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**A Critical Analysis of eThekweni Municipality's Bylaws that Criminalise Children in
Street Situations**

BY

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What a journey! My God has done it again! In Isaiah 60: 22, the Bible says:

‘When the time is right, I the Lord will make it happen’

Thank you to the almighty God for helping me reach the end of this journey.

To my family and friends, especially my parents and little sister, thank you. For the consistent support throughout this journey. Your prayers and patience have brought me this far and I am super grateful. Ngyabonga boMahlase, Bhovungane, Mlom’bomvu!

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ABSTRACT

For a little more than fifteen years, children in street situations have been a focus of concern for relief organisations, such as NGOs and governments. There are children on the streets in every country, which is an issue in both developed and developing countries. This is not unique to South Africa. Post-apartheid government was tasked to redevelop and correct the ills of the past including but not limited to matters of poverty, social development, law enforcement and inequality; through following and holding high the provisions in the constitution. Children in street situations are protected by section 28 of the Constitution of the Republic of South Africa, 1996, which extends to their best interests being paramount. This leaves the state with powers invested in them to care and protect them. However, there have been criticism rising about lack and/or inadequacy in eThekweni Municipality bylaws that criminalise these children. Their approach highlights negligence and a shortfall in policy and strategy formulation meant to protect, care and manage homelessness and children in street situations in their city. The perception created by the bylaws is that children in street situations are a “nuisance, vagrants, criminals” and so forth. This categorisation and stigmatisation is in conflict with children’s rights *inter alia* in the Constitution, the Children’s Act 38 of 2005, the African Charter on the Rights and Welfare of the Child, and the United Nations’ Convention on the Rights of the Child. This study unpacks the eThekweni Municipality’s bylaws in relation to children in street situation and finds that it fails to care and protect these children in line with its local government obligations. The study draws on principles established in case law, advisory opinions, soft law and treaty obligations, particularly that of the African and Inter-American regional legal systems. Recommendations are made to help align policies, bylaws and strategies to speak children’s rights and state obligations.

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ACRONYMNS AND ABRREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCtHR	African Court on Human and Peoples' Rights
AU	African Union
Banjul Charter	African Charter on Human and Peoples' Rights
COVID-19	Coronavirus
CRC	Convention on the Rights of the Child
Decriminalisation Principles	Principles on the Decriminalisation of Petty Offences in Africa
GASC	Gauteng Alliance for Street Children
HSRC	Human Sciences Research Council
IACtHR	Inter American Court of Human Rights
IDP	Integrated Development Plan
IAHRS	American Human rights system
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on Women in Africa
NGO	Non-governmental Organisation
NDP	National Development Plan
OAU	Organisation of African Unity
PALU	Pan African Lawyers
PPCLWS	Policy on children living and working in the streets
SADC	Southern African Development Community

TMB	Treaty Monitory Body
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations Children’s Fund
WHO	World Health Organization

CHAPTER ONE

INTRODUCTION

I. INTRODUCTION

In the post-apartheid era, the South African government was tasked amongst other things to correct the socio-economic ills of the past including matters of right to the city, poverty, social development, law enforcement and inequality.¹ Cities around the world are faced with increasing numbers of homelessness² pushed by different factors. However, the long history of this country continues to haunt the marginalised groups and has contributed to homelessness in different situations.³ More and more people have been discovered to be homeless, and the number is growing all across the world.⁴ Therefore, to establish meaningful programmes and interventions, a strong contextual understanding of homelessness is required as a social development response for cities.

Children in street situations are protected by section 28 of the Constitution of the Republic of South Africa, 1996, which extends to their best interests being paramount. These children should be afforded the same rights as all other children. The protection and care of children in street situations as homeless individuals and/or groups emanate from constitutional, legislative and policy frameworks where local government have a duty to implement and ensure the efficiency of service delivery to disadvantaged populations.⁵ Criticism of the eThekweni Municipality bylaws that criminalise children in street situations has shown that there is a lack of and/or inadequate formulation of policies and strategies to protect, care and handle homelessness and children in street situation in their city.⁶ Recently, the African Court on Human and Peoples Rights (the AfCtHPR) issued an advisory opinion in *The Pan African Lawyers Union on The compatibility of vagrancy laws with the African Charter on Human and*

¹ Department of the Presidency of the Republic of South Africa, *National Development Plan 2030 Our Future-make it work* available at 24 https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (Accessed: 17 August 2021).

² S. Frohlich 'South Africa: From the ashes of apartheid.' (2019) available at <https://www.dw.com/en/south-africa-from-the-ashes-of-apartheid/a-48462055> (Accessed: 09 June 2021)

³ Ibid.

⁴ United Nations Human Rights "The Centrality Of The Right To Housing In The Development Of The New Urban Agenda To Be Adopted At Habitat III" (2015) .Available on this website:<https://www.ohchr.org/Documents/Issues/Housing/HabitatIII/HabIII-SummaryReport-EN.pdf> (Accessed: 09 June 2021).

⁵ For example, s23 (1) of the Local Government: Municipal Systems Act 32 of 2000.'

⁶ W. Holness, "eThekweni's discriminatory bylaws: criminalising homelessness." (2020) *Law democr. Dev. [online].vol.24* at 498.

*Peoples' Rights and other human rights instruments in Africa (PALU opinion)*⁷ in which it declared that national laws that criminalise vagrancy are incompatible with the human rights standards. The court held that such laws punish individuals for their status rather than their actions, and thus are discriminatory, disproportionate response from state and further violates several human rights. The court required that states parties to the African Charter on Human and Peoples' Rights (Banjul Charter), African Charter on the Rights and Welfare of the Child (ACRWC) and Protocol to the African Charter on Human and Peoples' Rights on Women in Africa (the Maputo Protocol) to amend and repeal laws that criminalise the life-sustaining activities of persons such as children in street situations.⁸ The African Commission on Human and Peoples' Rights provide guidance in its Decriminalisation Principles⁹ to states including local governments, on how to change current approaches to criminalising petty crimes towards more sustainable approach to poverty and other challenges facing inhabitants of cities on the continent.¹⁰ States such as South Africa, and their local governments, will under these guidelines have to reconfigure any existing bylaws and measures that currently criminalise the poverty and behaviour of persons such as children in street situations.

This study seeks to investigate the eThekweni Municipality's bylaws that criminalise children in street situations and its measures within constitutional and international duties resting on local government to decriminalise vagrancy laws. International and regional law obligations resting on local government will be identified in relation to instruments such as the United Nations' Convention on the Rights of the Child (CRC), the ACRWC and relevant guidelines from Treaty Monitoring Bodies (TMBs) such as the Committee on the Rights of the Child's General comment No. 21 (2017) on children in street situations.

The study will analyse the application of a number of policies such as the *Strategy and guidelines for children living and working in the streets* by the Department of Social Development; legislation such as the Local Government: Municipal Systems Act 32 of 2000, and Children's Act 35 of 2005 (as amended). The municipal bylaws relating to social

⁷ The Pan African Lawyers Union (PALU) on the compatibility of vagrancy laws with the African Charter on Human Peoples' Rights and other human rights instruments in Africa (PALU opinion) No. 001/2018.

⁸ Ibid.

⁹ African Commission on Human and Peoples' Rights *Principles on Decriminalisation of Petty Offences* (2017) ACHPR/Res. 366 (EXT.OS/XX1).

¹⁰ Ibid.

development, homelessness and children in street situations will be outlined and discussed to indicate compliance failures and success therein.¹¹

II. BACKGROUND

Children in street situations, often called “street children”, are a major social concern that has been encountered by different nations worldwide. In the context of the eThekweni (Durban) Municipality the concern of children in street situations has also emerged as a major policy concern with inadequate care and protection for children in street situations.¹² Trent and Kotze suggests, “In the eyes of a large proportion of society, including policy makers and implementers, children in street situations disrupt the tranquillity, stability and normality of society.”¹³ This is the public perception that most people have about individual children in street situations, yet the story behind every child in street situations out there is unknown and therefore the perception of them could be misguided.

The Gauteng Alliance for Street Children (GASC, South Africa) conducted a national study in 2005 on the living conditions of ‘street children’ and reached a conclusion that 62% of the children living on the streets did not like to be called ‘street children.’ This has resulted in the unfavourable depiction of these children and contributed to the ‘street children’ term used to describe children living in street situations. Children in street situations feel like they are differentiated from the rest of the children and unaccepted by some people and being perceived as deviants involved in petty crimes.¹⁴ Accordingly, this study will thus utilise the term “children in street situations” to avoid a negative portrayal of these children and to put forward an ethically and legally acceptable term in line with the guidelines from the Committee on the CRC.¹⁵

Governments have particular duties towards the care and protection of children in street situations bounded by international laws and domestic laws. Most often, the relevant local governments are tasked with providing for the care and protection of these children. Local governments devise legislation, policies and measures to address the problem of children in street situations in different ways, some affirmative of children’s rights, and

¹¹ eThekweni Municipality *Nuisances and Behaviour in Public Places By-law* 2015.

¹² J. Trent and A.V. Kotze ‘A place in society? Strengthening Livelihood Opportunities for Street Children- A right based approach’ (2014) 45(2) *Social Work/Maatskaplike Werk* at 182.

¹³ Ibid.

¹⁴ M. Mankwane, “A conceptual analysis of the label “street children”: Challenges for the helping professions.”(2014) *Social work (Stellenbosch. Online)* [online]. vol.50, pp.134-145.

¹⁵ UN Committee on the Rights of the Child (CRC), *General comment No. 21 (2017) on Children in Street Situations*, 21 June 2017, CRC/C/GC/21 at 3.

others not so. There is a growing understanding that children in street situations are often “here to stay” and governments are being asked to develop more practical and international norms compatible legislation, policy, and procedures to address the issues of children on the street.

Children on the streets in eThekwin Municipality (Durban) have been more noticeable in recent years.¹⁶ They are more noticeable and this is found from the proposed *Policy on children living and working in the streets* (PPCLWS) prepared for the eThekwin Municipality in 2005,¹⁷ it is argued that in eThekwin Municipality over 3000 children are projected to be living or working on the streets. In 2016, the Human Sciences Research Council (HSRC) counted 3933 persons living on the streets and in shelters in Durban.¹⁸ Of this population, 50% of this group was found living on the street, in parks, or other public places, while the other half was found in formal shelters. Furthermore, for the focus of this study 3% of the 50% of street people is said to be children in street situations. This statistic is outdated, and statistics that are more recent are not available. Furthermore, the HSRC report found that black people constitute a greater percentage of individuals found in homelessness situation both on the street and shelter living- refer to figure one below. Across all groups, the dominant gender are males with 88% found on street living and 80% on shelter living. The age distribution suggests that the youth between ages 25 to 34 is sitting at 45% for street living persons in the city and the second largest percent is the age of 19 to 24 years with 26%. Whereas the other age groups are distributed within the remaining 29% of the 50% street living persons.

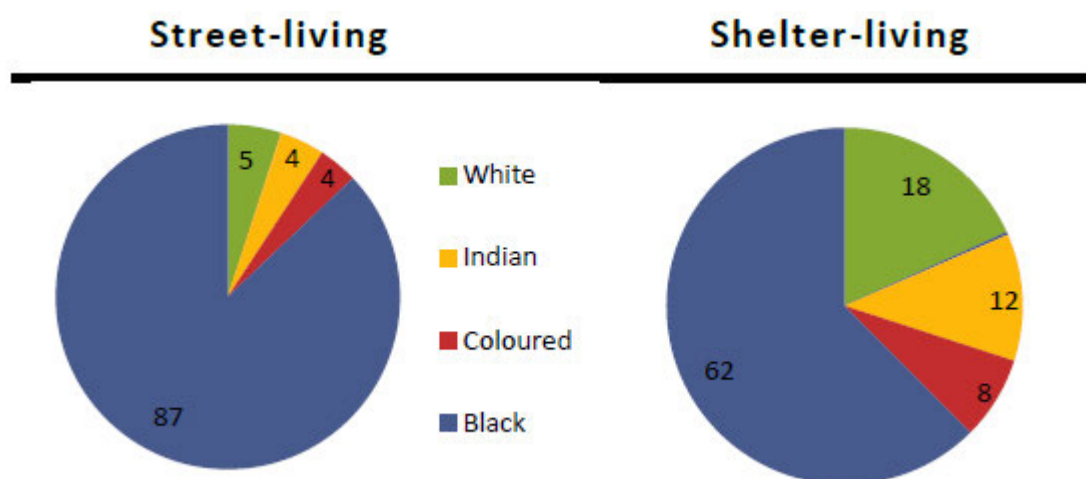


Figure 1: Ethnic group distribution for homelessness in Durban CBD. (Source: HSRC, 2016)

¹⁶ J. Trent and A. V. Kotze “A place in society? Strengthening Livelihood Opportunities for Street Children- A right based approach” (2014) 45(2) *Social Work/Maatskaplike Werk* at 182.

¹⁷ eThekwin Municipality *Policy on children living and working in the streets* (2005:2-3).

¹⁸ Human Sciences Research Council (HSRC), (2016) *iKhaya Lami: Understanding homelessness in Durban study* 1-52 at 8.

Trent and Kotze suggest that the warm climate of Durban plays a role in attracting children. More importantly, in one of South Africa's poorest provinces, the growing pressure on the limited resources of poor households and the socio economic factors of the region are the most helpless members of the household. It means that children often feel the most pain.¹⁹ Historically, the eThekweni Municipality's interventions has not been seen in a positive light. There is evidence of heavy-handed management of children in street situations, particularly as part of 'clean-up' campaigns before big events, such as the 2010 FIFA World Cup.²⁰ Van Blerk argues that when South Africa hosted the World Cup, supported by the enthusiasm surrounding the staging of the event, children should have had the opportunity to use the rehabilitation strategies offered by the sport in street situations. There are examples of groups that took advantage of this opportunity, such as the Street Child World Cup in Durban and the Homestead Soccer Tour, but that was not enough and was reflected in street life at the time. Instead, the city government prioritized the safety of visitors and residents, which adversely affected the children living in the street and effectively expelled them from the street.²¹

Despite the requirements to consider the 'best interests' of every child in matters that concern them, in terms of the Constitution and Children's Act 38 of 2005, local governments policies and measures have rather been done in the interests of 'world class' cities that hide poverty and mismanage resources meant for social and economic protection of children in street situations. Kashef argues that world-class cities are designed on the ideology of a vision of attracting investment, facilitating the integration of cities into the world economy and improving living standards.²² However, only the wealthiest and most influential residents of the city often enjoy these benefits and turning a blind eye on the children in street situations and/or even removing them in the city as they are regarded as nuisance.

It has been established that negative perceptions of street children can lead to oppressive and disciplinary laws, regulations, and policies aimed at eliminating children of street children, which are reflected in the limits of space that street children occupy on the streets.²³ As a result from the perception that children in street situations do not adhere to the societal norms, the governments in the Global South frequently aim to clean up homeless people, vagrants,

¹⁹ Trent & Kotze op cit note 17 at 182.

²⁰ Centre for Civil Society *List of World Cup Street Children Removals in the Media* (undated) <https://ccs.ukzn.ac.za/files/World%20Cup%20street-children%20removals.pdf> (Accessed: 17 August 2021)

²¹ L van Blerk "Managing' Cape Town's street children/youth: the impact of the 2010 World Cup bid on street life in the city of Cape Town", (2011) *South African Geographical Journal*, 93:1, 29-37 at 35.

²² M Kashef, 'Urban livability across disciplinary and professional boundaries.' *Frontiers of Architectural Research*, 5(2), (2016) at 243.

²³ M Van Buggenhout, 'Street child spaces: belonging, conflict and resistance in the city of Durban through the eyes of street youth.' (2020) *Children's Geographies*, vol 18:1, 96-109 at 99.

unwanted city dwellers, and children who wonder about the streets. This results in alienation, and serious harassment.²⁴ The more the children in street situation are seen in the public spaces, high visibility of street youth in public space, it appears to make them more threatening and “problematic” in the view of adults, making them a favoured target of the police.²⁵ Yet, the children have a link with the city as Van Buggenhout contends that “By developing spatiality within the city, they develop solidarity, an identity, and feelings of belonging, attachment and a form of ‘social and cultural capital’ that their home and families cannot always provide.”²⁶

It has been argued that many children come from homes with systemic disadvantage where poor living conditions lead to many problems. Children may have no choice in making their home in the streets because of the death or abandonment of their parents or carers, family conflict, or due to a lack of shelter.²⁷ In many situations, the transition to life on the streets is “an adaptive response to the stress and severe oppression that families face” in their communities. As a result, taking to the streets frequently reflects a desire to reclaim control of one’s life and replace old ideals and situations with new ones.²⁸

South African history has painfully recorded the exclusion of the African community from the country’s growth and deprived access to resources. This was enforced through restrictions to cities, which were hubs for economic activities. Durban in eThekweni Municipality is no exception to this history.²⁹ The new dispensation has brought about socio-political changes and promotes the participation and involvement of previously disadvantaged urban and rural communities. However, poverty continues to persist and amongst other contributors of homelessness in the city resulted in children in street situations.

In Durban, homelessness and therefore children in street situations are found in large numbers in the CBD and the surrounds where most economic and survival opportunities are vast. The HSRC reports stipulates that “prior to the eThekweni dispersal strategy, a large number of people from the homeless community were congregated in Albert Park which was

²⁴ Ibid.

²⁵ Ibid.

²⁶ Buggenhout op cit note 24 at 100.

²⁷ United Nations Human Rights “The Centrality Of The Right To Housing In The Development Of The New Urban Agenda To Be Adopted At Habitat III” (2015). Available on this website: <https://www.ohchr.org/Documents/Issues/Housing/HabitatIII/HabIII-SummaryReport-EN.pdf> (Accessed: 09 June 2021).

²⁸ J Le Roux “Street children in South Africa: findings from interviews on the background of street children in Pretoria, South Africa” (1996) *Adolescence*, vol. 31, no. 122, summer 1996, 423.

²⁹ eThekweni Municipality *Integrated Development Plan. (2017/2018). 5 Year Plan: 2017/18 to 2021/22*. Adopted by eThekweni Council on 31 May 2017. Available at http://www.durban.gov.za/City_Government/City_Vision/IDP/Documents/EthekweniMunicipality2021_22_IDP.pdf (Accessed: 13 June 2021).

also known as Whooga Park.³⁰ However, after the municipality's dispersal exercise they moved to suburbs on the outskirts of the CBD, particularly lower Glenwood, Umbilo, Greyville and lower Morningside."³¹ 'Dispersal' refers to strategies to banish or relocate children (and adults) in street situations and can sometimes be forceful. As observed by the researcher, a large number can also be found in the greater South Point area and along the beaches. Beside the dispersal exercise, the municipality have tried to accommodate and care for the homeless through some measures- whether these were efficient and complies with their duties remains a question for discussion later in this study.

eThekwini Municipality, in its integrated development plan (IDP) for 2019/2020 articulate its laudable vision: "EThekwini Municipality's vision for 2030 is to make Durban Africa's most liveable city, where all citizens live in harmony, to be achieved by growing the city's economy and meeting people's needs, high quality, and equal opportunities".³² The 2019/2020 IDP was designed to achieve this vision through socio-economic programs. Established by the eThekwini community and other stakeholders, the homeless task Force aims to meet the needs of the homeless through sustainable intervention.³³ Currently the IDP 2019/2020 includes, *inter alia*, improved access to homeless shelters, street sales infrastructure, improved access to healthcare, collaboration with local organizations servicing homeless people, and a number of contacts. It further includes the goal of increasing easy access to rehabilitation and provision of a family reunification programmes.³⁴

Bylaws within the local government specifically the eThekwini Municipality are enforced to provide measures in place to "regulate and control or behaviour which causes or is likely causes discomfort, annoyance or inconvenience to the public or users of any public place, so as to ensure that any such discomfort, annoyance or inconvenience is avoided and or penalties in place for the breach of the provisions."³⁵ These bylaws are binding on all persons including the marginalised groups in society, which includes children in street situations, and are enforced by the eThekwini Metropolitan Police through prohibition and punishment of such conduct such as begging, sleeping on public spaces, and so forth. Holness argued that if the bylaws were properly drafted taking into consideration all the rights that are enshrined in the

³⁰ HSRC op cit 19 at 4.

