pdf>.

[14] M Pieterse 'Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa' (2014) 131 *South African Law Journal* 155. See also M Pieterse *Rights-Based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (2017).

and risk taking as an existential and ethical obligation of living together.'[15] This is the ideal. However, to uphold many of the by-laws discussed in this article in their current form is to promote segregation. This segregation is racialised and has its origin in vagrancy laws that the white elite adopted to control the rest of the population and secure cheap labour. It is to this history that I now turn.

3. The history of vagrancy legislation in South Africa

The history of criminalising vagrancy in South Africa is interlinked with the history of pass laws. Both set of laws were first adopted with the aim of subjugating the indigenous population in the Cape.

The 1809 Caledon Code 'marked the final step in the transformation from independent peoples to "Hottentots", that is, subjugated Khoikhoi in the permanent and servile employ of white settlers'.[16] As noted by Elizabeth Elbourne, 'The Caledon Proclamation made pass laws more systematic and expanded the power of local officials to control and punish those taken up for "vagrancy".'[17] The Khoi became 'aliens in their own territory'.[18] This situation was reversed in 1828 with ordinance 50, which recognises equality before the law without distinction of colour.[19] This applied to those residing in the Cape Colony while foreign 'natives' had to obtain passes. Citing the inconsistency of the proposed legislation with ordinance 50, the

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[15] W le Roux 'Planning law, crime control and the spatial dynamics of post-apartheid street democracy' (2006) 21 *South African Public Law* 35.

[16] W Dooling 'The origins and aftermath of the Cape Colony's "Hottentot Code" of 1809' (2005) 31 *Kronos* 50.

[17] E Elbourne 'Freedom at issue: vagrancy legislation and the meaning of freedom in Britain and the Cape Colony, 1799 to 1842' (1994) 15 *Slavery & Abolition* 114, 122.

[18] Ibid.

[19] Ibid 128.

imperial government in London prevented the Cape Legislative Council's attempt to introduce new vagrancy legislation in 1834.[20] Master and Servants legislation passed in 1841 provided many limitations on the freedom of servants, which were further expanded in the years to come.

Vagrancy legislation was only reintroduced in the Cape Colony in 1879, this time with much more detail than in the laws of the early 1800s. Act 23 of 1879 for the Prevention of Vagrancy and Squatting defines a vagrant as a 'person found wandering abroad and having no visible lawful means, or insufficient lawful means of support' and who cannot 'give a good and satisfactory account of himself'. The reason for the adoption of the Act is set out in the preamble:

> Whereas it is expedient, as far as possible, to suppress idleness and vagrancy, and whereas serious losses of stock by thefts are experienced by the farmers of this colony, and there is reason to believe that the same are in a great measure traceable to the facilities afforded to unemployed persons, and persons without sufficient means of support, of residing upon crown and other lands, and of roaming about without proper control, and it is expedient that such facilities as aforesaid should be restricted. [21]

The penalty provided for vagrancy was imprisonment up to three months.

Vagrancy legislation was not unique to the Cape Colony but formed an integral part of social control in the other territories that would in 1910 form the Union of South Africa.

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[20] Ibid 133.

[21] Vagrancy Act 23 of 1879 s 2. See also Vagrancy Amendment Act (1889); Act 34 of 1895 to Declare and Amend the Law with regard to Vagrancy and Squatting; Act 34 of 1895 to Declare and Amend the Law with regard to Vagrancy and Squatting.

A law on vagrancy was one of the first the Volksraad of the newly formed Orange Free State adopted in 1855.[22] Similarly to the Cape Vagrancy Act, the ordinance, revised in 1860,[23] notes in its preamble that the legislation is necessary as vagrants without any honest occupation traversed the land stealing and even posing a threat to the lives of the honest (white) citizens of the state. The ordinance makes a distinction between white foreigners (not a citizen of Transvaal, the Cape Colony or Natal), coloured foreigners (not a legal inhabitant of the Orange Free State) and coloured inhabitants of Orange Free State. The law was extended in 1895 to also cover all white vagrants. Thus, the Law to Provide against Stock Thefts, Vagrancy and the Congregation of Coloured Squatters of the Orange River Colony (Chapter CXXXIII) provides in s 12:

> Any white or coloured person wandering about in this State or residing here without honourable means of subsistence, may and shall be detained and sent to the Landdrost of the district where he is detained to be examined with reference to his means of existence, and if he has none the Landdrost shall be competent to deal with him in accordance with the provisions of Article 30.

Section 30 provides that the punishment for vagrancy is a fine or imprisonment not exceeding three months. The section further provides that non-whites could be contracted as a servant of a white person for up to a year. Like the forced labour penalties in the Transvaal legislation discussed below, this penalty should be seen in the context of the need for labour of the white farmers in the Orange

[22] Ordonnantie tegen Landlooperij en Veedieverij No 2 (1855).

[23] Ordonnantie No 1 (1860) bepalende te Wet tegen Landlooperij en Veediefte, reprinted in Ordonnantie Boek van den Oranjevrijstaat 1854-1877 (1877) 181.

Free State at the time. The fear of vagrants as criminals, the need to secure labour and the subjugation of Africans were thus combined in the legislation.

The Zuid-Afrikaansche Republiek (Transvaal) even incorporated a provision on vagrancy and vagabondage in its 1858 constitution (Grondwet). Section 104 provides that field cornets have the duty to maintain law and order, which in s 105 is defined to include 'administration of the natives' and 'counteracting vagrancy and vagabondage'.[24] Section 9 of the Grondwet provides that there was no equality between black and white people.

The link between the black population, vagrancy and theft was further reinforced through ordinance 2 of 1864 and an 1866 act that was further revised and adopted as Act 9 of 1870 to Prevent Vagrancy, Thievery and other Irregularities by Natives, to Protect Persons, Properties and Possessions, to Better Regulate and Control Native Tribes, and to Impose a Return Tax upon the Natives and other Coloured Persons (Native Taxes and Vagrancy Law).[25] According to its preamble, the Act was adopted to provide for the safety and protection of all persons and property. The Act provides that all 'coloured' persons found on government land or in the towns must have a written permit from the Landdrost.[26] Any citizen could detain a 'coloured' person 'crossing the land without having a pass from his employer […] or, having a pass, not acting in accordance with it'.[27] Those not in possession of such a

[24] 'het opzigt over de kleurlingen 3) en het tegengaan van landlooperij en vagebonden'.

[25] English translation reprinted in JS Bergh & F Morton *'To Make Them Serve …': The 1871 Transvaal Commission on African Labour* (2003) 171-176.

[26] Native Taxes and Vagrancy Law (1870) s 2.

[27] Ibid s 3.

permit would be placed in compulsory labour with a citizen of the Republic.[28] The penalty was not surprising considering the white farmers dependency on African labour at the time. As noted by Johan Bergh and Fred Morton: 'From the very beginning [the white settlers] were dependent on African labour for their farming activities and tried, in various ways, to secure this labour.'[29] In 1871 the Volksraad decided that property owners were not to allow 'coloured' persons not in their employ to congregate on their property in order to 'prevent vagrancy, theft, and other irregularities arising from such congregating'.[30]

In 1881 the Volksraad enacted Law 1 of 1881 on Vagabondage and Vagrancy.[31] The law defines vagrants as 'persons who have neither a fixed place of residence nor means of subsistence, and who are not in the habit of carrying on any trade or calling'.[32] The punishment for vagrancy was up to six months imprisonment 'with hard labour according to circumstances'.[33] Foreign nationals found guilty of vagrancy could be deported.[34] As there was other legislation dealing with the African population, the 1881 Vagrancy Act was aimed at poor whites and not widely applied.[35]

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[28] Ibid s 4.

