Punishing the homeless: The constitutionality of the criminalisation of homelessness in the City of Cape Town.

By

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DEDICATION

To my dearest mother, Ntombekhaya Maureen Nogwavu, thank you for all the love and support you gave to me, though you were not able to see me through to the end of this work, I hope it embodies what you aspired for me.

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ABSTRACT

This research is a doctrinal study into Section 2(2), read with section 23, of *the City of Cape Town's Streets Public Places and the Prevention of Nuisances By-law* of 2007 and whether it violates the right to human dignity entrenched in section 10 of the Constitution. The provision prohibits begging, sitting, standing and lying in public places in the City of Cape Town. The overall argument made in this dissertation is that this prohibition is unconstitutional for the following three reasons: Firstly, it unlawfully interferes with homeless peoples efforts to maintain and build and decent life. Secondly, it disproportionally discriminates against black people. Lastly, it halts transformation in South Africa. Upon the findings of its analysis, this study aims to make recommendations and suggestions to improve the protection of homeless people in South Africa.

ACRONYMS AND ABBREVIATIONS

ACHPR - African Commission on Human and Peoples' Rights.

AFCOP - African Policing Civilian Oversight Forum**.**

APCOF - African Policing Civilian Oversight Forum.

AU - African Union

CALD - Council of Australian Law Deans

DSD - Department for Social Development

HSRC - Human Sciences Research Council

LGBTIQA+ - Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual

NDP - National Development Plan

PALU - Pan African Lawyers

SAPS - South African Police Service

SALC - South African Litigation Centre

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CHAPTER ONE

INTRODUCTION.

1.1. BACKGROUND

The *Streets, Public Places, and the Prevention of Noise Nuisances* by-law[1] (Hereinafter 'the nuisances by-law') prohibits the life-sustaining activities of homeless people including begging, standing, sitting, and lying in public spaces through the promulgation of petty offenses in the City of Cape Town.[2] In Cape Town, people begging, lying, sitting, or standing in public spaces have been fined up to R2,000 or even arrested.[3] While these by-laws technically apply to everyone, they disproportionately affect the homeless who often have nowhere else to go.[4] According to Kaggwa, the enforcement of such by-laws also has the effect of perpetuating the stigmatisation of poverty by mandating a criminal justice response to what is essentially a socio-economic issue.[5] In this regard, the criminalisation of petty offenses reinforces discriminatory attitudes against homeless persons and ultimately violates their right to dignity.[6]

However, according to the Constitution, homeless people are entitled to certain rights irrespective of their homelessness status.[7] A person is entitled to these rights not based on their status but based on the common humanity shared by all human beings.[8] One such right to which homeless people are entitled to is the right to dignity. This right is well provided for under the South African legal system through our constitution and other laws and policies in the country

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[1] Street, Public Places and the Prevention of Noise Nuisances by-law of 2007 s2(2) & s23; See also; eThekwini's Nuisances and Behaviour in Public Places by-law of 2015 at s5(2)(c), (d), (e), (k), (r) and (u) & s12(1)(b) and 12(2); City of Tshwane by-law pertaining to public amenities of 2014 at s8(21) & s11.
[2] Ibid.
[3] Ibid at s2(2) & s23.
[4] Magnus Killander 'Criminalising homelessness and survival strategies through municipal by-laws: Colonial legacy and constitutionality' (2019) 25 *South African Journal on Human Rights* 70-93 at 90, see also: Willene Holness 'eThekwini's discriminatory by-laws: criminalising homelessness' (2020) *Law, Democracy & Development* 24 at 469; African Policing Civilian Oversight Forum (AFCOP) 'Poverty is not a crime: Decriminalising petty by-laws in South Africa' (2021) available at *https://apcof.org/* accessed on 03 January 2022 and Lukas Muntingh & Kristen Petersen 'Punished for being poor: Evidence and arguments for the decriminalisation of petty offenses' (2015) available at *https://acjr.org.za/resource-centre/* accessed on 03 January 2022.
[5] SK Kaggwa in African Commission on Human & Peoples Rights *Principles on Decriminalisation of Petty Offences* 1 at 5. See also; Holness op cit note 4 at 2.
[6] SK Kaggwa in African Commission on Human & Peoples Rights *Principles on Decriminalisation of Petty Offences* 1 at 5. See also; Holness op cit note 4 at 2.
[7] Constitution of the Republic of South Africa, 1996.
[8] Ibid.

provide for the extension of certain rights, including those under Chapter II of the Constitution. Amongst other rights, Chapter II provides for the right to dignity.[9] Thus, by making human dignity a right and a value, this is a recognition of its elevated significance.[10] According to s10 of the Constitution, South Africa is obligated to protect and respect the right to dignity for everyone.[11] In recognition of this position, Chaskalson P held in the *Makwanyane case*[12] that:

> "the right to dignity is one of the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value this right above all others".[13]

The right to dignity must be prioritised. The South African government is obliged to respect and protect this right.[14] This was supported by the court in the *National coalition case* where it was noted that the right to dignity is the cornerstone of the South African constitution.[15] Despite these provisions, homeless people are still being discriminated against in the City of Cape Town. They are treated unlawfully and abused by peace officers. Some are even required to pay fines as punishment when they can barely make ends meet for their daily needs. It is against this backdrop that this project seeks to examine the constitutionality of s2(2) read with s23 of the *Nuisances* by-law in light of s10 of the Constitution. The project further seeks to show that this violation cannot be justified in terms of s36 of the Constitution and is therefore unconstitutional.

1.2. RELEVANCE AND SIGNIFICANCE OF THE STUDY

The City of Cape Town's unchecked and growing levels of attacks and violence towards homeless people came to the spotlight on the 09th of January 2022, when Dumisani Joxo was shot and murdered by a member of the City of Cape Town's Law Enforcement Unit.[16] Dumisani, who lived in a tent on Chester Street, stepped outside his tent to relieve himself

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[9] Ibid.
[10] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 16.
[11] Constitution.
[12] *S v Makwanyane* BCLR 665 (CC) 1996.
[13] Ibid para 144, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Justice* 1998 (12) BCLR 1517 (CC) para 28 (the right to dignity is the cornerstone of our constitution)
[14] Constitution at s10.
[15] *National Coalition* supra note 13 para 28.
[16] Ndifuna Ukwazi 'City of Cape Town charged with murdering Dumisani Joxo who was living on the street' available at *https://nu.org.za/wp-content*,accessed on 20 January 2022.

when he was shot in the mouth and killed by City of Cape Town Law Enforcement officer Luvolwethu Kati.[17] Kati, who was part of the Law Enforcement team doing their regular morning check up on the community, saw an open fire made by one of the community members and requested the fire to be extinguished.[18] At this stage, the officer had already armed his firearm.[19] Joxo refused to extinguish the fire and said that they needed the fire to cook breakfast.[20] Kati is alleged to have kicked over the pot intended to cook the pap when a scuffle broke out, ending with Dumisani's death by Kati.[21] According to Ndifuna Ukwazi, four days before this incident, Dumisani was brutally assaulted by members of the South African Police Service for no apparent reason.[22] He had a broken rib at the time of his death.[23] This is at least the third murder committed by the City of Cape Town's Law Enforcement Unit in the past two years.[24]

Before this incident, on the 21st of March 2021, eleven homelessness people launched applications in both the Western Cape High Court and the Equality Court challenging the constitutionality of two of the City of Cape Town's municipal by-laws, namely the By-law relating to Streets, Public Places and the Prevention of Noise Nuisances (2007)[25] and the Integrated Waste Management By-law (2009)[26]. The homeless people were represented by Ndifuna-Ukwazi.

Ndifuna Ukwazi argued that these by-laws criminalise homelessness by making it a crime for persons living on the street to conduct ordinary life-sustaining activities, like sleeping, camping, resting, bathing, erecting a shelter, or keeping personal belongings in public.[27] The by-laws also make it a crime to "beg", lie down, sit or even stand in a public place.[28] The City has labeled these activities "anti-social behavior" and has used these by-laws to issue fines of up to R2 000 against homeless people for unavoidable conduct.[29] According to Ndifuna Ukwazi, every day, these by-laws are used by the City's law enforcement officers to threaten, harass, arrest and, in some instances, forcefully displace homeless people, as well as confiscate

[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Nuisances by-law at s2(2) & s23.
[26] The Integrated Waste Management By-law of 2009.
[27] Nuisances by-law at s2(2) & s23.
[28] Ibid.
[29] Ibid.

what little possessions homeless people own.[30] Making it a crime and issuing fines for people to perform ordinary life-sustaining activities is a cruel, inhumane, and punitive response to a chronic socio-economic problem.[31]

Ndifuna Ukwazi argues that the City's failure to address a housing shortage and an inadequate supply of shelter beds means that homelessness, for many, is not a choice.[32] Further, according to the expert evidence of U-turn, a faith-based non-profit organisation offering skills development assistance to homeless people, approximately 14 357 people are living on the streets of Cape Town, but only 2 473 beds in the City's shelters.[33] In other words, five times more people are struggling with homelessness than there are shelter beds.[34] And as the economic impact of the COVID-19 pandemic drives more people into homelessness, this disjuncture is only set to get worse.[35] In addition to being unfair and inhumane, treating those struggling with homelessness like criminals does not address the root causes of homelessness, such as poverty, inadequate affordable housing, a lack of state assistance, mental health issues, substance abuse, and discrimination.[36]

According to U-turn, the City spends R744 million a year on people experiencing homelessness - with the City spending R345 million on enforcement and punitive measures and only R122 million on social development activities.[37] People living on the streets are already vulnerable, but these by-laws exacerbate their vulnerability to systemic disadvantage.[38] This highlights how the City's by-laws discriminate against homeless people and violate their constitutional rights.[39] The by-laws demonstrate a failure to break from discriminatory colonial and apartheid laws stretching back to 1760 that were used to dispossess Black and Coloured people of their rights to land and forcibly remove them from well-located urban areas.[40] The similarities between the by-laws and colonial and apartheid pass control laws that strictly regulated the freedom of movement of Black and Coloured people in urban areas are striking and disturbing.[41] At the core, the applicants are challenging the by-laws on the basis that they

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[30] Ndifuna Ukwazi op cit note 16.
[31] Ibid.
[32] Ibid.
[33] Jonathan Hopkins, James Reaper, San Vos & Gemma Brough 'Full Research Report: The Cost of Homelessness in Cape Town' U-Turn 2020 at 15, available at *https://homeless.org.za/wp* accessed on, 20 January 2022.
[34] Ibid.
[35] Ibid.
[36] Ndifuna Ukwazi op cit note 16.
[37] Hopkins, Reaper, Vos & Brough op cit note 33.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.

discriminate against homeless people by treating people like criminals purely for being without shelter.[42] With the support of expert evidence, the case shows that the City's continued enforcement of the by-laws has a devastating physical and psychological impact on people without shelter.[43] Although this dissertation focuses on the right to dignity, the arguments made by Ndifuna Ukwazi are similar to those made in the project. This all highlights how pertinent the challenging of these by-laws is. It will be argued in Chapter four of the dissertation that these by-laws are unconstitutional and cannot be justified in terms of s36 of the Constitution. Section 39 of the South African Constitution requires courts, when interpreting any legislation, to promote the spirit, purport, and objects of the Bill of Rights.[44] Given the human rights concerns associated with the application of vagrancy laws, it is likely that their constitutionality can be successfully challenged.[45]

The study is significant in that it examines the constitutional obligations imposed on the City of Cape Town by the Constitution to respect and protect the fundamental human rights of homeless people.[46] It is also important in that it examines the constitutionality of the *Nuisances* by-laws taking into account the right to dignity of homeless people contained in s10 as well as the purpose of the provision.[47] This is an exercise that needs to be undertaken by South African courts considering the recent events on attacks on homeless people. The study also examines relevant case law and experiences in other provinces. Finally, this dissertation has included an examination as to possible less restrictive measures that could be taken by the City to avoid a constitutional challenge, such as a provision in legislation repealing the prohibition of begging, sitting, standing, and lying in public spaces and expressly prohibiting all forms of discrimination effected by the by-law.

1.3 RESEARCH QUESTIONS

The central question of this study is:

Whether the criminalisation of begging, sitting, standing and lying in public spaces contained in s2(2) read with s23 of the *Nuisances by-law* is constitutional.

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[42] Ibid.
[43] Ibid.
[44] Constitution at s39.
[45] The African Court on Human & Peoples Rights 'Pan African Lawyers Union (PALU) for an Advisory Opinion on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and Other human rights instruments applicable in Africa (2018) available at *https://www.african-court.org* accessed on 03 January 2022.
[46] Constitution at s39
[47] Constitution at s10.

To respond to this question, the study examines two interrelated secondary questions, which are:

I. Whether s2(2) read with s23 of the *Nuisances* by-law violates the right to dignity of homeless people entrenched in s10 of the Constitution?
II. If so, whether the violation can be justified in terms of s36 of the Constitution?

1.4 CHAPTER SYNOPSIS

Chapter Two analysed the methodology used in the study. The methodology relied upon and discussed extensively is the doctrinal method. This chapter also examined the definition of methodology, the differences between method and methodology. The motivation(s) behind the study is also outlined in this chapter.

Chapter Three is a doctrinal exposition of the City of Cape Town by-laws. The Chapter examined the history of vagrancy laws in South Africa. The chapter also examined the elements of a crime and determined the elements. The provisions of each of these sources of law lead to the inevitable conclusion that the impugned provision in the by-law amounts to punishable criminal conduct.

Chapter four draws the arguments together and takes a closer look at the constitutionality of s2(2) read with s23 of the *Nuisances* by-law. This chapter looks at the right to dignity within the broader scope and other socio-economic rights provided for homeless people in the City of Cape Town. This discussion formed the central enquiry of chapter four of this work. The Chapter concluded that the by-laws are a breach of the right to dignity and cannot be justified.

Chapter Five of the project concludes with recommendations and the way forward to ensure that the right to dignity of homeless people is better protected. The chapter also outlined the implications of the research and suggested other research questions that still need to be answered.

CHAPTER TWO

METHODOLOGY

2.1 INTRODUCTION

Throughout South Africa, several municipalities have adopted measures to criminalise various types of conduct perpetrated typically by homeless people, including the enactment of by-laws for infringements known broadly as petty offenses.[48] This is done through the enactment and enforcement of by-laws that seek to prohibit the occupation of public spaces and the performance of certain activities in public.[49] To achieve their objectives, these by-laws prescribe the imposition of fines, imprisonment, or both for their infringement. This study will examine these by-laws and their effects on homeless people. The study will focus on the by-laws in the City of Cape Town. The main objective of this study is to assess the constitutionality of section 2(2) read with section 23 of the *Nuisances* By-law.[50] This section prohibits begging, standing, sitting, and lying in public places in the City of Cape Town.[51] Specifically, the study will seek to evaluate the compatibility of these provisions with section 10 of the constitution which provides for the right to human dignity.[52]

This chapter is divided into several sections addressing the subject matter, motivation, as well as the research method used to collect information. The chapter gives a general definition of methodology and an outline of the differences between method and methodology. Further, the chapter gives an extensive literature review.

