

# Regulating Public Property: The Account of the Homeless

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## Abstract

A global socio-economic problem concerns the unlawful occupation of public spaces. At a time when states are more inclined to adopt welfare-orientated, inclusive social policies, property rules continue to forbid the homeless from exercising those activities that should ideally be done in private. The City of Cape Town serves as an interesting case study to critically reflect on social policies and laws that regulate the use of public property when rough sleeping is not only excessive, but perhaps even normatively accepted. The article reflects on the social dilemma of an emerging conflict between property rules (specifically antisocial behavior laws) and what has become normatively conventional in the streets, sidewalks, and public parks of the City. Antisocial behavior laws are enforced irregularly as the homeless are informally pardoned therefrom; this can lead to civic hostility and more social violations. The regulatory framework pertaining to street people is also analyzed considering the constitutional directive to distribute land/dwellings. Property is inaccessible for the most destitute - the centrality of property is overlooked in the state's pursuit to not only provide access, but also enable the vulnerable to live dignified, self-sustaining lives. For the street population, the freedom to perform every-day acts is socially controlled by the property system to that of state forbearance, shaped by an indefinite norms-based understanding of where certain activities are considered reasonable. This is a unsustainable, inhumane practice that prejudices the entire community and the urban environment.

## Keywords

social control, rough sleeping, housing policy, antisocial behaviour, quality of life policing, broken window theory, housing rights, access to property, redistribution

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## Introduction

Property is limited, and yet, everyone must always occupy some space. The occupation of space goes beyond sleeping as all persons must exercise several basic activities. Those who do not have access to private property are compelled to exercise all actions in the public realm (Waldron, 1991). The regulation and protection of public/common property therefore has a direct impact on both the everyday life of homeless persons and the urban landscape. Framed within this reality, the article sets out a contradictory trend between human rights protection and social control in the context of rough sleeping in the City of Cape Town, South Africa. The chosen case study critically reflects on social policies and laws that regulate the use of public property, and specifically 'common' property, when rough sleeping is not only excessive but has evolved into a normatively established practice. This institutionalisation is arguably rooted in the governmental misallocation of property for destitute groups' housing interests, rendering rough sleeping a property problem with wide-scale societal implications.

Analogous to some jurisdictions, the South African property regime operates in a milieu of human rights where human dignity serves as the cornerstone of the constitutional vision (section 7 of the Constitution of the Republic of South Africa, 1996; Muller and Viljoen, 2021: 16; Plaatje, 2007). Article 1 of the EU Charter of Fundamental Rights is comparable to South Africa as it protects human dignity as an 'inviolable' right, worthy of respect and protection. Similarly, the United Kingdom has signed and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and has incorporated this Convention into domestic law via the Human Rights Act 1998. The European Court of Human Rights (overseeing the ECHR) has held that the very essence of the Convention is respect for human dignity (*SW v United Kingdom* no 20166/92, 22 November 1995, para 44 (ECtHR)). Article 8 of the Human Rights Act also protects property. Unique to South Africa is its constitutional mandate to progressively ensure that everyone has access to land/housing (sections 25 and 26 of the Constitution). South African property law is therefore one of the most progressive institutions considering its imperative to provide land and housing as assets of resilience (Fineman, 2017), to allow all South Africans to flourish and live dignified lives.

The purpose of the study is to critically engage with an evolving property conflict, which clearly manifests in the City of Cape Town – that of social controls that regulate the use and occupation of public property, and the constitutional directive to not only distribute land for housing purposes, but also promote human dignity as a core constitutional right. The article undertakes a theoretical analysis to highlight social problems that may emerge when property rules in the form of social controls are irregularly enforced, giving way to extensive forms of rough sleeping and the inevitable degradation of common property. For the purposes of this article, the concept of social control refers to the mechanism (the property rules) that aims to ensure compliance with norms (the open and accessible use of common property by the public at large) (Meier, 1982).

The article first reflects on the social dilemma of an emerging conflict between the City's property rules (specifically antisocial behaviour laws) and what has become

normatively conventional in streets, sidewalks, and public parks of the City of Cape Town. It shows that antisocial behaviour laws are enforced haphazardly as the homeless are informally pardoned therefrom; this can lead to civic hostility and more social violations. Secondly, the paper unpacks the regulatory framework pertaining to street people and considers it at variance with the outright constitutional directive to distribute land/dwellings as the property remains out of reach for the most destitute – the centrality of property is arguably overlooked in the state’s pursuit to not only provide access, but also enable the vulnerable to live dignified, self-sustaining lives. The case study shows that misallocation of the resource, for dedicated constitutional aims, directly impacts the ability to preserve common spaces, for all other stakeholders, giving way to the gradual degradation of the urban environment. In consequence, the street population’s freedom to perform everyday acts, such as sleeping, washing, and urinating, is socially controlled (Johnsen et al., 2018), and restrained by the property system to that of state forbearance, shaped by an indefinite norms-based understanding of where certain activities are tolerated.

Finally, the paper explores theoretical questions pertaining to the unsustainable, inhumane practice of irregularly controlling the social behaviour of destitute groups in a manner that prejudices the entire community and the urban environment. Public property – and residents’ open access to enjoy the use thereof – must be protected as a constituent of the well-lived life, which is a core contribution of property in any social system (Montgomery, 2013).