[29] Bergh & Morton (note 25 above) 10.

[30] Volksraad resolution (25 September 1871) reprinted in C Jeppe & J van Pittius *Statutes Law of the Transvaal, Vol 1, 1839-1900* (1910) 34.

[31] Reprinted in ibid. Repealed by Pre-Union Statute Law Revision Act 78 of 1967.

[32] Law on Vagabondage and Vagrancy (1881) s 2.

[33] Ibid s 3.

[34] Ibid s 4, 'placed across the border upon order of the Government'.

[35] See for example J Plowden-Wardlaw 'The agricultural laws of the Transvaal No II: the trespass or intrusion laws' (1904) 2 *Transvaal Agricultural Journal* 540; Transvaal Indigency Commission *Report of the Transvaal Indigency Commission 1906-08* (1908) 147.

The vagrancy acts discussed above do not expressly deal with begging. Their focus is on able-bodied people, specifically men. Begging was explicitly prohibited in Transvaal in 1909 with a penalty of a fine or imprisonment not exceeding six months.[36]

A decade before the Cape Colony adopted the Vagrancy Act, Natal adopted Law 15 of 1869 for the punishment of idle and disorderly persons and vagrants within the Colony of Natal. The preamble sets out the reason for the adoption of the Act: 'Whereas it is expedient to make provision for ensuring greater security and protection of the inhabitants of Natal, and for punishing idle and disorderly persons and vagrants within such Colony.'

Section 1 of the Act prohibits the following acts: trespass on private property, indecent exposure and 'riotous or indecent' behaviour. These acts were subject to a fine or imprisonment up to three months. In 'boroughs', the Act provided for an additional offence reserved for 'coloured' persons namely to be 'found wandering abroad after and before such hour as such Corporation may fix, and not giving a good account of himself or herself'.[37] In *Vinden v Ladysmith Local Board*,[38] Gallwey CJ held that what was prohibited was 'wandering abroad from one's habitation without good cause'.[39] The Act provided that a borough could make by-laws 'for carrying out the provisions' of the Act.[40] The Act gave a magistrate the power to impose a penalty

[36] Act 38 of 1909 to provide for the prevention suppression, and punishment of certain offences and to amend in certain respects the law relating to the detention of convicted persons, and to provide for the establishment of industrial schools for children. See also *Rex v Scott* (1947) 4 SA 583 (T).

[37] Natal Vagrancy Act 16 of 1869 s 2.

[38] *Vinden v Ladysmith Local Board* (1896) 17 NLR 78.

[39] Ibid 83.

[40] Note 37 above s 4.

but made no provision for arrest. Wragg J in *Vinden* noted that the power to make arrests was only provided for under a by-law and considered it 'a matter for argument' whether the by-laws were *ultra vires* in this regard.

According to Jeremey Martens, the history of the Natal Vagrancy Act should be viewed in the context of the perception of the colonialists that, 'African men in Natal towns presented a danger to settler society in general and a sexual threat to white women and children in particular.[41] The colonial administration deemed invalid a by-law providing for a 10pm curfew the Pietermaritzburg City Council proposed in 1868 and argued that it went beyond the powers of the council.[42] In April 1869 the Pietermaritzburg council adopted a revised version of the by-law and:

> amended an existing by-law so as to prohibit any 'person or persons' from standing or congregating 'on any footpath street or public place within the borough, so as to obstruct free traffic or endanger the public peace'. Both by-laws were again deemed ultra vires. [Colonial Secretary] Erskine informed the municipality that no law existed to prevent people from congregating in public, and that the 'curfew' by-law was illegal as a Vagrant Act was not in force in Natal.[43]

The positions of Wragg and Erskine illustrate that municipalities could only legislate within the powers provided to them by legislation. This subordinate position of local municipalities remained in place until the legislative autonomy given to municipal councils in the Constitution of the Republic of South Africa, 1996.[44]

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[41] J Martens 'Polygamy, sexual danger and the creation of vagrancy legislation in Colonial Natal' (2003) 31 *The Journal of Imperial and Commonwealth History* 24-25.

[42] Ibid 26.

[43] Ibid 28.

[44] See for example N Steytler & J de Visser, 'Local government' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2008) 22-15.

As shown above, the segregation of whites from other population groups was nothing new when the Cape Colony, Natal, Transvaal and the Orange Free State joined to form the Union of South Africa in 1910. Segregation and pass laws were further entrenched among others through the Native (Urban Areas) Act 21 of 1923, the Natives (Urban Areas) Consolidation Act 25 of 1945, the Natives Laws Amendment Act 54 of 1952 and the Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

These laws focused in particular on the presence of black people in urban areas. Some rural areas were set aside as reserves and the Bantu Authorities Act 68 of 1951 was adopted to regulate what became known as the Bantustans, which effectively functioned as labour reserves for the whites. Access by black people to urban areas was heavily regulated and with the only aim of providing labour. The 1922 Stallard Commission notes that, '[T]he native should only be allowed to enter urban areas, which are essentially the white man's creation, when he is willing to enter and to minister to the needs of the white, and should depart therefrom when he ceases to so administer.'[45]

This policy was reflected in the relevant legislation. Thus, the Natives (Urban Areas) Consolidation Act, in s 29, sets out the 'manner of dealing with idle, dissolute or disorderly natives in urban areas'. Failure to 'give a good and satisfactory account of himself' could result in detention 'for a period not exceeding two years in a farm colony, work colony, refuge, rescue home or similar institution'. Section 29 was widely applied. For example, in 1982 there were 5,000 enquiries in terms of s 29 in

[45] Quoted in C Nicholson 'Section 29: landmark judgement on "idle" blacks' (1983) 1 *Indicator South Africa* 3.

Durban alone.[46] It was only in 1983 that the Supreme Court[47] in Pietermaritzburg limited the definition of 'idle' to those who willingly chose not to work.[48] The Court held with regard to the complainant that, 'Idle means lazy, indolent, a shirker, a slacker and one not eager to obtain work. Her lack of employment was not of her own making. Throughout she strove for better. She did her best.'[49]

As noted in the 1997 Green Paper on local government, 'Through spatial separation, influx control, and a policy of "own management for own areas", apartheid aimed to limit the extent to which affluent white municipalities would bear the financial burden of servicing black areas.'[50] However, own management in black urban areas was never achieved.[51] In 1971 the responsibility of white municipalities for black townships was transferred to nationally appointed Administration Boards under the Bantu Affairs Administration Act 45 of 1971. Community Councils were introduced in 1977 and replaced by Black Local Authorities in 1982.[52] However, neither had any substantive powers and lacked revenue and legitimacy.[53] As Fanie Cloete notes, 'Local government was de facto controlled by the white system without effective participation by the other groups.'[54]

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[46] Ibid 4.

[47] Now the High Court.

[48] Nicholson (note 45 above).

[49] Ibid 3. See also the 1979 case *In re Dube* cited by Pieterse (2017) (note 14 above) 129.

[50] Ministry of Provincial Affairs and Constitutional Development 'Green paper on local government' (1997) 3.

[51] Ibid 4.

[52] Black Local Authorities Act 102 of 1982.

[53] Note 50 above 4.