³¹ Ibid.

³² EThekwini Municipality Integrated Development Plan op cit 30.

³³ Ibid.

³⁴ Maphumulo, L. S. (2020) Exploring the integration of homeless citizens in the Integrated Development Plan of eThekwini Municipality, the case study of the Qalakabusha Project. (LLM Thesis University of KwaZulu-Natal 2020) at 46.

³⁵ Nuisances and Behaviour By-laws op cit note 11 at 7.

Constitution of the Republic of South Africa 1996, they can be used as an instrument for progression and prevention of the ill treatment of children in street situations.³⁶

To date, no systematic legal analysis of the constitutional, legislative and international law duties resting on local government to care for children in street situations has been done in South Africa. The literature that does exist are more broadly focused on homelessness persons in general, particularly adults, and little focus has been placed on the legal situation of children in street situations. The call from the international community for countries to recognise and act in accordance with their duties towards children in street situations, in the form of the drafting of a United Nations' Committee on the Rights of the Child's General Comment on children in street situations means that metropolitan municipalities like eThekweni, will have to consider how they measure up against international law requirements.

III. PROBLEM STATEMENT

Across the world, law have been used inadequately to criminalise and forcefully remove persons of marginalised groups such as homeless people, children in street situations, local and international migrants and other from the cities.³⁷ The focus of this study is on children in street situations, their protection and care through local government structures and policies. The problem that Durban in eThekweni Municipality faces is the criminalisation of children in street situations enforced through the municipal bylaws. The establishment of the Bylaws do not meet the obligations of the international law and the domestic laws that required local government to care and protect children in street situations and to decriminalise their vagrancy laws.

It is no longer a doubt that children in street situations as a phenomenon of modernisation is indeed a social and security problem that needs to be addressed and requires attention. Furthermore, this study is an urgent call for appropriate responses to care and protect children in street situations. Currently, the protection and care for children in street situations is inadequate and require intervention that may ensure that the right to the city is enforceable for all. With this study, the researcher seeks to determine whether the municipality is complying with their duties under the law.

Currently in the past year and a half the whole world has been faced with a COVID-19 pandemic which exacerbated the struggles that has been faced by the children in street situations within the eThekweni Municipality. This then forced the country to go under national lockdown and this limited the movement around the country as a whole and thus highlighted

³⁶ Holness op cit note 6 at 469.

³⁷ Ibid.

the challenges and inadequacies in the protection and care of children in street situations. Children in street situations are particularly at risk because of disrupted and uncoordinated service delivery.³⁸

The hypothesis is that the eThekweni Municipality operates in the vacuum parallel to their obligations, flouting international and domestic legal standards through for example their bylaws in Nuisances and Behaviour in Public Places Bylaws, 2015 that criminalise begging and is direct evidence of how local government conceives of children in street situations and their legal entitlements (or lack thereof).

IV. SIGNIFICANCE OF THE STUDY

This study builds on literature that unpacks social perceptions and norms of children in street situations in the city through law, regulatory and policy intervention. This study will outline and critically discuss the municipality's legal response to children living in street situations as mandated by the Constitution, domestic legislation and international and regional law. Whilst there have been studies about interventions in Hillbrow³⁹ and Cape Town⁴⁰ (Gauteng and Western Cape provinces respectively), there is limited literature on the response by municipalities in KwaZulu-Natal hence the study.

V. AIM OF THE STUDY

The main aim of the study is to investigate and provide a framework for the eThekweni Municipality (and local governments in South Africa) against which it can measure its compliance with legal obligations towards the care and protection of children in street situations.

(a) *Objectives of the study*

- i. To identify the obligations of government and in particular local government to care and protect children in street situations under international and regional law.
- ii. To investigate the extent of South African national and local government policy and legislative interventions for children in street situations.

³⁸ S Haffejee, DT Levine "When will I be free": Lessons from COVID-19 for Child Protection in South Africa.'(2020) *Child Abuse Negl.* 110 (Pt 2):104715 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7473251/#sec0005title> (Accessed: 17 August 2021).

³⁹ C Myburgh, A Moolla, and M Poggenpoel "The lived experiences of children living on the street of Hillbrow."(2015) 38(1) *Curationis*, 1-8.

⁴⁰ P E. Gebers, "Health of Street Children in Capetown" (1990) at 1-216.

- iii. To explore the eThekwin Municipality bylaws and other measures put in place to care, protect children in street situations, and determine whether these meet the international law, regional law and constitutional obligations of local government.
- iv. To explore and identify selected interventions from other comparative jurisdictions and South African municipalities to assist eThekwin Municipality with a working strategy to meet its obligations towards the care and protection of children in situations.

VI. RESEARCH QUESTIONS

(a) *Main research Question*

Does the eThekwin Municipality's bylaws dealing with children in street situations comply with the state's international and regional law duties to decriminalise vagrancy?

(b) *Sub-questions*

The proposed study will focus on the following research questions:

1. How does criminalisation of children in streets situations through petty offences/vagrancy offences impact on their rights, locally and globally, identified in literature.
2. What are the requirements resting on states to decriminalise petty offences in relation to children in street situations under the African Court on Human and Peoples' Rights (ACtHPR) and the African Commission on Human and Peoples' Rights?
3. What is South Africa's legal framework on local government and children in street situations in relation to begging and life-sustaining activities?
4. How are the bylaws of the eThekwin municipality criminalising children in street situations and how do these measure against the international, legal and constitutional obligations on local government to decriminalise vagrancy/petty offences?

VII. RESEARCH METHODOLOGY

Research methodology refers to a systematic or a procedural method of gathering, analysing as well as presenting data. This is a desktop study that utilises primary and secondary sources. Primary sources that will be used in this research include international and domestic laws as well as the case law. Secondary sources will be derived from journals, chapters in books, government reports, newspaper articles and policy documents *inter alia*. The secondary sources

of data for this study will be acquired from libraries, the internet, government organisations and institutions.⁴¹ Databases consulted through access of UKZN's Library includes JUTA, Sabinet, Lexis Nexis, Taylor Francis, Jstor, Heinonline, EbscoHost and Wiley.

This study is doctrinal in nature because laws, including domestic, international and regional laws are analysed in relation to the research questions posed in the study. The advantage of using secondary data is that it is not too costly in relation to time and finances at the disposal of the researcher to collect empirical data on this topic. Furthermore, a legal analysis of this topic has not yet been conducted in South Africa.

VIII. CHAPTER OUTLINE

The Chapters in this Dissertation are as follows:

Chapter One- Introduction

Chapter one covered the introductory section of this research, it includes the background of the study, the problem statement, the research aim, objectives, research questions and chapter outline. The chapter's goal was to provide the groundwork for the study's purpose in terms of investigating compliance with the state's international and regional law duties to decriminalise vagrancy.

Chapter Two- Literature Review

Chapter two aims to outline and discuss a body of knowledge around the shortfalls and/or inadequacies of local governments to comply with international and regional law to decriminalise vagrancy offences relating to children in street situations, from a local and global perspective. This chapter will consider the relevant theoretical approaches to vagrancy offences including the child rights approach. The chapter will also consider the historical treatment of children in street situations by the eThekweni Municipality and other South African municipalities.

Chapter Three- International and regional fora's approaches to decriminalising children in streets situations

This chapter will discuss the instruments that place legal obligations on government, particularly local government to amend and repeal petty offences that criminalise children in

⁴¹ B.A, Thyer, 'The handbook of social work research methods' (2010), 2nd edition. SAGE publication, California.

street situations. Specifically, the Committee on the CRC's General Comment 21, the ACtHPR's Advisory Opinion and the African Commission's Principles on Decriminalisation of Vagrancy Laws.

Chapter Four- Critical analysis of the South African legal framework on children in streets situations in relations to life sustaining activities, reflecting on the eThekweni Bylaws as a case study

Chapter four critically analyses South Africa's legal framework on local government and policies that safeguard the rights of children in street situations in relation to begging and life sustaining activities and measure these against the international, legal and constitutional obligations on local government. Instruments to be discussed are, the Constitution of the Republic of South Africa, 1996, the Children's Act, the Local Government: Municipal Systems Act, *inter alia* and the eThekweni Nuisance Bylaws.

Chapter Five- Conclusion and recommendations

Chapter five comprises of a summary of analysis and discussion on compliance of the eThekweni Municipality with both international and domestic law duties and obligations to care and protect children in street situations. In this chapter, recommendations are made for local government that will give light to obligations and compliance to care and protect children in street situations.

IX. CONCLUSION

In conclusion, this chapter serves as an introduction to the study by describing the study's foundation and contextual background.

CHAPTER TWO

LITERATURE REVIEW

I. INTRODUCTION

This chapter represents a review of scholarly literature that provides a knowledge context for this study. Therefore, this chapter defines certain concepts as well as theoretical approaches. The theoretical approaches considered are the welfare and repressive approaches and the child rights approach (the latter is supported by this study). The literature on the criminalisation of children in street situations through petty offences/vagrancy offences and how these impact on their rights, locally and globally is reviewed.

II. CONCEPTUAL AND THEORETICAL FRAMEWORK

Four concepts are defined and the theoretical framework is discussed.

(a) Defining children in street situations

The term street children refer to children that need care and protection within the region of the eThekweni Municipality. Street children can be defined as those that are young and who reside/dwell on the street with the purpose of making a living for themselves. According to the Children's Act 38 of 2005,⁴² a child "means a person under the age of 18 years." The United Nations Children's Fund (UNICEF) differentiates between "children on the street" and "children of the street."⁴³ This category distinguishes between children who are seen working on the streets but are connected and live with their families, and children who do not live with their families and are homeless.

There has not been one definition for the concept of street children; however, the Committee on the Convention on the Rights of the Child (Committee on the CRC) reflect their definition on the convention focuses on ensuring all rights for all children.⁴⁴ According to the Children Act 38 of 2005, a street child means a child who:

- “(a). Because of abuse, neglect, poverty, community upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets, or
- (b). Because of inadequate care, begs or works on the streets but returns home after night.”

⁴² Section 1 of the Children's Act 38 of 2005.

⁴³ UN General Assembly, *United Nations Children's Fund (UNICEF)* (1953) A/RES/802.

⁴⁴ UN. Committee on the Rights of the Child op cit note 15 para 4.

On the other hand, UNICEF has identified three major types of street children in defining street children:

- “(1) children on the streets- children who maintain good family ties and often return home in the evenings;
- (2) children of the streets- children with loose family contacts who spend some nights or days or part of the day, on the streets and occasionally go back home; the definition also includes
- (3) children who are completely detached from their families and live-in gangs in temporary makeshift shelter.”⁴⁵

This study will focus on children in street situations that spend most of their day and nights on the streets as described above under children of the streets and children who are completely disconnected from their families.

(b) Vagrancy

Vagrancy is known to be a state of homelessness. Usually, it refers to the status of persons - people who live the streets with no employment or any consistent income and that these people support themselves by begging, amongst other things, to survive. According to the Black’s Law Dictionary,

“a vagrant person is anyone belonging to the several classes of idle or disorderly persons, rogues and vagabonds,⁴⁶ further this includes anyone who, not having a settled habitation, strolls from place to place; a homeless, idle wanderer. Vagrancy, generally, is the state or condition of wandering from place to place without a home, job or means of support. Vagrancy is thus considered a course of conduct or a manner of living, rather than a single act.”⁴⁷

(c) Petty offences

Petty offences are those offenses that are usually punishable by a relatively small fine or short period of imprisonment. Petty offences further does not pose a serious threat to society’s safety on any individual or property. In this study, petty offences will be discussed to show that in some cases they discriminate, criminalise, and marginalise children in street situations. Petty offences include but not limited to offences such as

“being a rogue and vagabond, being an idle or disorderly person, loitering, begging, being a vagrant, failure to pay debts, being a common nuisance and disobedience to parents; offences created through by-laws aimed at controlling public nuisances on public roads and in public places such as urinating in public and washing clothes in public; and laws criminalising informal commercial activities, such as hawking and vending. Petty offences are entrenched in national legislation and, in most countries, fall within the broader category of minor offences, misdemeanors, summary offences or regulatory offences.”⁴⁸

(d) Life sustaining offences

⁴⁵ L Ochola, “*Street children and Gangs in African Cities: Guidelines for local authorities*” (2000). (Vol. 18). *Urban Management Programme* at 13.

⁴⁶ Gardener (Ed) Black’s law dictionary (2009) 1689.

⁴⁷ Ibid

⁴⁸ Decriminalisation Principles op cit note 9.

Children living in street situation commit life sustaining “offences” in order to survive. Life-sustaining activities include to “move, eat, sleep and exchange food, trade, tout, hawk, and engage in hygiene-related activities in public places.”⁴⁹

(e) Child Rights approach versus the Welfare and Repressive approach

Various approaches are adopted in response to children in street situations. Most government organisations on paper support the child rights approach as it purports to realise the child’s rights as laid down in the United Nations’ Convention on the Rights of the Child (CRC) and other international human rights instruments but in practice we find that welfare and the repressive approach is applied.

The UNICEF states that the child rights approach is one that:

- “(a) Furthers the realization of child rights as established in the Convention and other international human rights instruments;
- (b) Uses child rights standards and principles from the Convention and other international human rights instruments to guide behaviour, actions, policies and programmes, particularly: non-discrimination; the best interests of the child; the right to life, survival and development; the right to be heard and taken seriously; and the child’s right to be guided in the exercise of his or her rights by caregivers, parents and community members, in line with the child’s evolving capacities;
- (c) Builds the capacity of children as rights holders to claim their rights and the capacity of duty bearers to fulfil their obligations to children.”⁵⁰

This study supports the child rights approach as it protects children in street situations and provides for the long-term approaches, which are designed to promote the development of the children’s skills, knowledge and builds a support structure for them. It also emphasises the importance of listening to children on the street and encouraging their participation and assessment of any programs intended for them, in accordance with the new constitutional dispensation.

The concept of children’s rights combines two important ideas, one is the idea that all humans can enjoy basic human rights, and the other is that children should be treated as humans with their own rights rather than property of their parents. Therefore, it means children who are eligible to be treated as holders of basic rights.⁵¹ Further, Justice Sachs in *S v M*⁵² held that:

⁴⁹ Decriminalisation Principles op cit note 9 at 9.

⁵⁰ UNICEF, Child Rights Education Toolkit: Rooting Child Rights in Early Childhood Education, Primary and Secondary Schools (Geneva, 2014), at 21. <https://www.unicef.org/media/63081/file/UNICEF-Child-Rights-Education-Toolkit.pdf> (accessed: 12 August 2021).

⁵¹ T. Boezaart, “Child Law in South Africa” Juta and company Ltd (2009) at 306-307.

⁵² (CCT 53/06) (2007) ZACC 18.

“individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, mind and make choices in the wide social and moral world of adulthood.”

The Welfare and repressive approach, which is largely applied by the governments, pushes the children in street situations from being visible in the streets to becoming invisible, which then creates this illusion of a successful strategy. These approaches are problematic because these approaches do not support the rights of the child and they make paternalistic assumptions about what they need and do not actually meet their real needs and rights. Additionally, the child is perceived to as victim of the street and thus decisions are made for the child without considering his or her opinion as the child is viewed as a delinquent.⁵³

The welfare and repressive approaches does not allow children to be considered as a right holders and this further violates their rights by forcing the children in street situations off the streets. In support of the approach advanced by the Committee on the Rights of the Child, it is submitted that the Committee on the Rights of the Child supports this approach because they have identified “that applying a child’s rights approach is not only a moral and legal obligation.”⁵⁴ The committee also indicated “the most sustainable approach for identifying and implementing long-term solutions with children in street situations.”⁵⁵

III. THE GLOBAL RECOGNITION OF STREET CHILDREN

Street children have been the spotlight from “aid agencies and governments for little more than fifteen years.”⁵⁶ In many countries, the general perception of street children is largely unfavourable. There is no country in the world that does not have children on the streets. Buske asserts, “the above indicates a crisis in both developed and developing countries.”⁵⁷ It is very difficult to estimate the global number of street children, but the social phenomenon of street children is growing as the world’s population expands.⁵⁸ Buske states that children on the street are continuously perceived and treated as something unpleasant and unsightly that has to be

⁵³ UN. Committee on the Rights of the Child *General Comment No. 21*, op cit note 15 at 4 para 5.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ K Lalor, “Street children: a comparative perspective” (1999), *Child abuse and neglect*, Vol 23 (8), 759-770 at 1.

⁵⁷ S L Buske, “A Case Study in Tanzania: Police Round-Ups and Detention of Street Children as a Substitute for Care and Protection,” (2011) *South Carolina Journal of International Law and Business*: Vol. 8: Iss. 1, Article 4 at 87

⁵⁸ N A Montanez, *The knowledge of Street children in Pretoria, South Africa, of sexuality and of HIV and AIDS* (LLM thesis University of Pretoria 2011) at 1.

removed everywhere around the world.⁵⁹ Following the International Year of the Child (1979), the issue became topical.⁶⁰ In 1982, an inter-NGO program for street children and street children was established. In 1986, the UNICEF Board approved priority actions for children in particularly difficult situations. Attention for street children has been growing worldwide with interests to their legal and not so legal trades in the streets.⁶¹

Killander argues that in many parts of the country, children in street situations who are trying to eke their lives in public spaces are seen to be criminals. Children in streets situation's life sustaining activities are criminalised through the enforcement of municipal by-laws.⁶² In northern Tanzania, police often gather children on the street and detain them for days or weeks, only to mistreat, torture, and force them to perform hard labour.⁶³ In the Inter American Court of Human Rights (IACtHR) decision in *Villigran Morales v Guatemala*, Justice Canada Trindade in his opinion said:

“A world which abandons its children in the streets has no future; it no longer renders it possible to create and develop a project of life... A world which tries to ignore the precariousness of the human condition inspires no confidence... It is a world wherein each one survives amongst a complete spiritual disintegration. It is a world that has become simply dehumanized, and which today needs to urgently awake to the true values.”⁶⁴

This opinion is significant to the study as it emphasises an approach that advocates that children in street situations should be afforded rights in line with the new constitutional dispensation in making sure that they are cared for and protected rather than being exploited. Across the globe children in street situations have experienced the worst form of mistreatment, abuse and neglect.⁶⁵ Children in street situations are frequently charged with offences such as loitering, or vagrancy, and they are main suspects for police round-ups, which they get their mandate from bylaws, which give them power to act ruthlessly and repressively.