2.2 DEFINITION: METHODOLOGY

2.2.1. WHAT IS METHODOLOGY

According to Denzin and Lincoln, research methodology is determined by the nature of the research question and the subject being investigated.[53] As a result, the research format used in any investigation should be seen as a tool to answer the research question.[54] Helen also notes

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[48] African Policing Civilian Oversight Forum (APCOF) Research Paper 'Poverty is not a crime: Decriminalising Petty By-laws in South Africa.', available at https://apcof.org/ accessed: 24 October 2021.
[49] Ibid.
[50] Nuisances by-law.
[51] Ibid at s2(2) & s23.
[52] Ibid; Constitution at s10.
[53] Norman Denzin & Yvonna Lincoln *Introduction: The Discipline and Practice of Qualitative Research* (2005); See also: Norman Denzin & Yvonna Lincoln *The Sage handbook of qualitative research* (Eds) at 1–32.
[54] Ibid.

that, methodology is a contextual framework for research, a coherent and logical scheme based on views, beliefs, and values, that guides the choices researchers make.[55] Fundamentally, methodology refers to the strategy employed in conducting research.[56] It guides our thinking or questioning of or within that field or both.[57]According to Roberts, it comprises three 'eternal' questions.[58] First, there is the question of subject-matter definition, often requiring conceptual clarification or elucidation.[59] Answers to this question identify the field, topic, or issue that the research will investigate. It answers what the research is all about. The second is the question of motivation.[60] This concerns the justification for undertaking any particular research project. Answers to the question of motivation supply the rationale for selecting these particular research topics and questions from the virtually limitless universe of potential alternative research projects. Third, are questions of method and methodology.[61] A researcher needs to decide and specify in appropriate detail, how the research will be conducted.[62] Legal researchers can select from a variety of research methods.[63] Methodology, as the theory of research methods, supplies the theoretical justification for one's choice of methods.[64] Comprehensive answers to the third question on the method (how) should explain why the chosen research methods are the right tools for the job at hand, given that other methods might have been employed as well or instead.[65]

2.2.2 THE DIFFERENCE BETWEEN METHOD AND METHODOLOGY.

A methodology does not set out to provide solutions - it is, therefore, not the same as a method.[66] The methodology is something different, although it is related to the method.[67]It offers a contextual and theoretical perspective for understanding which method, set of methods,

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[55] Helen Kara *Creative Research methods in the Social Sciences: A practical guide* (2015) at 4.
[56] Terry Hutchinson and Nigel Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *Deakin Law Review* 83.
[57] Robert Cryer, Tamara Hervey & Bal Sokhi-Bulley *Research Methodologies in EU and International Law* (2011).
[58] Paul Roberts 'Interdisciplinarity in Legal Research' in Mike McConville & Wing Hong Chui's 2 ed Research Methods for Law (2017) at 100.
[59] Ibid at 101; see also Cryer, Hervey & Sokhi-Bulley op cit note 57 at 6.
[60] Ibid.
[61] Ibid.
[62] Ibid at 102; See also Cryer, Hervey & Sokhi-Bulley op cit note 57 at 6.
[63] Ibid.
[64] Cryer, Hervey & Sokhi-Bulley op cit note 57 at 5.
[65] Hutchinson & Duncan op cit note 55.
[66] Cryer, Hervey & Sokhi-Bulley op cit note 57 at 5.
[67] Ibid.

or best practices can be applied to the research question(s) at hand.[68] While the objective of the methodology is to determine the appropriateness of the methods applied with a solution, the objective of methods is to find the solution to the research problem.[69] The methodology is an analysis of all the methods and procedures of the investigation. Further, it guides our thinking or questioning of, or within a field of research.[70] On the other hand, methods are just tools used to select a research technique.[71] Methodology encompasses several techniques used while conducting these experiments, surveys, tests, etc. Dissimilarly, the method encompasses carrying out experiments, conducting surveys, tests, etc.[72] Simply put, a method is a research tool, a component of research, for example, a qualitative method such as interviews. Methodology, on the other hand, is the justification for using a particular research method.[73] Researchers should be clear as to methodology and reasons for choosing a particular methodology. Effective legal research is hardly possible without a proper understanding of research methodology. A researcher should justify the important methodological choices in his/her work. As mentioned above, methodology answers the question of what, who, and how.[74] This chapter, therefore, serves as a justification for the research method used in this study.

2.3 THE THREE ETERNAL QUESTIONS.

2.3.1 CONCEPTUAL DEFINITION AND SUBJECT MATTER (WHAT?)

I. GENERAL OVERVIEW.

The study is a doctrinal study into Section 2(2) read with section 23 of *the City of Cape Town's Streets Public Places and the Prevention of Nuisances By-law* and whether it violates the right to human dignity entrenched in s10 of the constitution.

The purposes of the study are twofold:

1. To examine whether s2(2) read with s23 of the by-laws is constitutional.

[68] Ibid; Kara op cit note 55 at 8.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Roberts op cit note 58 at 100.

2. To unpack the concept of dignity in the South African context and how the courts have interpreted it and relate it to homeless people affected by this by-law.

The broad research question of this study is:

Whether criminalising homelessness is consistent with the Constitution?

To respond to this question, the study examines two interrelated secondary questions, which are:

1. Whether section s2(2) read with s23 of the by-law infringe on the right to dignity entrenched in section 10 of the Constitution.
2. If so, whether the impugned provisions are reasonable and justifiable under s36 of the Constitution?

Notwithstanding this reasoning, the research method(s) used will be outlined later in this Chapter. However, it is first necessary to also lay out the components of this study and investigate the motivation behind the study.

2.3.2 RESEARCH STUDY MOTIVATION (WHY?)

This research project is addressed primarily towards the persistence of homelessness in Cape Town despite the municipality's attempt to alleviate this social phenomenon through the imposition of criminal sanctions. Homelessness not only indicates a governments' failure to guarantee access to safe, affordable, and adequate housing for all, it violates as well several other human rights. For example, being exposed to homelessness impairs strongly the health of those affected undermining their right to the highest attainable standard of health.[75] In addition, it must be noted that the right to life entails more than mere survival, as it encompasses the core notion that everyone has the right to enjoy her or his life in dignity.[76] Instead of the municipality addressing the homelessness issue using the correct measures, homelessness is stigmatized and often addressed with criminalisation, violence, and aggressive policies that further violate, rather than safeguard, the rights of the persons involved.[77] This is usually done through municipal by-laws. Persons experiencing homelessness are also often discriminated against based on their housing status, affecting their political, economic, and social rights, such

[75] Muntingh & Petersen op cit note 4.
[76] *Makwanyane* supra note 12 para 83-84.
[77] Muntingh & Petersen op cit note 4 at 30.

as their right to dignity.[78]The existence and enforcement of such laws is disproportionately experienced by the poor and marginalised population including; black people, women, children as well as people with disabilities.[79] Legal and Policy reforms are needed that aim at limiting, if not ending, arrest and imprisonment for homelessness that do not have any effect on public safety.[80] Law enforcement and the criminal justice system cannot operate as if they have no impact on poverty and marginalisation and should act in a way that is in alignment with the Constitution.[81]

2.3.3 COMPONENTS OF THE METHOD

I. DOCTRINAL STUDY

Doctrinal research provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and, perhaps, predicts future developments.[82] Hutchinson and Duncan argue that there are varying degrees of complexity within doctrinal legal research.[83] Doctrinal legal research ranges from practical problem-solving to straightforward descriptions of (new) laws, with some incidental interpretative comments, to innovative theory building (systematisation), with 'the more "simple" versions of that research' being the 'necessary building blocks for the more sophisticated ones'.[84] Different forms of legal research necessitate variations in the method.
Doctrinal legal research methodology, also called "black letter" methodology, focuses on the letter of the law rather than the law in action.[85] Using this method, a researcher composes a descriptive and detailed analysis of legal rules found in primary sources (cases, statutes, or regulations). The purpose of this method is to gather, organize, and describe the law; provide commentary on the sources used; then, identify and describe the underlying theme or system and how each source of law is connected. Under this approach, the researcher conducts a critical, qualitative analysis of legal materials to support a hypothesis.[86] The researcher must identify specific legal rules, then discuss the legal meaning of the rule, its underlying principles,

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[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Hutchinson & Duncan op cit note 56 at 19.
[83] Ibid.
[84] Ibid.
[85] The term ‘black letter refers to research about the law included in legislation and case law. It is defined as ‘One or more legal principles that are old, fundamental, and settled’ (BA Garner & HC Black law dictionary (1999) 7ed at); See also; Susan Bartie ‘The Lingering Core of Legal Scholarship’ (2010) 30 (3) *Legal Studies* at 345.
[86] Hutchinson & Duncan op cit note 55 at 2; See also; D Watkins & M Burton *Research Methods in law* (2018) 2 ed at 12.

and decision-making under the rule (whether cases interpreting the rule fit together in a coherent system or not).[87] The researcher must also identify ambiguities and criticisms of the law, and offer solutions.[88] Sources of data in doctrinal research include the rule itself, cases generated under the rule, legislative history where applicable, and commentaries and literature on the rule.[89] This approach is beneficial by providing a solid structure for crafting a thesis, organizing the paper, and enabling a thorough definition and explanation of the rule.[90] The drawbacks of this approach are that it may be too formalistic, and may lead to oversimplifying the legal doctrine.[91] The doctrinal method is normally a two-part process because it involves first locating the sources of the law and then interpreting and analysing the text.[92] But the doctrinal research methodology is much more than 'scholarship'. It is the location and analysis of the primary documents of the law. That is the crux of the doctrinal method. Doctrinal research also requires a trained expert in legal doctrine to read and analyse the law - the primary sources: the legislation and case law.[93] Doctrinal research is not simply the locating of secondary information.[94] It includes that intricate step of 'reading, analysing and linking' the new information to the known body of law. The method is centered on the reading and analysis of the primary sources of legal doctrine.[95] It seeks to achieve more than simply a description of the law.[96]

The reason for the use of this method in this project is that many lawyers consider the doctrinal method to best typify a distinctly legal approach to research. Lawyers, judges, and jurists have widely been using doctrinal research as a systematic means of legal reasoning since the nineteenth century.[97] Doctrinal research is therefore established as the traditional genre of research in the legal field. Also known as theory-testing or knowledge-building research in legal academia, it deals with studying existing laws, related cases, and authoritative materials analytically on some specific matter.[98] With its jurisprudential base on positivism, doctrinal

[87] Ibid; Watkins & Burton op cit note 86 at 12.
[88] Ibid at 3.
[89] Hutchinson & Duncan op cit note 56 at 84; Watkins & Burton op cit note 85 at; See also; SN Jain 'Doctrinal and Non-doctrinal legal research and methodology' (1982) 24 *Journal of Indian Law Institute* at
[90] Ibid;
[91] Hutchinson & Duncan op cit note 56.
[92] Watkins & Burton op cit 36 at 18.
[93] Terry Hutchinson *Researching and Writing in Law* 3 ed (2010) at 38.
[94] Ibid.
[95] Watkins & Burton op cit 86 at 5.
[96] Ibid.
[97] Hutchinson & Duncan op cit note 56 at 2; Watkins & Burton op cit note 86 at 16; See also; JR Holmes *The Path of the Law* (1881) at 457.
[98] Council of Australian Law Deans (CALD) 'Statement on the Nature of Legal Research' (2005) Available at: https://cald.asn.au Accessed; 06 December 2021.

legal research is 'research in law' rather than 'research about law'. This method is best suited for this project because the project seeks to study existing laws. The project seeks to evaluate the constitutionality of the *nuisances* by-law. As noted before, the study will give a doctrinal exposition of the by-law and consider its constitutionality according to s36. This can only be done using the doctrinal method as this method is used in such projects.

II. S2(2) READ WITH S23 OF THE CITY OF CAPE TOWN BY-LAW

The City of Cape Town is constitutionally entitled to enact and enforce laws that are necessary for the effective administration of its affairs in terms of section 156 of the Constitution of the Republic of South Africa, 1996 (the Constitution).[99] The existence and enforcement of many laws that criminalise what are essentially life-sustaining activities and efforts to institute and maintain a decent life are now subject to debate and possible legal action. In this project, the argument is made that section 2(2), read with s23, of the *City of Cape Town's Streets, Public Places, and the Prevention of Noise Nuisances* By-Law is contrary to the Constitution and violates the right to dignity and cannot be justified. This legislation, in my view, has the effect of criminalising homelessness and poverty. The criminalisation of begging, sitting, standing and lying in public places (homelessness) in the City of Cape Town finds its basis in the *Streets, public places, and the prevention of nuisances By-law*. The *Nuisances*' by-law prohibits petty offenses such as begging, sitting, standing and lying in public spaces. Section 2(2) of the by-law prohibits begging, sitting, standing, and laying down in public spaces.[100] This indicates that in the City of Cape Town, begging, standing, sitting, and lying in public spaces are prohibited and may result in a criminal sanction as provided for in section 23 of the by-law. Section 23(1)[101]and section (3)[102]provide the sanction as well as punishment of the transgression of these by-laws.

This study entails a doctrinal exposition of this by-law by looking into the history of vagrancy laws in general. The project also looks at the history of vagrancy law in South Africa. Further, the research examines the legal responses to vagrancy or homelessness in the City of Cape Town. The study analyses the criminalisation of homelessness in the City of Cape Town as a legal response. The study also examines the history of these by-laws and how they were used as a tool of discrimination and oppression in the past. The research specifically looks into

[99] Constitution at s156.
[100] Nuisances' by-law at s2(2)
[101] Ibid at s23(1).
[102] Ibid at s23(3).

a criminal liability in South Africa by considering the elements of a crime and whether there could be any defences against this criminalisation.

III. THE CITY OF CAPE TOWN

Although the issue of criminalising homelessness is a continental issue, the study focuses on the City of Cape Town. The reason for this focus is that there is a dearth of scholarship on this in the City of Cape Town. Though South Africa is classified as an upper-middle-income country.[103] It remains amongst the most unequal societies in the world, with high income and wealth inequality and low intergenerational mobility remaining as marked legacies of the historic entrenchment of economic and social exclusion.[104] In several municipalities throughout South Africa, including the City of Cape Town, laws exist that have the effect of making the poorest and most marginalised in society criminally responsible for their status by making it a criminal offence to perform life-sustaining activities in public spaces. This includes sleeping, bathing, washing, urinating or defecating, collecting money, washing any object, or drying/spreading washing or bedding in a public space. In other words, people who are homeless are criminalised for undertaking the bare necessities of life in public. This includes the City of Cape Town where the number of homeless people outnumbers shelter beds by 5 to 1.6.[105] Punishing the poor does not have the effect of ending the criminalised conduct, but further entrenches exclusion, discrimination, and marginalisation.[106] Further, research demonstrates that these laws are often used by law enforcement officials as a means to harass, intimidate, extort, and otherwise mistreat people who are marginalised or vulnerable to human rights abuses in a law enforcement context because of their status.[107] The study draws on the experiences of other municipalities to aid the improvement of the City of Cape Town by-laws. The study contextualises the City of Cape Town's status and draws

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[103] The World Bank, Data for South Africa, Upper middle income. Available at: https://data.worldbank.org/?locations=XT-ZA Accessed: 24 October 2021.