[54] F Cloete *Local Government Transformation in South Africa* (1995) 3.

With the Natives (Urban Areas) Consolidation Act addressing the main vagrancy problem from the point of view of the apartheid government, there was no longer a need for vagrancy legislation.[55] In addition, provincial local government ordinances provided municipalities with the power to adopt related by-laws.[56] The provincial and national governments also adopted standard by-laws for municipalities. The provincial vagrancy acts were repealed.[57]

Street trading was not regulated in 19th century legislation. The segregation legislation of the 20th century as noted above aimed at making the black population servants of the whites. Apartheid legislation was used 'to tightly control black business activity', whether formal or informal.[58] Street trade was to a large extent deregulated through the Business Act 71 of 1991, though municipalities were allowed to impose some restrictions.

The aim of the historical overview above was to illustrate the reasons for adoption of vagrancy laws and their role in socially controlling the poor and to illustrate the racism inherent in this legislation in the colonies, the Boer republics, the Union and under the apartheid government. As discussed below, the offshoots of the vagrancy laws are municipal by-laws, which remain in force in the democratic era.

4. Municipal by-laws and the 'illegal poor'

[55] See also the Trespassing Act 6 of 1959.

[56] Local Government Ordinance 17 of 1939 (Transvaal); Local Government Ordinance 8 of 1962 (Orange Free State); Municipal Ordinance 20 of 1974 (Cape of Good Hope); Local Authorities Ordinance 25 of 1974 (Natal).

[57] Pre-Union Statute Law Revision Act 78 of 1967; Pre-Union Statute Law Revision Act 43 of 1977.

[58] J May & M Schacter 'Minding your own business: deregulation in the informal sector' (1992) 10 *Indicator South Africa* 53.

4.1 The power of municipalities to adopt and amend by-laws

Despite the vagrancy and pass law legislation adopted in the colonies and the Boer republics in the 19th century, municipalities adopted complementary by-laws. As noted above, in adopting such by-laws, they needed to stay within the confines of the mandate given to them in legislation. This changed with the Constitution, which provides municipalities with the power to legislate within their areas of competence without any enabling legislation. Thus, according to s 156(2) of the Constitution, 'A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.' Section 156(3) provides that, '[A] by-law that conflicts with national or provincial legislation is invalid.' A municipality has the right to administer local government matters as set out in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. The most relevant local competencies for the current purposes fall under Schedule 5: control of public nuisances, local amenities, municipal roads, public places and street trading. There is no definition of these terms in the Constitution or in national or provincial legislation adopted in the constitutional era.

Under the Constitution, municipalities are autonomous in relation to their area of competence. They may thus legislate as they deem fit within the areas indicated, as long as the by-laws do not conflict with Constitution or national or provincial legislation. The detailed by-law provisions set out in the provincial ordinances are thus no longer of relevance, even if they remain on the statute book. Since the ordinances are broadly permissive, they also do not provide much guidance on what should fall within the ambit of concepts such as 'public nuisance'. However, it is also clear that even if a particular behaviour would fall within the ambit of public nuisance as defined under the apartheid legislation, constitutional values would have to be

taken into consideration in determining the extent of municipal legislative powers within their areas of competency.

In the preamble, the Local Government: Municipal Systems Act 32 of 2000 sets out the importance of municipalities in the new constitutional order:

> Whereas the system of local government under apartheid failed dismally to meet the basic needs of the majority of South Africans;
>
> Whereas the Constitution of our non-racial democracy enjoins local government not just to seek to provide services to all our people but to be fundamentally developmental in orientation;
>
> […]
>
> Whereas the new system of local government requires an efficient, effective and transparent local public administration that conforms to constitutional principles;

There is, therefore, an implicit obligation on municipalities to revise by-laws in light of constitutional rights such as dignity, non-discrimination, and freedom of trade and movement. However, in its substantive parts, the Act is only focused on procedure and not the substance of by-laws. The Act thus provides for the procedure for adopting new by-laws, including public consultation. No provision is made with regard to by-laws already in force. However, it follows from s 15(3) of the Local Government Transition Act 209 of 1993 that an old by-law remains in force until repealed or amended.

The Local Government: Municipal Systems Act 32 of 2000 makes provision for standard draft by-laws adopted by the minister for local government or the

provincial member of the executive council for local government.[59] However, as opposed to previous legislation as discussed below, such draft by-laws only become law in a municipality after council adoption as municipal by-laws in line with the provisions of the Act.

4.2 Criminalisation of homelessness and survival strategies in the by-laws of the four major metropolitan municipalities

4.2.1 Homelessness

The Johannesburg Public Open Spaces By-laws adopted in 2004 include broad prohibitions such as to 'contravene the provisions of any notice' and 'cause a nuisance'.[60] It is further prohibited to 'camp or reside' in a public open space.[61] This differs from the prohibition in the 1972 Parks, Gardens and Open Spaces By-laws, which only prohibit lying on a seat.[62] The prohibition of camping or residing in a public open space is clearly directed at homeless people. Few people with access to a private home would choose to camp in an urban public space, at least outside areas specifically designated for this purpose. 'Public open space' is defined very broadly.[63] This in essence prohibits the homeless from sleeping, a basic human necessity.[64]

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[59] Section 14.

[60] City of Johannesburg Metropolitan Municipality 'Public Open Spaces By-laws' (21 May 2004) *Gauteng Provincial Gazette* 179 s 12 <https://www.joburg.org.za/documents_/Documents/By-Laws/prom_public_open_spaces_by-laws.pdf>

[61] Ibid s 13(c).

[62] City of Johannesburg Metropolitan Municipality 'Parks, Gardens and Open Spaces By-laws' (2 February 1972) Administrator's notice 166 *Transvaal Provincial Gazette* 275 s 8(v).

[63] Public Open Spaces By-laws (note 60 above) s 1 defines 'public open space' as 'land owned by the state or 'controlled and managed by the Council' and which is '(i) set aside in terms of any law, zoning scheme or spatial plan, for the purpose of public recreation,

According to 2005 Tshwane By-laws Relating to Public Amenities, no one is allowed to 'lay down on any seat' in a public amenity.[65] Public amenity is defined as 'any public place, excluding any public road or street which is the property of, or is possessed, controlled or leased by a council and to which the general public has access, whether on payment of admission fees or not.' In 1984 the Pretoria City Council adopted by-laws relating to public order and places.[66] These prohibit camping,[67] washing,[68] begging,[69] playing an instrument or singing for profit,[70] and conducting trade[71] without the permission of the Council. These by-laws have seemingly been repealed, since they are no longer listed among the by-laws on the

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conservation, the installation of public infrastructure or agriculture; or (ii) predominantly undeveloped and open and has not yet been set aside for a particular purpose in terms of any law, zoning scheme or spatial plan.' Also see the definition of public space in s 2 of Transvaal Local Government Ordinance 17 of 1939: 'any road, street, thoroughfare, bridge, overhead bridge, subway, foot pavement, foot-path sidewalk, lane, square, open space, garden, park, enclosed space vested in a town or village council [and] any road, place or thoroughfare however created which is in the undisturbed use of the public or which the public have the right to use.' <https://www.imesa.org.za/wp-content/uploads/2016/01/Transvaal-Local-Government-Ordinance-1939-Ord-17-of-1939.pdf>

[64] See also Waldron (note 5 above).