The Inter-American Human rights system (IAHRS) has shown its effectiveness by ensuring and prioritising the protection and ensuring the free and full exercise of human rights.⁶⁶ This is demonstrated in the case discussed below as it confirms the effectiveness of

⁵⁹ Buske op cit note 58 at 87.

⁶⁰ Lalor op cit note 57 at 1.

⁶¹ Ibid.

⁶² M. Killander “Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality” (2019), *South African Journal on Human Rights*, 35:1 at 70-71

⁶³ Buske op cit note 58 at 88.

⁶⁴ *Villagrán Morales v Guatemala* 1999 Inter-Am Ct HR. (ser C) No 63 (Nov 19 1999).

⁶⁵ U U Ewelukwa, ‘Litigating the Rights of Streets Children in Regional or International for a: Trends, Options, Barriers, Breakthroughs’ (2006) *Yale Human Rights, and Development Journal: Vol. 9 Iss.1, Article 3* pg. 85-131 at 94.

⁶⁶ D A. Gonzalez-Salzeverg, “The effectiveness of the Inter-American human rights system: a study of the American states’ compliance with the judgements of the Inter-American courts of Human Rights” (2010)., *16 International Law, Revista Colombiana de Derecho Internacional*, at 115-142.

the body as it makes the “final and binding decision regarding the behaviour of states and its compliance with the protection of human rights”.⁶⁷ In November 1990, the IACtHR in a landmark decision in *Villagran Morale v Guatemala*⁶⁸ held that the “Republic of Guatemala was in violation of many provisions of the Inter-American Convention on Human Rights (IACHR) which was on account of the 1990 abduction, detention and or the murder of the five street youths of which three were minors.”⁶⁹

This case is of great importance as it is the first case that involves children living in streets situations to ever come before an international adjudicatory body and further where the children were victims of humans’ rights violation. One of the most significant rights which was violated greatly is the right to human dignity. The Inter-American Court, referring to “illegally detained” people, recalled that “a person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to being treated with dignity, will be violated.”⁷⁰ Due to the extreme vulnerability of children in street situations and the “constant threat of violence and arrest”, the wellbeing of children in street situations critically lies on the protection of their fundamental human rights. One of the most fundamental human rights that has been greatly violated is the right to human dignity. Monsalve and Roman⁷¹ submitted that the “IACHR required two elements to identify and define the violation of human dignity:

1. Conditions of people’s special vulnerability; and
2. the context in which the violations take place.”⁷²

This is thus evident in the case of *Villagran Morales et al vs. Guatemala.*, where four children in street situations were kidnapped and driven away in truck manned by armed men and two of them were identified as police officers of National Police Force of Guatemala.⁷³ Further, the court had observed “according to law by a competent judicial authority, that the boys were not caught *infraganti* while committing a crime or offence, and that they were not promptly brought before a competent judicial authority.”⁷⁴ This bold observation by the court is thus evidentiary of how grossly the children in street situations rights are violated based on their condition and also where they have no one to protect and represent them. This case re-affirmed the rights of

⁶⁷ Ibid.

⁶⁸ *Villagrán Morales v Guatemala* op cit note 65.

⁶⁹ Ewelukwa, op cit note 66 at 86

⁷⁰ *Villagrán Morales v Guatemala* op cit note 65 para 166.

⁷¹ V B Monsalve and JA. Román, “Tensions of human dignity”, *SUR 11* (2009), <https://sur.conectas.org/en/tensions-human-dignity/> (Accessed 20 October 2021).

⁷² Ibid at 52

⁷³ ⁷³ Ewelukwa, op cit note 66 at 12

⁷⁴ Ibid at 14

children in streets situations to personhood as it addresses the prevalent impression of children in street situations as non-persons and nuisance and establishing their position as citizens, persons, and individuals capable of contributing meaningfully to the economy. Further that they are not only full citizens but also the children in street situations also have rights to the basic dignity to which all human beings are entitled.⁷⁵

(a) *The Impact of Covid-19 pandemic on children in street situations*

The World Health Organization (WHO) proclaimed the Coronavirus (covid-19) outbreak a global pandemic on March 11, 2020. As the covid-19 pandemic grew over the whole world, it wreaked havoc on health systems, economics, and people. Particularly this has put a spotlight on the marginalised groups of people and of relevance to this study are the children in street situations. Their rights to shelter, human dignity *inter alia* have been violated over the years and not enough measures have been taken into consideration to ensure full enjoyment of all rights afforded to them just like all people. In certain locations, such as eThekweni⁷⁶, the Covid-19 pandemic has assisted homeless people. In Harare, Zimbabwe, authorities performed roundups of street children and teenagers in the days leading up to the lockdown. Children between the ages of 10 and 16 were placed into children's homes, while other children remained on the streets with their parents and were not removed. Hunter et al identify that due to the children's "fear of the unknown, lack of accurate information, or previous experience with roundups", they sought to escape the roundup process. Arrests and incarceration in poorly organised care and protection centres are linked to roundups.⁷⁷ However, in other countries, even with the pandemic it still does not meet the well-being of children in street situations such as Uganda.⁷⁸ However, it is still unclear if the Covid-19 crisis response will result in the long-term systemic change which is needed to meet the goal of decriminalising homelessness.

⁷⁵ Ewelukwa op cit note 66 at 110.

⁷⁶ L Bhengu "Covid-19 speeds up creation of 'safe open spaces' for Durban's homeless" *Times Live* 9 April 2020 available at <https://www.timeslive.co.za/news/south-africa/2020-04-09-covid-19-speeds-up-creation-of-safe-open-spaces-for-durbans-homeless/> (Accessed 06 January 2022).

⁷⁷ J Hunter et al, "Learning on Harare's streets under COVID-19 lockdown: making a story map with street youth" (2020) *Environment & Urbanization* Vol 22, Issue 1, at 37.

⁷⁸ BA Kawala et al. "Effect of COVID-19 response in Uganda on street children." (2020) *The Pan African Medical Journal* vol. 35, Suppl 2 56, doi:10.11604/pamj.supp.2020.35.2.23545.

IV. THE ROLE OF LOCAL GOVERNMENT IN SOUTH AFRICA PERTAINING TO CHILDREN LIVING IN STREET SITUATIONS

Municipalities are constitutionally responsible for providing sustainable services to citizens within their communities, promoting social and economic development, and to further promote a safe and healthy environment. Pieterse also supports this where he submits, “Local government is clearly a part of the 1996 Constitution’s conception of the ‘state’. As such, it is constitutionally enjoined to ‘respect, protect, promote and fulfil’ all the rights in the Bill of Rights and to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of socio-economic rights.”⁷⁹ This therefore means that there is a duty that lies on the local government to ensure that the basic needs of the communities are met and prioritised. This is applied to all citizens, which includes the marginalised group such as children in street situations.

The local government of the eThekweni, Holness argues, does not meet its mandate to ensure sufficient care and protection of its people is provided for including in how they treat children in street situations especially with regards to the heavy-handed actions taken by police officials in enforcing by-laws that degrade self-sustaining activities.⁸⁰ Holness further submits that in order for the local government to ensure that their duties are practiced accordingly they need ensure that they in consultation with the affected parties like the children in street situation so that they create bylaws that care and protect the marginalised groups and further not criminalise them.⁸¹

V. CRIMINALISATION OF CHILDREN IN STREET SITUATIONS

Killander in his articles quoted the Anatole France who said, “the law, in its majestic equality, forbids the rich, as well as the poor to sleep under bridges, to beg in the streets, and to steal bread”.⁸² This is relevant in South Africa today as we see how many of the by-laws have criminalised people and in this particular study street children.

Almost all parts of the country, the law criminalises beggars and street vendors. In a similar manner, this also applies to loiterers and those who are forced to sleep on the streets due to their circumstances. These poor people are criminalised by local governments by laws.⁸³ This

⁷⁹ M. Pieterse, “Development, the Right to the City and the Legal and Constitutional Responsibilities of Local Government in South Africa,” (2014) *South African Law Journal* 131, no. 1 at 156.

⁸⁰ Holness op cit note 6 at 481.

⁸¹ Ibid at 481.

⁸² Killander op cit note 63 at 70.

⁸³ Ibid.

has been done through vagrant laws and petty offences against children in street situations. Most scholars have made mention that assuming that just because someone “looks a certain way or lives in the street” they are a potential harm or they have committed crime is vagrant and criminalising. This is a constant concern against children in street situations perpetuated by municipal by-laws. The enabling statute (by-laws) enacted by the municipal council, as well as the role of the metropolitan police, are critical to the criminalisation of homelessness. It is submitted that criminalisation of children living in street situations leads to an even greater crime as children only commit these petty crimes just to survive. Criminalising children living on the street will push them further out of reach and encourage them to continue to rely on illegal ways of survival because they are already stigmatised in society. Many of the petty offenses committed by children on the street necessitated socioeconomic remedies rather than law enforcement or criminal justice answers.⁸⁴ Before the children in street situations are removed from their environment, they require nurturing and protection and thus it could be possible to contain the phenomenon if it is treated correctly.

VI. THE ROLE OF THE POLICE WITH REGARDS TO CHILDREN IN STREET SITUATIONS

One of the main challenges faced by street children is the victimisation and harassment by police. The Human Sciences Research Council’s (HSRC) study of homelessness in 2016⁸⁵ found that “children reported high rates of intimidation/violence from police with 54% having experienced intimidation/violence in the past.” Children in street situation around the world are viewed and treated unpleasantly and are seen to be requiring removal as they are considered to performing criminal activities. Buske asserts that the “removal of large numbers of street children is routinely done through mass arrests, commonly known as round-ups” because of allegations that they are in violation of vagrancy laws.⁸⁶ Holness also states that the harassment and vilification of children in street situations by police officials is a daily event and the

⁸⁴ L. Muntingh & K. Peterson “Punished for being poor: evidence and arguments for the decriminalisation and declassification of petty offences” (2015) *Bellville: Dullah Omar Institute & Pan-African Lawyers Union* at 46 <https://doi.org/10.4324/9781315163710>.

⁸⁵ HSRC op cit note 19.

⁸⁶ Buske op cit note 58 at 87.

eThekwini is no stranger to this behaviour.⁸⁷ The police in Durban, in particular, subject male street children to aggression and physical harassment.⁸⁸

Police have also been removing children in street stations from the public view in order to ‘sanitize’ the streets for major events and so clearing the streets of unwanted elements. This was also seen in South Africa when it was world cup in 2010.⁸⁹ The use of police violence and harassment is not limited to South Africa. According to other studies conducted in Nepal⁹⁰ and Zimbabwe⁹¹, police often harass street children, and in some cases, seek bribes from children in street situations in return for not harassing them.⁹² Children in street situations in Sudan said that, “the police would apprehend them, beat them up and seize their money before releasing them, and for the girls, the police would also rape them”.⁹³

These sorts of police treatment infringes a number of children’s rights specified in the South African Constitution, the United Nations Convention on the Rights of the Child, and the regional and national legislation and policies in place to safeguard children.⁹⁴

VII. CONCLUSION

Many scholars have identified challenges faced by children in street situations and mostly homelessness and very little to none that identify challenges in relation to the criminalisation due to petty offences and especially how their rights are infringed through vagrant laws. From the themes that have been discussed above, it is submitted that there is a gap because children in street situations are not discussed in relation to petty crimes in South Africa. The literature reviewed explains numerous ways that have developed from the traditional disciplinary response to one that recognizes that children have rights that the government must protect in responding to the problems of children in street situations.

⁸⁷ Holness op cit note 6 at 471.

⁸⁸ F Hills, A Meyer-Weitz & K O Asante “The lived experiences of street children in Durban, South Africa: Violence, substance use, and resilience” (2016), *International Journal of Qualitative Studies on Health and Well-being*, 11:1, 30302, DOI: 10.3402/ at

⁸⁹ N Tolsi ‘Rounded up and shipped out’ Mail and Guardian 22 January 2010.

⁹⁰ C Panter-Brick, (2004). Homelessness, poverty, and risks to health: Beyond at risk categorizations of street children. *Children’s Geographies*. 2. 83-94. 10.1080/1473328032000168787.

⁹¹ A Sexton. 2005. Street children: the situation in East and Southern Africa and the need for a strategic global response. A Presentation to the House Committee on International Relations Subcommittee on Africa, Human Rights and Global Operations. Hearing: Protecting Street children Vigilantes or the rule of Law, 13th September, 2005.

⁹² F Hills et al “The lived experiences of street children in Durban, South Africa: Violence, substance use, and resilience” (2016), *International Journal of Qualitative Studies on Health and Well-being*, 11:1, 30302, DOI: 10.3402/ at 4-5

⁹³ M. Kudrati et al, “Children of the sug: A Study of the Daily Lives of Street Children in Khartoum, Sudan, with Intervention Recommendations.” 2008 *Child Abuse & Neglect*, Vol. 32, No. 4, at 439-448. <http://dx.doi.org/10.1016/j.chiabu.2007.07.009>

⁹⁴ Ibid at 5.

The *Villagran Morale v Guatemala* case is significant in this study, as it made clear that Guatemala had failed to take specific efforts to safeguard and aid children in street situations, instead tolerating their arbitrary detention, torture, and eventual murder as part of a larger pattern of violence against children on the streets. The Court relied on the Convention on the Rights of the Child to understand the responsibility that governments have for street children under Article 19 of the American Convention on Human Rights in reaching its result. This therefore means that this immoral behaviour towards children in street situations should not be tolerated and more work needs to be done in order to have their rights to be realised. It is also decided that the local government has not taken sufficient steps to alleviate or mitigate the challenges that children in street circumstances confront; instead, they have supported the behavior of police officers who misuse their authority when dealing with children on the street.

The stated unfriendly behaviour of police officers demonstrates the children's vulnerability in street circumstances. One of the most dreaded social agents is the authority that is supposed to protect them. COVID-19 responses to the plight of children in street situations differed by country; some countries focused on meeting immediate needs, such as providing food and temporary shelters to marginalized groups, including children in street situations; however, this is insufficient because we have no proof that it will address the long-term effects of the pandemic. In some countries, little has changed in terms of how they treat children living in the streets.

Finally, in concluding, the chapter makes the realisation that governments follow a repressive/welfare approach in their intervention towards children in street situations. The General Comment advocates implementation at the local government level, including inclusion of children in street settings in planning processes and enough budgetary support for initiatives. This study supports this approach, and it is to be noted that the eThekweni Municipality follows the welfare/repressive approach, which they need to move away from in order to necessitate positive initiatives at both the national and municipal levels.

The following chapter examines international and regional law instruments in an attempt to determine whether international and regional law expressly impose legal obligations on governments, particularly local governments, to amend and repeal petty offenses that criminalise children in street situations.

CHAPTER THREE

STATE LEGAL OBLIGATIONS

I. INTRODUCTION

This chapter discusses the instruments that place legal obligations on government, particularly local government to amend and repeal petty offences that criminalise children in street situations. Specifically, the guidelines of treaty monitoring bodies (TMBs), and soft instruments such as that of the Committee on The Convention on the Rights of a Child's (CRC) General Comment 21, The African Court on Human and Peoples' Rights (ACtHPR) Advisory Opinion and the African Commission's Principles on Decriminalisation of Vagrancy Laws.

South Africa is *inter alia* a member of the United Nations; the Organisation of African Unity (OAU) that is now legally the African Union (AU); as well as the Southern African Development Community (SADC). The Committee on the Rights of the Child explains that it seeks to provide “*authoritative guidance to States on developing comprehensive, long-term national strategies on children in street situations using a holistic, child rights approach and addressing both prevention and response in line with the Convention on the Rights of the Child*”.⁹⁵

In South Africa, “any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”⁹⁶ This therefore necessitates the state domesticates treaties it has ratified and thereafter the government should ensure that it adheres to its international law obligations.

South Africa is party to essential international and regional instruments that provides authority on how they should respond to the plight of children in street situations. Yet research has shown that the local government has inadequately adhered to the provisions of these instruments⁹⁷ as we still see the sufferings of the marginalised groups and for the purposes of this research, children in street situations.

⁹⁵ UN. Committee on the Rights of the Child *General comment No. 21* op cit note 15 para 2.

⁹⁶ Section 231(4) of the Constitution of the Republic of South Africa, 1996

⁹⁷ JL Du Toit *Containment, displacement or exclusion? Local metropolitan government responses to homelessness in South Africa* Pretoria: Human Sciences Research Council (2010).

II. THE UNITED NATIONS' CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (CRC) was adopted in June 1995 in South Africa, and as previously indicated; this committed the country to implementing the concept of “first call children,” in which children’s needs are prioritised in all government programs, services, and strategies. The CRC establishes a comprehensive approach to children’s rights, confirming “all rights apply to all children without any exceptions, and that all activities affecting the child must take full consideration of the child's best interests”.⁹⁸ The CRC, in effect, requires governments to regularly assess their policies with the intention to improve the quality of living for all citizens; of importance in this case is the children in streets situations.⁹⁹

The CRC has identified four rights that are of paramount importance for the implementation of the convention, and they are the best interest principle¹⁰⁰; the principle of non-discrimination¹⁰¹; the rights to survival and development¹⁰² and lastly, the child rights to participate in matters concerning his or her wellbeing.¹⁰³ The Committee on the Rights of the Child issued General Comment No. 21 on Children in Street Situations in June 2017. The General Comment gives states authoritative direction on how to ensure that children in street conditions receive the same level of human rights protection as any other child under their authority. This is the first time that children living on the streets have been given this level of recognition, and their rights have been officially acknowledged under the Convention on the Rights of the Child. The Committee on the Rights of the Child identifies four relevant articles for the purpose of this study.

(a) *Article 2 on non-discrimination*

“States must respect and ensure that all children under their jurisdiction have access to the rights outlined in the Convention, without discrimination of any sort”. In addition, it highlights that “discrimination should be eliminated both formally and substantively, through ensuring that a state’s constitution, legislation, and regulations do not discriminate against children living on the street”, and by giving adequate attention to children living on the street as a group

⁹⁸ N R. Lefeh, “South African Government responses to the plight of street children: an analysis of policy development and implementation in Johannesburg” (2008) at 22.

⁹⁹ V. Veeran “Working With Street Children: A Child-centred Approach, Child Care in Practice”, (2004) *Child Care in Practice* 10:4, 359-366, DOI: 10.1080/1357527042000285538 at 362.

¹⁰⁰ Article 3 of the CRC.

¹⁰¹ Article 2 of the CRC.

¹⁰² Article 6 of the CRC.

¹⁰³ Article 12 of the CRC.

who have faced continuous discrimination and deserve affirmative action.¹⁰⁴ Kaggwa asserts, “The enforcement of these [petty offences] laws also perpetuates the stigmatisation of poverty by mandating a criminal justice response to what are essentially socio-economic issues. In this regard, the criminalisation of petty offences reinforces discriminatory attitudes against marginalised persons.”¹⁰⁵ It is common for local officials to harass and denigrate these marginalised groups of individuals on a daily basis. Such behaviour is not uncommon in the eThekweni Municipality, which includes removal of children in street situations and dumping them elsewhere so that are not seen in public platforms.¹⁰⁶ This behaviour thus constitutes unjustifiable discrimination based on their socioeconomic situation.