[104] The World Bank (2018) 'Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints, and opportunities' Available at: https://documents.worldbank.org/ Accessed: 24 October 2021. See also, The World Bank (2021) 'The World Bank in South Africa' Available at: https://www.worldbank.org/ Accessed: 24 October 2021.

[105] APCOF Research paper op cit note 48.

[106] Ibid.

[107] Ibid.

lessons from other municipalities, that will improve its jurisprudence on by-laws that violate the rights of the homeless and marginalized.

IV. SECTION 10 OF THE CONSTITUTION.

The study also focuses on section 10 of the Constitution which provides for the right to human dignity. This is because this right has been described as one of the most important rights in the South African constitution.[108]By committing ourselves to a society based on the recognition of human rights we are required to value this right.[109] Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected.[110] The right to be treated with dignity is one of the foundational tenets of South Africa's constitutional democracy.[111] Section 1 of the Constitution provides that South Africa is founded on the values of, inter alia, human dignity, the achievement of equality, and the advancement of human rights and freedoms.[112] The recognition of the significance of the right to dignity, and its centrality in promoting the exercise of all other human rights, is evident in judicial interpretation of the right to be treated with dignity.[113] The study will consider how this right has been interpreted by various courts and academics throughout the year. Further, the study will explore academic writings that also intensify arguments that vagrancy-related by-laws violate the right to dignity, primarily because they authorise the treatment of individuals as objects that should be removed from view. Essentially, the study will argue that the impugned provisions violate the right to dignity of homeless people in the City of Cape Town.

2.3.3 LITERATURE REVIEW

I. IS THE PROJECT NEW?

Several scholars have written comprehensively on vagrancy laws that continue to violate human rights. In 2019, the decision by the City of Cape Town to impose fines against homeless people for occupying communal places attracted a public outcry and brought to the fore issues at the intersection of criminal justice, poverty, and development.[114] This decision revived the

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[108]*Makwanyane* supra note 12 para 144. See also *National Coalition* supra note para 28; *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) para 41; *Prinsloo v Van der Linde & Another* 1997 (6) BCLR 759 (CC) para 31-33.
[109] Ibid
[110] Constitution at s10.
[111] *Makwanyane* supra note 12 para 328.
[112] Constitution at s1.
[113] *Makwanyane* supra note 12.
[114] APCOF Research paper op cit note 48.

pushback by civil society organisations and other stakeholders against the coordinated imposition of criminal sanctions on these vulnerable groups for conduct that is necessary for survival.[115]

In his paper "*Criminalising Homelessness and Survival Strategies through Municipal By-laws and colonial*" Killander also uses a doctrinal study to argue that many by-laws of South African municipalities including the City of Cape Town are full of provisions criminalizing the poor.[116] He further argues that many of these by-laws are rarely enforced while others are enforced to provide a sense of security among the privileged by removing them from the streets.[117] Holness in her doctrinal study further argues that by-laws, enforced through the city police are a tool to control "anti-social behaviour" through prohibition and punishment of such conduct.[118] The functions of the city police have shifted from mostly crime prevention to a broader mandate, including enforcement of by-laws, such as control of nuisances: addressing both prevention of crime and maintenance of social order.[119] Key to the criminalisation of homelessness is the enabling law legislated by municipalities (by-laws) and the role of the city police (who enforce the by-laws).[120]She further argues that local governments that internalize anti–vagrant and anti-poor sentiments in their legislative and executive functions are acting unconstitutionally.[121] Additionally, these by-laws are liable to challenge for failing the principle of legality and offending the equality clause as well as other rights in the Constitution including the right to dignity. It is worth noting that municipalities have the power to craft, within their executive and legislative powers, by-laws that are transformative, but not divisive. Hence, Holnes argues that anti-vagrancy by-laws have to be scrapped.[122] Kriel *et al* call for "practical ways of limiting, even eradicating, the neglect, abuse, and stigmatisation that people who are homeless are subject to daily.[123]

The African Policing Civilian Oversight Forum in its research paper '*Poverty is not a crime'* uses a qualitative method of research. Their research is also doctrinal and essentially argues that the prohibition of the behaviour and activities extracted from the above-mentioned by-laws

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[115] Ibid.
[116] Killander op cit note 4 at 70.
[117] Ibid at 70.
[118] Holness op cite note 4 at 473
[119] Riaan Riekert & Ian De Vries 'Strategic approaches to by-law enforcement as a means of crime prevention in the Tshwane metropolitan area' (2015) *Acta Criminologica* 99 at 113.
[120] Holness op cit note 4 at 473.
[121] Ibid at 473.
[122] Ibid.
[123] Inge Kriel, Miriam Julia Paulo Tembe & Victoria Ruvarashe Mashava 'Homelessness in Pretoria: the survival challenges of the homeless and their right to the City' (2017) 34(4) *Development Southern Africa* at 479

is problematic because it criminalises everyday behaviour in the case of poor, homeless, and indigent persons.[124] Such prohibition is therefore too broad in scope. The extensiveness, vagueness, and the fact that certain key descriptive terms remain undefined, leave these laws open to abuse and discriminatory application by the entities with the power to impose them. [125]

According to Muntingh and Petersen, the majority of people arrested for petty offences such as begging, sitting, standing, and lying in public spaces are poor, marginalised, powerless, and vulnerable.[126] They are often the first victims of police violence because their vulnerability and poverty do not allow them to defend themselves and demand their rights.[127] Although the study by Muntingh and Petersen is a comparative study, this dissertation will draw several insights from it. While there have been other projects that are similar to this project, existing projects are either broad or focused on different provinces and by-laws but none of them focus on the City of Cape Town. They also elaborate on different other constitutional rights and are not specific to the right to dignity as this project has focused on it. However, this dissertation draws several insights from them.

2.3.4 RESEARCH METHOD (HOW?)

This study questions the constitutionality of the City of Cape Town by-laws relating to homelessness. As a result, the study reviews and analyses the literature and case law that is relevant to the study. The methodology is doctrinal research based on the review and analysis of literature and case law that are relevant to the subject of the study. The sources that were examined included the cases of the South African courts and municipal law; legal literature including textbooks and journals; and case law. The critical use of statistics from several different sources serves to enrich the doctrinal research in the course of the chapters. Empirical data collection methods are not used because first, the study involves a conceptualisation of the mode of dealing with laws that are repugnant to the constitution; and secondly, the study employs a conceptual approach for the development of a framework for dealing with laws that violate constitutional rights.

2.3 CHAPTER CONCLUSION

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[124] AFCOP Research paper op cit note 48.
[125] Ibid.
[126] Muntingh & Petersen op cit note 4. See also Lukas Muntingh 'Arrested in Africa: An exploration of the issues' (2015).
[127] Ibid.

The chapter outlined the specifics of why and how the study was conducted and what methods were used. The chapter gave a comprehensive outline of the research method used to answer the research questions. A discussion of the subject matter was given. Further, the motivation behind the study was laid out.

CHAPTER THREE

A CRITICAL ANALYSIS OF THE CITY OF CAPE TOWN BY-LAWS RELATING TO STREETS, PUBLIC PLACES, AND THE PREVENTION OF NOISE NUISANCES.

3.1. INTRODUCTION

The criminalisation of begging, sitting, standing and lying in public places (homelessness) in the City of Cape Town finds its basis in the *Streets, public places, and the prevention of nuisances By-law* (Hereinafter, "the By-law"). The by-laws prohibit petty offences such as begging, sitting, standing and lying in public spaces. Section 2(2) of the by-law specifically prohibits begging, standing, sitting and lying in public places.[128] This indicates that in the City of Cape Town, begging, sitting, standing, and lying in public spaces is prohibited and may result in a criminal sanction as provided for in section 23 of the by-law. Section 23(1)[129] and (2)[130] provide for the criminal sanction or punishment for breaching s2(2). This chapter gives a doctrinal exposition of this by-law. To give context, the chapter briefly defines "vagrancy' and the general history of 'vagrancy laws'. The chapter also locates the relevant organs and institutions responsible for fulfilling the purpose of these laws. The chapter will further discuss the legal responses to vagrancy in South Africa.

3.2. BRIEF HISTORY: VAGRANCY LAWS.

Vagrancy is defined as 'a condition of homelessness without regular employment or income'.[131] Vagrants usually live in poverty and support themselves by begging, scavenging, petty theft, temporary work, or welfare (where available). During the 19th and 20th century, vagrancy in Western societies like the United Kingdom and the United States of America was associated with petty crime, begging and lawlessness, and punishable by law with forced labor, military service, imprisonment, or confinement.[132] Vagrancy laws provide for the arrest of street vendors, beggars, street kids, homeless people, and sex workers. As a legacy of the colonial past of Africa, vagrancy laws criminalising loitering and homelessness still form part

[128] Nuisances by-law at s2(2).
[129] Ibid at s23(1).
[130] Ibid at s23(3).
[131] Paul Ocoboxk & A L Beier *Cast Out: Vagrancy and homelessness in Global and Historical Perspective* (2008) 2.
[132] Ibid.

of our current legislation in South Africa.[133] This is the case even today in several other countries in Africa such as Malawi, Botswana, Zimbabwe, where vagrancy laws are still being used. Vagrants have always been characterised by society as outsiders in settled, ordered communities: embodiments of 'otherness'[134], objects of scorn or mistrust, or worthy recipients of help and charity. This is done through vagrancy laws that effectively criminalise their status of being homeless and poor. Anti-homelessness legislation generally takes three forms, either; legislation that aims to help and re-house homeless people; send them to homeless shelters compulsorily, or to criminalize homelessness and begging.[135]

Vagrancy laws in common law jurisdictions are traceable back to England's *Vagrancy Act of 1824* and remain in the penal codes and by-laws (prohibiting loitering) of former British colonies including South Africa.[136] As part of the colonial heritage of Africa, vagrancy laws criminalising loitering and homelessness remain in existing legislation in South Africa, mostly in by-laws. According to Chambliss; English vagrancy laws were promulgated for three main purposes:

1. To curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labor to landowners and industrialists whilst limiting the presence of undesirable persons in the cities;
2. To reduce the costs incurred by local municipalities and parishes to look after the poor; and
3. To prevent property crimes by creating broad crimes providing a wide discretion to law enforcement officials.[137]

3.2.1 VAGRANCY LAWS IN SOUTH AFRICA

Killander argues that in South Africa, colonial laws have been used as a basis for our current vagrancy municipal by-laws and these laws have a history of being used for social control of

[133] Lizette Grobler 'Revisiting Vagrancy and Loitering Provisions in the light of International law' Available at https://iises.net/ Accessed: 05 October 2021.
[134] Alan Bullock & Stephen Trombley *The Other: The New Fantana Dictionary of Modern Thought* 3 ed (1999) 620.
[135] Southern African Litigation Centre Research Report 'No Justice for the Poor: A preliminary study of enforcement of Nuisance related offences in Blantyre, A history of English Vagrancy laws' available at https://www.southernafricalitigationcentre.org/ Accessed: 02 August 202.
[136] Ibid.
[137] William Chambliss 'A Sociological Analysis of the Law of Vagrancy' (1920) 12 *Social Problems* 67-77

the poor, who have throughout history been viewed as a threat to the elite.[138] Vagrancy laws can be found in provincial legislation and municipal by-laws such as those that supposedly prohibit begging, standing, sitting, and lying down in public spaces. These can be interpreted as designed to criminalise the status of an individual, rather than specific conduct that satisfies all the known elements of an offence. When the history of current measures criminalising the poor in South Africa is considered, they are often viewed as having their origin in English vagrancy laws, in particular, the *1824 Vagrancy Act*.[139]

Further, as much as the link with English legislation is evident in existing criminal law throughout Anglophone Africa,[140] the historical trajectory in South Africa is more complex.[141] Although there have been some studies on the origins of the Cape, Natal, and Transvaal vagrancy statutes, the link between them, pass laws, and the current by-laws has not been explored.[142] Previously, vagrancy legislation was used during the apartheid era.[143] However, petty offences are still prohibited by by-laws about conduct such as nuisance, begging, noise, street trading, and loitering in a city, this means there are still remnants of vagrancy laws lingering in South African law.

3.3 LEGAL RESPONSES TO VAGRANCY (HOMELESSNESS)

The regulation of homelessness has proved to be a complex issue for politicians and policymakers. The decriminalisation of vagrancy through the removal of vagrancy laws has become an option that a few countries in Africa have embraced, and more about this will be discussed later in the study. The government has the responsibility to decide between continuing with the criminalisation of vagrancy or pursuing alternative non-criminal means. This chapter focuses on criminalisation.

3.3.1 CRIMINALISATION

I. CRIMINALISATION OF VAGRANCY IN THE CITY OF CAPE TOWN

[138]Magnus Killander 'Do Archaic colonial laws criminalise homeless people today' (2013), available at www.up.ac.za accessed on 03 September 2021.
[139] The Vagrancy Act, 1824 (5 Geo.4.c.83).
[140] Muntingh & Petersen op cit note 4.
[141] Killander op cit note 4 at 70.
[142] Ibid at 3.
[143] Southern African Litigation Centre (SALC) Research Report 'No Justice for the Poor: A preliminary study of enforcement of Nuisance related offences in Blantyre, A history of English Vagrancy laws' available at https://www.southernafricalitigationcentre.org/ accessed on 02 August 2021.

Generally, criminalisation is the process by which behaviours and individuals are transformed into crime or criminals.[144] It is the action of rendering activities illegal and their commission a criminal offence.[145] As mentioned earlier, In South Africa criminalisation of vagrancy is legislated by municipalities and enforced by the metropolitan police (who enforce the by-laws).[146] In the City of Cape Town, *the Streets, Public Places, and Prevention of Noise Nuisances By-law* regulate the conduct of individuals in public spaces. The City of Cape Town adopted these by-laws in 2007. The by-laws prohibit begging and loitering in the City and several other livelihood activities. Offenders may be issued with a verbal warning, failing which there is a "warning notice" (which on its own is not an admission of guilt) requesting them to desist from the unlawful behaviour.[147]A written notice is issued to ensure the person's attendance in court, in terms of section 56 of the Criminal Procedure Act 51 of 1977.[148]

3.4 GENERAL OVERVIEW: PUNISHABLE OFFENCES UNDER THE STREETS, PUBLIC PLACES, AND THE PREVENTION OF NOISE NUISANCES BY-LAW.