[65] City of Tshwane Metropolitan Municipality 'By-laws Relating to Public Amenities' (9 February 2005) *Gauteng Provincial Gazette* 42 LAN 265 s 8(1)(u) <http://www.tshwane.gov.za/sites/business/Bylaws/Promulgated%20ByLaws%20Documents/bylaw_publicamenities.pdf>.

[66] City of Pretoria Metropolitan Municipality 'By-laws relating to public order and public places' (18 January 1984) Administrator's notice 55 *Transvaal Provincial Gazette* 105.

[67] Ibid s 7(1)(c).

[68] Ibid s 7(1)(e).

[69] Ibid s 8(1)(f).

[70] Ibid s 8(1(e)

[71] Ibid s 8(1)(h).

Tshwane Municipality website. The revised Public Amenities By-laws of 2005 repealed:

> all other By-laws relating to public amenities that were in effect prior to the promulgation of these By-laws within the jurisdiction of the City of Tshwane Metropolitan Municipality, including all clauses relating to public amenities as appears in other By-laws that were in effect prior to the promulgation of these By-laws.

However, fines for violations of the public order by-laws are still provided in the September 2006 fine schedule for by-law policing, which is available on the Tshwane Municipality website. If the intention were to repeal these by-laws, it would have been better to do so by name as many other municipalities do when they repeal by-laws (and as the 1984 by-laws did with regard to earlier by-laws). This is particularly important as public places as defined in the 1939 Local Government Ordinance[72] is a much broader concept than public amenities as defined in the 2005 by-laws, and the legal situation is subsequently particularly unclear with regard to acts that take place in public places that do not constitute public amenities; public roads are an example, as they are regulated in the 1984 but not in the 2005 by-laws.

In 2007 Cape Town adopted new by-laws relating to streets, public places and the prevention of noise nuisances.[73] Section 2 sets out prohibited behaviour, including starting or keeping a fire, sleeping overnight or erecting any shelter, except for 'cultural initiation ceremonies or [in] informal settlements'. Similar to the

[72] Cf note 63 above.

[73] City of Cape Town Metropolitan Municipality 'By-laws Relating to Streets, Public Places and the Prevention of Noise Nuisances' (28 September 2007) *Western Cape Provincial Gazette* 6469 <https://openbylaws.org.za/za-cpt/act/by-law/2007/streets-public-places-noise-nuisances/eng/>.

Johannesburg by-laws, the prohibition of sleeping overnight is of concern, particularly problematic in the absence of sufficient shelter capacity. The same applies to the 2016 eThekwini by-law governing nuisance and behaviour in public places, which provides that no one may 'lie or sleep on any bench, seating place, street or sidewalk'.[74]

4.2.2 Loitering and begging

When Johannesburg revised its 70-year-old traffic by-laws in 2004, the Council decided to provide in s 15(4) of the 2004 Public Road and Miscellaneous By-law that, 'No person may on any public road in any way loiter or solicit or inconvenience or harass any other person for the purpose of begging.'[75] The wording is more modern, but the message is the same as in s 83 of the 1934 Johannesburg Traffic By-laws, which provided that, 'No person shall in or near any street in any way loiter or solicit or importune any other person for the purpose of prostitution or mendicancy.'[76] A public road is defined as 'a square, road, sidewalk, island in a road, subway, avenue, bridge, public passageway and any thoroughfare shown on the general plan of a township'.[77]

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[74] City of eThekwini Metropolitan Municipality 'Nuisances and Behaviour in Public Places By-law' (11 September 2015) *KwaZulu-Natal Provincial Gazette* 1490 MN 176 s 5(2)(q) <https://openbylaws.org.za/za-eth/act/by-law/2015/nuisances-behaviour-public-places/eng/>.

[75] City of Johannesburg Metropolitan Municipality 'Public Road and Miscellaneous By-laws' (21 May 2004) *Gauteng Provincial Gazette* 179 LAN 832 <https://openbylaws.org.za/za-jhb/act/by-law/2004/public-road-electronic-communications-networks-and-miscellaneous/eng/contents/>.

[76] City of Johannesburg Metropolitan Municipality 'Road Traffic By-laws' '(27 June 1934) Administrator's notice 281 *The Province of Transvaal Official Gazette* 211.

[77] Public Road and Miscellaneous By-law (note 75 above) s 1.

Tshwane by-laws reads: 'No loitering or lingering about which may infringe on the use of a public amenity by the general public is permitted.'[78] The 2005 by-laws further prohibit begging in public amenities.[79] This can be compared to the 1990 standard by-laws, which provide the following in s 10:

> No person leading the life of a loiterer or who lacks any determinable and legal refuge or who leads a lazy, debauched or disorderly existence or who habitually sleeps in a public street, public place or on a private place or who habitually begs for money or goods or persuades others to beg for money or goods on his behalf, may loiter or linger about in a public amenity.[80]

The 2007 Cape Town by-laws prohibit intentionally blocking traffic, physical contact with another person without consent, intimidation, continue to beg after receiving negative response, use of abusive or threating language and solicit for prostitution or immorality. While the right balance might not yet have been struck, the Cape Town revisions reflect an active engagement on the issue of striking a balance between demands from the general public for the municipality to provide a safe environment and the right of the marginalised to make a living in the city. The current

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[78] By-laws Relating to Public Amenities (note 65 above) s 11.

[79] Ibid s 8(1)(u) (public amenities).

[80] The minister of local government and housing of the apartheid government adopted the 'By-laws in Respect of Local Councils Regarding Public Amenities' 2208 on 14 September 1990. According to the local council regulations ('Regulations Regarding Local Councils' R2517 s 46(2)) at the time, the minister could make by-laws that applied to the area of each council, unless 'excluded by or inconsistent with the by-laws of the council of an area concerned'. A few weeks after the standard by-laws were adopted in 1990, the Reservation of Separate Amenities Act of 1953 was abrogated. There is a clear link between these two pieces of legislation, such that the close time between the enactment of the one law and the abrogation of the other can hardly be seen as coincidental.

provisions can be compared to the 1977 Cape Town By-law for the Convenience of Persons Using Streets or Public Places, which prohibited 'loitering, standing, sitting or lying' when it was done in such a manner 'as to obstruct or be likely to obstruct or cause or be likely to cause inconvenience, annoyance or danger to persons or other traffic using such street or public place.'[81] A 1995 revision of the Cape Town by-law removed the word 'annoyance'.[82] Both the 1977 and the 1995 by-laws prohibited begging.[83]

Until 2016, the City of Durban General Bylaws retained the following provision reminiscent of the apartheid legislation: 'No person who leads a vagrant life and who has no ascertainable and lawful means of livelihood or leads an idle, dissolute, or disorderly life shall remain in a street or public place.'[84] These bylaws were replaced in 2016 by the eThekwini Nuisance and Behaviour in Public Place By-law.[85] This by-law retains many anti-poor provisions. For instance, in addition to the sleeping prohibition set out above, it provides a blanket ban on begging in public places,[86] and specifies that no one may 'loiter for the purpose of or with the intention

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[81] Cape Town Municipality Provincial 'By-law for the convenience of persons using streets or public places' Provincial Notice 1103 (11 November 1977) *The Province of the Cape of Good Hope Official Gazette* 630 s 1.

[82] Transitional Metropolitan Substructure of Cape Town 'Amendment to the by-law for the convenience of persons using streets or public places' Provincial Notice 271 (9 June 1995) *Province of the Western Cape: Provincial Gazette* 4958 s 1.

