

Dullah Omar Institute submission to the Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty and human rights

Call for Input: Decriminalisation of homelessness and extreme poverty

15 September 2023

The role of subnational governments in criminalising poverty and status

1. Introduction

The Dullah Omar Institute for Constitutional Law, Governance and Human Rights (Dullah Omar Institute) is based at the University of the Western Cape in South Africa and engages in research, teaching and advocacy on governance and human rights in Africa. The Dullah Omar Institute welcomes the opportunity to make this submission to the Special Rapporteur on the right to adequate housing and the Special Rapporteur on extreme poverty and human rights (the Special Rapporteurs) on the call for inputs on the decriminalisation of homelessness and extreme poverty.¹

We are a member of the [Global Campaign to Decriminalise Poverty and Status](#) which is a coalition of organisations from across the world that advocate for the repeal of laws that target people based on poverty, status or for their activism.² Over the years, campaign partners have worked collaboratively on specific areas and approaches, such as vagrancy and nuisance-related laws, homelessness, and strategic litigation, compiling collections of resources and strategies that have led to successful law reform.

This submission is based on our *foci* of work on sub-national governments and the criminalisation of poverty and status. Below we provide a brief overview of the challenges at a subnational government level concerning public spaces, informal work and the enforcement practices by subnational government law enforcement agencies.

2. Why the focus on subnational governments? How do they contribute to the criminalisation of poverty and status?

Subnational governments (SNG) exist below the national level and are typically provinces, states, municipalities, and/or counties, depending on how each country devolves powers. They manage local affairs on behalf of national governments although this may frequently be contested terrain. These entities are usually delegated general local responsibilities and autonomy and may have their own policy priorities independent of that of the national government. In government systems, competencies in respect of legislative powers are typically spread across two to three tiers of

¹ 'United Nations Human Rights Office of the High Commissioner, Call for Input: Decriminalization of Homelessness and Extreme Poverty.', 15 September 2023, <https://www.ohchr.org/en/calls-for-input/2023/call-input-decriminalization-homelessness-and-extreme-poverty>.

²See <https://decrimpovertystatus.org/>

government (e.g., national, provincial and local, or counties). National legislation is usually of a more general nature and applies nationally, or to specific sectors on a national scale. Sub-national governments invoke their own legislation (e.g., by-laws, municipal laws, and local ordinances, etc.) that applies to a particular area. They may also have their own law enforcement agencies to enforce their by-laws or local ordinances. Herein lies the problem. We have found that there are many by-laws or local ordinances at a SNG level that restrict poor and marginalised people from performing life sustaining activities (sleep, begging, street trading, waste picking, etc) in public spaces.³ The laws and ordinances are often drafted in vague or ambiguous terms and criminalise the socio-economic status of people, even where Constitutions or national laws contain provisions upholding the rights of the poor. Moreover, the enforcement of SNG laws by local law enforcement agencies are often arbitrary and violently enforced.⁴

Below, we elaborate further on the challenges with law and policy and law enforcement at a SNG level.

2.1 How law and policy at SNG level criminalise poverty and status

It is especially at a local or subnational government level where legislation and policy regulate how people ought to behave and interact with the environment, public spaces; as well as interact with others. For example, urban, spatial planning and zoning legislation and policies often restrict public spaces for particular usages or activities or to certain times. There are also offences against local government laws (by-laws, municipal laws, and local ordinances) that target behaviour that is not inherently criminal, but rather a perfectly normal action such as selling or producing something, walking or being in a particular area or not having the necessary permit to do so. The contravention of these by-laws, municipal laws, or local ordinances is often treated as a crime or results in a fine or a combination of both. This has serious ramifications for people relying on public spaces to perform life sustaining activities or earn a livelihood.

There is no closed list of people impacted by these laws and policies however, they include people (mostly poor and vulnerable) who rely on access to public spaces and the informal economy for survival. This includes, but is not limited to, poor and homeless people, people living in informal settlements, informal traders, waste pickers, migrants and other minority groups. In our report titled [Public Spaces and Informal Work](#) we elaborate extensively on how laws and policies at a SNG tend to

³ K Petersen, 'Public Spaces and Informal Work: Principles and Approaches to Law & Policy-Making' (Dullah Omar Institute, University of the Western Cape, August 2023).

⁴ Petersen.

restrict the access to and ability of people to earn a livelihood or perform life-sustaining activities in public spaces. We provide detailed examples of the plight of street traders, waste pickers and informal transport operators. For instance, street trade accounts for a significant proportion of informal employment in Africa, and contributes significantly to economies, yet traders are often subjected to harassment, arbitrary arrests and treated as criminals for non-compliance with local ordinances or by-laws which are often restrictive, onerous or bureaucratic.⁵ Moreover, waste pickers are often harassed by local authorities, penalised, arrested and sometimes assaulted by law enforcement officials for participating in waste collection activities⁶ despite the fact that evidence shows that they can make a valuable contribution to dealing with issues surrounding waste management, environmental pollution and play a vital role in reducing poverty.⁷

In our report we note that there is growing evidence pointing to the problematic way in which public spaces are governed and that a reconceptualization is needed to shift public law from criminal to an administrative framework.⁸ The emphasis should be placed on public consultations with people affected by policy decisions and ensuring a good process for decision making.⁹ Firstly, this requires a participatory governance system, meaning that all persons should actively participate in policy decisions affecting them.¹⁰ Secondly, governance regimes should be administered within a progressive and dynamic administrative law framework to protect citizens from authorities exercising their power in an arbitrary way by ensuring a good process for decision-making.¹¹ Essentially, it comes down to the manner in which authorities formulate and implement public policy and involve the people mostly impacted by their decisions.