The following are punishable commissions in the by the *By-law*:

• Begging [149]	• Sitting, standing and lying [150]
• Camping and sleeping in public[151]	• Erecting a shelter [152]
• Keeping personal belongings in public [153]	• Bathing and Washing [154]
• Urinating and defecating [155]	

These are all essential human and bodily functions that all other persons with their accommodation can conduct freely in the safety of their residential or work premises. The study focuses specifically on begging and loitering. The reason for this focus is because begging,

[144] Raymond Michalowski *Order, Law and Crime: An Introduction to Criminology* (1985) 6.
[145] Ibid.
[146]Holnes op cit note 4.
[147] Ibid.
[148] Nuisances by-law at s23; Criminal Procedure Act 51 of 1977 at s56.
[149] Ibid at s2(2).
[150] Ibid.
[151] Ibid at s2(3)(m).
[152] Ibid.
[153] Ibid at s10.
[154] Ibid at s2(3)(d).
[155] Ibid at s2(3)(c).

sitting, standing and lying down are necessary for survival for homeless people, yet they are criminal offences under the by-law. It is estimated that there are about 4 862 homeless people in the greater Cape Town area and an estimated 700 live in the central business district (CBD).[156] Homeless people have no other option but to beg and loiter for their survival, yet the act of begging or loitering constitutes a criminal offence in the City Territory with penalties ranging from a fine to imprisonment.[157] Begging, sitting, standing, and laying in public places is framed as a strict liability offence, that is, fault is not a requirement. This substantially limits the bases upon which a charge of begging may be defended, and as a result, most of those charged with begging plead guilty and incur a penalty.[158] There are no defences available to those charged with begging, sitting, standing, or lying in public spaces, Thus, in seeking to defend begging, sitting, standing, and lying in public spaces, offenders, recourse must be had to arguments that go to the validity of the laws that prohibit begging, sitting, standing and lying in Cape Town.

BEGGING, SITTING, STANDING, AND LYING IN PUBLIC SPACES

TYPES OF CONDUCT

The following are types of conduct that constitute punishable commissions in the *nuisances* by-law

Begging	**Other Conduct**
• For money	• Standing
• For food	• Lying
	• Sitting

- BEGGING

[156] Hopkins, Reaper, Vos & Brough op cit note 33.
[157] Ibid at s23.
[158] Ibid.

The by-law provides that any person who begs in a public place shall immediately cease to do so when directed by a peace officer or member of the Cape Town Metropolitan Police Department.[159] Begging is defined in the by-law as any request made by a person for an immediate donation of money or some other thing of value or otherwise.[160] According to the by-law, this definition does not include passively standing or sitting with a sign or other indication that one is seeking donations without addressing any solicitation to any specific person other than in response to an enquiry.[161] Under section 2(1)(c) of this by-law, no person is permitted to continue begging from a person or closely following a person who has responded negatively to them. Individuals who breach this by-law may be punished with a fine and/or imprisonment for a period not exceeding six months.[162]Alternatively, a court convicting a person of contravening this by-law may impose an alternative sentence, such as community service. [163] Accordingly, the effecting of the by-law concerning begging is such that if a person is instructed by a peace officer to refrain from begging, they should immediately cease to do so. When read with s23 of the by-law, the person can be held criminally liable and can be penalized for begging. All of this depends on the discretion of the peace officer.

- STANDING, SITTING, AND LYING IN PUBLIC SPACES.

According to the by-law, any person who stands, sits, or lies in a public place shall immediately cease to do so when directed by a peace officer or member of the Cape Town Metropolitan Department.[164] Accordingly, the effect of s2(2) read with s23 includes any person who stands, sits, or lies in a public place.[165] This means that any person acting in the way described commits a punishable criminal offence. As a result, the by-law is so vague as to catch within its ambit any extraordinary broad array of activities. This includes; purely by way of example;

i. A person standing or sitting on a public road having a conversation;
ii. A person standing or sitting on a public road to eat lunch;
iii. A person sleeping on a public road;

[159] Ibid.
[160] Ibid at s1.
[161] Ibid.
[162] Ibid at s23.
[163] Ibid.
[164] Ibid at s2(2) read with s23.
[165] Ibid at 2(3)(m).

iv. A person engaged in an otherwise lawful protest on the public road.

Regardless of how these conducts occur, the persons concerned are committing a criminal offence and should refrain when directed by a peace officer. This is irrespective of whether and to what extent they are acting unlawfully. It is irrespective of whether the concerned persons are homeless and have nowhere else to go.

3.5 CRIMINAL LIABILITY IN SOUTH AFRICA

3.5.1 THE ELEMENTS OF A CRIME

One is only criminally liable and subject to punishment if the following requirements are met.[166] It must be proved, beyond any reasonable doubt, that the accused committed some *wrongful conduct* which coincided in time[167] with a *culpable/guilty mental state.* The South African common law of criminal liability recognises 5 separate and distinct elements or requirements, namely; (i) Conduct (actus reus); (ii) which is unlawful (unlawfulness); (iii) causing the crime (causation); and (iv) committed with the necessary intent or culpa (intention) and with the relevant capacity.[168]

(a) CONDUCT

Unlawful conduct most often takes the form of an act or positive conduct, but there are occasions when an omission will be regarded as unlawful, and so will give rise to criminal liability. The conduct must be carried out by a human being; be voluntary, and take the form of :

(i) a commission or omission;
(ii) a state of affairs prohibited by law; or
(iii) causing a consequence prohibited by law.

It is also worth noting that conduct is regarded as voluntary when it is controlled by an accused's will.[169] Involuntary conduct is also known as automatism – from the notion of an

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[166] SV Hoctor *Snyman's Criminal Law* 7 ed (2020) at 59.
[167] Ibid.
[168] Ibid.
[169] *S v Chretien* 1981 (1) SA 1097 (A); John Austin *Lectures on Jurisprudence* 3 ed (1869) 426, reported in W. Wilson *Criminal Law: Doctrine and Theory* (1998) 220; Andrew Ashworth *Principles of Criminal Law* 2 ed (1997) 96-7; Jonathan Burchell *Principles of Criminal Law* 3 Revised ed (2006) 180; Ronald Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 *SACJ* 207; Deborah W Denno 'Crime and Consciousness:

automaton. So fundamental is this requirement that if it is absent the enquiry into liability ends – the accused cannot be liable.[170] In the context of a person who acts involuntarily, there is no need to proceed any further in determining liability because such person will inevitably also lack capacity and, incidentally, *mens rea* (culpable mental state) as well. No-one doubts the all-embracing nature of the defence of automatism that swallows up all other defences.[171] In the *City of Cape Town v Bolus & Others* case (Hereinafter "*the City of Cape Town case*") where the court dealt with a breach of provisions in the Nuisances by-law including s2(2) read with s23.[172] The court ordered the respondents to refrain from conduct contravening s2(2) read with s23 of the Nuisances by-law.[173] This conduct included, among other things; begging, sitting, lying, and standing in public spaces.[174] Case law from the Gauteng province also shows that this conduct is prohibited through by-laws. For example in the *Central Methodist Mission & Others v the City of Johannesburg and others* (Hereinafter '*Central Methodist case*")[175] it was noted that loitering laws prohibit conduct such as sitting, standing, and lying in public spaces, and peace officers usually penalised people whom they suspected were loitering.[176] As mentioned earlier, the *nuisances* by-law prohibits the act of standing, sitting, lying, and begging in public spaces.[177]The by-law allows the peace officer to remove or prevent a person from begging, sitting, standing, or lying in public spaces and the person can be held criminally liable for this conduct as stated in s23 of the by-law.[178] The prohibited act or commission is the 'begging' and 'sitting, standing and lying' in public spaces. In summary, although a peace officer has discretion when it comes to what constitutes an offence. Any person who begs, sits, stands, or lies in a public space commits a criminal offence that could lead to a fine or imprisonment and must cease to do so when instructed by a peace officer.

Science and Involuntary Acts' (2002) 87 *Minnesota Law Review*. See also Leon 'Responsible Believers' (2002) 85 The Monist; Charles Taylor 'Responsibility for Self' In *Free Will* edited by Gary Watson 111-26 (1982); Gary Watson 'Free Agency' (1975) 72 *Journal of Philosophy*; Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)).

[170] *S v Johnson* 1969 (1) SA 201 (AD); *S v Chretien* 1981 (1) SA 1097 (A); *R v Kemp* [1957] 1 QB 399 at 407; SHC 18; *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Victor* 1943 TPD 77.

[171] Jonathan Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica* 36. See also *S v Chretien* 1981 (1) SA 1097 (A).

[172] *City of Cape Town v Bolus & Others* 2020 2 All SA 784 (WCC) para 25.

[173] Ibid para 58.

[174] Ibid.

[175] *Central Methodist Mission, Johannesburg & Others v City of Johannesburg & others* 09/45915 Founding Affidavit.

[176] Ibid.

[177] Nuisances by-law at s2(2).

[178] Ibid at s23.

(b) CAUSATION

Causation describes how the definitional elements of some crimes are met.[179] Crimes of consequence should be distinguished from crimes of circumstance. In addition to the above, causation is required for consequence crimes.[180] These are crimes where the conduct which is prohibited is the *causing* of some prohibited consequence. For instance, for murder,[181] the prohibited conduct is the *causing* of the death of another human being. In contrast, other crimes, known as circumstance crimes,[182] prohibit a particular state or circumstance, such as the possession of drugs. There is no need for anything to be caused by the conduct of begging, standing, sitting, or lying in a public place for that conduct required to be satisfied. When an accused is charged with a consequence crime, the prosecution must prove that the conduct of the accused *caused* the prohibited consequence.

Our courts adopt a two-phase enquiry[183] into causation. The first stage is an enquiry into factual causation, using the *conditio sine qua non* test.[184] The second stage is an enquiry into 'legal causation', based on policy considerations of reasonableness, fairness, and justice, as informed by various specific tests of legal causation.[185] However, this does not apply to circumstance crimes because as mentioned above, with circumstance crimes a particular state or circumstance is prohibited and not the consequence.[186] In the *City of Cape Town* case[187] the court held that the respondents should refrain from conduct prohibited by the by-law.[188]. This is conduct including begging, sitting, standing, and lying in public places in terms of s2(2) read with s23 of the by-law.[189] The by-law prohibits these acts and not the consequences they cause. Additionally, in the *Central Methodist Mission* case, the court highlighted that loitering by-laws are such that an offender is committing an offence even before being instructed by a peace officer.[190] As a result peace officers treat loitering behaviour as a criminal offence that is

[179] Ibid.
[180] Also known as materially defined crimes (Snyman *Criminal Law* 7 ed (2008) 79).
[181] Defined as the unlawful intentional killing of another human being (Ibid).
[182] Also known as formally defined crimes (Ibid).
[183] *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34; *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) para 17; *S v Daniëls* 1983 (3) SA 275 (A) 324-5 & 31; *S v Mokgethi* 1990 (1) SA 32 (A) 39.
[184] *Minister of Police v Skosana* 1977 (1) SA 31 (A) 33-5, & 43-4; *S v Daniëls* 1983 (3) SA 275 (A) 324 & 31; *S v Haarmeyer* 1971 (3) SA 43 (A) 47; *S v Mokgethi* 1990 (1) SA 32 (A) 39.
[185] Ibid
[186] Ibid.
[187] *City of Cape Town* supra note 172.
[188] Ibid para 53.
[189] Nuisances' by-law s2(2), s23.
[190] *Central Methodist Mission* supra note 175 para 150.

already in progress.[191] This also. shows that there is no need for a consequence to be caused by the conduct. For that reason, begging, sitting, standing, and lying in public places can be regarded as circumstance crimes. This is because the by-law prohibits the actual acts and not the consequence caused by them.

(c) FAULT

Fault is an element of every crime. It may take one of two forms: (i) intention (*dolus*); or (ii) negligence (culpa).[192] Fault refers to the legal blameworthiness of the reprehensible or careless conduct of a criminally accountable person who has acted unlawfully.[193] It is a firmly established principle of criminal justice that there can be no liability without fault, a principle generally expressed in the *maxim actus non facit reum*, *nisi mens sit rea* (the act is not wrongful unless the mind is guilty).[194] In other words, the general rule is that, for an accused to be held liable, in addition to unlawful conduct (or actus reus) and capacity, there must be fault (or *mens rea*) on the part of the accused. The requirement of fault as an element of liability means, among other things, that fault must exist in respect of every element of the crime with which the accused has been charged.[195] This is so whether fault is in the form of intention or negligence.[196] The only exception to the rule is where the Legislature is silent provides that fault need not exist in respect of each element of a crime but, even in this eventuality, there is a presumption of statutory interpretation that the Legislature intended some form of fault to be required.[197] Criminal liability attaches to conduct which is voluntary and unlawful if the accused had the capacity and the relevant form of fault at the time of his/her conduct. In addition, if the crime is a consequence crime, the accused must have caused the prohibited consequence. All of this must be proved by the prosecution, beyond a reasonable doubt.

[191] Ibid.
[192] Ibid at 129.
[193] Ibid at 127.
[194] Ibid.
[195] Ibid.
[196] Ibid at 136.
[197] Ibid.

STRICT LIABILITY

Strict liability is liability where no fault is required.[198] That is, the prosecution does not have to establish that the accused entertained any form of fault to secure a conviction. Fault is simply irrelevant. It is an exception to the principle of no liability without fault. As mentioned earlier, where in a statutory offence, it is not clear whether fault is required, our Courts prefer to interpret the statute to require fault.[199] The requirement of fault and the particular form of fault required, that is intention or negligence, may be made by the legislature to appear expressly in the statute by the use of various words such as: intentionally, maliciously, knowingly, or negligently, amongst others.[200] For instance in *S v Qumbella*[201]the Court said: "the legislature must make strict liability appear plainly". In *S v Arenstein*[202] the court said:

> "The general rule is that *actus non facit reum nisi mens sit rea* and that in construing statutory prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary not to have intended innocent violations thereof to be punishable."[203]

According to the by-law, once a person is directed by a peace officer to refrain from begging, standing, sitting, or lying in a public space, they can be held criminally liable. This means that the conduct (begging, sitting standing, or lying in a public space) is unlawful unless justified by a ground of justification. As noted above, begging, sitting, standing, and lying in South Africa are strict liability offences, that is, they do not require fault to be established for the offence to be made out. Section 23 of the by-law further provides that anyone who contravenes or fails to comply with any provision of this by-law or disobeys any instruction by a peace officer or a member of the Cape Town metropolitan police department, enforcing this by-law, shall be guilty of an offence.[204] This means that one becomes strictly liable under the by-law. The wording in the by-law indicates that the by-law leads to liability regardless of fault.

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[198] Hoctor op cit note 166 at 208.
[199] *S v Qumbella* 1966 (4) SA 256 (A); *S v Arenstein* 1964 (1) SA 361 A.
[200] Hoctor op cit note 166 at 209.
[201] Ibid.
[202] *Arenstein* supra note 199.
[203] Ibid at para 68.
[204] Nuisances' by-law at s23.

(d) UNLAWFULNESS

Unlawfulness is required for all offences, both common law, and statutory offences.[205] Unlawfulness is also the requirement that is excluded when what one does is *justified*. One is justified in one's conduct when what one does is the right thing to do[206]– all things considered.[207] Possibly the most well-known justification (known as a ground of justification) is self-defence – more technically known as private defence. Other grounds of justification recognised in our law include necessity (also known as compulsion or as duress in other jurisdictions), consent, and de minimis. The list of grounds of justification that have been recognised is not closed so that new grounds of justification may be recognised.[208] The ultimate test of unlawfulness, and for grounds of justification, is the legal convictions of the community,[209] as informed by the values in the Constitution.[210] It is a balancing exercise in which competing interests and values are weighed.[211] Furthermore, the form in which the defences have currently been recognised cannot be regarded as fixed and must also be subject to development in light of the demands of the legal convictions of the community as informed by the values in the Constitution.[212]

Having assessed the above evidence, it is clear that begging, sitting, standing, and lying in public spaces is criminalised by the *Nuisances* by-law with very few prospects of defence or justification. This means that homeless people are held criminally liable for begging, sitting, standing, and lying in public places in the City of Cape Town.