[83] By-law for the convenience of persons using streets or public places (note 81 above) s 2(c).

[84] City of Durban 'General by-laws' Provincial Notice 204 (1 December 1994) *The Official Gazette of the Province of Natal* 5002.

[85] See also eThekwini Municipality 'Beaches By-Law' (24 June 2015) <http://www.durban.gov.za/Resource_Centre/Bylaws/Beaches_By-law_2015_Commencement Date 12 April 2016.pdf>.

[86] Ibid s 5 & 12.

of committing an offence'. If one considers how much could be viewed as offences under the by-law, the provision on intention to commit an offence loses its meaning in limiting law-enforcement discretion.

4.2.3 Street trade

Section 6A of the Business Act provides that a local authority may make by-laws with regard to 'supervision and control' of street traders and certain restrictions with regard to where such trade may take place. Thus, by-laws may regulate that street trading may not take part in municipal parks or gardens, where it obstructs vehicular or pedestrian traffic or access to buildings or 'other facilities intended for the use of the general public' or in front of residential housing 'if the owner or occupier' of the building objects to the trading.

The Cape Town informal trading by-law is generally in line with the Business Act. The 2005 Tshwane Street Trading By-Law goes beyond the prohibitions allowed under the Business Act and provides for a general prohibition of street trading in all public amenities and within five metres from any intersection.[87] The 2012 Johannesburg Informal Trading By-laws similarly provide extensive restrictions on street trading.[88] The 1995 Durban Street Trading By-laws were generally in line with

[87] City of Tshwane 'Street Trading By-laws' (16 March 2005) *Gauteng Provincial Gazette* 105 LAN 550 s 4.1, 4.8 <http://www.tshwane.gov.za/sites/business/Bylaws/Promulgated%20ByLaws%20Documents/bylaw_streettrading.pdf>.

[88] City of Johannesburg Metropolitan Municipality 'Informal Trading By-laws' (14 March 2012) *Gauteng Provincial Gazette* 98 s 9, 10 < https://www.joburg.org.za/documents_/Documents/By-Laws/local_government_-_municipal_systems_act_32-2000_-_city_of_johannesburg_-_informal_trading_by-laws_final%20%20by%20laws%203.pdf>. See also Pieterse (2017) (note 14 above) 122.

the provisions of the Business Act. However, the 2014 Informal Trading By-laws provide that, 'No person may conduct informal trading on municipal property without a valid informal trading permit from the Municipality.'

4.2.4 Penalties

In Johannesburg, penalties provided in the 1972 Parks, Gardens and Open Spaces By-laws was a fine or three months imprisonment.[89] The 2004 by-laws provide for a fine or maximum six months imprisonment.[90] Contravention of the 2007 Cape Town By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances provide for the same maximum penalty, though there is a provision for alternative sentencing instead of a fine or imprisonment.

The Tshwane public amenities by-laws provide for a maximum penalty of a fine of R10,000 or one-year imprisonment.[91] Tshwane is the only one of the four metros with a publicly available fine schedule.[92] Loitering carries a fine of R300, while begging will set you back R1,000. Of course, most beggars could not afford a R1,000 fine and would thus risk imprisonment.

Section 22 of the eThekwini nuisance by-law provides: 'Any person who is convicted of an offence under this By-law is liable to a fine of an amount not exceeding R40 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and imprisonment.'

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[89] Parks, Gardens and Open Spaces By-laws (note 62 above) s 9.

[90] Public Open Spaces By-laws (note 60 above) s 27(d).

[91] By-laws Relating to Public Amenities (note 65 above) s 25.

[92] Tshwane Metropolitan Police Service 'Fine schedule by-law policing' (September 2006) <http://www.tshwane.gov.za/sites/business/Bylaws/Promulgated ByLaws Documents/fines_schedule.pdf>.

It is not clear what penalties apply for the different offences set out in the eThekwini by-laws.[93] The difficulty of knowing what penalty applies is not the only problem with the penalty provision of the eThekwini by-law. The maximum penalties are very high for what are petty offences. The imprisonment for a maximum of two years can be compared to the maximum penalty provided in s 266(7)(a) of the Natal Ordinance that sets out the maximum penalty for a first-time offence as a fine of R500 or maximum six-month imprisonment or both such fine and imprisonment. It is more reminiscent of the maximum two years of forced labour under the Natives (Urban Areas) Consolidation Act 25 of 1945.

5. Constitutionality

In *S v Jordan*, the Constitutional Court held that, 'The legislature has the responsibility to combat social ills and where appropriate to use criminal sanctions.'[94] Homelessness and social exclusion are social ills that need to be addressed. Various interventions are needed, such as provision of shelters, employment opportunities, grants and social and psychological services. Arguably, local and national government are not doing enough to address the situation of the persons discussed in this article, who belong to the most vulnerable in society.[95] However, my concern

[93] This is in line with the general difficulty for the inhabitants of a municipality to find the penalties of a particular offence under the by-laws. Ideally, penalties should be set out in the by-law or at least in a separate publicly available fine schedule, such as is available on Tshwane's website.

[94] *S v Jordan* (Sex Workers Education and Advocacy Taskforce (SWEAT) and others as *amici curiae*) 2002 (6) SA 642 (CC) para 25.

[95] See for example R Vally & S de Beer 'Pathways out of homelessness' (2017) 34 *Development Southern Africa* 383.

here is with criminal sanctions that are in direct contravention of the interests of theses persons and arguably have no effect on the situation they seek to address.

5.1 Infringement of rights

The criminal prohibitions of the by-laws discussed above infringe on several rights in the Bill of Rights. These provisions target particular groups and therefore infringe on the right to equality before the law in s 9(1). They discriminate on the basis of poverty.[96] Not taking sufficient measures to protect this category of person infringes on the right to dignity (s 10). Many people risk arrest simply by trying to make ends meet. This infringes on the prohibition of arbitrary arrest in s 12(1)(a). Criminalisation also put those targeted at risk of public and private violence in contravention of s 12(1)(c) and confiscation of their property (art 25). Criminalisation further infringes on the right to privacy in s 14, the freedom of movement in s 21 and the freedom to choose 'trade, occupation or profession freely' as set out in s 22. The social exclusion that causes the perceived need for this type of legislation constitutes an infringement on the right to housing in s 26 and the right to social security in s 27. Below follows a discussion of how some of these rights have been interpreted, and whether the general limitation clause in s 36 of the Constitution could save the infringements.

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[96] Poverty is not listed as a prohibited ground of discrimination in s 9(3) of the Constitution. However, the list is not exhaustive, and poverty-related discrimination could be said to fall under the listed grounds of 'social origin' and 'birth'. In the *V&A Waterfront* case, Desai J noted that given South Africa's history discrimination based on poverty constitutes racial discrimination. However, as Pieterse (2017) (note 14 above) 126 notes, '[T]he Constitutional Court's jurisprudence in equality cases signals that the protection of the right will seldom extend to those whose marginalization flows from their own wilful violation of the law, especially the criminal law.'

5.1.1 Freedom of movement

Many of the by-laws discussed above significantly restrict how people may move. With regard to movement on public streets, national legislation is even more restrictive. However, it is noticeable that pedestrian infringements stipulated in s 316 of the National Road Traffic Regulations (2000) are not offences.