Oftentimes, the crimes defined under local government laws may not at face value invoke the same sense of gravity as nationally defined crimes. However, the enforcement of local government laws can have dire consequences for individuals and for their socio-economic well-being. This is further discussed in the section below.

⁵ M. Von Broembsen, 'The New Urban Agenda's and Social Inclusion: Street Vendors' Participation in Decision-Making about the Use of Public Space' (Marlese Von Broembsen, 2019), 3; Muntingh and Petersen, 'Punished for Being Poor: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences' (Dullah Omar Institute, 2015), 28.

⁶ D. Kuria and R. Muasya, 'Mapping of Waste Pickers and Organisations Supporting Waste Pickers in Kenya' (Women in Informal Employment: Globalizing and Organizing, 2010); EJAtlas, 'Waste Pickers of Nakuru Face Harassment, Exclusion and Toxic Conditions, Kenya', 27 May 2020, <https://ejatlas.org/print/waste-pickers-of-nakuru-suffer-from-harassment-exclusion-and-hazardous-conditions-kenya>.

⁷ T. Ogwueleka and B.P Naveen, 'Activities of Informal Recycling Sector in North-Central, Nigeria', *Energy Nexus* 1 (1 November 2021): 100003, <https://doi.org/10.1016/j.nexus.2021.100003>.

⁸ M. Von Broembsen and M. Chen, 'Eliminating Legal Barriers from the Perspective of The Informal Economy', A Policy Brief for the UN Secretary-General's High-Level Panel on Women's Economic Empowerment (United Kingdom.: Women in Informal Employment: Globalizing and Organizing, September 2016), 13.

⁹ Von Broembsen and Chen, 13–14.

¹⁰ Von Broembsen and Chen, 13.

¹¹ Von Broembsen and Chen, 14.

2.2 Subnational law enforcement in African States

There is a tendency in the African local government context to resort to criminalisation and law enforcement to manage potential or actual problems which require expensive, systemic or demanding interventions. In many African jurisdictions, provisions for sub-national law enforcement are usually embedded within local government acts and usually falls within the ambit of either; provincial, municipal, district or council police depending on how each country devolves powers. As a separate entity to the police, these agencies are typically not mandated to deal with serious crime, and their powers are typically focused on crimes defined under local government laws (referred to as by-laws, municipal laws, and local ordinances), including minor offences related to public spaces, and traffic violations.¹²

Sub-national law enforcement (if properly organised) supplements the work of the national police at a local level by strengthening community-police relations and allowing for the swift response to emergency situations. However, this is only possible if each local law enforcement agency has, amongst others, formal standard training, independent budgets, and existing effective mechanisms for public complaints, oversight and monitoring, which unfortunately is not always the case.¹³

In a number of African jurisdictions, it is observed that local law enforcement agencies often conduct their work in an arbitrary and discriminatory manner infringing on citizens fundamental human rights which include and are not limited to the right not to be discriminated against, the right to human dignity, the right to freedom of movement and the right to freedom against torture or cruel, inhumane or degrading treatment.¹⁴ The violation of these rights often occurs during enforcement, and may be a consequence of the absence of a rights based and democratic policing style of training which includes notions of knowledge, effectiveness, ethics and accountability, responsivity, and objectiveness, to name but a few.¹⁵ Moreover, there is a lack of strong and effective oversight and monitoring mechanisms to regulate the enforcement practices of subnational law enforcement agencies to protect citizens against human rights abuses.¹⁶ Consequentially, even when they have powers of arrest, there is little regard by subnational law enforcement officials to uphold rights-based treatment particularly when dealing with vulnerable groups such as those living on and those

¹² D Bruce and K Stone, 'The State of Local Government Law Enforcement: Preliminary Report Prepared for the South African Local Government Association' (South African Local Government Association, 2022).

¹³ Surrey Police, 'Why Municipal Policing', 2023, <https://www.surreypolice.ca/why-municipal-policing>.

¹⁴ 'UN General Assembly, "International Covenant on Civil and Political Rights", Arts. 2, 3, 6, 7, 9, 10, 12 and 26', Pub. L. No. Pub. L. No. Resolution 2200A (XXI) (1976).

¹⁵ L Muntingh et al., 'Democratic Policing: A Conceptual Framework', *Law, Democracy and Development* 25 (2021), <http://dx.doi.org/10.17159/2077-4907/2021/ldd.v25.5>.