3.6 CHAPTER CONCLUSION

This chapter has offered an understanding of the *Streets, Public Places, and the Prevention of Noise Nuisances* By-law. The chapter has argued that these by-laws originate from colonial

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[205] Hoctor op cit note 166 at 79.
[206] George Fletcher *Rethinking Criminal Law* (2000) 759; L Austin *Philosophical Papers* (1970) 123-4; H L A Hart *Punishment and responsibility* (1968) 13-14.
[207] *S v Trainor* [2003] SA 435 (SCA) para 12 -13, Hoctor op cit note 166 at 107 and 9.
[208] Hoctor op cit note 166 at 97.
[209] *S v Chrestien* 1981 (1) SA 1097 (A), *S v Gaba* 1985 (2) SA 575 (A), *Clarke v Hurst* 1992 (4) SA 630 (D) para, *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) para.
[210] *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC)
[211] Jonathan Burchel *Principles of Criminal Law* 3 Revised ed (2006) 227.
[212] *Engelbrecht* supra note 60.

vagrancy laws. As part of the colonial heritage of Africa, vagrancy laws criminalising idleness and disorderliness still form part of existing legislation. These laws originated in England's *Vagrancy Act of 1824* and remain in the penal codes and by-laws (prohibiting loitering) of former British colonies including South Africa.

They provide for the arrest of street vendors, beggars, loiterers, street kids, homeless people, and sex workers. Petty offences are still prohibited by by-laws about issues such as nuisance, noise, street trading, and littering in a city. Petty offences may refer to bathing or washing in public; urinating or defecating in public; using abusive or threatening language in public; drunken behaviour; fighting or acting in a riotous manner in public, and drying or spreading laundry in a public place or on a fence on the boundary of a public road. This chapter focused specifically on the prohibition of begging, standing, sitting, and lying in public places in the City of Cape Town. This is provided for in section 2(2) read with s23 of the *Nuisances* by-law. The chapter proved that these offences meet the elements of a crime with little prospects of justification. Whether criminal law is an appropriate response to the criminalisation of begging, sitting, standing, and lying in public spaces is a much wider question that cannot be dealt with in this Chapter. It will therefore be argued in Chapter four of this project that the nuisances by-law is unconstitutional and should be reconsidered by the City of Cape Town.

CHAPTER FOUR

CHALLENGING THE CONSTITUTIONALITY OF S2(2) READ WITH S23 OF THE *NUISANCES* BY-LAW

4.1 INTRODUCTION

Constitutional rights and freedoms are not absolute.[213] They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values. Section 36 sets out specific criteria for the justification of restrictions of the rights in the Bill of Rights.[214] Limitation is synonymous with infringement.[215] A law that limits a right infringes that right. However, the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on the right to human dignity, equality and freedom.[216] This means that not all infringements of fundamental rights are unconstitutional.[217] Where an infringement is justifiable under s36 it will be constitutionally valid.[218] Davis and Cheadle note that a limitation clause gives rise to two stages of analytical enquiry.[219] The first stage is to determine whether the right in question is infringed.[220] The second is to determine whether that infringement can be justified as a reasonable limitation of the right.[221] Thus, this chapter seeks to answer the question per s36 of the Constitution, whether s2(2) read with s23 of the nuisances by-law infringes on the right to dignity. The Chapter will do a limitation analysis of the right to dignity in light of the impugned provisions of the *Nuisances* by-law.

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[213] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) at 150.
[214]Ibid at 150. See also: *Van Rooyen v S (General Council of the bar of south Africa Intervening)* 2002 (5) SA 246 (CC) at para 35: The section applies only to the limitation of the rights in the Bill of Rights. Provisions elsewhere in the constitution that directly grant rights cannot be limited by reference to s36.
[215]Currie & De Waal op cite note 212 at 151.
[216] Ibid.
[217]Ibid.
[218]Ibid.
[219] Halton Cheadle, Dennis Davis and Nicholas Haysom *South African Constitutional Law: The Bill of Rights* (2019) Ch 30. See also: *S v Zuma and Others* 1995 (4) BCLR 401 (CC) para 414, following *R v Oakes* (1986) 26 DLR (4th) 200; *Makwanyane* supra note 12 para 102.
[220] Ibid. See also: Currie & De Waal op cit note 212 at 151.
[221]Ibid.

4.2 GENERAL OVERVIEW: THE TWO-STAGE ENQUIRY

The first stage involves two enquiries: a determination of the right's boundary and, then, ascertaining whether the law or action complained of crosses that boundary.[222] The first requires an interpretation of the infringing law. The second may require evidence of the effect of the infringement. To the extent that any evidence may be necessary to prove an infringement, the onus lies on the party alleging the infringement.[223] If a court finds that a law infringes a constitutional right, the second stage is triggered. The second stage concerns the justification for the limitation – the application of section 36(1).[224]

4.3 FIRST STAGE: HAS THE RIGHT TO DIGNITY BEEN INFRINGED?

The first stage of the enquiry is to determine whether a law has infringed a right. This requires an analysis of the right and a determination of its scope. According to Cheadle, Davis & Haysom, there are conceptually two approaches to the task. The first is that the rights be given the broadest possible scope within the bounds of the text.[225] According to this approach, any limitation of the right should be reserved for the limitation's enquiry under section 36. If the text is wide and general enough to encompass the full range of interests, the scope of the right will accordingly be wide. The alternative approach is to define the constitutionally protected interest advanced by the right. That interest may be narrower than a literal interpretation of the text and may be determined by a hermeneutic exercise based on the text, the context and the foundational values. This approach has been endorsed by the Constitutional Court.[226] This approach entails an analysis of the text in its context, namely the historical background to both the Constitution and the right, the reason for its inclusion as a constitutional right, the concepts

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[222]Ibid. See also: Woolman "Limitation", in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 1996, at 12–2 also requires two enquiries, one of which involves a determination of scope and the other, a determination of an infringement. There is a difficulty with his formulation of the first enquiry. He states that an applicant must show first that "the activity for which she seeks constitutional protection falls within the sphere of activity protected by a constitutional right". This, we think, confuses issues of *locus standi* with the determination of scope. The crisper question is always "what is the ambit of the right?". Moreover, it is quite clear from *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 that it is not necessary that an applicant show any need of constitutional protection: "a law that infringes a religious freedom is, by that reason alone, inconsistent with the Charter" (at 366–367).

[223] Cheadle, Davis & Haysom op cit 218 at 30-34

[224] Ibid.

[225] Ibid. This appears to be the approach adopted in *S v Zuma and Others* 1995 (4) BCLR 401 (CC), at 18, namely that a constitutional right should be given a broad construction "as far as its language permits".

[226] Ibid at 30-34. See also: *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at para 46.

enshrined in the right and their legal elaboration under both our law and comparative law, the other provisions of the Constitution, in particular the other constitutional rights, and the foundational values.[227] Hence, this research will employ the latter approach in interpreting the right to dignity.

4.3.1. AN ANALYSIS OF THE RIGHT TO DIGNITY IN SOUTH AFRICA.

4.3.1.1 CONTEXT: HISTORICAL BACKGROUND AND REASON FOR THE INCLUSION OF THE RIGHT TO DIGNITY IN THE BILL OF RIGHTS.

Human dignity plays a greater role in South Africa.[228] The South African Constitution accords everyone the right to have their dignity respected and protected.[229] It also recognizes human dignity as one of three values (the others are equality and freedom) upon which the Republic of South Africa was founded and which the South African Bill of Rights affirms.[230] Thus, in the Constitution, human dignity is both a founding value[231] and a discrete right in the Bill of Rights.[232] In the interim Constitution under which South Africa's transition to democracy took place, dignity was listed only as a fundamental right.[233] It was the Constitutional Court that declared, in its decision outlawing the death penalty, that dignity played a larger role than merely as a right: it was also the value on which the new democracy was founded.[234] As a direct response to the *Makwanyane* decision,[235] the Constitutional Assembly, drafting South Africa's final Constitution, adopted this.[236] It listed dignity not only as a fundamental right but also right at the start of the Constitution, as a founding value.[237] It provided that dignity was one of only

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[227]Ibid. See also: The approach adopted by the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64, at 103, has been repeatedly endorsed by the South African Constitutional Court (see, for example, *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at para 46). That approach is described in *R v Big M Drug Mart Ltd* as follows: In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and the purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

[228] Anton Fagan *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014) Ch 42 at 402.

[229] Constitution at s10.

[230] Constitution at s1 & s7(1).

[231] Constitution at s1 & s10.

[232] Constitution at s10.

[233] Constitution at s10.

[234]*Makwanyane* supra note 12 at para 58 (Chackalson P) & para 328 (O'Regan J). See also: Edwin Cameron *Dignity and Disgrace: Moral Citizenship and Constitutional Protection* in Christopher McCruddens' *Understanding Human Dignity* (2014) at Part VI.

[235] Ibid.

[236] Ibid.

[237] Constitution at s1 & s10.

two rights – alongside the right to life – that is entirely non-derogable.[238] Dignity thus operates in the jurisprudence of the Court in two ways: as a foundational value that informs the interpretation of all other rights; and as a justiciable right.[239]Dignity is relatively rarely invoked as a right in itself.[240] More often it operates as a value infusing other rights, most particularly, perhaps, the right to equality.[241] Dignity has an important public dimension.[242] This is embodied in the status and protection that legal, social and political institutions confer.[243] These enable us, without fear of abuse, discrimination or constraint, to engage out in the world in the commitments and activities that embody who we are and what we wish to become – to attain self-actualisation, despite the accidents of our birth and notwithstanding any incidents of lifestyle.[244]

The court has thus held that the anti-discrimination provisions of the Constitution provide "a bulwark against invasions which impair human dignity" and that the commitment to dignity underpins the commitment to avoid discrimination.[245] In this way, dignity is the basis of the Court's anti-discrimination jurisprudence.[246] Dignity is intrinsic to each person.[247]It comprises the deeply personal understandings we have of ourselves and our worth as individuals and in our material and social context.[248] No law or social practice can strip dignity, in this sense, away unjustifiably.[249] Apartheid was an assault on black South Africans' dignity, but its laws could not deprive them of their intrinsic human worth.[250] The systematic humiliation and degradation of apartheid's legal structures inflicted on black people may not have detracted from their intrinsic human dignity.[251] But it came from an ideology of racial superiority that privileged (white) skin colour and European culture more generally, while regarding black skin colour and African culture as inferior.[252] This left a residue of indignity that was perceived and experienced as shameful. Cameron argues that it is from this that the

[238] Constitution at s37. See also; Cameron op cit note 234.
[239] *Dawood* supra note 10 para 35. See also: Currie & De Waal op cit note at 254.
[240] Stu Woolman *Dignity* in Stu Woolman & Michael Bishops' *Constitutional Law of South Africa* at 36-19. See also; Cameron op cit note 234.
[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid.

conception of apartheid's racism as "disgraceful" stems: that it sought to inflict a state of disgrace on people for no morally sound or rational reason.[253]

In one of its earliest judgments, the Constitutional Court distinguished the South African Constitution from others by noting that it marks a "decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive."[254] South Africa has neither forgotten nor fully healed from our oppressive past. However, the Constitution has given full recognition to those previously shamed and disgraced by an oppressive system. It has created a legal framework to permit the assertion of rights. This has enabled people to express their anger, to demand recognition.[255]Moreover, it has provided the means for overcoming that past, and for asserting, at an individual and collective level, a sense of dignity. As a result, the South African constitutional jurisprudence has sought to abolish the impediments of the past by ensuring that everyone's self-worth is recognized and protected by the formal institutions of the state and its law under section 10 of the Constitution.[256] Further, it has sought to create a normative framework in which South Africans can assert their personhood without the shameful stigma of past subordination. Thus, the function of dignity in South African constitutionalism has been to repair indignity, to renounce humiliation and degradation and to vest full moral citizenship in those who were denied it in the past.

4.3.2. SCOPE OF THE RIGHT TO DIGNITY

According to Cheadle and Davis, the determination of the scope of the right should commence with the mischief that right is intended to remedy.[257] Each right has a history. Inconsistency with the right to dignity (As with inconsistency with any other right in the Bill of Rights) is ground for a court to declare invalid a legal rule (only if this is without justification under s36), whether it be a statutory, common-law or customary rule. Whether or not a legal rule is inconsistent with the right to dignity depends on the scope of the right and the extent of the intrusion by the impugned provision. This means that it depends upon whom the right binds. According to the Constitution, every one of the rights in its Bill of Rights, and thus also the right to dignity, binds the state and natural persons.[258] This dissertation is concerned with the

[253] Ibid.
[254] Ibid. See also *Makwanyane* supra note 12.
[255] Constitution.
[256]Constitution.
[257] Cheadle, Davis & Haysom op cit note 218 at 30-34.
[258]Constitution at s8(1) & (2).

state.

4.2.3. PROOF THAT THE RIGHT TO DIGNITY IS INFRINGED BY THE BY-LAW

This stage involves an interpretation of the right, to determine its ambit, and an interpretation of the law to determine whether the law infringes or permits an infringement of that ambit. Of course, conduct can infringe a right, but that infringing conduct is not, on its own, the subject of limitation analysis.[259] The prohibition of begging, sitting, standing and laying in public spaces interferes with homeless people's way of life and essentially their right to human dignity as most of them do not have any other option but to beg. If homeless people are prohibited from begging, then their right to life and dignity are violated because these two rights are intertwined.[260] As a result, the by-law offends the principle of equality in that it unfairly discriminates against persons who live on the street or in shelters based on their socio-economic status (poverty and homelessness) and ultimately their race because most of these people are black.[261] The impact of the by-law on black people is clear. As a direct result of the by-law, police harassment, criminalisation of life-sustaining activities, community stigmatisation and rights infringements occur.[262] The impact of these actions is demeaning and harmful - both physically and psychologically.[263] This impact is similar to the impact apartheid laws had on black people during that era. Hence, they infringe the right to dignity under s10 of the Constitution.

4.4 THE SECOND STAGE OF THE ENQUIRY.

As part of the second stage of the enquiry, section 36 states that:

> "36(1): The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

[259] Cheadle, Davis & Haysom op cit note 218 at 30-34.
[260] *Makwanyane* supra note 11 para 58.
[261] Pieter Kok, Catherine Cross & Niël Roux 'Towards a demographic profile of the street homeless in South Africa' (2010) *Development Southern Africa.* **27** (1): 21–37.
[262] Holness op cit note 4.
[263] Holness op cit note 4.