(b) *Article 3 (1) on the best interests of the child*

According to the Committee, as part of a child rights approach, the obligations related to the best interest of the child are critical in ensuring the “overall physical, psychological, and moral” standing of children in street circumstances, as well as upholding their fundamental human rights. This principle confirms that the child’s welfare should always come first and that in all action done towards children in street situations, the best interests of the children must always come first. The United Nations High Commissioner for Refugees (UNHCR) defines the concept as follows: “best interests broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences.”¹⁰⁷ Every State Party is obligated to uphold and fulfil a children’s right to have his or her best interests evaluated and considered as primary consideration, and to take all necessary, deliberate, and tangible actions to ensure the full implementation of this right. This is not applied in the eThekweni Municipality as well as other municipalities in South Africa as detaining and removing from places where they feel safe and harassed is not in their best interest. Another factor that is not in the best interest of the child is the portrayal of children in street situations. Children in street situations are seen as deviants and objects of concern rather than seen as vulnerable children.

¹⁰⁴ UN Committee on the Rights of the Child *General comment No. 21* op cit note 15 at 9- 10.

¹⁰⁵ S K Kaggwa in *Decriminalisation Principles* op cit note 9 at 5.

¹⁰⁶ Z Dawood “Anger over vagrants ‘dumping’” *Daily News* 23 March 2018 available at <https://www.iol.co.za/dailynews/anger-over-vagrants-dumping-14004694> (Accessed: 06 January 2022).

¹⁰⁷ UNHRC Emergency Handbook, available at <https://emergency.unhcr.org/entry/44308/best-interests-procedure> (Accessed:06 January 2022)

(c) *Article 6 on the right to life, survival and development*

This article establishes the child's inherent right to life, as well as the state's responsibility to ensure the child's survival and growth. Seager and Tamasane assert that children in street situations are assaulted and harassed by the South African Police Service and Metro Police, who are given authority by the by-laws. Children in street situations have "claimed that whenever a criminal offence is being reported, they are the first suspects and the police chase them away from vacant apartments and other buildings in Johannesburg central business district."¹⁰⁸ For the purposes of Article 6, the right to survival should be construed as requiring states to adopt all reasonable positive and negative measures to ensure a child's survival. In the above situation, the police by chasing the children in street situations away and not finding alternative measures is in violation of Article 6. Access to housing and protection are fundamental rights that are denied to children in street situations.

(d) *Article 12 on the right to be heard*

The provision, outlined in Article 12 of the Convention, states that

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law."

Most countries throughout the world have faced a dilemma since a culture of listening to children is not prevalent or even acceptable. This is not new in South Africa as we find that the children in street situations are always stigmatised and not given any opportunity to be heard. Children in street situations are automatically assumed to be in the wrong.

In conclusion, these articles establish that street children are entitled and have to enjoy the same rights as other children, and that the responsibility lies in the State to provide protection, safety, care, and a chance to reintegrate into society. Furthermore, the state is responsible for overseeing and ensuring that the care they receive is of sufficient quality. The CRC clearly stipulates in its general comment that states must prohibit vagrancy and petty offences. The CRC indicated that

¹⁰⁸ John R Seager & Tsiliso Tamasane "Health and well-being of the homeless in South African cities and towns" (2010), *Development Southern Africa*, 27:1 at 70.

“States should, with immediate effect remove provisions that directly or indirectly discriminate on the grounds of the street situation of children or their parents or family.”¹⁰⁹ It further stipulates the following:

“abolish any provisions allowing or supporting the round-up or arbitrary removal of children and their families from the streets or public spaces; abolish where appropriate offences that criminalise disproportionately affecting children in street situations, such as begging, breach of curfews, loitering, vagrancy and running away from home *inter alia*.”

This is above statements shows this mandatory and binding and requires absolute compliance of members of States. In addition, it shows that the Local government in South Africa is failing to meet the obligation required by the CRC as the bylaws are inconsistent with what is required in terms of treating children. They are required to immediately amend and or repeal these laws as they infringing on the rights of the children in street situations, which they have til today not done so. In reviewing these discriminatory by laws, they are required to include the children in street situation on the basis of participatory research as supported by the child rights approach advocated for by the CRC.

Children have the right to participate in choices affecting their circumstances, such as shelter programmes and reuniting with their families, according to the articles. The abovementioned principles are also contained in the African Charter on Human and Peoples’ Rights as well as the African Charter on the Rights and Welfare of the Child.¹¹⁰ These principles apply to all children, including street children. In ensuring that these principles are realised the CRC has put an obligation on states to “ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.” Further, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. And ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.” This clearly stipulates the role South Africa’s local government needs to make and play in ensuring the children in streets situations are cared and protected especially because they vulnerable group that need extra protection instead of being victimised and criminalised.

¹⁰⁹ UN Committee on the Rights of the Child *General comment No. 21* op cit note 15 at 6.

¹¹⁰ Articles 2, 3, 5, 6, 7, 12 & 18 of African Charter on Human and Peoples’ Rights; and Articles 3, 4, 17 & 5 of ACRWC.

The local government through their bylaws has clearly not followed through with the obligation that vests in them.

III. THE AFRICAN CHARTER PROVISIONS FOR CHILDREN IN STREET SITUATIONS

Instead of punishing people for being poor, the UN Special Rapporteur on Extreme Poverty and Human Rights emphasises the reality of poverty and stigmatisation. It calls on members of authorities to implement comprehensive policies and actions “to address the root causes of poverty and to advance the fulfilment of fundamental human rights”.¹¹¹ In carrying out its mandate to preserve and promote human rights on the continent, the African Commission on Human and Peoples’ Rights (ACHPR) has recognised the existence of legislation across the continent that restrict behaviours that are required to survive and maintain decent living conditions. In addition, it has emphasised that the enactment of such laws have a significant influence on fundamental human rights and freedoms. As a result, the ACHPR also adopted the Principles on the Decriminalisation of Petty Offences in Africa in 2017. These principles designed to serve as a guide for African countries in decriminalising certain offenses. The ACHPR recognises that these laws intensify the issue rather than addressing the reasons and underlying circumstances that encourage people to occupy public spaces and participate in particular activities in the open, and proposes that progressive, appropriate, and long-term anti-poverty measures be implemented.¹¹²

The African Court on Human and Peoples’ Rights (the African Court), another human rights body within the continental human rights system supported the ACHPR’s position and approach by issuing a landmark ruling that reaffirms the understanding that these petty offences laws, especially those that seek to criminalise vagrancy, violate existing human rights principles.

The African Charter of Human and Peoples Rights (the African Charter)¹¹³ details rights that are applicable to all people, which includes children in street situations. The Charter gives the jurisdiction for the African Court to provide us with the advisory opinion.

¹¹¹ United Nations, “Report of the Special Rapporteur on Extreme Poverty and Human Rights” (2011), Available at: <https://undocs.org/A/66/265>. At 4–5.

¹¹² Ibid at 7.

¹¹³ Articles 2, 3, 5, 6, 7, 12 & 18 of the African Charter of Human and Peoples Rights.

(a) *African Charter on the Rights and Welfare of the Child (ACRWC)*

Gose submits that the African Charter on the Rights and Welfare of the Child also known as the Children's Charter is "a further means of securing children's rights in the international context".¹¹⁴ This study focuses on articles 3, 4, 5 & 17 of the Children's Charter read in conjuncture with the African Charter on Human and Peoples' Right mentioned above. The purpose for focusing in these articles lay solely on the lack of States responses violating the provisions for, non-discrimination, ensuring best interest of the child, their right to life, survival and development, as well as their right to be heard. In dealing with the vagrant laws that criminalise children in street situations, these articles will provide for protection against the vagrancy offenses against them and obliges the State to take authoritative action to ensure that these rights are not violated.

The articles relevant articles are as follows:

Article 3 provides for Non- discrimination which states that ¹¹⁵

"Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

Article 4 provides the best interests of the child clause: ¹¹⁶

1. "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration;
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law".

Article 5 provide the Survival and Development clause: ¹¹⁷

1. "Every child has an inherent right to life. This right shall be protected by law.
2. State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection, and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children."

Article 17 provides for the Administration of Juvenile Justice:¹¹⁸

¹¹⁴ M Gose, "The African Charter on the Rights and Welfare of the Child" (2002) Community Law Centre <https://dullahomarainstitute.org.za/childrens-rights/Publications/Other%20publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>.

¹¹⁵ ACRWC.

¹¹⁶ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

¹¹⁷ Ibid.

¹¹⁸ ACRWC.

1. “Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

(b) ensure that children are separated from adults in their place of detention or imprisonment;

(c) ensure that every child accused of infringing the penal law:

- i. shall be presumed innocent until duly recognized guilty;
- ii. shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
- iii. shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
- iv. shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
- v. shall not be compelled to give testimony or confess guilt.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”¹¹⁹

In the above section, unlike article 37 of the CRC, the ACRWC does not provide for extraordinary circumstances when it may be in the best interests of the child to be held with adults. There is no specific mention of a provision for separate courts.

In several cases, the ACRWC’s children’s rights are essentially mirrored versions of rights previously recognised in the CRC. The ACRWC is heavily influenced by the CRC, and the two instruments are completely compatible, albeit there may be times when one provides better protection for children than the other. For instance, Article 3 CRC introduces the principle of the “best interests of the child as a primary consideration” in all actions concerning the child. Similarly, the ACRWC phrases it in even stronger terms in Article 4(1), in which it states that this principle should be a primary consideration in the consideration of children’s rights. Therefore, the latter provides for the better protection of the child. Concerning Article 3 of the CRC other principles can be taken into account alongside it.

The ACRWC takes a lot of inspiration from the CRC, and the two devices are completely compatible, however there may be situations when one provides more protection to children than the other. Overall, the CRC and the ACRWC have had a significant influence on the lives of millions of children across the world because they acknowledge that children have rights and a voice to be able to make a contribution to society. They both aim to ensure

¹¹⁹ Ibid

the survival of children, development, protection and participation rights. The important values of “non-discrimination, the best interests of the child, children’s participation, and the survival and growth of the child” have been found to be shared by the two children’s rights instruments (mainly the CRC and the ACRWC).¹²⁰ It could be claimed that the ACRWC duplicates most of the rights previously included in the CRC. It is crucial to stress that the duplication of certain rights in the CRC and the ACRWC is not a negative, but rather an advantage, as it draws more attention to important issues.¹²¹ The duplication is intended to emphasise the necessity for state parties to provide extra enforcement measures in order to effectively implement the treaty.

(b) *The Principles of Decriminalising Petty Offences in Accordance with Regional and International Human Rights Standards*

The ACHPR established principles of decriminalising petty offences to assist members of the African Charter to adhere and comply with the rights, duties, and responsibilities stipulated in the charter. According to the ACHPR, The African Charter's State Parties should take the following steps to ensure that their legislation and enforcement are consistent with these Principles and other regional and international human rights standards:¹²²

- i. “Decriminalise certain petty offences
 - Ensure that laws criminalising conduct in broad, vague and ambiguous terms are decriminalised;
 - Ensure that laws which criminalise the status of a person or their appearance are decriminalised, in particular, laws that criminalise life-sustaining activities in public places”.
- ii. “Provide alternatives to arrest and detention for other minor offences that are not decriminalised under these Principles
 - For all other minor criminal offences that are assessed by State Parties as being in compliance with the African Charter as interpreted by this Principle, State Parties are encouraged to establish and apply a variety of alternatives to arrest and detention;
 - These alternatives include, but are not limited to, diversion of cases involving petty offences away from the criminal justice system and making use of community service, community-based treatment programmes, alternative dispute resolution mechanisms such as mediation, as well as the utilisation of recognised and effective alternatives that respect regional and international human rights standards, and the declaration of certain offences as non-arrestable offences;
 - Alternatives to arrest and detention should be promoted under a framework that recognises the need for reasonable accommodation for persons with disabilities, and a framework that promotes the best interests of the child in conflict with the law”.
- iii. “Address the root causes of poverty and other marginalisation
 - Adopt measures that aim to address the conditions that cause, exacerbate or perpetuate poverty, rather than criminalise poverty, in accordance with the State obligation to respect,

¹²⁰ O Ekundayo “Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)’s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC” (2015) *International Journal of Humanities and Social Science* Vol. 5, No. 7(1) at 156.

¹²¹ Ibid.

¹²² ACRWC.

protect and promote human rights, which includes the right to development in Article 22 of the African Charter”.¹²³

In the creation, execution, and proper financing of national plans of action for poverty alleviation, The African Charter’s *Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights* should serve as a guide for State Parties. Such national plans are to consider State Parties’ “minimum core obligations in respect of equality and non-discrimination, the rights to employment, health, education, housing, culture, social security, food, water and sanitation, and family,” as defined in the Principles and Guidelines. It must be noted that South Africa does not follow the minimum core obligation principle as in our jurisprudence the Constitutional Court has held that the government did not live up to their “obligations under the Constitution because it did not provide relief for those in situations of desperate need”.¹²⁴

In the *Government v Grootboom and others* with respect to children rights to social services, the Court determined that “because children have a right to parental or family care, their right to ‘suitable alternative care’ from the government applies only when family or parental care is unavailable”. This means that their parents are responsible for providing shelter to the children while government only takes responsibility for those in alternative care. It is submitted that this is inconsistent with the CRC. Children have the right to an appropriate standard of life for their physical, mental, spiritual, moral, and social development, as stated in Article 27 of the Convention.¹²⁵ While it is true that it is the primary obligation of parents or other caregivers to fulfill this right to the best of their ability and resources, states are also expected to support caregivers of children requiring assistance in relation to nutrition, clothing and shelter. Although the Court found a violation of the right to housing under the Constitution, it would have been appropriate for the Court to mention the South African government’s obligation under the CRC to assist families who are unable to provide their children with suitable housing or other necessities for a decent standard of living.

The principles further provide a framework for states to identify and review laws that are incompatible with the rights guaranteed by the African Charter, such as “non-discrimination in article 2, equality and equal protection under the law in article 3, dignity and freedom from ill treatment in article 5, and freedom from arbitrary arrest and detention in article 6”. They define the nature and characteristics of laws that are incompatible with the African Charter,

¹²³ PALU opinion op cit note 7 para 14 at 16-17.

¹²⁴ *Government v. Grootboom and others* 2001 (1) SA 46 (CC).

¹²⁵ UN Committee on the Rights of the Child *General comment No. 21* op cit note 15 at 17

and they encourage states to employ alternatives to arrest and custody for minor offenses that are in accordance with the African Charter. Thus creates political pressure to ensure that state parties take action in ensuring that they decriminalise these petty offences.

South Africa is no exception to the adoption and application of the above-mentioned measures to safeguard the principles as established as a member State. Affiliation with the African Union mandate that member States follow and comply with the Charter and other interventions directed to social and economic development. This is true with the provisions made in the African Charter; South Africa must comply and effect changes to bylaws that discriminate and criminalise children in street situations. Failing which, once the local remedies have been exhausted the ACHPR should adopt a resolution to penalise and punish member States that do not comply with the Charter even if the provisions are coherent with the member State's constitution.

Further, the ACHPR has provided guidelines, principles, resolutions and declarations on various human rights issues. The ACHPR has also made recommendations to States on how to improve the enjoyment of human rights protected by the African Charter and other regional and international human rights agreements and the states can base their legislation on the "principles and rules aimed at solving legal problems relating to human and people."¹²⁶ However, the ACHPR struggle to monitor state compliance with their obligations as states fail to report on time. When the African Commission "considers that the State party to the African Court Protocol has not complied or is unwilling to comply with its recommendations in respect of the communication" within the prescribed term, it may bring a case to the African Court. In disputed processes, the Court's judgments and orders are legally binding. As a result, States Parties must "comply with the judgment in any case to which they are parties within the time prescribed by the Court and ensure its execution."¹²⁷ If a court concludes that a human right has been violated, it has the authority to "make appropriate orders to remedy the infringement." If a treatment is "sufficient, effective, quickly ascribed, holistic, and proportional to the seriousness of the harm suffered," it is deemed "appropriate." This includes the provision of adequate "reparation" or "fair compensation."¹²⁸

¹²⁶ Article 45(1)(b).

¹²⁷ African Court protocol Article 30.

¹²⁸ Ibid Article 27(1).

(c) *African Court on Human and Peoples' Rights' Advisory opinion on vagrancy laws*

According to scholars and advocates of human and people's rights, the criminalisation of the status of individuals as being poor, homeless, or unemployed is unconstitutional.¹²⁹ The African Court's landmark Advisory Opinion in PALU unanimously declared these laws incompatible with provisions from three treaties - the African Charter, the African Charter on the Rights of Women in Africa, and the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol). This opinion was sought by the Pan African Lawyers Union (PALU) on behalf of a broad coalition of civil society organisations. The African Court also made African states responsible for reviewing, amending, or repealing the appropriate offences. This is a tremendous step forward for human rights on the continent, with enormous legal weight and moral authority, and the ability to significantly alter criminal justice outcomes for Africa's impoverished and marginalised people.¹³⁰ It has been argued that eThekweni Municipality has gone against the provisions of the Charter on human rights by using "vagrant laws" and "vagrancy offences" in their bylaws against the society especially children in street situations.¹³¹

PALU took to the African Court to argue that many States in Africa have retained laws, which criminalise individuals as being "poor, homeless, or unemployed as opposed to specific unacceptable acts."¹³² This conduct has been termed as a use of "vagrancy laws" to depict the unconstitutionality of the act against the marginalised groups.

It is argued that states go as far arresting and detaining people where there has been no evidence of a criminal act relying on vagrant laws. PALU's submission to the court was that that "these laws are overly broad and confer too wide a discretion on law enforcement agencies to decide who to arrest which impacts disproportionately on vulnerable individuals in society".¹³³ As argued in the above chapters, in Durban, the Metropolitan Police are tasked and/or mandated by the vagrancy laws (bylaws) to give a letter of warning and fine children in street situation for sleeping, street begging and so forth. Whereas one can argue that this is better than other municipalities and countries where they are arrested and detained, the fines

¹²⁹ PALU opinion op cit note 7; Killander op cit 63 note 70-93.

¹³⁰ Open Society Initiative for Southern Africa (OSISA) "Vagrancy laws must fall! A landmark decision by the African Court on Human and Peoples Rights (2020) *Human Rights New* <https://osisa.org/vagrancy-laws-must-fall-a-landmark-decision-by-the-african-court-on-human-and-peoples-rights/> (Accessed 06 January 2022).

¹³¹ PALU opinion op cit note 7 para 123 at 32.

¹³² Ibid para 3 at 1.

¹³³ Ibid para 4 at 2.

on children in street situations compromise their rights such as the right of freedom movement and further exacerbate their struggles to fend for themselves in the street by being limited by warnings and fines on their daily activities. Where arrest and detainment is applicable, the arrests contribute to overcrowding in police cells and in prisons.