¹⁶ Chumile Sali, 'Municipal Oversight Bodies Must Be Beefed up to Protect against Human Rights Abuses by Police', *Daily Maverick*, 12 July 2020, <https://www.dailymaverick.co.za/opinionista/2020-07-12-municipal-oversight-bodies-must-be-beefed-up-to-protect-against-human-rights-abuses-by-police/>.

performing life sustaining activities in public spaces. Poor and marginalised groups such as homeless persons, women, children, and those seeking to earn a living (minibus operators, touts, street and market vendors) often find themselves at the mercy of law enforcement officials who enforce a combination of formal penalties (fines, confiscation of goods, arrest and detention) and informal penalties (the solicitation of bribes, extortions, etc.).¹⁷ Numerous reports have highlighted the harassment and brutal treatment by local law enforcement in countries such as Kenya Ghana, Zambia and South Africa to name a few.¹⁸ When by-laws are enforced in such a manner, there are long-lasting implications for the socio-economic development of many States whose economies are driven by the informal economy.

3. Recommendations and conclusion

As noted above, the arbitrary enforcement of these laws and policies infringes on the fundamental rights to amongst others the right not to be discriminated against, the right to human dignity, the right to freedom of movement and the right to freedom against torture or cruel, inhumane or degrading treatment.¹⁹ Moreover, laws and policies which impose bans, onerous licences or strict restrictions on street vendors undermine the rights of persons living in poverty to earn a living as protected under Article 6 of the International Covenant on Economic, Social and Cultural Rights.²⁰

In our report [Public Spaces and Informal Work](#) we provide an overview of principles and approaches that are fundamental to good policy-making and which may serve as a guidance for authorities when embarking on public policy and law making. Essentially, the policy and the policy-making process should be inclusive and must take account of the impact on and/or meet the needs of all people directly or indirectly affected by the policy; especially the poor and marginalised. Sub-national governments should consider public participation as fundamental to the law and policy making process. Furthermore, policies should be designed around outcomes, decisions of policy-makers should be based on the best available evidence, and more importantly policy decisions must be

¹⁷ Joseph Muraya, 'Kenya: The Bribery Economy; How Petty Offenders Have Been Made Cash Cows', *Campaign to Decriminalise Poverty and Status*, n.d., <https://pettyoffences.org/the-bribery-economy-how-petty-offenders-have-been-made-cash-cows/>.

¹⁸ Z Nancy, 'Kasama Street Vendors Removed', *Zambia News* 365, August 2023, <https://zambianews365.com/kasama-street-vendors-r/>; C Wrigley-Asante et al., 'Crime and Safety in Urban Public Spaces: Experiences of Ghanaian Women Traders in the Makola Market in Accra, Ghana', *Geographic Journal* 188, no. 1 (2021), <https://doi.org/DOI:10.1111/geoj.12423>; Maureen Kinyanjui, 'Pressure on NMS and City Hall to Rein in Rogue County Askaris', *The Star*, 25 July 2021, <https://www.the-star.co.ke/counties/nairobi/2021-07-25-pressure-on-nms-and-city-hall-to-rein-in-rogue-county-askaris/>.

¹⁹ See K Petersen, 'Law and Policy: Barriers to Accessing Justice for Sustainable Development', *ESR Review : Economic and Social Rights in South Africa* 21, no. 4 (1 December 2020), <https://journals.co.za/doi/abs/10.10520/ejc-esrrev-v21-n4-a5>.

²⁰ UN General Assembly, 'Report of the Special Rapporteur on the Question of Human Rights and Extreme Poverty, Magdalena Carmona' (New York, USA: UN General Assembly, 4 August 2011), para. 39.

assessed against a country's international and regional commitments to key human rights treaties and conventions.

While the enforcement of regulations and by-laws in public spaces is useful in ensuring sanitary and safe public spaces, it should be proportionately done by taking into consideration those living and working within those spaces. It is thus important to encourage less of a reliance on criminal justice systems and harsh enforcement by addressing socio-economic challenges and building compliance to the law through risk prevention, public education and awareness as well as constructive dialogue with those most affected. It is important for States to ensure that subnational governments comply with international human rights standards and that other relevant policy changes are adopted to protect the rights of those working and living in public spaces. It is recommended that State Parties, subnational governments and other relevant stakeholders support the efforts of those living and working in public spaces, because these activities significantly contribute to the socio-economic development of the country.

Submitted by the Dullah Omar Institute:

Prof L M Muntingh
Director: Dullah Omar Institute
Project Head: Africa Criminal Justice Reform
University of the Western Cape
South Africa
lmuntingh@uwc.ac.za

Ms. K E Petersen
Researcher
Dullah Omar Institute
University of the Western Cape
South Africa
kepetersen@uwc.ac.za

15 September 2023

Ms. J Mangwanda
Researcher
Dullah Omar Institute
University of the Western Cape
South Africa
jmangwanda@uwc.ac.za