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relationship between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights." [264]

The task of determining whether a right can be limited within the ambit of section 36 is not an easy one, as it requires a range of factors to be taken into account, and requires both factual as well as objective inquiries at different stages.[265] In a nutshell, section 36 firstly requires an inquiry as to whether the rights affected are limited by a law of general application. Secondly, it requires an analysis of the reasonableness of the limitation in light of a democracy that values human dignity, equality and freedom, taking into account subsections 36(1)(a) to (e) of the Constitution.[266]

4.4.1 THE LAW OF GENERAL APPLICATION – S36 (1)

The first factor that needs to be established is whether the rights to dignity of homeless people in the City of Cape Town is done so by a law of general application. For instance in the case of *President of the RSA v Hugo*,[267] the Constitutional Court had to determine whether a Presidential Act fell within the scope of the law of general application. The Court referred to the case of *Du Plessis and Others v De Klerk and Another*[268] where the Court held that:

"The term regulation is used in other parts of chapter 3 [of the Interim Constitution] as the equivalent of law", for example in s 8 (equality before the law) and s 33(1) (law of general application). Express references to the common law in such sections as s 33(2) and s 35(3) reinforce the conclusion that the law referred to in s 7(2) includes the common law and that chapter 3 accordingly affects or may affect the common law [s] 33(1) does not distinguish different categories of the law of general application [I]t is

[264] Constitution at s36(2).
[265] Currie & De Waal op cit note 213 at 157. See also: Cheadle, Davis & Haysom op cit note 219 at 30-34.
[266] Constitution at s36.
[267] *The President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1.
[268] Ibid at para 96. See also: *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 para 44.

> irrelevant whether such rule is statutory, regulatory, horizontal or vertical, and it matters not whether it is founded on the XII Tables of Roman law, a Placaet of Holland or a tribal custom."[269]

The Court in *President of the RSA v Hugo*,[270] in keeping with their earlier decision of *Du Plessis and Others v De Klerk and Another*,[271] found that the term "law of general application" encapsulates both common law as well as statutory law.[272] Thus, as the prohibition of begging, standing, sitting and laying in public places falls within statutory law, it is deemed to be a law of general application and will allow the right to dignity of homeless people to be limited if it passes the remainder of the requirements within section 36.

4.4.2 THE NATURE OF THE RIGHT TO DIGNITY – S36(1)(a)

Section 36(1)(a), requires an examination into the nature of the right infringed by the prohibition.[273] This right is analysed in detail in paragraph 4.2 above. The right to human dignity is included in the Constitution as one of the founding principles of the South African democracy.[274] This right is of such a nature that it is deeply personal and closely tied with equality, life and the right to freedom and security of the person. Any infringement to this right should not be taken lightly as it also affects other rights and is known to be the cornerstone of our constitution as indicated above.[275]

4.4.2.1. THE RIGHT TO DIGNITY IN LIGHT OF S2(2) READ WITH S23 OF THE NUISANCES BY-LAW.

The argument proposed below is, first, that although the by-laws do not specifically regulate the movements of homeless people, this indirectly discriminated against this demographic of people based on their race, socio-economic status, etc. Secondly, they interfere with homeless peoples means to make a living.

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[269] *Hugo* supra note 266 at 96. See also: *Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 para 44.
[270] *Hugo* supra note 266. See also: *Du Plessis* supra note 267 at para 44.
[271] Ibid.
[272] Ibid.
[273] Constitution at s36(1)(a).
[274] Constitution at s1.
[275] *Makwanyane* supra note 12 para 330.

I. DISCRIMINATES AGAINST BLACK PEOPLE IN SOUTH AFRICA

As illustrated above, in South Africa, the right to dignity must be understood through the history and the lens of South African history and its past of apartheid. This is because according to Cameron, dignity-based jurisprudence has helped to foster the notion of an inclusive moral citizenship in South Africa, unburdened by the humiliating exclusions and degradations of the past.[276] The process of degradation of civic status started with the European settlement of South Africa in the 17th century.[277] Over time, successive white governments made laws that regulated both the public and the most intimate aspects of people's lives, and in particular, placed onerous restrictions on the movements and economic choices of black people.[278] At its most brutal, the legal apparatus of apartheid denied black South Africans the vote, land, freedom of movement, certain jobs, public office, educational opportunity, the capacity to learn in their languages and ultimately to make their living. It deprived them even of their South African citizenship.[279]

The most oppressive embodiment of this control was the pass laws,[280] which required black people at all times to carry a document[281] that denoted permission to be in a particular city or location for a specific purpose. Cameron argues that the "pass" came to symbolise the viciousness and pettiness of apartheid.[282] To be caught without a pass was a crime. Many hundreds of thousands of black South Africans were arrested every year for violating these laws,[283]and sentenced to jail terms, generally short, but often repeated.[284] The very spectre of

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[276] Cameron op cit note 234.
[277] Lawrie Schlemmer *The Factors Underlying Apartheid* in Peter Rendals' ed *Anatomy of Apartheid* (1970) 20-21 (noting that master-slave relationships beginning in the Cape Colony of the seventeenth century established blackness as a badge of inferiority that has persisted throughout the country's history). See also Nigel Worden *The Making of Modern South Africa: Conquest, Apartheid, and Democracy* 3 ed (2000) & Edwin Cameron op cit note 274.
[278] Cameron op cit note 234.
[279] Ibid
[280] Nigel Worden *The Making of Modern South Africa: Conquest, Apartheid, and Democracy* 3 ed (2000) at 74-80. See also Muriel Horrell *Laws Affecting Race Relations in South Africa (To the end of 1976)* (1978) at 171-195. The Native (Urban Areas) Consolidation Act 25 of 1945, The Native Laws Amendment Act 50 of 1952; The Native (Abolition of Passes and Coordination Documents) Act 67 of 1952; Bantu Laws Amendment Act 19 of 1970 & Cameron op cit note 233.
[281] Muriel Horrell *Laws Affecting Race Relations in South Africa (To the end of 1976)* (1978) at 171-172. See also Cameron op cit note 234.
[282] Ibid.
[283] John F Burns "Pass Laws Aspect of Apartheid Blacks' Hate most, Bring Despair and Pent- up Fury" *N.Y. Times* 24 May 1978. See also Nigel Worden *The Making of Modern South Africa: Conquest, Apartheid, and Democracy* 3 ed (2000) at 81; Thomas Karis & Gail Gerhart *From Protest to Challenge; A documentary History of African Policies in South Africa – Challenge and violence (1953-1964)* (1977) 250-251 & Edwin Cameron *Dignity and Disgrace: Moral Citizenship and Constitutional Protection* in Christopher McCruddens' *Understanding Human Dignity* (2014) at Part VI.
[284] Cameron op cit note 234.

arrest dominated black urban life. In this way, apartheid made criminals of a large proportion of South Africa's adult population. The laws sought to erect and entrench "separateness". Necessarily, they embodied a pervasive strategy of repression and domination.[285] They branded black South Africans as inferior.

According to Biko, the effect of systematic degradation persists even after legalised racial,[286] and other, stigmas are abolished.[287] This is evident in laws and stigmas such as the by-laws of the City of Cape Town. Holness also argues that the colonial project appears to be perpetuated in by-laws that criminalise poverty in anti-vagrancy provisions like the s2(2) read with s23 of the *nuisances* by-law.[288] In addition, Killander traces the historical adoption of vagrancy laws in South Africa through legislation in the former colonies, Boer Republics, the Union and the apartheid government, and concludes that these laws were aimed at social control of poor persons, particularly with a defined racist implementation.[289] Lurie et al call for society to re-examine laws that criminalise homelessness, similar to the social rejection of "laws that discriminatorily target many of these same marginalized groups" - referring to LGBTIQ, veterans, mental disability and particular racial groups in the US context.[290] The street homeless population is predominantly black and male.[291] This ultimately means that the people most affected by these by-laws are black people. The differentiation between people who are homeless and people who are not, in the enforcement of the *nuisances* by-law, provides homeless people with less protection and benefit of the law.

As argued above, dignity has enabled the Court to secure a significant break from the past. As a value and as a right, dignity has affirmed and destigmatised those previously excluded. It has also provided a framework and tools for the future proscription of other forms of discrimination – for instance, against non-citizens – and for recognition of sexual expressiveness. It is against this backdrop, characterised by the internalisation of stigma and disgrace for the majority of people in South Africa, that constitutionalism has sought to create a reparative legal framework – one in which injury to dignity can be repaired, and in which

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[285] Ibid.
[286] Steve Biko *I Write What I like: A selection of his writings* (2004) at 53. See also Edwin Cameron op cit note 234.
[287] Steve Biko op cit note 286 at 53. See also Edwin Cameron op cit note 234.
[288] Holness op cit note 4.
[289] Killander op cit note 4 at 85. See also Holness op cit note 4 at 482 & *V & A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* (4543/03) [2003] ZAWCHC 75; [2004] 1All SA 579 (C).
[290] Kaya Lurie, Breanne Schuster & Sara Rankin 'Discrimination at the margins: The intersectionalism of homelessness & other marginalized groups' available at *https://digitalcommons.law.seattleu.edu*, accessed on 24 January 2022. Also, see Holness op cit note 4 at 498.
[291] Kok, Cross & Roux op cit note 260.

humanhood can be asserted. As Cameron notes, that law on its own cannot create internal dignity or repair history of degradation. Nor can the law by itself remove stigma or stop hatred. But it can reject branding people as subordinate and inferior and thus make them objects of shame.

II. DENIES HOMELESS PEOPLE THEIR RIGHT TO MAKE A DECENT LIVING – THE RIGHT TO LIFE

South Africa has a high unemployment rate.[292] Thus, the reality is that many seek to provide for themselves through the opportunities available, which are often in the informal sector. A study conducted in 2010 in Cape town revealed that 19% of homeless people rely on begging as a source of income. In this study, the question was asked as to what their sources of income were.[293] The participants could indicate more than one source of income, as indicated in **Table 1** below. The sources of income were indicated as day labour (65%), waste picking (30%), street trading (2%), government grants (22%) and support from relatives (2%). Begging was mentioned by 19% of the homeless as a source of income.

Another study conducted 12 years later in 2020 by U-turn revealed that 14% of homeless people rely on begging as a source of income.[294] The various sources of income were analysed (see **Table 2**) and the relative proportions of each income source were calculated with a weighting given to each depending on how frequently they were reported.[295] In this study, the respondents could select more than one income source. None of the homeless in both studies mentioned formal work as a source of income.[296]

Table 1: Homelessness in Observatory Cape Town study.

SOURCES OF INCOME	PERCENTAGE
Day labour	65%
Waste Picking	30%
Government Grants	22%
Begging	**19%**

[292]Ibid.
[293]Ibid. See also; Rinie Shenck, Nicolette Roman, Charlene Erasmus, Derick Blaaw & Jill Ryan 'Homeless in Observatory, Cape Town through the lens of Max Neef's Fundamental Human Needs Taxomony' (2017) *Social Work* 53(1) 266-287.
[294] Hopkins, Reaper, Vos & Brough op cit note 33.
[295] Ibid.
[296] Ibid.

Street Trading	2%
Support from relatives	2%

Table 2: Study by U-Turn

SOURCES OF INCOME	PERCENTAGE
PARKING CARS	23%
EPWP/STIPEND	17%
FAMILY/FRIENDS	15%
GOVERNMENT GRANT	15%
AD HOS EMP	15%
RECYCLING	15%
BEGGING	**14%**
EMPLOYMENT	12%
TOURISTS/RESIDENTS	7%
HOUSEHOLDS	4%
SEX WORK	3%
SELLING DRUGS	2%
SPONSOR	1%

As indicated above, begging is one of the ways most homeless people rely on to make a living and maintain or build a decent life. For some, it is the only source of income they know. If this is criminalised then they will not have any other source of income to sustain and maintain a decent life like other people. The Supreme Court of Appeal in *Minister of Home Affairs v Watchenuka*[297] noted that:

> 'The freedom to engage in productive work – even where that is not required 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.'[298]

[297] *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA).
[298] Ibid at para 27.

Although the court did not set out what is considered 'productive work' and what would be seen as 'socially useful', the court emphasised the impact of not being able to make a living on one's dignity.[299] Further, the Court noted that the state had no obligation to provide employment, however, the state does have an obligation to protect and respect the right to dignity of people who are homeless.[300] Furthermore, Chaskalson further argues that socio-economic rights are rooted in respect for human dignity, for there can be no 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.[301] This was also reiterated by O'Regan J in *S v Makwanyane*[302], that the right to human dignity and the right to life are 'Intwined'.[303] One cannot experience other rights if one does not have the right to life – thus, it is the predecessor to all other rights.[304] However, as O'Regan J acknowledged, the right to life as enshrined in the Constitution is the right to human life and not the right to life as 'mere organic matter'.[305] Therefore, the right to dignity largely informs the content of the right to life.[306]

Davis J also noted in the *V & A Waterfront case*[307] that:

> "The issue of the prohibition of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The right to life and dignity are the most important of all rights. Furthermore, the right to life encompasses more than "mere existence" it includes the right to livelihood[308]

In *S v Makwanyane*, it was concluded that without respect for dignity, human life is significantly diminished.[309] Further, in *President of the Republic of South Africa v Hugo*, the court noted that central to the prohibition of unfair discrimination in the country, is the

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[299] Ibid.
[300] Ibid.
[301] Arthur Chaskalson 'Human dignity as a foundational value of our constitutional order'(2000) 16 *South African Journal on Human Rights* 204.
[302] *Makwanyane* supra note 12.
[303] *Makwanyane* supra note 12 at para 326.
[304] Ibid.
[305] *Makwanyane* supra note 12 para 325.
[306] *Makwanyane* supra note 12 para 326.
[307] *V & A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* (4543/03) [2003] ZAWCHC 75; [2004] 1All SA 579 (C). See also *Makwanyane* supra note 12 para 144; *Olga Tellis v Bombay Municipal Corporation AIR* 1986 SC 180 para 32 & Dennis Davis, Halton Cheadle & Nicholas Haysom *Fundamental Rights in the Constitution: Commentary and Cases* a Commentary on Chapter 3 on Fundamental Rights of the 1993 Constitution and Chapter 2 of the 1996 Constitution (1997) 520.
[308] *V & A Waterfront* supra note 306 para 7.
[309] *Makwanyane* supra note 12 para 326.

acceptance that the purpose of our new constitutional order is the formation of a society in which everybody will be granted equal dignity and respect, irrespective of their affiliation to any group.[310] In *Ngomane & others v City of Johannesburg Metropolitan*, for instance, the court held that the decision of Johannesburg Metropolitan Police Department to confiscate and destroy properties belonging to homeless people resulted in the violation of their right to have their dignity respected and protected.[311]

It is evident from the analysis above that the right identified is of considerable importance in a democratic South Africa, given its history of inequality, violence and degrading treatment. Taking into account all relevant South African considerations, it can be concluded that the prohibition of begging, sitting, standing and laying in public places in the context of section 10 of the Constitution denies homeless people their right to make a decent living. This prohibition destroys life and dignity. Furthermore, the effect of it is such that it discriminates against marginalised groups and ultimately halts transformation in South Africa. As a result, it annihilates human dignity. What follows is an analysis of the importance, purpose, nature and extent of the limitation, the relationship between the limitation and its purpose and a less restrictive means to achieve the purpose as required in sections 36(1)(b) to (e).