Furthermore, PALU submitted “the manner in which vagrancy offences are enforced is contrary to the basic principles of criminal law; for example, it undermines the presumption of innocence and thereby threatens the rule of law”.¹³⁴ PALU took to court for these reasons to get clarity from court for the use of vagrant laws and vagrant offences against homelessness, poor circumstances, and unemployment statuses/classism given to individuals.

For the purpose of this study, more focus of the Court’s opinion will be on the ACRWC as discussed by the court. As a point of departure, the court held and understood that all Member States have taken on the responsibility of upholding human rights for all people within their control by making this pledge. All domains of government in South Africa, including local government, where the state must protect, serve, and care for the society, are included. Member States have taken on the responsibility of upholding human rights for all people within their control by making this pledge. Included are all spheres of government in South Africa where the state must protect, serve, and care for the society, including local government.

Before the court, PALU argued that vagrancy laws and by-laws criminalise poverty and are inconsistent with rights such as “the right to dignity, equality before the law and non-discrimination”.¹³⁵ These rights are enshrined in both the African Charter and the Constitution of South Africa. However, an essential part of the PALU proposal is that “vagrancy laws do not penalise particular acts of individuals, but rather a condition or ‘status’ that individuals have involuntarily gone into and cannot be changed easily”.¹³⁶ The greatest example of this is criminalisation of homelessness by the eThekweni Municipality’s Nuisance Bylaws where children in street situations are arrested and detained alternatively rounded up and “dispersed” into outlying areas for working in the streets to make a living. Hence, according to PALU, these laws either target or have a disproportionate impact on the poor and disadvantaged.

¹³⁴ Ibid para 4 at 2.

¹³⁵ Ibid at para 41 at 10.

¹³⁶ Ibid para 42 at 11.

PALU maintained that:

“Vagrancy laws afford police justification which otherwise would not be present under prevailing constitutional and statutory limitations; that is to arrest, search, question and detain persons solely based on suspicions that they have committed or may commit a crime. Vagrancy laws are also used by police to clear the streets of ‘undesirables’, to harass persons believed to be engaged in crime, and to investigate unclear offences.”¹³⁷

eThekweni Municipality, as discussed in the above chapters has been argued to have committed the same error of instituting petty offences through metro police and it is for this reason this study seeks to speak against the vagrant laws and bylaws that criminalise children in street situation in and around Durban. In such a circumstance, the municipality enables police to arrest a person without a warrant if they have probable grounds to suspect that an offence has been committed.¹³⁸ The need of reasonable cause, on the other hand, is a crucial protection against unlawful police invasions of constitutionally protected rights. These criminal procedural rules should be adequate to prevent crime without the need for vagrancy statutes to be employed as catch-all measures.

What is currently happening is that the police are using vagrancy laws to clean the streets of individuals who are deemed “undesirable”, to harass those who the police suspect of engaging in illegal activities, and to investigate wrongdoings.¹³⁹ An example of such conduct is that of the eThekweni Municipality during the 2010 FIFA World Cup when people in street situation were removed from the roads with claims of keeping the city “attractive” and “safe”. Furthermore, the PALU contended that because “the police's suspicion is the ground for the implementation of vagrancy laws, the concept that an individual is assumed innocent unless proven guilty is violated when vagrancy laws are applied”.¹⁴⁰ The rights of children in street situations are denied and they are violated through the application of vagrant laws.

The Court further sought to explain and discuss the term “vagrancy” to highlight that “the term is often used in a generic sense to allude to various offences”.¹⁴¹ The term can refer but not limited to a person who is being and/or acting “idle and disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer”.¹⁴¹ According to the Court, there were three main reasons that motivated the adoption of vagrancy laws in the past:

- “To curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to landowners and industrialists whilst limiting the presence of undesirable persons in the cities.

¹³⁷ Ibid.

¹³⁸ Ibid para 43 at 11.

¹³⁹ Ibid para 44 at 11.

¹⁴⁰ PALU op cit note 7 para 48 at 12.

¹⁴¹ Ibid para 1 at 09.

- To reduce the costs incurred by local municipalities and parishes to look after the poor.
- To prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials.”¹⁴²

However, even though these were vagrancy offences that were implemented during the colonial and apartheid regime in South Africa,¹⁴³ the court alluded that there are still countries with laws containing vagrancy offences. The court noted that in South Africa there are by-laws that “prohibit a person without a fixed abode from loitering or sleeping in a public amenity, public space or in the beach”.¹⁴⁴ Whereas the court did not point it out that this is wrong and against the human and people’s right, it was a clear indication of existence of vagrant laws in their opinion advisory. The court observed that there are countries that had had vagrant laws repealed such as Angola, Cape Verde, Kenya, Lesotho, Mozambique, Rwanda and Zimbabwe.¹⁴⁵ In other countries such as Malawi, their High Court case had ruled on a vagrancy offence that it was unconstitutional to charge a person on an offence of being a “rogue and vagabond”.¹⁴⁶

The Court determined that Articles 1 of the Charter, the ACRWC, and the Maputo Protocol all compel all State Parties to change or abolish their vagrancy laws and by-laws to bring them into line with these treaties. This finding is compatible with the need to take all necessary efforts, including legislative and other measures, to fully implement the three treaties.¹⁴⁷

In terms of the nature of the duty, the Court maintains that “all State Parties must change or repeal all of their vagrancy laws, associated by-laws, and other laws and regulations in order to comply with the requirements of the Charter, the Children's Rights Charter, and the Women's Rights Protocol”.¹⁴⁸

PALU has also asked the Court to rule on whether vagrancy statutes and by-laws, such as those including offences that, once a person has been labeled a “vagrant or rogue and vagabond”¹⁴⁹, force that person to be relocated to another region, infringe Articles 3, 4(1), and 17 of the ACRWC. According to PALU, vagrancy laws are frequently used to arbitrarily arrest street children, undermining their right to dignity and equal treatment under the law. With

¹⁴² C. Ballard et al, “Poverty is not a crime decriminalising petty bylaws in South Africa” (2021) *APCOF Research Series* at 13

¹⁴³ S Hinds Lennox. “Apartheid in South Africa and the Universal Declaration of Human Rights.” *Crime and Social Justice*, no. 24, Social Justice/Global Options, 1985, pp. 5–43, <http://www.jstor.org/stable/29766267>.

¹⁴⁴ PALU opinion op cit note 7 para 59 at 16.

¹⁴⁵ Ibid para 61 at 16.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid para153 at 40.

¹⁴⁸ Ibid at para 154 at 41.

¹⁴⁹ Ibid at para 155 at 41.

regard to Article 3, Arbitrary arrests, according to the Court, disproportionately affect underprivileged and marginalised children. For children in street situations, any violent removal may result in the loss of their community and means of subsistence. As a result, children who are in violation of vagrancy rules receive treatment that is less favourable than that received by other children in society. The fact that these children are marginalised and vulnerable is the primary reason for their differential care. As a result, children who are in violation of vagrancy regulations face discrimination as a result of their situation. As a result, this is incompatible with the right of children to be treated equally under the law, as guaranteed by Article 3 of the ACRWC.¹⁵⁰

The ACRWC's Article 4(1) restates the general principle of the child's best interests. Here, the Court notes that the African Committee of Experts on the Rights and Welfare of the Child (known as the Committee of Experts) declared in General Comment No. 5 that the principle of the best interests of the child is unconditional.¹⁵¹ In the words of the Committee of Experts, there are "no limitations to the domains or sectors within which the best interests of the child must apply, so that its application can extend to every conceivable domain of public and private life." The Court points out that all children are entitled to a fair trial under Article 17 of the Children's Rights Charter. The clause emphasises the importance of giving children preferential care that is compatible with their "feeling of dignity and value."

The court relied on the provisions of the charter on Article 2, 3, 5, 6, 7, 12 and 18 of African Charter to pronounce on compatibility of vagrancy offences.¹⁵² The court addressed Articles 2 and 3 at the same time, noting that "the right to non-discrimination extends beyond the right to equal treatment before the law" and has practical implications in that individuals should be able to enjoy the Charter's rights "without discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin, or any other status".¹⁵³

Article 2 is required for the respect and enjoyment of all other Charter rights and freedoms, according to the court. The court went on to say that Article 2 establishes a principle that is fundamental to the African Charter's spirit and is thus necessary in eradicating discrimination in all its forms, while Article 3 is significant because it ensures fair and just treatment of individuals within a country's legal system. These clauses are non-derogable, which means that they must be followed at all times in order for anybody to enjoy all of the

¹⁵⁰ Ibid at 74 at 20.

¹⁵¹ Ibid at para 122 at 32.

¹⁵² Ibid at para 155 at 42

¹⁵³ Ibid at para 66 at 18.

other rights guaranteed by the African Charter.¹⁵⁴ Whereas these provisions are binding, it has been argued by scholars such as Killander that “the by-laws of South African municipalities are full of provisions criminalising the poor”.¹⁵⁵ This is the same concern brought forward by the researcher about eThekweni Municipality’s bylaws that criminalise children in street situations.

The Court, based on article 2 and 3 made an observation that several African countries, criminalise the status of an individual being a “vagrant,” often defined as “any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession,” a “suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself” or “someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself.”¹⁵⁶ The Court noted that vagrancy laws, effectively, punish the poor and underprivileged, including but not limited to the homeless.

Individuals are clearly denied equal protection of the law as they are treated differently based on their statuses, as is the case with the application of vagrancy laws. As a result, the Court agrees with the Commission that regulations that discriminate against the poor and marginalized are incompatible with both Articles 2 and 3 of the Charter.¹⁵⁷ Court held that “vagrancy laws, both in their formulation as well as in their application, by, among other things, criminalising the status of an individual, enabling the discriminatory treatment of the underprivileged and marginalised, and also by depriving individuals of their equality before the law are not compatible with Articles 2 and 3 of the Charter.”¹⁵⁸

The court went on to pronounce on the application of Article 5 of the Charter as outlined in the above paragraphs; and held that “Vagrancy laws frequently rob the poor and marginalized of their dignity by interfering with their efforts to maintain or develop a good existence or enjoy a lifestyle they choose”.¹⁵⁹ In the words of Killander “poor persons are made criminals through municipal by-laws”.¹⁶⁰ This is very much applicable to children in street situations where reasons could be amongst other that it is a lifestyle, working, and/or forced socio-economic circumstance to be in the streets. The Court also found that labelling someone

¹⁵⁴ Ibid.

¹⁵⁵ M. Killander op cit note 63 at 70.

¹⁵⁶ PALU opinion op cit note 7 para 59 at 16.

¹⁵⁷ Ibid para 73 at 20.

¹⁵⁸ Ibid para 75 at 20.

¹⁵⁹ PALU opinion op cit note 7 para 81 at 22.

¹⁶⁰ Killander op cit note 63 at 71.

as a “vagrant,” “vagabond,” “rogue,” or any other disparaging term and ordering them to be forcibly moved to another location degrades a person’s dignity.¹⁶¹

The Court also pointed out that one of the most challenging parts of executing vagrancy legislation is that they frequently result in *prima facie* arrests, arrests without warrants, and unconstitutional pre-trial detention.¹⁶² This expose vagrancy laws to constant potential abuse. Arrests (particularly without a warrant) and detentions under vagrancy laws, according to the Court, are incompatible with the arrested persons’ rights to liberty and the security of their person, as protected by Article 6 of the Charter.

The fundamental concept of the presumption of innocence is reaffirmed in Article 7(1)(b) of the Charter. Killander argues that homeless people and/or other persons trying to “eke out a living in public spaces without authorisation are labelled as a threat and viewed as dangerous.” In eThekweni Municipality, the bylaws view and accuse people in street situations of stealing, “causing traffic accidents and standstills, spreading disease and being a general nuisance.”¹⁶³ As the Court has held, “the essence of the right to presumption of innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established.”¹⁶⁴ Vagrancy laws generally penalise an individual's perceived status, such as being “idle,” “disorderly,” or “a suspected thief,” whose status has no objective meaning, law enforcement officers can arrest people without *prima facie* proof that they committed a crime, according to the Court.¹⁶⁵ As a result of this statute, law enforcement officers place undue pressure on suspected criminals by pretextually detaining them under vagrancy laws and then seeking incriminating evidence even in cases that are unrelated to vagrancy. As a result, the Court determined that detaining people under vagrancy laws and obtaining statements from them concerning their potential criminal guilt violates the presumption of innocence and is incompatible with Article 7 of the Charter.

Article 12 of the Charter deals with the right to freedom of movement and residence in the borders of a State. The right to freedom of movement entails the “right of everyone lawfully within the territory of a State to move freely and to choose his or her place of residence.”¹⁶⁶ Therefore, the States must, ensure the full enjoyment of this right without questioning

¹⁶¹ PALU opinion op cit note 7 para 81 at 22.

¹⁶² Ibid para 85 at 23.

¹⁶³ Killander op cit note 63 at 71.

¹⁶⁴ PALU opinion op cit note 7 at para 89 at 24.

¹⁶⁵ Ibid para 94 at 24.

¹⁶⁶ Ibid para 96 at 25.

individual's purpose or reason for staying in and/or moving in and/or out of a specific place. One could associate with the apartheid pass law, which restricted people especially black people freedom of moving around the country in urban areas. The Charter simply states in Article 12(1) that the enjoyment of freedom of movement is conditional on the individual's compliance with the law. This section makes it plain that the law may, in proper circumstances, limit the Charter's freedom of movement.¹⁶⁷ However, limitations must be proven with no doubt against the conditions and/or checks and balances of limitations. Limitations must be:

- As required by the law
- Restrictions must be required to defend, public order and health
- The limits must be compatible with the other rights guaranteed by the Charter.

The Court observes that, in many instances, "the enforcement of vagrancy laws leads to infringement limitation of the right of freedom of movement." In effect, vagrant laws are able to satisfy the first condition mentioned above, however they fail to satisfy the second and the last. This, according to the Court, is because vagrancy statutes are not required for any of the objectives for which they are frequently invoked. As a result, the Court concludes that "the execution of vagrancy regulations is incompatible with the right to freedom of movement as granted by the Constitution (under Article 12 of the Charter)".¹⁶⁸ The Court also finds that "forced relocation is also incompatible with Article 12 of the Charter".¹⁶⁹

It is submitted that the advisory opinion is great as it defends the rights of children in street situation but it is only limited to articles 3, 4(1) and 17 of the ACRWC and did not consider other principles. This is problematic as it creates a limitation for South African domestic courts that they cannot just detain or fine children in street situation but also they need to put measures in place that are alternatives.

IV. CONCLUSION

This chapter has discussed international and regional law obligations resting on South Africa to care and protect children in street situations and ensure compliance. The international and regional law is very clear on what countries are expected to do in ensuring that the children in street situations rights are fully met and recognised. CRC obligated member States to the UN to comply with the principles of decriminalisation of vagrant laws. The principles are aimed

¹⁶⁷ Ibid para 98 at 26.

¹⁶⁸ Ibid para102 at 27.

¹⁶⁹ Ibid.

to ensuring that children in street situations are not discriminated against, their best interest is given priority, have their right to life, survival and development respected, and that their voices are heard. South Africa's local government is not in compliance with the provisions of the CRC and the principles of decriminalisation as we continue to have by laws that criminalise petty offences and essentially criminalise children in street stations for being poor. Therefore, South Africa's local government needs to amend and repeal their bylaws in order to meet the standards set by the international and regional obligations.

The study further outlined and discussed the views and opinions of PALU, the ACHRP principles, and the provisions in the African Charter, which provided a clear stand of non-compliance by the eThekweni Municipality in their enactment of their Nuisances and Behaviour in Public Spaces By-Laws. As a member State to both the UN and AU, South Africa is party to implementing and adhering to the resolutions and international treaties. Therefore, eThekweni Municipality has breached a core reason of having affiliation with the UN and AU. According to the principles and the opinions of PALU, eThekweni Municipality is obligated to amend and repeal all their vagrant laws that are against Children and Human Rights. The findings of this chapter are analysed and discussed further in chapter 5. The advisory opinion does not specify how states should amend or repeal their laws; rather, it imposes a duty on local governments to work diligently to ensure the realisation and implementation of children's rights in street situations, so that discrimination against children in street situations is reduced and their best interests are recognised. Finally, it is argued that South Africa's local government has failed to adequately protect the rights of children in street situations, as evidenced by the fact that the articles of the CRC and the ACRWC, namely articles 2, 3(1), 6, 12 of the CRC and articles 4, 5 and 17 of the ACRWC, have been grossly violated. Even when the African Court and the African Commission step in to provide measures, recommendations, and opinions to help states, including South Africa's local government, meet their obligations, South Africa's local government has blatantly ignored and failed to meet its obligation to ensure that children in street situations are afforded their rights equally and without discrimination.

In the next chapter, chapter 4, the domestic reaction of South Africa to these international and regional duties will be examined in depth.

CHAPTER FOUR

SOUTH AFRICAN LEGAL AND POLICY FRAMEWORK

I. INTRODUCTION

Chapter four critically analyses South Africa's legislative and policy framework on local government that safeguard the rights of children in street situations in relation to begging and life sustaining activities, and measure these against the international, legal and constitutional obligations on local government. Instruments to be discussed are, the Constitution of the Republic of South Africa, 1996, the Children's Act, the Local Government: Municipal Systems Act, *inter alia* and the eThekweni Municipality's Nuisances and Behaviour in Public Places By-Laws of 2015.

II. BACKGROUND HISTORY

South African legislation and regulations did not sufficiently protect children prior to 1994, particularly during the apartheid era. In the past, South Africa's apartheid government did little to help children in street situations, refusing to reform laws that caused their existence and failing to care for them.¹⁷⁰ There were no programmes or secure care facilities in place to cope with such transgressions. South Africa's democratisation in 1994 resulted in legislation reforms regarding children who were in dispute with the law, further it promoted a new era of respect for fundamental human rights in South Africa and the bill of rights compelled the government to protect and care for children in need as one of its enumerated rights.¹⁷¹

III. ANALYSIS OF ETHEKWINI MUNICIPALITY BY-LAWS

An abundance of statutory provisions obligates states to fulfil its duties and responsibilities towards all children. As it is the responsibility of all municipalities to provide services to all people within their boundaries, in order to ensure this, they have developed rules and regulations characterised as the eThekweni Municipality's Nuisances and Behaviour in Public Places By-Laws of 2015.

Municipalities around South Africa have enacted by-laws to criminalise urban poor and homelessness, including the enactment of by-laws for what are regarded as "petty offences."

¹⁷⁰ Timothy J. Treanor, "Relief for Mandela's Children: Street Children and the Law in the New South Africa" (1994), *Fordham Law Review* vol. 63 at 884.

¹⁷¹ Ibid at 885-886.

This approach is clear from drafting and enforcing legislation or bylaws aimed at prohibiting the use of public places and the conducting certain activities in public spaces. In order to achieve their aims, these laws sanction offenders with fines or imprisonment.

These bylaws include provisions for preventing and regulating public nuisances, as well as prohibiting certain activities or conduct in public spaces.