The *V&A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* case before the Western Cape High Court dealt with whether two persons who had harassed patrons at the V&A Waterfront in Cape Town could be permanently interdicted from entering the premises.[97] Desai J noted: 'In the light of the unfortunate recent history of this country where millions of people were denied access to towns, cities and other public places, the practice of excluding people from parts of a city, albeit for limited periods, may appear repugnant and not pass constitutional muster.'[98]

Despite the Waterfront constituting private property, the judge refused to give the requested interdict, as the property essentially constitutes a suburb of Cape Town and could not be compared with a restaurant, for example. However, the Court held that the owners of the property had a legitimate interest in preventing 'unlawful activities by the respondents' and issued an order prohibiting the respondents from 'unlawfully causing harm to visitors and businesses' at the Waterfront.

5.1.2 Dignity

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[97] *V&A Waterfront* (note 6 above).

[98] See also Pieterse (2017) (note 14 above) 129, who notes that, 'Given that the Constitution guarantees a right of freedom of movement, arguably precisely in response to such apartheid-era restrictions on black urban presence, similar blanket legislative or regulatory bans of particular people from cities would most likely never pass constitutional muster.'

Former Chief Justice Arthur Chaskalson notes that socio-economic rights are 'rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance?'[99] In *S v Makwanyane*, Chaskalson held that the death penalty 'strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state'.[100] While the consequences of the by-laws discussed in this article are not as dire as death, the by-laws treats poor people as objects that should be removed from view.

The Supreme Court of Appeal in *Minister of Home Affairs v Watchenuka* considered the right to work and study of asylum seekers. The Court noted that, 'The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity […] Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.'[101] The Court does not set out what is considered 'productive work' and what would be seen as 'socially useful'. However, it considers that asylum seekers who are not allowed to work would 'have no alternative but to turn to crime, or to begging, or to foraging' which 'threatens […] to degrade'. [102] The Court notes that the state has no obligation to provide employment. In *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* the Supreme Court of Appeal

[99] A Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal on Human Rights* 204.

[100] *S v Makwanyane* 1995 (3) SA 391 (CC) para 26.

[101] *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) para 27.

[102] Ibid, para 32.

extended the dignity argument set out in *Watchenuka* to apply to self-employment in a case where foreigners had been denied the right to obtain trade permits.[103] The cases illustrate the particular vulnerability of foreign nationals in the context of making a living in South Africa.

5.1.3 Freedom and security of the person

Section 12(1)(a) provides that a person may 'not be deprived of freedom arbitrarily or without just cause'. In *S v Coetzee*,[104] the Constitutional Court held that the protection is substantive and procedural. Substantive protection means the 'reasons for which the state may deprive someone of freedom' and the procedural protection is concerned with the 'manner whereby a person is deprived of freedom'.[105] According to Iain Currie and Johan de Waal, the Constitutional Court would not hold an arrest to be arbitrary unless it lacked legal basis.[106] The by-laws, read together with Criminal Procedure Act 51 of 1977, give a legal basis for deprivation of freedom. However, Currie and De Waal cite Canadian case law to the effect that, '[W]here a discretion to deprive a person of freedom is conferred by legislation, that power will be arbitrary if there are insufficient or inadequate criteria to govern its exercise'.[107] This is linked to how the by-laws are often used for intimidation, as discussed below.

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[103] *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 (1) SA 151 (SCA) para 43.

[104] *S v Coetzee (*CCT50/95) [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 527 (6 March 1997).

[105] Ibid para 159.

[106] I Currie & J de Waal *The Bill of Rights Handbook* (2013) 274.

[107] Ibid.

Section 40(1)(a) of the Criminal Procedure Act provides that a police officer may arrest a person 'who commits or attempts to commit any offence in [their] presence'. Clearly by-law violations with prescribed penalties fit within the definition of 'any offence'. South African police statistics do not provide any details with regard to arrests for by-law violations. However, it is clear that thousands of arrests take place each year.[108] This is in line with the statements of officials cited elsewhere in this article. Official statistics also provide an indication of the scale. Thus, according to the *SAPS Annual Report* 2015/2016, there were just over one million arrests for 'serious crimes' (including more than 250,000 for drug-related crimes) and more than 400,000 arrests for 'less serious crimes'. There were also 195,716 'other arrests'. No details are provided with regard to arrests for 'less serious crimes' and 'other arrests'. The majority of 'other arrests' are presumably arrests on reasonable suspicion of being a 'prohibited immigrant' in terms of art 40(1)(l) of the Criminal Procedure Act, while 'less serious crimes' would include by-law infringements.

The police officer has discretion under s 40(1). However, it is a discretion that must be exercised in 'the light of the bill of rights'.[109] As noted by the Constitutional Court: '[A]n arrest is an invasive curtailment of a person's freedom. Under any circumstances an arrest is a traumatising event.'[110]

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[108] For example, in 2016, an eThekwini Metro Police superintendent boasted, 'We arrest hundreds of [by-law] transgressors weekly'; taken from P Nkabane 'eThekwini tackles prostitution during citywide by-law blitz' (2 September 2016) 48 *eThekwini Weekly Bulletin* <http://www.durban.gov.za/Resource_Centre/ewb/September_2016/Weekly_Bulletin_Issue_48.pdf>.

[109] *Raduvha v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para 44.

[110] Ibid para 57.

With the exception of illegal immigrants, the Constitutional Court has held that, '[T]he fundamental purpose of arrest […] is to bring the suspect before a court of law, there to face due prosecution.'[111] In *The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security*, Fourie J held that the arrests were arbitrary, since the police officers were aware 'with a high degree of probability that no prosecutions would follow'.[112] Clearly many of the arrests that take place in terms of the by-laws discussed in this article are for the purpose of intimidation rather than prosecution. The high number of arrests is despite a directive the National Commissioner of Police issued on 28 April 2005 to curb arrests for petty crimes due to the high cost of civil claims against the police for unlawful arrest.[113] However, despite this circular, the numbers of arrests and civil claims for unlawful arrest have both increased in recent years.[114] Of course many poor who are arrested do not have the means or knowledge to bring claims for unlawful arrest.

5.1.4 Freedom of trade and occupation

[111] *Ex Parte Minister of Safety and Security: In Re S v Walters and Another* 2002 (4) SA 613 (CC) para 50.

[112] *The Sex Worker Education and Advocacy Taskforce (SWEAT) v Minister of Safety and Security* 2009 (6) SA 513 (WCC) para 26.

[113] *Minister of Police v Safety and Security Sectoral Bargaining Council* (P 582/2011) [2015] ZALCPE 20 (24 March 2015) para 4.

[114] G Dereymaeker 'Making sense of the numbers: civil claims against the SAPS' (2015) 54 *South African Crime Quarterly* 29.

Section 22 of the Constitution provides: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'[115]

The Constitutional Court has held that economic activity must be in accordance with the law.[116] When the case of Operation Clean Sweep in 2013 came before the Constitutional Court in *South African Informal Traders Forum v City of Johannesburg*, the focus was on the failure of the authorities of Johannesburg to comply with its own by-laws and policies.[117] In this case, both 'legal' and 'illegal' street traders were prevented from earning their livelihood. However, the Court was mainly concerned with the plight of the 'legal' traders and noted that, '[I]t is open to the City to use all lawful means to combat illegal trading and other criminal conduct.'[118] The Durban High Court reiterated this emphasis on 'legal' trade in *Makwickana v eThekwini Municipality*, which held that the city had to pay compensation when it had impounded and destroyed the wares of a permit-holding trader, despite the by-laws not providing for such compensation.[119]

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[115] Since this provision is limited to citizens, the courts have relied on the right to dignity in cases dealing with foreign nationals; see discussion above.