4.4.3 THE IMPORTANCE OF THE PURPOSE OF THE LIMITATION - S36(1)(b)

For the limitations imposed by the prohibition of begging, standing, sitting and lying in public spaces to be justifiable they must serve a purpose that is reasonable in an open and democratic society.[312] To determine the importance of a law's purpose, the courts must refer to a system of values as a yardstick against which to measure that purpose. This value system is premised on the values of an open and democratic society based on human dignity, equality and freedom, and has been elaborated by the courts and extended to include values such as *ubuntu* and reconciliation.[313]The first step is to determine whether a law's purpose accords with the value system. For example, in the determination of the justifiability of capital punishment, the Constitutional Court, in *S v Makwanyane*,[314] held that

> 'Deterrence of violent crime was an acceptable purpose, but that retribution was not: it smacks too much of vengeance to be accepted as a worthy purpose of punishment in

[310] *Hugo* supra note 108 para 28.
[311] *Ngomane & others v City of Johannesburg Metropolitan* 2020 (1) SA 52 (SCA).
[312] Constitution at s36.
[313] Constitution at s36. See also *Minister of Home Affairs v NICRO & others* 2004 (5) BCLR 445 (CC) at para 20-25.
[314] *Makwanyane* supra note 12.

the enlightened society to which we South Africans have now committed ourselves.'[315]

The second step is to determine whether, in terms of that value system, the purpose is sufficiently important to justify the limitation of a constitutional right. The purpose of the by-law is aggressive, threatening, abusive or obstructive behaviour of persons in public. The sufficiency of the purpose has been described by the Constitutional Court as that which all reasonable citizens would agree to be compellingly important.[316] Thus, following on from our example, the deterrence of violent crime is a purpose that meets that threshold: '[t]he needs for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is entitled, indeed obliged, to take action to protect human life against violation.[317] On the other hand, the purpose of protecting the morality of one sector of a society is not sufficiently compelling to justify the limitation of a constitutional right. The more important the purpose of the measure, the more effective it is likely to be, and the *more likely* it will be that the limitation would be constitutionally justified.

4.3.3.1 FIRST STEP: WHETHER THE PURPOSE OF S2(2) READ WITH S23 ACCORDS WITH THE VALUE SYSTEM

The Constitution of South Africa is based on the values of human dignity, the achievement of equality and the advancement of human rights and freedom, non-sexism and non-racialism and the supremacy of the constitution. The purpose of the *Nuisances* by-law according to the preamble is to prevent aggressive, threatening, abusive or obstructive behaviour ("Anti-social behaviour") of persons in public. This purpose seems to be aligned with the values of the Constitution, however, it is the effect of some of the provisions of the by-law that is repugnant to constitutional values. As illustrated above, the effect of this by-law is such that it discriminates against black people, interferes with their means of making a living and ultimately halts transformation.

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[315] *Makwanyane* supra note 12 para 185.

[316] *National Coalition* supra note Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* 1997 at 36–43.

[317] Ibid at para 118. See the following judgments for purposes that the courts have held to be sufficiently compelling to justify the limitation of a constitutional right: *Beinash and Another v Young and Others* 1999 (2) BCLR 125 (CC) (protection of constitutional rights of others – Vexatious Proceedings Act 3 of 1956); *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) and *Christian Education of South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) (to give effect to constitutional obligations).

4.3.3.2 SECOND STEP: WHETHER IN TERMS OF THE VALUE SYSTEM THE PURPOSE IS SUFFICIENTLY IMPORTANT TO JUSTIFY THE LIMITATION OF THE RIGHT TO DIGNITY.

Constitutional values create a new South African identity and enable South Africans to overcome their inhumane past and attain a nationality based on equality, freedom and dignity. They further provide normative principles that ensure ease of life, shared by all. As already discussed above, historically, in South Africa, criminal codes trace their origin to colonial rule, with the British Empire deliberately shaping the contents of penal codes in many countries including South Africa.[318] Despite the end of colonialism, these laws continue to exist in almost identical wording in most penal codes of former British colonies in Africa.[319] The introduction of laws that prohibit vagrancy-related activities followed a similar process. Colonial states in Africa imported European vagrancy law in the nineteenth and early twentieth centuries. In South Africa, their historical origin is linked to that of pass laws.[320] Both sets of laws were enacted to control the actions and behaviours of the indigenous people of the Cape.[321] As their influence and impact spread across the country, they continued to entrench segregation and subjugation of the destitute. While various by-laws create petty offences, the scope of this research is limited to the enactment and enforcement of laws that prohibit vagrancy-related activities in the City of Cape Town, specifically begging, standing, sitting and laying in public spaces.[322] The indicative purpose of the *Nuisances* by-law is highlighted in its preamble and is the same as mentioned above.[323] The preamble provides that it seeks to prevent aggressive, threatening, abusive or obstructive behaviour of persons in public.[324] From the outline above it is evident that the courts have highlighted the purpose of the criminalisation of begging and vagrancy to be important for the protection of other members of society.[325] People 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 feel threatened. Informal traders are also viewed as a safety risk and should preferably

[318]Chambliss op cit note 137. See also South African Litigation Centre (SALC) 'Research Report: No Justice for the Poor: A preliminary study of enforcement of nuisance related offences in Blantyre, Malawi' available at *https://www.southernafricalitigationcentre.org* accessed on 23 January 2022. See also Killander op cite note 3 at 85; Holness op cit note 4 at 482.
[319] Ibid. See also Killander op cite note 4 at 85; Holness op cit note 4 at 482.
[320] Killander op cit note 4 at 85
[321] Ibid.
[322] Nuisances' by-law at s2(2) read with s23
[323] Ibid at s1.
[324] Ibid.
[325] PALU Advisory opinion supra note 44. See also *V & A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* (4543/03) [2003] ZAWCHC 75; [2004] 1All SA 579 (C)

be confined to reserves frequented by other poor people.[326] 'Scavengers' trying to make a living from the garbage of the elite must be prevented from entering privileged neighbourhoods.[327] No study 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. Killander argues that the legitimate purpose of legislation should never be to sweep a societal problem under the carpet to make the elite feel better about themselves.[328] Indeed, the effect of the by-laws sometimes opposes the purported aim, for example concerning 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.[329] The by-laws have although meant for protecting, improving and enriching life have the effect of violating and limiting the rights of the poor and homeless. This leaves the question of whether the envisaged measure would impose such an unprecedented and extreme limitation on the right to human dignity that it could not be constitutionally justified. The purpose of the limitation is not sufficiently important. The limitation of the right to dignity cannot be justified in this regard.

4.4.4 THE NATURE AND EXTENT OF THE LIMITATION - S36(1)(c)

The enquiry into the nature and extent of the limitation is part of the proportionality analysis; the greater the infringement the more compelling the purpose must be. The infringement must be cost-efficient: the harm done must be proportionate to the benefits achieved. The nature of the limitation is such that it has the effect of criminalising those who beg, stand, lie and sit in public spaces. If this criminalisation did not exist, homeless people would not have their rights being infringed when they beg, sit, stand or lie in public places in the City of Cape Town. They would be able to make a living for themselves without being prohibited. Criminalisation of begging, sitting, standing and lying in public spaces results in homeless people, despite being seen as vulnerable and deserving of more protection,[330] being afforded less protection against discrimination than any other category of persons in South Africa.

The enforcement of these vagrancy laws also perpetuates the stigmatisation of poverty by mandating a criminal justice response to what are essentially socio-economic issues. In this

[326] Killander op cit note 4 at 85.
[327] Ibid at 85.
[328] Ibid.
[329] Holness op cit note 4.
[330] Killander op cit note 4 at 85.

regard, the criminalisation of petty offences reinforces discriminatory attitudes against marginalised persons.[331] As indicated in the previous chapters, municipalities are by law allowed to create and enforce by-laws within the areas that fall under their jurisdiction.[332] However, how they create and enforce these laws must also guard against the injustices of the past. The only way in which they can do this, as articulated by O'Regan, is by creating laws and by having law enforcement processes that are respected by their communities.[333]

Vagrancy laws are subsequently being criticized throughout the world for their tendency to criminalize, personal condition, state of being, and social and economic status of offenders.[334] With the adoption of The Principles on the Decriminalisation of Petty Offences by the African Commission on Human and Peoples' Rights by the African Commission on Human and Peoples Rights in November 2017, the reconsideration of vagrancy and loitering has become immanent to African legislators. This is all due to their discriminative and colonial nature and their repugnance to international human rights principles. This goes to show that the nature of these vagrancy laws is such that they have the effect of discriminating against homeless people based on their social status and protecting the elite. But it is through these actions (not being allowed to beg, sit, loiter, lie in public spaces) against homeless people that many lose their livelihood and what little they own. The nature of the limitation is such that it provides homeless people with less protection from the law when it comes to charges of begging, sitting, standing and lying in public spaces than any other category of persons in South Africa, despite their inherent vulnerability.

4.4.5 THE RELATION BETWEEN THE LIMITATION AND ITS PURPOSE - S36(1)(d)

It is a necessary element of the proportionality analysis to determine whether the limiting law will serve its purpose. In *S v Makwanyane*,[335] capital punishment was defended based on prevention, deterrence and retribution.[336] Execution prevented further criminal acts by the convicted person, but the evidence in support of deterrence was not sufficient to demonstrate that capital punishment achieved that purpose.[337] Petersen and Muntingh argue that the relationship between the limitation imposed by the criminalisation of begging and loitering,

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[331] SK Kaggwa in African Commission on Human and Peoples' Rights Principles on Decriminalisation of Petty Offences (2017) 1 at 5.
[332] Constitution at s156(2)
[333] Kate O'Regan *Without Prejudice: History and Justice (*2009) 33
[334] Lizette Grobler 'Revisiting Vagrancy and Loitering Provisions in the Light of International Law' available at *Proceedings of Law and Political Sciences Conferences*, accessed on 02 September 2021
[335] *Makwanyane* supra note 12 para 168.
[336] *Makwanyane* op cit 12 para 168.
[337] Ibid.

and the purpose that it seeks to achieve is tenuous.[338] The main purpose of the *nuisances* by-law and vagrancy laws, in general, is to prevent aggressive, threatening, abusive or obstructive behaviour of persons in public in the City of Cape Town.[339]Instead of dealing with homeless people through socio-economic means, the state uses criminalisation. Extensive research has been conducted on the effects of criminalisation of vagrancy and petty offences like begging, sitting, standing and lying in public places for both the short term and long term.[340] Muntingh and Petersen note that the argument that arrests for petty crimes such as begging and loitering are vital to promoting social order, public safety and crime prevention has been soundly rebutted in the authoritative Sherman report, a meta-analysis of existing research on what works and what does not in reducing crime.[341] Sherman notes that being arrested by the police for a petty crime can permanently lower police legitimacy, both for arrested persons and their social network of family and friends, because being arrested is usually a traumatic experience for most people[342] and perceived to be unjust and often discriminatory. Police officers often treat arrestees harshly to 'show them who is boss' and to punish them, as they know that few of these arrests will make it to court.[343] Those arrested feel unduly victimised over a petty misdemeanour and studies show this makes the arrested person lose faith in the criminal justice system.[344]

The main conclusion to be drawn from the analysis above is that the relationship between the limitation imposed by the criminalisation of begging, sitting, standing and lying in public places and the purpose that it seeks to achieve is repugnant to our constitution is tenuous because the criminalisation of begging, sitting, sleeping and standing in public spaces does not serve the purpose of the by-law.

4.4.6 LESS RESTRICTIVE MEASURES TO ACHIEVE THE PURPOSE - S36(1)(e)

This requirement is part of the proportionality analysis. Essentially, if the same purpose can be achieved by other means that are less invasive of the right, the limiting law is not reasonable and justifiable. In *S v Makwanyane*,[345] it was held that the purpose of deterring crime, a purpose

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[338] Muntigh & Petersen op cit note 4.
[339] Nuisances' by-law at s1.
[340] Lawrence Sherman et al *Preventing Crime: What Works, What Doesn't, What's Promising* (1998) Chapter 8.
[341] Ibid. See also Lukas Muntigh & Kristen Petersen 'Punished for being poor: Evidence and arguments for the decriminalisation of petty offences' (2015) available *https://acjr.org.za/resource-centre* accessed on 23 January 2022. Muntigh & Petersen op cit note 4.
[342] Sherman et al op cit note 350. See also Muntigh & Petersen op cit note 4.
[343] Ibid.
[344] Ibid.
[345] *Makwanyane* supra note 12.

served by the imposition of capital punishment, was less invasively achieved by long prison sentences.[346] As mentioned above, the main purpose of the by-law is to prevent aggressive, threatening, abusive or obstructive behaviour of persons in public in the City of Cape Town. This can be done without criminalising the homeless or in ways that do not have the effect of violating the right to dignity of homeless people. Instead of imprisonment or a fine, people can be placed in homeless shelters when found in public places with nowhere to go. The municipality can also offer training and skills programmes or even employment to assist people who are homeless to make a living for themselves instead of begging. This would also be a long-term solution to ensure transformation and development. To ensure that people have access to the city and can sustain themselves and make a decent living.

4.5 CHAPTER CONCLUSION

In summary, the criminalisation of begging, standing, sitting and laying in public places in the City of Cape Town is one of the responses used by the municipality to deal with homelessness. This criminalisation has been analysed through numerous court cases in the past, and its constitutionality remains unchallenged despite the rights of homeless people that it affects. As this dissertation seeks to challenge the constitutionality of this criminalisation, the reasonableness and justifiability of the limitation imposed by the criminalisation of begging, standing, sitting and laying in public places in the City, in light of the right to dignity as well as the requirements contained in the section 36 limitations clause. Section 36 of the Constitution requires an inquiry as to whether the right to dignity is limited by a law of general application. Further, it requires a look into the nature of the right infringed; the importance and purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and a less restrictive means to achieve the purpose. The analysis undertaken within this chapter concluded that the criminalisation of begging, sitting, standing and laying in public places entrenched in s2(2) read with s23 of the *nuisances* by-law is a law of general application, in terms of which homeless peoples' rights can be limited if it passes the scrutiny of the remainder of the requirements in section 36 of the Constitution.

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[346] *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (3) BCLR 231 (CC), the majority of the court found against the appellant because the relevant legislation constituted a justifiable limitation. In arriving at this conclusion, the majority of the court found that there was no objective way in which a narrower limitation could be framed to safeguard the applicant's right to freedom of religion (see paras 129–130). Without so saying, the judgment appears to be based on the difficulty of developing a less restrictive limitation.

The right to dignity has been identified as a fundamental right in the South African Constitution, and in an open and democratic society free from violence, and therefore very stringent requirements would have to be met before these rights can be limited. The importance and purpose of the limitation were highlighted in numerous judgments. The nature and extent of the criminalisation are such that it provides municipalities with the authority to arrest and prohibit those who beg, sit, stand and lie in public spaces. The criminalisation, therefore, results in homeless people, despite being more vulnerable and deserving of more protection, being afforded less protection than any other category of persons.