Relevant provisions from the eThekwini bylaws are:

“Section 5(2) no person may in a public place-

(q) lie or sleep on any beach, seating place, street or sidewalk, or use it in such a manner that it prevents others from using it;

*(r) beg for money or goods whether by gesture, words or otherwise;”*¹⁷²

“Section 12(1) No person may-

(a) in a public place, intentionally block or interfere with the safe or free passage of pedestrian or motor-vehicle, unless to the extent authorised by law; or

*(b) approach any pedestrian or a person inside a motor-vehicle on any public road intersection or any other public place for the purposes of begging from such pedestrian or person in a motor-vehicle”*¹⁷³

*“(2) Any person, who unlawfully blocks, occupies or reserves a public parking space, or space begs, stands, sits, lies in a public place, or does anything which hinders or disturbs the flow of pedestrian or road traffic must immediately cease to do when directed by an authorised official.”*¹⁷⁴

It is submitted that the eThekwini municipality bylaws exist to make the poorest and most marginalised members of society criminally liable for their situation by making life-sustaining actions in public spaces a crime. Sleeping, bathing, washing, urinating or defecating, begging for money in a public location are all examples of this. These by-laws further go as far as criminalising and issue penalties that prohibited conduct in terms of section 21¹⁷⁵ and Section 22¹⁷⁶ of the bylaws. Holness argued that these by-laws are:

¹⁷² Nuisances and Behaviour By-Laws op cit note 11 at 8.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ “(1) A person commits an offence if he or she— (a) contravenes any provision of this By-law; (b) contravenes any conditions, restrictions or prohibitions imposed in terms of this Bylaw; (c) fails to comply with the terms of any notice or signage displayed in terms of this Bylaw; (d) obstructs, hinders, or in any manner interferes with an authorised official who is acting or entitled to act in terms of this By-law; or (e) fails to obey any lawful instruction or direction given to him or her in terms of this By-law. (2) A person is guilty of a continuing offence if he or she continues with an offence after notice has been served on him or her in terms of this By-law requiring him or her to cease committing such offence.”

¹⁷⁶ “(1) Any person who is convicted of an offence under this By-law is be liable to a fine of an amount not exceeding R40 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and imprisonment. (2) In the case of a continuing offence, an additional fine of an amount not exceeding R200 or imprisonment for

“Contrary to the rule of law and an irrational extension of local government powers to develop and maintain law and order within municipal boundaries, and constitute unfair discrimination in respect of a number of protected and unlisted bases that cannot be justified, because they criminalise homelessness and poverty.”¹⁷⁷

According to Ballard et al, law enforcement authorities frequently utilise these laws to harass, threaten, extort, and generally mistreat people who are marginalised or vulnerable to human rights violations in a law enforcement environment due to their status.¹⁷⁸ Ballard et al argue that the existing use of by-laws relating to public areas and prohibited behaviours in a number of South African municipalities including the eThekweni Municipality are incompatible with the country’s human rights duties. Gossar et al also expresses worry that the method in which these offenses are prosecuted endangers the rights and dignity of people who are disproportionately targeted for prosecution because of their socio-economic level.¹⁷⁹ Further, these by-laws are inconsistent with the international standards that South Africa has signed and have become party to, thus making the South African government bound by their obligations.

In addition to the African Court’s judgment, there are court precedents in South Africa that support the view that the execution of vagrancy-related legislation violates offenders’ rights to dignity. For example, in *Ngomane & others v City of Johannesburg Metropolitan another*, the court found that the Johannesburg Metropolitan police’s action to collect and destroy properties belonging to homeless persons violated their right to dignity.¹⁸⁰

In terms of the rule of law, strong legislation and a fair, independent judicial system are required to preserve all children’s rights, which includes children living in street situations. Evidently, children living in street situations are among the least protected by law and law enforcement, implying that extra protective mechanisms may be needed to protect them. The by-laws highlighted above it a criminal offense to undertake life-sustaining activities in public settings, and in so doing make children in street situations (and adults) criminally liable for their status or socio-economic situation. Similarly, Currie and De Waal also submit that the content of the law and government behaviour are both affected by the rule of law.¹⁸¹ They contend that the rule of law consists of both procedural and substantive elements. The procedural component bans the government from making arbitrary decisions, while the

a period not exceeding 10 days, for each day on which such offence continues or both such fine and imprisonment, will be imposed.”

¹⁷⁷ Holness op cit note 6 at 469.

¹⁷⁸ Ballard et al op cit note 140 at 3.

¹⁷⁹ Ibid.

¹⁸⁰ (2019) (SCA) 57 para 21.

¹⁸¹ I Currie & J De Waal, *The Bill of Rights Handbook* (Juta & Co. Ltd Cape Town 2013).

substantive component requires the government to respect core human rights such as the right to equality and respect for human dignity.¹⁸² They argue that the rule of law also necessitates the clarity and accessibility of legislation. “A law that does not tell individuals who are bound by it what is expected of them with reasonable certainty so that they can govern their behaviour accordingly is ambiguous, and hence unconstitutional and invalid.”¹⁸³

IV. CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

South Africa’s dedication to children and their future remains a basic priority. Throughout South Africa; children grow up under progressive rights frameworks established by the Constitution of South Africa and by the international treaties that the country has ratified. The ratification of international legislations implies that South Africa is obliged to give effect to these provisions in its domestic laws “A child’s best interests are of paramount concern”¹⁸⁴, according to section 28 of the Constitution. The development mandate of local government is identified in the Constitution, and in legislation.¹⁸⁵ Accordingly, government has to prioritise “the basic needs of the community” and lead the way in promoting their social and economic development in its processing, including budgeting and planning.¹⁸⁴

While the government’s legislation appears to address children’s issues, it is submitted that a broader mandate is still required in order to ensure that these laws are enforced as enshrined in terms of the Constitution as well as the relevant statutes. In the following argument, this will be discussed in further detail. There are different legislative and policy frameworks that provide for the protection and participation of children in South Africa. For the purpose of this study, which focuses on children in street situations, the study has considered the most relevant and more focus will be on the Constitution of South Africa, 1996, Children’s Act 38 of 2005, the Municipal Systems Act, the Municipal Structures Act, Child Justice Act 75 of 2008, The 1997 White Paper for Social Welfare and the eThekweni Municipality By-laws.

¹⁸² Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others (2009) ZACC at 12.

¹⁸³ Government of South Africa (2016). White Paper on Safety and Security, pp. 42–43. Available at: <https://www.saferspaces.org.za/uploads/files/2016-WPSS.pdf>.

¹⁸⁴ S28(2) of the Constitution.

¹⁸⁵ Municipal planning is expected to be developmentally orientated, according to s 23(1) of the Act and to give effect to socio-economic rights: “A municipality must undertake developmentally-oriented planning so as to ensure that it— (a) strives to achieve the objects of local government set out in section 152 of the Constitution; (b) gives effect to its developmental duties as required by section 153 of the Constitution; and (c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.”

(a) *The 1996 Constitution*

The Bill of Rights, which is enshrined in the South African Constitution, protects and guarantees the rights of all citizens of the country. It upholds democratic values such as human dignity, equality, liberty. This provision is important in practice because it imposes a positive duty on the state to safeguard, promote, and fulfill the entrenched rights.¹⁸⁶ In South Africa's constitutional environment, children's rights are enshrined in Section 28 of the Constitution. Section 28(1)(g) "deals specifically with children accused of committing an offence and, apart from confirming the application of sections 12 and 35 of the Constitution, the section lays down the principle that children should only be detained as a measure of last resort and for the shortest possible period of time." Section 8(1) of the Constitution states that, "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."¹⁸⁷ This means that, as state organs, like the municipalities are required to follow section 28 in all of their actions. Furthermore, the local government has a constitutional responsibility to apply *inter alia* sections 9 (equality and non-discrimination), 10 (dignity), 21 (freedom of movement) and 28 of the Bill of Rights when adopting bylaws or executing executive duties.¹⁸⁸

Although the Bill of Rights contains a specific children's rights section,¹⁸⁹ several of these constitutional provisions are relevant to this study, including right to dignity,¹⁹⁰ right to equality and no discrimination,¹⁹¹ right to freedom of movement,¹⁹² right to be presumed innocent¹⁹³ and the best interest principle.¹⁹⁴ These rights are discussed in further detail below.

(a) *Right to dignity*

It is everyone's right and privilege to be treated with dignity. According to Section 10 of the Constitution. One of the core foundations of South Africa's constitutional democracy is the right to be treated with respect. The court explained in *S v Makwanyane*¹⁹⁵ that the right to dignity is the foundation of many other constitutional rights. It was established that human life suffers greatly when dignity is not respected. The presence and enforcement of vagrancy-

¹⁸⁶ S 7(2) of the 1996 Constitution.

¹⁸⁷ S230 (a) of the Constitution.

¹⁸⁸ M Couzens, "Child-friendly municipalities: including children on local government's agenda" (2011) *Stellenbosch Law Review Vol. 22, No. 1* at 143.

¹⁸⁹ S28 of the 1996 Constitution.

¹⁹⁰ S10 of the 1996 Constitution.

¹⁹¹ S9 of the 1996 Constitution.

¹⁹² S12 of the 1996 Constitution.

¹⁹³ S35(3) of the 1996 Constitution.

¹⁹⁴ S28(2) of the 1996 Constitution.

¹⁹⁵ *S v Makwanyane* (1995) (ZACC) 3 para 326–328.

related legislation clearly have a significant impact on the exercise of basic human rights and dignity. eThekweni Municipality have tampered with the right to dignity of the children in street situation by criminalising and discriminating their existence and their survival on the streets based on classism.

(b) *Right to equality and non-discrimination*

The right to equality and non-discrimination is entrenched in Section 9 of the Constitution. It states that “everyone is equal before the law”, has equal protection and benefits under the law, and that equality involves the full and equal exercise of rights and freedoms. The constitutional court confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* that, at the very least, equality requires equal concern and respect across differences. The court further stated that disparities should not be used as a basis for exclusion, marginalisation, stigma, or punishment under the right to equality.¹⁹⁶ These children are seen as a threat to public safety and are discriminated against due to their disadvantaged status. Municipalities in South Africa, and of relevance to this study is the eThekweni Municipality, enforce by-laws that criminalise and or penalise conduct related to the performance of life-sustaining activities in public spaces. Through such by-laws, marginalized people in society, including children living on the streets, are indirectly discriminated against. It is submitted that children in street situations are presumed criminals and/or have committed crime solely because of their looks and living on the street. Arresting and detaining children in street situation does not help the municipality in support to create better future for South Africa, instead they are worsening the quality of life by limiting these children from life changing opportunities with criminal records. These children are being treated differently to children who do not live on the streets.

(c) *Right to freedom of movement*

Section 21 of the Constitution guarantees the right to freedom of movement. It is incompatible with the right to freedom of movement to adopt laws that prohibit the right to vagrancy, for example, those that prohibit specific activities such as loitering. These laws ignore the requirements of a justifiable limit to restrict the right to freedom of movement. Many regulations targeting homeless persons, which include children in street

¹⁹⁶ (1998) (ZACC) 15 para 132.

situations living in public spaces, restrict their freedom of movement by barring them from particular sections of a city or compelling them to move to other locations against their will (dispersal). The eThekweni bylaws are infringing on the right to freedom of movement especially of children in street situation that eke for their life through begging and selling. The right to the city for children in street situations is important as it is for any other citizen in this country.¹⁹⁷

(d) *Right to be presumed innocent*

Section 35(3) of the Constitution states that “every accused person has the right to a fair trial” and, in subsection (3)(h), the right “to be presumed innocent, to remain silent, and not to testify during the proceedings.” This right is greatly violated as children in street situations are not presumed to be innocent, they are presumed to be guilty of by-law related offences and the children in street situations are disempowered as they have no support structure. Further they do not have legal representation. There are few case law decisions dealing local governments and its duties pertaining to children and this reflects a limited number of specific statutory functions of local government in respect of children.¹⁹⁸

(e) *The Best Interests of the Child*

The idea of the “best interests of the child” is strongly rooted in South African legal jurisprudence. In *Minister for Welfare and Population Development v Fitzpatrick*¹⁹⁹ the Constitutional Court held that:

“Section 28(2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).”

Couzens asserts that we have to read section 8(1) of the Constitution with the above court’s analysis of the best interest of the child. This requires the municipality to apply the best interest principle when making decisions concerning children, irrespective of whether the decision of the municipality has any bearing on any of the other human rights of the child.²⁰⁰

¹⁹⁷ Pieterse op cit note 78 at 176-177.

¹⁹⁸ Couzens op cit note 187 at 151.

¹⁹⁹ 2000 7 BCLR 713 (CC).

²⁰⁰ Couzens op cit note 187 at 144.

(b) *Children's Act 38 of 2005 (as amended)*

The Children's Act seeks to protect all children, including children in street situations. Its goal is to give effect to South Africa's child-related commitments as defined in the international conventions to which the country is party to. In terms of Section 1 of the Children's Act is define street children as follows:

“ a child who because of abuse, neglect, poverty, community, upheaval or any other reason, has left his or her home, family or community and lives, begs or works on the streets; or because of inadequate care, begs or works on the streets but returns home at night.”

Section 4(1) of the Children's Act requires the collaboration of all spheres of government, which includes the local government in the implementation of this act. Therefore, it calls on the local government to support all that is mentioned in the Act.²⁰¹ As supported in the Constitution, the Children's Act further reaffirms the application of the best interest of the child in terms of section 6(1)(b). Section 6(2)(a) states that “ all proceedings, actions or decisions in a matter concerning a child, must, respect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act.”

This section therefore establishes a child's rights approach in respect of all proceedings pertaining to children. This is consistent with our Constitution and the international obligation.²⁰² One of the most fundamental principles afforded to children, which included children in street situations is the best interest of the child standard in section 7 of the Children's Act. Section 7 refers to the standard of the child's best interests and defines the necessary considerations to consider while applying it. This section outlines the criteria that should be considered when evaluating the child's best interests. Section 7(1)(g) includes “the child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child.” Children in street situations are usually more mature than the average child because of their exposure and therefore asking for the opinion or views of the children in street situations in what really affects them is really of importance. Petty offences like the ones listed on the eThekweni Bylaws do not provide children in street situation for a voice for them to heard and included. Rather they have included by laws that arrests, detains them amongst other unconstitutional conditions that children in street situations are put under which then makes follow the repressive and welfare approach in the implementation of their by-laws.

²⁰¹ Couzens op cit note 187 at 174.

²⁰² T Boezaart 'General Principles (ss 6-17)' in C Davel & A Skelton (eds) *A Commentary on the Children's Act*. (2018) 1-43 at 4.

Section 9 states the emphasis on the paramountcy of the best interest of the child, in that it requires that “in all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.” The supremacy of the best interests test is firmly established in international law, as previously stated and in our Constitution yet South Africa’s local municipalities and for the purpose of this study specifically the eThekweni Municipality in they by laws have not taken the paramount interest of a child. I agree with Couzens in that the lack of direction in applying the best interests criteria to children in general, or to groups of children, is a key flaw in this provision, which is particularly important for local governments. This lack of guidance could make it difficult for municipalities to apply the best interests criterion effectively.²⁰³

Section 10 of the Children’s Act makes provision for child participation. It states that “Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.” Every child has a right to participate, which includes actively participating in decisions and activities involving affecting and this includes the policies. Despite legal obligations such as the CRC and ACRWC, a variety of legislative and implementation gaps and hurdles to child involvement remain, and a supported national systemic child participatory framework is required. It is essential to ensure that participatory activities with children are ethical, safe, and meaningful if the children’s best interests are to be protected. Yet we find that in South Africa, the local government does not prioritise this principle when it comes to children in street situations. Children in street situations are not considered to be in the position to participate in decisions that concerns them as they are already viewed as criminals.

Section 150(1)(c) of the Children’s Act stipulates, “a child is in need of care and protection if the child lives or works on the streets or begs for a living.” This therefore means that children in street situations as they require need of care and protection, they require statutory interventions in the form of removal to an alternative care to the best of their interest. As a result, this section protects children in street situations by establishing particular provisions for them. However, it is submitted that the difficulty is that municipal bylaws are not consistent with the protection of children in street situations, resulting in a divergence between the Children’s Act and municipal bylaws. According to the Children’s Act, this must be done by the state in a formal proceeding before a children’s court. State representatives who conduct

²⁰³ Couzens op cit note 187 at 147.

investigations to determine whether children require care and protection must “designated” social workers.²⁰⁴

Social workers and magistrates collaborate to find the best option for the child. Through this process the child can be reunited with their family if it is in their best interest, sent to drop-in centres. Section 213 provides for the Drop in centres. It provides for “basic services aimed at meeting the emotional, physical and social development needs of vulnerable children.” The drop in centres are usually run by the NGOs who are usually funded by the local government. Local government provides funding to the drop in centres who make provisions for children in street situations and offer the services in terms of section 213(2) of the Children’s Act. This is contradictory to the by-laws the local government requires to be enforced as it negates that children in street situations should be begging and other ‘supposed offences’ listed in terms of section 5(2) and section 12(1) of the eThekweni Municipality’s Nuisances and Behaviour in Public Places By-Laws of 2015. In making provisions for the drop in centres, it shows that the legislature is aware that there are children in street situation and thus are making provisions for them to be protected and provided for. However, the Municipalities’ by-laws does not adequate, sustainable provisions in protecting and caring for children in street situations. Instead, they criminalise their means of survival with no acceptable provisions or guidelines in how to protect the vulnerable children. The process does not always but it is an initiative that could potentially assist the child. The challenges are in the implementation.

The intervention from stakeholders such as the metro police are counter-productive. Instead of taking the child to care and protect them and provide for the best possible solution for children in street situation, they criminalise these vulnerable children and harass and abuse them. This is inconsistent with what the local government should do in line with its developmental goals in ensuring the care and protection of children living in street situations. Instead, through their by-laws they criminalise and punish for being homeless. The Children’s Act creates an obligation on every municipality to ensure the adherence to all rights afforded to all children.

It is submitted that the Children’s Act is much more progressive, but the bylaws are not complementing the Act as the Municipalities by-laws contradict the requirements in the Children’s Act to uphold children’s best interests and promote their participation in matters affecting them.

²⁰⁴ N Zaal and C Matthias, “Local Government and the provision of child care services: an essential area for legislative reform”, (2012) *SALJ* 119 (1) at 150.

(c) *Child Justice Act 75 of 2008*

The Child Justice Act creates a criminal justice system for children who are accused of crimes, separate from the criminal justice system for adults who are accused of crimes. The Act's primary goal is to keep minors out of custody and out of the formal criminal justice system. The existing legislation that governed the criminal justice system, notably the Criminal Procedure Act, did not recognize children's vulnerabilities. It also did not provide special protection to children who are in violation of the law, hence the creation of the Child Justice legislation. The Act elevates the minimum age for a kid to be considered "criminal capacity" from seven to ten years old. Children under the age of ten lack criminal competence and hence cannot be arrested or prosecuted; instead, if they commit a crime, they must be sent to social services. The Child Justice Act, Section 9, specifies how to deal with children under the age of ten:

(1) "Where a police official has reason to believe that a child suspected of having committed an offence is under the age of 10 years, he or she may not arrest the child, and must, in the prescribed manner, immediately hand the child over-

(a) to his or her parents or an appropriate adult or a guardian; or

(b) if no parent, appropriate adult or a guardian is available or if it is not in the best interests of the child to be handed over to the parent, an appropriate adult or a guardian, to a suitable child and youth care centre,"

This is progressive reform that will automatically divert younger children into the care and protection system rather than the criminal justice system. The Child Justice Act is there to protect children but the act is not implemented because the people of authority such as the police are the ones who do not ensure the protection of the children instead they criminalised and judged as being deviants. Even when children are not arrested when the bylaws are enforced, they are interacting with law enforcement and possibly the criminal justice system. In the *Teddy Bear Clinic for Abused Children v, Minister of Justice and Constitutional Development*²⁰⁵ the court indicated that such interaction with police officials should be minimised. In this case, the respondent's argument was based on the National Director of Public Prosecution's discretion to bring criminal charges based on the 'merits' of each case. The court expressed its displeasure with this idea, simply stating that adolescents diverted from the criminal justice system, might still be subjected to being arrested and being forced to

²⁰⁵ 2014 (2) SA 168 (CC).

interact with police officials. For children in street situations this is also true for their interaction with the police.