[116] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 34.

[117] *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (4) SA 371 (CC). See also M Pieterse 'Rights, regulation and bureaucratic impact: the impact of human rights litigation on the regulation of informal trade in Johannesburg' (2017) 20 *Potchefstroom Electronic Law Journal* 1.

[118] *South African Informal Traders Forum* ibid para 33. On this case and its consequences see Pieterse (2017) (note 14 above) 134.

[119] *Makwickana v eThekwini Municipality* 2015 (3) SA 165 (KZD).

5.2 The general limitation clause

Infringements of the rights in the bill of rights do not necessarily mean that they have been violated. Section 36(1) provides a general limitation clause.

5.2.1 Law of general application

The first criterion is that any law must be of general application. There may be a need for different regulations in different municipalities, taking into consideration local concerns. However, why should it be prohibited to live under a bridge in Johannesburg and eThekwini, but not in Tshwane? More importantly, the by-laws discussed above are not addressed to everybody but target a particular group of persons. Waldron, in his article on homelessness and freedom, notes: 'If public places are to be available for everyone's use, then we must make sure that their use by some people does not preclude or obstruct their use by others.'[120] However, he further notes that laws that in their effect are targeted at a particular group, such as the homeless, may not be hidden behind the banner of general application.[121]

Criminal law must be sufficiently clear, so that anyone can understand what is prohibited. In *Dawood v Minister of Home Affairs*, the Constitutional Court held:

> It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the

[120] Waldron (note 5 above) 312.

[121] Ibid 313.

exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.[122]

According to the Constitutional Court, 'The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.'[123]

The issue of vagueness can be illustrated with the issue of criminalising sex work in South Africa. In 1988, the Appellate Division in *S v H* held that the offence of living off the earnings of prostitution in s 20(1)(a) of Sexual Offences Act 23 of 1957 did not criminalise prostitution *per se* as if this would have been intended, there would have been explicit provision.[124] The Sexual Offences Act was amended through Immortality Amendment Act 2 of 1988, which introduced, in s 20(1)(aA), the offence of 'unlawful carnal intercourse […] or act of indecency […] for reward'. The constitutionality of s 20(1)(aA) was challenged in *Jordan*. In the High Court, Spoelstra J noted that the provision could easily be interpreted as additionally inclusive of sexual acts by women who were given benefits of any kind as a *quid pro quo* for sex. The High Court held that s 20(1)(aA) was unconstitutional. At the Constitutional Court, the specificity of the legislation was considered by the minority opinion of Kate O'Regan and Albie Sachs, who noted:

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[122] *Dawood v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 47.

[123] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 73.

[124] *S v H* 1988 (3) SA 545 AD.

> The question is whether the phrase "unlawful sexual intercourse or indecent act for reward" is capable of being read to include only activity ordinarily understood as prostitution. In other words, is the phrase reasonably capable of being read so as to cover only commercial sex, that is, sex where the body is made available for sexual stimulation on a paid basis? We think there are strong contextual pointers in favour of the more restrictive reading.[125]

The only 'contextual pointer' highlighted by O'Regan and Sachs was that the heading of the provision was entitled 'persons living on the earnings of prostitution'.[126]

With regard to the offences discussed in this article, US jurisprudence is relevant. The US Supreme Court in 1999 declared a Chicago ordinance prohibiting persons 'to remain in anyone place with no apparent purpose' as vague and therefore void.[127] Vagueness can be either because of imprecise terms or over-breath of coverage.[128]

Loitering is defined in the *Oxford Dictionary* to mean '[s]tand or wait around without apparent purpose'. In Johannesburg, it is prohibited to 'in any way loiter' on a public road (defined broadly to include almost all public spaces). In Tshwane, it is prohibited to loiter or linger about in a public amenity in a way that may infringe on others' use of the amenity. In eThekwini, loitering 'for the purpose of or with the intention of committing an offence' is prohibited. Loitering was removed from the 2007 Cape Town by-laws. In my view it is clear that loitering should be removed as

[125] *Jordan* (note 93 above) para 48.

[126] Ibid para 49.

[127] *Chicago v Morales* 527 US 41 (1999).

[128] *State v Metzger* 319 N.W.2d 459 (1982) (Municipal Court of Lincoln, Nebraska decision).

an offence from all by-laws, as it is an over-broad offence. By-law offences often lead to arbitrary arrest in the sense that people are arrested as a tactic of intimidation rather than for prosecution, as discussed above. It is therefore clear that there are insufficient constraints on the discretionary powers of the police.

5.2.2 Importance of the purpose of the limitation

The purpose of legislation is usually set out in the preamble and a memorandum attached to the bill. However, only a few of the by-laws discussed above have preambles setting out their aim, and none have a memorandum. It is thus difficult to determine the purpose of the by-laws, though guidance can also be obtained from public statements issued in connection with the adoption of these laws. An exception to the lack of preambles is the Cape Town By-laws Relating to Streets, Public Places and the Prevention of Noise Nuisances, which provide that, 'Aggressive, threatening, abusive or obstructive behaviour of persons in public is unacceptable to the City.'[129] These are all valid reasons.

As the Constitutional Court noted in *South African Transport and Allied Workers Union v Garvas*, 'Every right must be exercised with due regard to the rights of others cannot be overemphasised.'[130] However in public debate, it is generally a more general safety argument put forward, reminiscent of the reasons put forward for the historical vagrancy laws. The homeless and beggars are seen as potential robbers and rapists who should be removed from the public space, so that those who view themselves as entitled to enjoy this space peacefully, the already privileged, do not

[129] Note 73 above, preamble.

[130] *South African Transport and Allied Workers Union v Garvas and Others* 2013 (1) SA 83 (CC) para 68.

feel threatened. Informal traders are also viewed as a safety risk and should preferably be confined to reserves frequented by other poor people. 'Scavengers' trying to make a living from the garbage of the elite must be prevented from entering privileged neighbourhoods.[131] To my knowledge there is no study that shows that the people who suffer as a result of these by-laws would be responsible for a higher degree of serious crimes than others in society. The legitimate purpose of legislation could, in my view, never be to sweep a societal problem under the carpet to make the elite feel better about themselves. Indeed, the effect of the by-laws sometimes opposes the purported aim, for example with regard to the Johannesburg public spaces by-laws, which provide that, '[T]he recreational, educational, social and other opportunities which public open spaces offer must be protected and enhanced to enable local communities, particularly historically disadvantaged communities, and the public to improve and enrich their quality of life.'[132]

5.2.3 Less restrictive means

Some view begging as an undignified occupation, while others view it as an economic activity. Most would agree that both those engaging in begging and informal trade would be better off if they had work in the formal sector. However, South Africa has a very high unemployment rate and a weak social-support system. Thus, the reality is that many seek to provide for themselves through the opportunities available, which are often in the informal sector. Many of them do not have the financial means to become 'legal' informal traders.

[131] D Rodenbecker 'Weekly scavenger hunt in Sinoville, Tshwane has gotten out of control' News24 (27 March 2018) <https://www.news24.com/MyNews24/weekly-scavenger-hunt-in-sinoville-tshwane-has-gotten-out-of-control-20180327>.

[132] Johannesburg Public Open Spaces By-laws (note 60 above) s 4(6).