Concerning the relationship between criminalisation and its purpose, it was highlighted through numerous studies that criminalisation does not achieve the purpose that it seeks to achieve. Lastly, it was shown that there are more effective alternative methods of dealing with homeless people, that will not have the effect of discriminating and violating the right to dignity of homeless people available to the city of Cape Town. Therefore, the prohibition of begging, sitting, standing and laying in public spaces cannot be deemed to be reasonable and justifiable within an open and democratic society based on human dignity, equality and freedom. In conclusion, it is submitted that the criminalisation of begging, standing, sitting, and laying in public spaces in the city of Cape Town does not meet the standards of reasonableness and justifiability as required by section 36 of the Constitution. The nature, extent and purpose of the limitation concerning the rights in question, coupled with less restrictive methods of discipline, fails the limitation test. It is therefore submitted that if an attack on the constitutionality of s2(2) read with s23 of the *nuisances* by-law is made, the Constitutional Court, in light of the fundamental nature of the constitutional rights of homeless people affected, has no option but to declare this limitation unconstitutional and invalid.

CHAPTER FIVE

CONCLUSION

5.1 GENERAL CONCLUSION

This study sought to determine whether s2(2) read with s23 of the *Nuisances* by-law violates the right to dignity of homeless people entrenched in s10 of the Constitution and if so, whether this violation can be justified in terms of s36 of the Constitution.[347] It was guided by three research questions. First, whether this criminalisation violates section 10 of the constitution. Lastly, whether this violation can be justified under s36 of the constitution.

The first research question was foregrounded by the doctrinal exposition of the by-law in Chapter Three. The first and second research questions were dealt with in Chapters Four, by looking into the constitutionality of the by-law and doing a limitation analysis as provided for under s36. Chapter Four involved a detailed exposition of the nature of the right to dignity in the South African context, and how the courts have interpreted it throughout the years since the inception of the 1996 Constitution. In addition, Chapter Four examined the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose of the limitation. Lastly, whether there are any less restrictive measures that can be used instead of criminalisation to ensure that the purpose of the by-law is carried out in a way that is not repugnant to the Constitution.

Chapter Four was used to determine and evaluate the constitutionality of this by-law using the two-pronged limitation analysis.[348] Each of the preceding chapters has its conclusions, and as such, they will not be repeated here. It should be noted, however, that these subsequent general conclusions and observations deserve attention. The *nuisances* by-law criminalises begging, sitting, standing and lying in public spaces in the City of Cape Town. This prohibition is unconstitutional for the following three reasons: Firstly, it unlawfully interferes with homeless peoples efforts to maintain and build and decent life. Secondly, it disproportionally discriminates against black people and halts transformation in South Africa and ultimately infringes the right to dignity and cannot be justified under s36 of the Constitution.

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[347] Nuisances by-law at s2(2),s23. See also Constitution at s10 & s36.
[348] *Makwanyane* supra note 12.

5.2 RESEARCH IMPLICATIONS

The by-laws of the City of Cape Town are full of provisions criminalising the poor. As indicated above, the by-law prohibits begging, standing, sitting and laying in public spaces. The by-laws are enforced to provide a sense of security among the privileged by removing undesirable persons from the streets. But it is through the action against them that many lose their livelihood and what little they own. This violates their right to dignity. 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 homeless persons in the City of Cape Town. It shows how vagrancy by-laws have been, and are being, used for social control of the poor and homeless, who have throughout history been viewed as a threat to the elite. The research explored the constitutionality of these anti-homeless by-laws. This will inevitably involve doing away with the undeniably archaic and discriminatory approach to dealing with homelessness.

Although this research covered a little aspect of the homelessness issue in the City of Cape Town. As a legal document, the Constitution carries the force of ultimate authority as opposed to the mere political suggestion.[349] Thus ordering strong affirmative approaches such as declaring laws that are outdated and repugnant to the values of the Constitution as unconstitutional will mean that courts use their power to fulfil their constitutional mandate. Discriminatory by-laws do not belong in a constitutional state, and boldness by the courts would not be misplaced in declaring these laws unconstitutional.[350]

To this end, the research has shown that 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 research 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 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.[351] The research has made three contributions: first, it has developed arguments for unconstitutionality and discrimination, which arguments could help

[349] Constitution.
[350] Constitution.
[351] *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 63.

people in Court challenge these by-laws on their constitutionality. Second, it has given a doctrinal interpretation of the by-law. This could be helpful to judges when interpreting the extent of the sanctions of the by-law. Last, the research lays a theoretical foundation for the consideration of possible or potential decriminalisation of these by-laws or similar by-laws by policymakers.

One can accept as a conclusion from the preceding discussions that homelessness and social exclusion are social ills that need to be addressed through proper and efficient measures that protect everyone in South Africa. Various interventions are needed, such as the provision of shelters, employment opportunities, grants and social and psychological services. Criminalisation and sanctions are in direct contravention of the interests of these people and arguably do not affect the situation they seek to address. It is from this premise that options of an approach in dealing with homeless people can begin to be considered. From a reading of the preceding Chapters and the literature and judicial decisions surveyed, the City of Cape Town needs a different approach in dealing with homelessness.

5.3 ADVANCING FUTURE RESEARCH

A point that has been frequently made in this research is that s2(2) read with s23 of the *Nuisances* by-law is unconstitutional, in so far as it has the effect of discriminating against previously disadvantaged individuals in the City of Cape Town. It has been indicated in Chapter Two that there is minimal research in South Africa in this area and existing research does not address everything there is to address this issue. It is therefore pertinent that given what this research has covered, I end by suggesting ways that the research can be taken a step further.

Although this research focused on the right to dignity, the criminalisation of homelessness does not just violate the right to dignity but other fundamental rights in the Constitution as argued by Killander and Holness in their studies. [352] These include the right to equality, the right to freedom and security of the person, the right to life.[353] These are other possible research questions that can be undertaken in future by constitutional scholars. The research can be undertaken in other provinces in the country as well. This is because provinces like the City of Tshwane, eThekwini in Kwazulu Natal also have similar by-laws that are being

[352] Holness op cit note 4 at 473. See also Killander op cit note 4 at 70.
[353] Holness op cit note 4 at 473. See also Killander op cit note 4 at 70.

questioned as they also seem to violate fundamental constitutional rights.[354]Different models on how to empower homeless people still need to be researched to ensure durable and long term solutions for the homelessness issue. Research on the training of peace officers and other City of Cape Town workers in how to deal with homeless people in a way that does not lead to unfair treatment that is not in alignment with the Constitution still needs to be conducted.

Further, it remains an open question how decriminalisation and declassification of petty offences in South Africa can be implemented. The City of Cape Town should conduct a comprehensive review of all existing laws that violate the human rights of homeless people and see to it that they are aligned with the values enshrined in our Constitution. This may, invariably, entail the repeal and replacement of some laws that do not satisfy the minimum standards of respect for non-derogable human rights such as the right to dignity. Although there is research advocating for it, very little is written on how it can be implemented, this is a possible project in the criminal justice fraternity. A model on how to restructure such laws is pertinent.

[354] KZN and Tshwane by-laws op cit note 1.

6. BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

The Criminal Procedure Act 51 of 1977.

The South African Police Services Act No. 68 of 1995.

The Vagrancy Act, 1824 (5 Geo.4.c.83).

City of Tshwane by-law pertaining to public amenities of 2014.

eThekwini's Nuisances and Behaviour in Public Places by-law of 2015.

The Streets, Public Places and Prevention of Noise Nuisances By-law, 2007.

Cases

South African:

Central Methodist Mission, Johannesburg & others v City of Johannesburg & others 09/45915 Founding Affidavit.

City of Cape Town v Bolus & Others 2020 2 All SA 784 (WCC).

Christian Education South Africa v Minister of Education (10) BCLR 1051 (CC).

Carmichele v Minister of Safety and Security 2001 (10) BCLR 995 (CC).

Clarke v Hurst 1992 (4) SA 630 (D).

S v Mamabolo 2001 (5) BCLR 449.

Minister of Home Affairs v Fourie 2006 (3) BCLR 355 (CC).

Minister of Police v Skosana 1977 (1) SA 31 (A) 34.

Minister van Polisie v Ewels [1975] ZASCA 2.

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC).

S v Makwanyane and Another ZACC 3 1995 (2) SACR 1 (CC).

The State v Russell Mamabolo, 2001 (5) BCLR 449.

S v Chretien 1981 (1) SA 1097 (A).

S v Johnson 1969 (1) SA 201 (AD).

S v Chretien 1981 (1) SA 1097 (A).

R v Kemp [1957] 1 QB 399 at 407; SHC 18.

R v Schoonwinkel 1953 (3) SA 136 (C).

R v Victor 1943 TPD 77.

Road Accident Fund v Russel 2001 (2) SA 34 (SCA).

S v Daniëls 1983 (3) SA 275 (A) 324-5 & 31.

S v Mokgethi 1990 (1) SA 32 (A) 39.

S v Daniëls 1983 (3) SA 275 (A) 324 & 31.

S v Haarmeyer 1971 (3) SA 43 (A) 47.

S v Mokgethi 1990 (1) SA 32 (A) 39.

S v Qumbella 1966 (4) SA 256 (A).

S v Arenstein 1964 (1) SA 361 A.

S v Trainor [2003] SA 435 (SCA).

S v Engelbrecht 2005 (2) SACR 383 (CC).

R v Zikalala 1953 (2) SA 568 (A).

R v Patel 1959 (3) SA 121 (A).

S v Jackson 1963 (2) SA 626 (A).

S v Chrestien 1981 (1) SA 1097 (A).

S v Gaba 1985 (2) SA 575 (A).

Victoria & Alfred Waterfront (PTY) Ltd and Another v Police Commissioner of the Western Cape and Others [2004] 1 All SA 579 (C).

Foreign:
The African Court on Human & Peoples Rights 'Pan African Lawyers Union (PALU) for an Advisory Opinion on the compatibility of vagrancy laws with the African Charter on Human and Peoples' Rights and Other human rights instruments applicable in Africa (2018) available at *https://www.african-court.org* accessed on 03 January 2022.

Secondary Sources

Baker, Dennis 'A Critical Evaluation of the Historical and Cotemporally Justifications for Criminalising Begging' (2009) 73 *Journal of Criminal Law* 212.

Burchell, Jonathan 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica* 36.

Chambliss, William ‘A Sociological Analysis of the Law of Vagrancy’ (1960) 12 *Social Problems* 67-77.

Denno, Deborah 'Crime and Consciousness: Science and Involuntary Acts' (2002) *Minnesota Law Review* 87.

Du Toit, Jacques ‘Local metropolitan government responses to homelessness in South Africa’ (2010) *Development Southern Africa* 27.

Holness, Willene ‘eThekwini’s discriminatory by-laws: criminalising homelessness’ (2020) *Law, Democracy & Development* 24.

Killander, Magnus ‘Criminalising homelessness and survival strategies through municipal by-laws: Colonial legacy and constitutionality’ (2019) 25 *South African Journal on Human Rights* 70-93.

Louw, Ronald 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 *SACJ* 207

Riekert, Riaan & De Vries, Ian ‘Strategic approaches to by-law enforcement as a means of crime prevention in the Tshwane metropolitan area’ (2015) *Acta Criminologica* 99.

Scheinck, Rini; Roman, Nicolette; Erasmus, Charlene; Blaauw, Derick & Ryan, Jill ‘Homelessness in Observatory Cape Town through the lens of Max-Neef’s fundamental needs taxomony’ (2017) 53 *Social Work* 273.

Watson, Gary 'Free Agency' (1975) *Journal of Philosophy* 72.

BOOKS

Ashworth, Andrew *Principles of Criminal Law* 2 ed (1997) Oxford University Press, Oxford, United Kingdom.

Austin, L *Philosophical Papers* (1970) Oxford Clerendon Press, Oxford, United Kingdom.

Austin, John *Lectures on Jurisprudence* 3 ed (1869) Henry Holt and Company, New York.

Wilson, William *Criminal Law: Doctrine and Theory* (1998) Cambridge University Press, United Kingdom.

Burchell, Jonathan *Principles of Criminal Law* 3 Revised ed (2006) Juta, Town.

Bullock, Alan & Trombley, Stephen *The Other: The New Fantana Dictionary of Modern Thought* 3 ed (1999) HarperCollins Publishers, London.

Currie, Iain & De Waal, Johan *The Bill of Rights Handbook* 6 ed (2013) Juta, Cape Town.

Fletcher, George *Rethinking Criminal Law* (2000) Oxford University Press, United Kingdom.

Hart, Herbert Lionel Adolphus *Punishment and responsibility* (1968) Oxford University Press, United Kingdom.

Hoctor, SV *Snyman's Criminal Law* 7 ed (2020) Lexis Nexis, South Africa.

Taylor, Charles 'Responsibility for Self' In *Free Will* edited by Gary Watson 111-26 (1982) Oxford University Press.

Michalowski, Raymond *Order, Law and Crime: An Introduction to Criminology* (1985) McGraw-Hill Book Comp, New York.

Ocoboxk, Paul & Beier, A L *Cast Out: Vagrancy and homelessness in Global and Historical Perspective* (2008) Ohio University Press, United States of America.

Visser & Vorster's General Principles of Criminal Law Through the Cases 3rd ed (1990) Butterworths, Cape Town.

Robert Kane *The Oxford Handbook of Freewill* (2002) Oxford University Press, United Kingdom.

African Policing Civilian Oversight Forum (AFCOP) 'Poverty is not a crime: Decriminalising petty by-laws in South Africa' (2021) available at *https://apcof.org/* accessed on 03 January 2022

Council of Australian Law Deans (CALD) 'Statement on the Nature of Legal Research' (2005) Available at: https://cald.asn.au Accessed; 06 December 2021.

Jonathan Hopkins, James Reaper, San Vos & Gemma Brough 'Full Research Report: The Cost of Homelessness in Cape Town' U-Turn 2020 at 23-26 , available at *https://homeless.org.za/wp* accessed on, 20 January 2022.

Legal Information Institute 'Loiter' (2020) Available at: https://www.law.cornell.edu Accessed : 26 October 2021.

Lukas Muntingh & Kristen Petersen 'PUNISHED FOR BEING POOR: Evidence and arguments for the decriminalisation of petty offences' (2015) available at *https://acjr.org.za/resource-centre/* accessed on 03 January 2022.

Lizette Grobler 'Revisiting Vagrancy and Loitering Provisions in the light of International law' Available at https://iises.net/ Accessed: 05 October 2021.

Magnus Killander 'Do Archaic colonial laws criminalise homeless people today' (2013) available at www.up.ac.za Accessed: 03 September 2021

Ndifuna Ukwazi 'City of Cape Town charged with murdering Dumisani Joxo who was living on the street' available at *https://nu.org.za/wp-content* ,accessed on 20 January 2022.

Southern African Litigation Centre Research Report 'No Justice for the poor: A preliminary study of enforcement of Nuisance related offences in Blantyre, A history of English Vagrancy laws' available at https://www.southernafricalitigationcentre.org/ Accessed: 02 August 2021

The World Bank (2018) ‘Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities’ Available at: https://documents.worldbank.org/ Accessed: 24 October 2021.

The World Bank (2021) ‘The World Bank in South Africa’ Available at: https://www.worldbank.org/ Accessed: 24 October 2021.

SK Kaggwa in African Commission on Human & Peoples Rights *Principles on Decriminalisation of Petty Offences*