(d) *The Local Government: Municipal Systems Act 32 of 2000*

The Municipal Systems Act, which is legislation that implement the constitutional provisions pertaining to local governments in terms of Schedule 4B of the Constitution. The Act provides that municipalities need to guarantee that the community they serve develops in a sustainable manner. In its preamble, the Local Government: Municipal Systems Act highlights the importance of municipalities in the new constitutional order:

“Whereas the Constitution of our non-racial democracy enjoins local government not just to seek to provide services to all our people but to be fundamentally developmental in orientation;”²⁰⁶

“Whereas the new system of local government requires an efficient, effective and transparent local public administration that conforms to constitutional principles.”²⁰⁷

Killander states that this is an “implicit obligation on municipalities to revise by-laws in light of constitutional rights such as dignity, non-discrimination, and freedom of trade and movement.”²⁰⁸

Section 4(2)(j) of the Act requires municipal councils to “contribute together with organs of state, to the progressive realization of the fundamental rights contained in sections 24, 25, 26, 27 and 28 of the Constitution.” Section 28 of the Constitution, which deals specifically with children's rights, is notably missing from this list. This phrasing implies that the decision was made to limit the amount of support for children that will be given under the Municipal Systems Act.²⁰⁹ As a general observation, it is regrettable that children are not specifically identified as a priority category in the Municipal Systems Act. There is certainly a need for more additional law that gives at least some direction regarding the responsibilities of municipal governments in relation to children.

V. THE ROLE OF KEY STAKEHOLDERS

(a) *The role of Department of Social Development*

The Department of Social Development is a government department tasked with assisting those in need. The department has a responsibility to meet the needs of all children, including housing, food, clothing, and services that protect and safeguard their rights. These include

²⁰⁶ Municipal Systems Act 32 of 2000: Preamble at 2.

²⁰⁷ Ibid.

²⁰⁸ Killander op cit note 63 at 79.

²⁰⁹ Zaal & Matthias, op cit note 203 at 146-147.

children who live and labour on the streets and who, because of their situation, require immediate government assistance. According to section 4(2) of the Children's Act all departments are mandated and shall take "reasonable steps to the utmost extent of their available resources to achieve the achievement of the Act's objectives."

The Department developed "Strategy and Guidelines for children living and working on Streets," which is aimed at giving guidance on the services and programmes to be rendered to children in street situations. It highlights that it will bring "key role players" to the realisation of the better services for these children. Amongst the key role players are the police who according to the guidelines are responsible for investigating the crimes against the children and further said to have programmes in place that trains the police officers in interacting with vulnerable children, which include children in street situations.²¹⁰ However, in this research it has been discovered that police officers, instead of protecting the children in streets situations and ensuring that they are cared for, harass the children and violate their rights.²¹¹

Another observation is that going through the strategy and guidelines for children living and working on streets, consultation with the children in street situation are rarely done nor mentioned as an intervention to be implemented. Their involvement is driven by their own personal experiences, worries, challenges, and future ambitions. By participating, children can play an important role in becoming self-advocates. This is advocated by the child's rights approach by the United Nations' Convention on the Rights of the Child (CRC). The Children's Act also advocates for the child's voice to be heard in section 10, requiring child participation in matters affecting them in line with their age, stage of development and maturity.

(b) Role of the Police

In chapter 2, the role of the police in relation to the literature was discussed. Here, the role of the police in respect of the legislation, policies and by-laws is discussed. In South Africa, we have the South Africa Police Service (SAPS) who is the national police service for the whole country. SAPS is in charge of law enforcement, policy development, direction, and general execution of the department's mandate in accordance with applicable laws. The provincial metro police typically enforce provincial legislation such as traffic laws and local municipal by-laws and attempt to keep order and prevent crime. Some of the responsibilities of the police officials is to create a safe and secure environment for all people in South Africa,

²¹⁰ Department of Social Development, "Strategy and Guidelines for children living and working in the streets."

²¹¹ Ibid.

maintain public order and amongst many other duties to prevent anything that may threaten the safety or security of any community. The preamble of the South African Police Service Act 68 of 1995:

- “Ensure the safety and security of all persons and property in the national territory;
- Uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;
- Ensure co-operation between the Service and the communities it serves in the combating of crime; and
- Reflect respect for victims of crime and understanding of their needs”

Chapter 12 of the South African Police Service Act provides for the Municipal and Metropolitan Police service. The Act clearly sets out what is required from the Police official, to “ensure safety and security of all persons.” This includes children in street situation therefore the first instinct for the police officials is to ensure the protection and care of the children in street situation as they have been established to be the one of the most vulnerable groups of persons. Instead, police officials victimise children in street situations and criminalise the acts of children in streets situations ways of trying to make a living for themselves. Police officials further are required to “uphold and safeguard the fundamental rights of every person.”

Furthermore, the Constitution of the Republic of South Africa is clear in terms of defining the roles, responsibilities and objectives of police in the society and/or community. Section 205(2) of the 1996 Constitution gives guidance to the role and responsibilities of police in enforcing by-laws; the Section states that:

“National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.” Section 205(3) states that *“the objects of the police service are to prevent, combat, and investigate crime, to maintain public order, and to protect and secure the inhabitants of the Republic.”*

For this reason and purpose of this study the local governments formulate by-laws to be enforced by the police officials who then carry out the mandate to “enforce the laws” to arrest children in street situation who commit petty offences as mandated by the municipalities by-laws. This is unconstitutional as the police officials enforces by-laws that are infringing on the rights of the children in street situations, criminalise vagrancy offences. The same by-laws which should be amended and repealed as they are not in line with the obligations set out by the international and regional law. In addition, police officials go beyond the enforcement of the by-laws as they harass and abuse children in street situations and as mentioned in the

literature in chapter 2 as discussed in the HSRC report²¹², children fear for their lives when apprehended by the police officials whom they should be seeking protection from.

Children in streets situations are afforded rights in terms of the chapter 2 of the bill of rights thus police officials are violating the rights that are supposed to be enjoyed by the children in streets situations. It is thus submitted that the role of the police officials is not supported in this regard as it is not in line with the international, regional and constitutional obligations.

(c) The role of the Local Government

Chapter 7 of the Constitution stipulates the duties and responsibilities of the local government. In terms of section 152 of the Constitution:

- “(1) The objects of local government are—
- (a) to provide democratic and accountable government for local communities;
 - (b) to ensure the provision of services to communities in a sustainable manner;
 - (c) to promote social and economic development;
 - (d) to promote a safe and healthy environment; and
 - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).”

The Constitution clearly stipulates what the local government should aim to achieve as stipulated above. It is their developmental duty to ensure the needs of the communities are met, this includes children in street situations. When the local government developed the municipal by-laws they should take into account needs of the marginalised and be progressive with regards to formulating better strategies and policies in order to ensure they enjoy their rights. Killander submits “it 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.”²¹³ It is submitted that local government is not doing enough to ensure that the rights of children in streets situations are recognised as they have powers vested in them to ensure that the vulnerable are cared for and protected. Local government through their by-laws have chosen to rather criminalise the behaviour that keeps the children in street situations surviving as it is their means of survival to beg and find vacant spaces and occupy them.

²¹² HSRC op cit note 19.

²¹³ Killander op cit note 63 at 92.

VI. POLICY FRAMEWORK

(a) The 1997 White Paper for Social Welfare

The White Paper on Social Welfare, published in 1997, is a policy framework that outlines a strategy for a developmental approach to social welfare. It is the first overall social welfare policy under 1996 Constitution. proposed the following measures for meeting the needs of children in street situations:²¹⁴

- Children in street situations will be reintegrated into their families and communities, and vulnerable children will not become street dwellers.
- Appropriate programmes for children living on the streets will be recognised, including, for example, preparing them for formal schooling and jobs for older youngsters.
- More research will be conducted in the future to assess the success of existing programs and to inform the development of new programming.

It is submitted that these interventions are great on paper but it is unfortunate that these are not implemented accordingly and no one is held accountable for these interventions not being applied correctly when concerning children in street situations

(b) The 2016 White Paper on Safety and Security

The White Paper on Safety and Security, approved by Cabinet in 2016, is a policy on safety, crime and violence prevention which is line with the National Development Plan (NDP), that encourages a comprehensive and integrated approach to these areas. The “White Paper aims to establish an overarching policy for safety, crime, and violence prevention that will be articulated in a clear legislative and administrative framework to facilitate synergy and alignment of safety and security policies; and to establish a sustainable, well-resourced implementation and oversight mechanism to coordinate, monitor, evaluate, and report on the implementation of crime prevention priorities across all sectors.”²¹⁵ The White Paper on Safety and Security of September 1998 calls for “effective enforcement of by-laws to ensure safer and cleaner environments less conducive to crime.”

²¹⁴ Department of Welfare (1997) ‘White Paper for Social Welfare’ https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf; Department of Social Development (2014) Strategy and guidelines for children living and working in the streets https://www.gov.za/sites/default/files/gcis_document/201409/strategyandguidelineschildrenlivingworkinginthestreets50.pdf

²¹⁵ White Paper on Safety and Security op cit note 181.

South African municipalities, in particular, have implemented the communication by criminalisation of loitering, begging, illicit street trading, and camping in the streets. It is submitted that this is not in support of children in street situations and it is inconsistent in ensuring the safety of the children in street situations. This also highlights the inconsistencies between the legislation and policies in ensuring that all rights of all persons should be realised.

VII. CONCLUSION

It was argued in this chapter that the South African local government's obligations under international law, as discussed in Chapter 3, have not been met in its domestic legislation and policy. No amendments have been made by the local government to ensure that their bylaws are in line with the mandates and obligations that they ratified and agreed to be in line with. South Africa has seen a progressive growth in challenges to the enactment and enforcement of bylaws that create petty offences, but little is known about how they are adopted and implemented. This leaves the South African local government in violation of its own promise to abide by the recommendations and laws.

Local governments have a developmental responsibility that is not only identified in the Constitution, but also enshrined in legislation. This is in terms of sections 152(1) of the 1996 Constitution and section 1 of the Local Government: Municipal Systems Act 32 of 2000. The duty requires the local government to provide sustainable development. That is the need to sure basic services to the marginalised but instead of following through with the required mandate, the local government is violating the children in street situations rights in implementing and enforcing these bylaws. Not responding to the needs of the children in street situations and by ignoring them in the process of governing communities leads to a failure of municipalities in performing their constitutional mandate. 'Children' is noticeably absent from the Systems Act.

South Africa's commitment to the rule of law is found in our Constitution and in our commitments to international instruments and therefore the constitutional provisions are unquestionably in line with the international obligations. However the same cannot be said for the legislation and the by-laws. There is a gap in the implementation of the constitutional duties by the legislation and policies developed by the local government. The Municipal Systems Act does not clearly mention children as a priority category. Hence execution of the provisions of the Constitution pertaining to local governments will not correlate as they are not properly crafted to include children who are of paramount important and their needs being prioritised.

Further, the by-laws do not correspond with the Children's Act requirement of the best interest as it is not in the best interest of the children in street situations to be fined and detained/imprisoned for committing petty offences. I agree with Couzens who advocates in favour of more responsibilities on local governments regarding children's matters. With regards to the role of the stakeholders the researchers discovered that more work needs to be done by the police, the local government and the department of social development. It was determined that the administration has been too focused on policy concerns in terms of policy formulation and has completely ignored policy execution in ensuring the children in street situations rights are realised. Stakeholders need to address the difficulties that children in street situations face in life and this required a collaborative effort.

In conclusion, eThekweni by-laws as applied to children in street situation criminalise children discriminate against children in streets situations and therefore the by-laws should be amended and repealed to be in line with the Decriminalisation principles, African Court, Advisory opinion, Constitutional provisions and legislative framework.

The study's conclusions and relevant recommendations are presented in Chapter 5.

CHAPTER 5

CONCLUSION AND RECOMENDATIONS

I. INTRODUCTION

As stated in the first chapter of the research, this study aimed to critically analyse the bylaws that criminalise children in street situation, with a focus being eThekweni Municipality. A review of the literature and analysis of legal statutes was undertaken and findings from that process supports the argument that vagrancy laws, including by-laws, that must repealed where they apply to children in street situations. This chapter therefor provides the conclusions of the study and recommendations for how municipalities can ensure compliance with powers invested in them to care and protect children in street situations.

II. SUMMARY OF THE KEY DISCUSSION AND FINDINGS

Chapter two reviewed literature pertaining to children in street situations and their rights. The world is faced with ever-rising population, especially in the cities coupled with economic and social challenges. Rising numbers of children in street situations is no exception to one of phenomenon that government have to deal with, especially local governments. In this chapter, the study looked at the following themes:

- Conceptual and theoretical framework
- The global recognition of children in street situations
- The role of the local government
- The criminalisation of children in street situation
- The Role of the police with regards to children in street situations

In the exploration of the abovementioned themes, it is submitted that this study followed the child rights theoretical approach as it is in support for the paramountcy of the children including children in street situation. This study supported the Child Rights approach because it gives a clear line to follow for the development of children and building a support structure for them. The approach makes a profound call that all individuals are entitled to fundamental rights, and that children are people in their own rights. The mentioning of this approach served this study to highlight the failures of eThekweni Municipality to ensure the prosperity of fundamental rights of children in street situation. In contradistinction, the

repressive/welfare approach views children in street situation as an issue that needs to be removed.

The chapter found many shortfalls in the treatment of the children in street situations and how they are viewed. As it was further discovered and discussed in chapter three and four, children have been discriminated against and criminalised by eThekweni municipal by-laws. Chapter two further established that children in street situation are seen as criminals globally as thus the exercise of their rights is diminished through the mistreatment, the abuse and neglect that they are exposed to. The application of the repressive/welfare approach by eThekweni Municipality the 2010 FIFA World Cup is evident to this. This is done through police officials enforcing mandate in the municipal by-laws established by the local government to criminalise the acts of children in street situations that they engage on and/or do to survive. Of significance to this study is the case of *Villgan Morale v Gautemala* as it advocated for the children in street situations and held that children in street situations should be afforded the same rights in line with the constitutional dispensation, ensuring that children in street situations should be afforded special care and protection due to their vulnerability. It further demonstrated that Guatemala had failed to take concrete steps to protect and assist children on the streets, instead permitting their arbitrary imprisonment, torture, and final murder as part of a larger pattern of violence against children on the streets.

The literature review further identified that the issue of children in street situations is an increasing phenomenon as cities continue to grow with populations increasing under challenges of poverty, and economic stresses amongst other issues. This then requires municipalities to recognise and understand that people, especially children in street situations, will resort to finding different ways to survive in the city including different activities in public spaces such as begging and so forth. Simultaneously, local government in South Africa is responsible for service delivery and development that promotes social and economic development of the nation. Municipalities are mandated under the Constitution and other legislative and policy frameworks to fulfil this duty, yet the eThekweni Municipality has failed to live up to this mandate. This is due to implementation and enforcement of bylaws that criminalise and discriminate against children in street situations, namely the Nuisances and Behaviour in Public Places By-Laws of 2015.

The gaps discovered in the literature and later the inconsistencies in the formulation of the by-laws with the constitution, international and regional laws, policies and legislations showed that criminalisation of children in street situations through petty offences, children in street situations are being discriminated upon because of their status. When the police officials

apprehend them, they do not wait for the children in street situations to be in the wrong but victimise the children based on their status and are perceived and/or assumed to have committed crime. Their rights are infringed significantly, which includes the rights to freedom of movements, equality, and human dignity.

Chapter three identified the key international and regional law obligations resting on the South African state. South Africa as a member state to the UN is mandated to comply with the international treaties that provide authority and require compliance, especially in matters that concern social development and other issues facing the society. Criminalisation and discrimination of children in street situations is a concern as established in the literature. The Convention on the Rights of the Child (CRC) made it clear that the needs of children come first in their call for “first call children.”²¹⁶ The Committee on the Rights of the Child issued a General Comment No. 21 on Children in Street Situations which states that States must ensure that children in street situations are not discriminated against, their best interest is given priority, have their right to life, survival and development respected, and that their voices are heard. However, the research has found that eThekweni municipality has failed to comply with these rights by criminalising begging, sleeping the public spaces, and other petty offences.

The African Charter cemented the similar stand for children in street situations. As part of its mandate to protect and promote human rights the continent, the African Commission on Human and Peoples Right (ACHPR) has recognised that laws exist across the continent that prohibit behaviours that are necessary to live. Such behaviours and activities include but not limited to begging, washing cars in public spaces, car guiding, and so forth. Both the CRC and the ACRWC supported and further ensure that member States of the AU adhere to the rights of the children, which are therefore applicable to children in street situations as passed by the CRC. Again, South Africa as a member State to AU has failed to uphold and comply with the mandates of the Union to safeguard and ensure protection and care for children in street situation. This is evident with the eThekweni Municipal by-laws that according to this research are in contempt of bridging fundamental constitutional Children’s Right and therefore the African Charter.

Furthermore, ACHPR established principles that are very important to the discourse of decriminalising petty offences. The principles are clear that member States need to amend

²¹⁶ UN. Committee on the Rights of the Child *General comment No. 21* op cit note 15.

and/or repeal laws that criminalise conduct in “broad, vague and ambiguous terms”.²¹⁷ To bring it into the context of this research, eThekweni Municipality has failed to honour these principles and comply with the African Charter. The eThekweni Municipal bylaws have also failed to comply with the principle that decriminalise people or conduct based on their status or appearance, and life sustaining activities in public spaces. On the other hand, the African Court in the PALU advisory opinion provided guidance to state parties to ensure compliance by municipalities to their obligations to care and protect children in street situation. According to this research, the African Court in the PALU opinion made it so clear that local governments conducting themselves similarly to the eThekweni Municipality has failed to comply and uphold their part as member State to the AU. It became clear that the bylaws criminalise poverty in the jurisdiction of the municipality, and it is infringed on the right to dignity, equality before the law, and non-discrimination.

The chapters’ main findings concluded that local government needs to amend and repeal discriminatory by-laws which criminalise begging and other life-sustaining activities for them to be in line with obligations of the international law and regional law.

Chapter 4 considered and provided the most relevant constitutional, legislative and policy framework that safeguard the rights of children; children in street situation being included. The study looked at the Constitution of South Africa, 1996, Children’s Act 38 of 2005, the Municipal Systems Act, the Municipal Structures Act, Child Justice Act 75 of 2008, The 1997 White Paper for Social Welfare and the eThekweni Municipality By-laws. The provision on these legislative and policy frameworks suggests that the enactment of the eThekweni by-laws was inadequate and infringed on the children’s rights, in particular children in street situations.