The nuisance experienced by 'others' sharing urban space with vulnerable persons discussed in this article could be compared to the nuisance the activities of a neighbour create. The test here is 'whether the activity is proper, becoming and socially appropriate (secundum bonos mores) in accordance with the prevailing views of the community'.[133] The remedy is an interdict or damages. To determine whether a nuisance is unreasonable, '[T]ime, duration and nature [are] considered.'[134] To be exposed to a beggar at a street corner while waiting for the light to turn green is hardly an unreasonable nuisance and simply an illustration of the inequality that still engulfs South Africa. Should a person feel harassed, there is national legislation – namely Protection from Harassment Act 17 of 2011, which came into force in 2013 – that can be used to obtain a protection order.

'Legal' traders have legitimate concerns that 'illegal' traders have less operating costs and could therefore make more profits.[135] In my view, this cannot be addressed through criminalisation but through active engagement with traders and approaching permitting of trade as a social issue rather than as an income-generating activity for the municipality.

5.2.4 Proportionality

It is clear that criminal sanctions will not help the homeless and those making a living in the informal sector. No one is helped by being arrested and detained, having their goods confiscated, being fined or imprisoned if they are unable to pay the fine.

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[133] H Mostert & A Pope (eds) *Principles of the Law of Property in South Africa* (2010) 134.

[134] Ibid 135.

[135] Pieterse (2017) (note 14 above) 122.

In the controversial *Jordan* judgment, with regard to the criminalisation of sex work, the Court held that, '[W]e are not entitled to set aside legislation simply because we may consider it to be ineffective or because there may be other and better ways of dealing with the problem.'[136] In my view, this and other court cases cited above show too much deference to the legislature (whether national, provincial or municipal) to decide what should be legal. Work can be undignified but should not be criminalised on this ground alone. The criteria should be whether the work is voluntary and whether it harms others. Blanket prohibition of begging, street trading without a permit, loitering and sleeping in public places clearly discriminates against the poor. It is clearly also discrimination on the basis of race.

Pieterse notes, with regard to the *V&A Waterfront* and *SWEAT* judgments:

> [N]either judgment pronounced on the constitutionality of legal restrictions on beggars or sex workers' particular ways of making a living. Indeed, both judgments appear to accept that such restrictions are legitimate, although both hold that the enforcement of such restrictions may not have the effect of driving people out of public space.[137]

For the reasons set out above, a constitutional challenge may be difficult. The fact that litigation challenging Johannesburg by-laws was abandoned following a settlement[138] just reinforces this assessment. However, litigation is not the only way to achieve change. Advocacy at the local and national level to change problematic by-laws is needed.

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[136] *Jordan* (note 93 above) para 26.

[137] Pieterse (2017) (note 14 above) 131.

[138] Southern Africa Litigation Centre 'Litigation against loitering laws – PILG panel' (13 July 2012) <http://www.southernafricalitigationcentre.org/2012/07/13/litigating-against-loitering-laws-pilg-panel/>. See also Pieterse (2017) (note 14 above) 129.

6. Conclusion

Two hundred years of criminalisation of poverty illustrates that measures to remove the marginalised from public view have either been taken to subjugate the already powerless or have come about a result of irrational fear from the side of the privileged. The view that the poor living in the streets are criminals or at least potential criminals is alive and well. Subjugation for work is less evident given the high levels of unemployment in South Africa today, a fact that contributes to making more and more persons living in South Africa criminals in the eyes of the law despite them just trying to make a living.

The White Paper on Safety and Security of September 1998 calls for 'effective enforcement of by-laws to ensure safer and cleaner environments less conducive to crime'.[139] South African municipalities have taken the message to heart in particular through maintaining or even extending the criminalisation of loitering, begging, illegal street trading and sleeping in the streets.

The 1997 Green Paper on Local Development notes that, 'Municipalities should strive to ensure that [the rights in the Bill of Rights] become part of the daily life experience of every person in the nation.'[140] Twenty years on, much remains to be done to make this a reality. A step forward would be to revise by-laws to decriminalise offences like sleeping in the street, begging and street trading without a permit; or issuing permits free of charge as a social service. A national consultative

[139] Department of Safety and Security 'White Paper on safety and security' (September 1998) <http://www.policesecretariat.gov.za/downloads/white_paper_security.pdf>.

[140] Ministry for Provincial Affairs and Constitutional Development 'Green Paper on local government' (October 1997) 25 <https://www.gov.za/sites/default/files/gcis_document/201409/local1.pdf>.

process that brings together representatives of municipalities could inform national or provincial standard by-laws that municipal councils could then adopt.

Many by-law revisions have neglected to sufficiently consider the impact these laws have on the poor and simply just updated the language of earlier by-laws. Municipalities must revise by-laws based on constitutional values. This may not be very popular given the association in the popular mind between the 'vagrant' and crime. Even a municipality such as Cape Town, which has made some headway in revising its by-laws, still recommends, on its official government website: '[G]iving money to beggars is not a good idea. While many are genuinely destitute and are looking for help, giving money keeps them on the streets; some are thieves and may be looking for a chance to rob you.'[141]

Apart from reiterating the equating of begging to criminality, the statement begs the question where the 'genuinely destitute' are supposed to go. In a society that lacks a comprehensive social security system and does not provide sufficient shelter, there are simply not enough places to go. Provision of shelter also does not equal a livelihood so is only part of the solution. Some officials, even those responsible for assisting the poor, have only contempt for them and the difficulties they face. For instance, Faith Mazibuko, member of the executive council for social development in Gauteng said: 'We are appealing to members of the community to refrain from giving money to beggars. If you continue giving out money, you are the one sending the

[141] City of Cape Town 'Safety at night and on the streets' <http://www.capetown.gov.za/Explore and enjoy/visitor-safety/general-safety-awareness/safety-at-night-and-on-the-streets>.

message that, in Gauteng, it is easy to make money without going to work.'[142] The statement reeks of insensitivity to the high unemployment rate and the inadequate social security system in South Africa.

Given the deference of the courts to the national and municipal legislator to determine what should be illegal, a constitutional challenge against the criminalisation of petty crimes of the type discussed in this article may be unlikely to succeed. As Pieterse notes:

> "[I]llegality" significantly restricts the protective power of legal rights. Much as most constitutional rights theoretically vest in persons regardless of the legality of their actions, legality appears to be a near absolute threshold for the exercise of legal rights, so that "illegal" persons are typically deprived of the "right to have rights".[143]

The Western Cape High Court judgment that states that arrest must be for the purpose of prosecution is important, but even if law enforcement adheres to it, it does not address the underlying issue, namely that attempts to secure a livelihood that are not harmful to others should not be criminalised.

Homelessness is a major societal challenge in South Africa. Some homeless people have jobs; others support themselves as beggars or through their entrepreneurship. Many poor people are not homeless but still make their living on the street. This article is not an argument that begging, street trading without a permit and sleeping on the street is good for the persons involved. Indeed, we need to take

[142] P Dlamini 'MEC get tough on Gauteng street beggars' *The Sowetan Live* (1 November 2014) <http://www.sowetanlive.co.za/news/2014/11/01/mec-gets-tough-on-gauteng-street-beggars>.

[143] Pieterse (2017) (note 14 above) 135.

collective action to create a society where people are not forced into these circumstances. However, criminalisation should not be part of the solution. As held by the Constitutional Court, 'ours is a "never again" Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away.'[144]

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Conflict of interest

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[144] *Garvas* (note 129 above) para 63.