Prior to 1994, South Africa laws had failed to care and protect children and therefore children in street situations; however, democracy saw a rebirth of law with the new constitution recognising child’s rights. The State comprising all spheres of government is obligated to fulfil its duties and responsibilities to care and protect all children. However, findings from chapter indicate that the eThekweni Municipality’s Nuisances and Behaviour in Public Places By-laws of 2015 are in contempt with the responsibilities of the state to ensure the realisation of the children’s rights in the Constitution, Children’s Act, and other statutes. This has been shown in chapter three where Children’s Rights were outlined and discussed as stipulated by CRC and ACHPR.

²¹⁷ Decriminalisation Principles op cit note 7 para 14 at 16

Chapter four further discovered that the bylaws criminalise poverty, homelessness, and discriminate against these children based on their status. This is a clear indication of a vagrant laws that according to the CRC, ACHPR, and Decriminalisation Principles should not exist in member States of the UN and the AU. Therefore, eThekweni Municipality should comply with these to repeal and amend their bylaws that contain criminalisation of petty offence and vagrancy laws. This include law enforcement authorities to act on their responsibility and not criminalise and suspect children because they are on the streets eking for their lives.

The Constitution of the Republic of South Africa advocates and mandates the State to realise “a child’s best interest” in formulating policies and legislations. The Bill of Rights in the Constitution is very important because it prescribes important rights for children. Furthermore, the Bill of Rights have constitutional provisions that are relevant to this study, including right to dignity, right to equality and no discrimination, right to freedom of movement, right to be presumed innocent, and the best interest principle. These provisions are in harmony with the provisions of the CRC and ACHPR for children protection and care. This study found that the eThekweni Municipality should adhere and comply with these provisions to amend and/or repeal vagrant laws. Furthermore, the municipality should be guided by the Children’s Act to protect children in street situations. One of the important provisions and/or clause is Section 6(2)(a) which states that “all proceedings, actions or decisions in a matter concerning a child, must, respect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act”. This is a very critical clause, and it sets a precedent for the State to comply.

Another crucial finding from the chapter is that the Department of Social Development, applicable eThekweni Municipality, is mandated take “reasonable steps to the utmost extent of their available resources to achieve the achievement of the Act’s objectives,” according to section 4(2) of the Children’s Act. However, the eThekweni Municipality passed their bylaws with the knowledge of this provision; the Department of Social Development should have picked this up and realised that it was against the constitutional obligation and what their work and responsibilities are in relation to children in street situations. Even the White Paper on Social Welfare is clear that the interest of children in street situations must be realised, and they must be protected and cared for. Therefore, the responsibilities of the State when it comes to children in street situations is evident: they are responsible to care and protect children in street situations. Furthermore, the State is obligated to comply with both local and international laws as discussed in chapter three of this study.

The study concludes that the bylaws were not established to care and protect children in street situation, nor they were meant to safeguard the rights enshrined in the Constitution of the Republic. Instead allow for state power abuse; children in street situation are further abused by the state organ responsible for implementation of the bylaws. Remedies and solutions to repeal vagrant law are needed in order to create a governmental approach and laws that does not discriminate against status and/or class, or any other form of discrimination.

III. RECOMMENDATIONS

This section evaluates possible proposals that might be utilised to pave the path for improved treatment of children in street situations and the realisation of their rights in South Africa. This study has argued that the children in street situation being detained for petty offences, are impoverished, marginalised, powerless, and vulnerable; because their vulnerability and poverty prevent them from defending themselves and demanding their rights, they are frequently the first victims of police abuse. As much as South Africa has made tremendous progress toward building a democratic society ensuring the protection and realisation of rights of the marginalised such as children in situations, there is a lot of room for improvement required. The implementation is the problem of the obligations set by the international, regional and constitutional law standards. Only by mobilising and collaborating effectively amongst the government, NGOs, and civil society can national legislation, policies, and programmes be implemented effectively. This study suggests that the issues raised are dealt with through legislative and institutional framework.

The following measures are recommended:

(a) Legal Recommendations

It is recommended that the eThekweni municipality needs to amend and repeal the municipal by laws to be in line with the international, regional and constitutional provisions. Local governments have been given the authority to develop laws that are transformative and not isolating within their legislative and executive authorities.

As stated by Decriminalisation Principles by ACHPR, the African Court Advisory opinion, and academic commentary such as that of Killander, Holness, Ballard et al, the eThekweni Municipality bylaws are discriminatory and should be amended or repealed. eThekweni Municipality must “abandon its arbitrary and discriminatory bylaws and street-sweeping techniques” in favour of drafting and implementing a properly financed policy that ensures that

basic services are provided and appropriate referrals are made for all marginalised people's additional needs.²¹⁸

(b) General Recommendations

- i. Make children's engagement in change processes a priority. At all levels, including the drafting of by-laws, create spaces for children's voices to be heard as provided for in section 10 of the Children's Act in conjunction with article 12 of the CRC and ACRWC provisions.
- ii. The creation of strong national child protection mechanisms to ensure that children (and families) who require assistance receive it in a timely, non-stigmatising manner, avoiding unnecessary criminal court participation must be established. This mechanism shall adhere and promote compliance to international treaties that safeguard the children's rights and ensure municipal compliance.
- iii. Ensure adequate budget allocation to social services and programmes for children in street situation so that municipalities and social development agencies are able to take necessary actions and develop proactive strategies to care and protect children in street situations. Furthermore, allocate funds for Non-Governmental Organisations that seek to care and provide for development of children in street situations.
- iv. It is recommended that political will needs to be implemented to safeguard and ensure guidance from the soft law provided for by the decriminalisation principles and the CRC Committee's General Comment 21 and state compliance with the advice provided for by the African Court.
- v. Institutional intervention in law enforcement (especially metro police) is required to ensure adequate training and understanding of roles, responsibility and obligations to care and protect children in street situations.

IV. CONCLUSION

There is an issue with the eThekweni Municipality Nuisances and Behaviour in Public Places By-Laws of 2015. The bylaw is inadequate and has unconstitutional elements in it that infringes on the rights of the children in street situations such as the right to dignity, non-discrimination, the right to life, survival and development, and that their voices are heard. The

²¹⁸ Holness op cit note 6 at 496.

failures have been shown through utilising available literature, legislative and policy framework, and through the analysis of international treaties.

The study also found that eThekweni Municipality has failed to comply with both local and international laws to care and protect children in street situations. These laws include but not limited to international treaties, the Constitution of the Republic of South Africa, Children's Act 38 of 2005 and Child Justice Act 75 of 2008. There needs to be cohesion between international, national, provincial and local policy framework. This will ensure balance and checks that will avoid state power abuse and having vagrant laws in the country. The research provided a strong view for a need for collaboration between state organs and other social development agencies to assist dealing with the development and care for children in street situations.

The objectives of this study was to see if the regulations in eThekweni Municipality dealing with children on the street conform with the state's international and regional law duty to decriminalise vagrancy offenses.

It is concluded that the eThekweni Municipalities' bylaws do not meet the obligations under international and regional law because their bylaws criminalise offenses, and they have not taken steps to amend and repeal their bylaws so that they do not violate the rights of children in street situations.

BIBLIOGRAPHY

PRIMARY SOURCES

INTERNATIONAL AND REGIONAL INSTRUMENTS

African Commission on Human and Peoples' Rights *Principles on Decriminalisation of Petty Offences* (2017) ACHPR/Res. 366 (EXT.OS/XX1). Available at <https://www.achpr.org/legalinstruments/detail?id=2> (Accessed 17 August 2021)

African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003,

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990)

SOUTH AFRICA POLICY INSTRUMENTS, WHITE PAPERS AND FRAMEWORKS

Government of South Africa (2016). White Paper on Safety and Security. Available at: <https://www.saferspaces.org.za/uploads/files/2016-WPSS.pdf>.

Department of Social Welfare (1997) 'White Paper for social welfare' https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf

CONSTITUTION

The Constitution of the Republic of South Africa, 1996

STATUTES

Children's Act 38 of 2005 (*as amended*)

Child Justice Act 75 of 2008

Local Government: Municipal Systems Act 32 of 2000

BYLAWS

eThekweni Municipality: Nuisances and Behaviour in Public places By-law, 2015 1-23

CASE LAW

African Court on Human and Peoples' Rights, *Advisory Opinion following Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, 4 December 2020.

Government v Grootboom and others 2001 (1) SA 46 (CC)

Minister for Welfare and Population Development v Fitzpatrick 2000 7 BCLR 713 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Justice and Others (CCT11/98) [1998] ZACC 15

Ngomane & others v City of Johannesburg Metropolitan another (734/2017) [2019] ZASCA 57

S v M [2008] (3) SA 232 (CC) 261

S v Makwanyane (CCT3/94) [1995] ZACC 3

Teddy Bear Clinic for abused women v, Minister of Justice and Constitutional Development 2014 (2) SA 168 (CC)

Villigran Morales v Gautemala 1999 Inter-Am Ct HR. (ser C) No 63 (Nov 19 1999)

SECONDARY SOURCES

BOOKS

Currie I & De Waal J, *The Bill of Rights Handbook* (Juta & Co. Ltd Cape Town 2013).

Boezaart T, editor. *Child Law in South Africa*. (Juta and company Ltd, 2009).

Davel CJ & Skelton A (eds.), *Commentary on the Children's Act* (Juta & Co. Ltd Cape Town 2007).

Thyer A, *The Handbook Of Social Work Research Methods* (Sage, 2010), 2nd edition.

JOURNAL ARTICLES

- Aptekar, L. (1994). Street children in the developing world: A review of their condition. *Cross-Cultural Research*, 28(3), 195-224.
- Ballard C, Burton P, Edwards L, Gossar A.M, and Sali C, "Poverty is not a crime decriminalising petty bylaws in South Africa" (2021) *APCOF Research Series* at 1- 59
- Bouah, N., & Sloth-Nielsen, J. (2021). Towards Comprehensive Guidance for States in the African Region to respond to Children's Rights in Emergencies, Disasters and Pandemics, *The International Journal of Children's Rights*, 29(2), 447-474.
- Buske S.L, "A Case Study in Tanzania: Police Round-Ups and Detention of Street Children as a Substitute for Care and Protection," (2011) *South Carolina Journal of International Law and Business*: Vol. 8: Iss. One, Article 4 pg 87-130.
- Couzens M, "Child-friendly municipalities: including children on local government's agenda" (2011) *Stellenbosch Law Review Vol. 22, No. 1* at 137-159
- Ewelukwa U, U, "Litigating the Rights of Streets Children in Regional or International for a: Trends, Options, Barriers, Breakthroughs" (2006) *Yale Human Rights, and Development Journal*: Vol. 9 Iss.1, Article 3 at 85-131.
- González-Salzberg D.A, "The effectiveness of the Inter-American Human Rights System: a study of the American States' compliance with the judgments of the Inter-American Court of Human Rights" (2010) *16 International Law, Revista Colombiana de Derecho Internacional*, 115-142.
- Hills F, Meyer-Weitz A, & Asante K.O, The lived experiences of street children in Durban, South Africa: Violence, substance use, and resilience, (2016). *International Journal of Qualitative Studies on Health and Well-being*, 11:1, 30302, DOI: 10.3402/
- Holness W "eThekweni's discriminatory bylaws: criminalising homelessness."(2020) *Law Democracy. Development. (Online)*.vol.24 at 468-511.
- Hunter, J., Chitsiku, S., Shand, W., & Van Blerk, L., Learning on Harare's streets under COVID-19 lockdown: making a story map with street youth, (2021). *Environment and Urbanization*, 33(1), 31-42.

- Kashef, M. 'Urban livability across disciplinary and professional boundaries.' (2016). *Frontiers of Architectural Research*, 5(2), 239-253.
- Killander M "Criminalising homelessness and survival strategies through municipal by-laws: Colonial legacy and constitutionality." (2019). *South African Journal on Human Rights*, 35(1), 70-93.
- Kudrati, M, Plummer, M. L, & Yousif, N. D. E. H. (2008). Children of the sug: a study of the daily lives of street children in Khartoum, Sudan, with intervention recommendations. *Child abuse & neglect*, 32(4), 439-448.
- Myburgh C, Moolla A, and Poggenpoel M "The lived experiences of children living on the street of Hillbrow." (2015) 38(1) *Curationis*, 1-8.
- O Ekundayo "Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC" (2015) *International Journal of Humanities and Social Science Vol. 5, No. 7(1)*
- Ochola L, "Street children and Gangs in African Cities: Guidelines for local authorities" (2000). (Vol. 18). *Urban Management Programme* pg 1-88.
- Panter-Brick C, Homelessness, poverty, and risks to health: Beyond at risk categorizations of street children (2004). *Children's Geographies*. 2. 83-94. 10.1080/1473328032000168787.
- Pieterse M, "Development, the Right to the City and the Legal and Constitutional Responsibilities of Local Government in South Africa," (2014) *South African Law Journal* 131, no. 1:149-177.
- Seager J.R & Tamasane T, (2010) "Health and well-being of the homeless in South African cities and towns", *Development Southern Africa*, 27:1, 63-83,
- Treanor T.J, "Relief for Mandela's Children: Street Children and the Law in the New South Africa" (1994), *Fordham Law Review Vol. 63* at 883- 925
- Van Blerk L "'Managing' Cape Town's street children/youth: the impact of the 2010 World Cup bid on street life in the city of Cape Town", (2011) *South African Geographical Journal*, 93:1, 29-37

Van Buggenhout M, ‘Street child spaces: belonging, conflict and resistance in the city of Durban through the eyes of street youth.’(2020) *Children’s Geographies*, vol 18:1, 96-109

Veeran, Vasintha. “Working With Street Children: A Child-centred Approach.” *Child Care in Practice* 10, no. 4 (2004): 359-366.

Zaal N, & Matthias C, “Local Government and the provision of child care services: an essential area for legislative reform”, (2002) *SALJ* 119 (1) at 146.

UNITED NATIONS PUBLICATIONS AND REPORTS

UN Committee on the Rights of the Child (CRC), *General comment No. 21 (2017) on Children in Street Situations*, 21 June 2017, CRC/C/GC/21 1-21

UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 5 January 2022]

UN General Assembly, *United Nations Children’s Fund (UNICEF)* (1953) A/RES/802, available at: <https://www.refworld.org/docid/3b00f07d80.html> (Accessed on 12 August 2021).

UNICEF, *Child Rights Education Toolkit: Rooting Child Rights in Early Childhood Education, Primary and Secondary Schools* (Geneva, 2014), p. 21. <https://www.unicef.org/media/63081/file/UNICEF-Child-Rights-Education-Toolkit.pdf> (Accessed: 12 August 2021).

United Nations, “Report of the Special Rapporteur on Extreme Poverty and Human Rights” (2011), Available at: <https://undocs.org/A/66/265>

United Nations (2015) *The Centrality of the Right to Housing in the Development of the New Urban Agenda to Be Adopted at Habitat III* available at <https://www.ohchr.org/Documents/Issues/Housing/HabitatIII/HabIII-SummaryReportEN.pdf>

THESES

Gebbers P E, *Health of Street Children in Cape Town* (LLM Thesis University of Cape Town, 1990).

Lefeh, Ngwenjah Rose. *South African Government responses to the plight of street children: An analysis of policy development and implementation in Johannesburg*. (PhD Thesis University of the Witwatersrand, 2008).

Maepa, M. P. *Psychosocial challenges of street children in Limpopo Province and efficacy of social skills training* (PhD Thesis, North-West University, 2015).

Maphumulo, L. S. *Exploring the integration of homeless citizens in the Integrated Development Plan of eThekweni Municipality, the case study of the Qalakabusha Project*. (LLM Thesis University of KwaZulu-Natal, 2020).

Montanez N.C, *The knowledge of Street children in Pretoria, South Africa, of sexuality and of HIV and AIDS* (LLM Thesis University of Pretoria, 2011).

GOVERNMENT PUBLICATIONS

Department of the Presidency of the Republic of South Africa, *National Development Plan 2030 Our Future-make it work* available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf

eThekweni Municipality Integrated Development Plan. (2017/2018). 5 Year Plan: 2017/18 to 2021/22. Adopted by eThekweni Council on 31 May 2017. Available at [http://www.durban.gov.za/City_Government/City_Vision/IDP/Documents/Ethekweni Municipality2021_22_IDP.pdf](http://www.durban.gov.za/City_Government/City_Vision/IDP/Documents/Ethekweni_Municipality2021_22_IDP.pdf) (Accessed: 13 June 2021)

ONLINE SOURCES

Du Toit, J. L. "Containment, displacement or exclusion? Local metropolitan government responses to homelessness in South Africa Pretoria: Human Sciences Research Council" (2010).

- Frohlich S 'South Africa: From the ashes of apartheid.' (2019) available at <https://www.dw.com/en/south-africa-from-the-ashes-of-apartheid/a-48462055> (Accessed: 09 June 2021)
- Gardener (Ed) Black's law dictionary (2009) 1689.
- Gose M, "The African Charter on the Rights and Welfare of the Child." (2002). *Publication of the Children's Rights Project, Community Law Centre, UWC.*
- Human Sciences Research Council (HSRC), (2016) iKhaya Lami: *Understanding homelessness in Durban study* 1-52 <http://hdl.handle.net/20.500.11910/10900>
- Human Sciences Research Council, *Integrative Annual Report 2016/2017* (2017) <http://www.hsrc.ac.za/uploads/pageContent/8653/publication.pdf> (Accessed: 09 June 2021)
- Lennox S.H. "Apartheid in South Africa and the Universal Declaration of Human Rights." *Crime and Social Justice*, no. 24, Social Justice/Global Options, 1985, pp. 5–43, <http://www.jstor.org/stable/29766267>.
- Monsalve V.B, & Román J.A, "Tensions of human dignity", SUR 11 (2009) <https://sur.conectas.org/en/tensions-human-dignity/> (Accessed 20 October 2021).
- Muntingh L, & Peterson K, "Punished for being poor: evidence and arguments for the decriminalisation and declassification of petty offences" (2015) *Bellville: Dullah Omar Institute & Pan-African Lawyers Union* at 1-87 <https://doi.org/10.4324/9781315163710>
- Sexton, A. 2005. Street children: the situation in East and Southern Africa and the need for a strategic global response. A Presentation to the House Committee on International Relations Subcommittee on Africa, Human Rights and Global Operations. Hearing: Protecting Street children Vigilantes or the rule of Law, 13th September, 2005.
- Tolsi N 'Rounded up and shipped out' Mail and Guardian 22 January 2010, available at <http://mg.co.za/article/2010-01-22-rounded-up-and-shipped-out>

ETHICAL CLEARANCE



Ms Sinenhlanhla Sibisi (213532078)
School Of Law
Howard College

Dear Ms Sinenhlanhla Sibisi,

Protocol reference number: 00014130

Project title: A critical analysis of eThekweni Municipality's bylaws that criminalise children in street situations

Exemption from Ethics Review

In response to your application received on 9 September 2021, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law

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