## **The Spaces Where People Live**

In 1991, Jeremy Waldron stressed a few truisms that require careful reflection and unpacking at a time when we are assumingly living, and occupying spaces, under the auspice of more egalitarian societies; for most civil-law systems, states are more inclined to at least consider the rights and interests of vulnerable groups when deciding eviction cases and regulating the urban landscape. Firstly, all humans are embodied beings, which means that we always occupy a location; all human-related actions or performances must be done somewhere (1991: 296). This does not mean that we can choose any location to perform certain actions, or simply occupy whichever space we prefer. Apart from physical inaccessibility, a significant percentage of the earth’s surface is off-bounds. Secondly, a core function of property rules is to set these boundaries/exclusions, either for the benefit of one or a selected group of people (private property) or for the use of the state. In the case of the latter where the state property is not intended for public access or use, the property usually serves a specific state function and citizens are denied access. An example would be where the property is used for military purposes. It follows that ‘if a person is in a place where he is not allowed to be, not only may he be physically removed, but there is a social rule to the effect that his removal may be facilitated and aided by the forces of the state’ (1991: 297). Waldron classifies the rules of state property as a subcategory of the rules of collective property. The use of collective property is determined by the state which acts in the community’s interest. The other subcategory of collective property is common property, which is defined as a place where anyone in society may make use of the property without having to

acquire permission before doing so. Examples of common property include streets, sidewalks, parks, and bus stops (Waldron, 1991: 297–298). Even though these spaces are held and intended for a rather indeterminate range of uses, they are not unregulated.

It follows that a private landowner may access and use his/her private property in addition to all common property. Private property rules dictate that an owner can decide who may enter and use his/her property; all others are excluded. This does not mean that property is inherently exclusionary; property rights are regulatory in nature and subject to a range of restrictions for various purposes, such as building and planning laws for health and safety reasons (Muller and Viljoen, 2021: 5; Van der Walt, 1986: 310, 1998: 416).

The more private property a person owns (or may readily access through private property rules), the more spaces he/she may legally occupy and use for various purposes. Inevitably, if a person does not have private property or any admissible use of private property, he/she is bound to use common property for all purposes. Persons without private property, or some access to private spaces, are restricted to live in finite common spaces – the streets, sidewalks and parks – and perform all activities in such spaces that those with private property would perform in private. If the use of common property is regulated to outlaw ‘elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around,’ persons without access to private spaces are altogether prohibited/unfree to conduct these fundamental actions (Waldron, 1991: 300–310, 315). The regulation of common property therefore has a direct impact on fundamental everyday activities and lives of persons without access to private property, exceedingly more so than the extent to which it affects all others if one agrees with Waldron’s account of the complementarity of the public realm:

Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land. (Waldron, 1991: 301)

This brings into question preconceived notions of the use of common property and the social control of the community. The regulation of common property discloses the states, and indirectly, the people’s, conceptualisation, and characterisation of such spaces at a given time. In the 1980s and early 1990s, the United States experienced increased ‘disorderliness of the urban street scene’, which led to political campaigns in favour of greater control of street misconduct (Ellickson, 1996: 1167). Waldron explains that the use of common property was increasingly reserved for activities that are complementary to those performed at home: streets and subways were intended for commuting, whereas parks were earmarked for recreational purposes. The regulatory framework conveyed a clear message, namely that basic human activities, such as sleeping, cooking, urinating, and washing should be done in private, at home. At the time, the reasoning was that when people occupy common property, those places will not only be cluttered with makeshift shelters, filthy blankets and shopping carts, but also become ‘contaminated with urine, faeces, and drug paraphernalia’, which arguably makes it difficult for

all others (those with private property) to use common property 'in the way that they were intended to be used.' (Waldron, 1991: 373)

It was argued that certain types of behaviour, such as panhandling and drunkenness, would exacerbate the 'problem' of creating a public urban environment that is unpleasant, hostile and even unsafe (Waldron, 1991: 373). The assumption was that street behaviour of this kind would result in a net decrease in the use of public spaces as fewer pedestrians would wish to linger there. For Ellickson, the type of behaviour that should be outlawed, for the sake of an attractive city, was nuisances that 'occur when a person regularly behaves in a public space in a way that annoys – but no more than annoys – most other users, and persists in doing so over a protracted period of time' (1996: 1169). The legislative response to outlaw such activities was meant to reduce annoyance, ensure fair access to common spaces in cities and create parks (and other open spaces) that create a healthy focus for the 'public life of the community' (Waldron, 2000: 373). The justification for doing so resonates with Ellickson's reasoning that open-access public spaces must be maintained and protected because they enable community members to freely move about and partake in recreation and face-to-face communication (1996: 1168).

Two normative assumptions underscore such reasoning, firstly that the community would benefit from common property that is attractive as public meeting spaces, and secondly, that common property is intended to serve this purpose – for the community to meet and interact; to exercise activities that are complementary to those conducted at home. The former is largely dependent on the latter: if the core purpose of common property is indeed to allow for complementarity, for all members of the community, that community would most definitely benefit from an appealing, well-kept public environment. However, if common property is increasingly being utilised by members of the community for fundamental everyday activities because they lack access to private property, critical questions should be asked about (a) the social controls that impact the movements and freedom of the homeless; (b) the broader societal values that underscore such regulatory framework; and (c) the obligations of the state to align fundamental rights and values with normatively established practices. In any urban space where homelessness persists, answers to these questions help frame the property regime's overall stance and response to rough sleeping, offering a useful stepping stone from which to address the problem in a systemic fashion.

Even though it is widely accepted that the state must regulate the use of common property to ensure safe accessibility for all and maintain the quality of such places, 'the regulation of public space is a different matter in a community some of whose members have no private space to retreat to than in a community all of whose members have access to private spaces' (Waldron, 2000: 373). The state's regulatory approach to common property must be sensitive to the profile of the community, and the specific day-to-day usage of such spaces by its most regular users. This does not mean that the law should adjust to normatively established practices, as this may conflict with systemically endorsed rights and values. An all-things-considered, contextual approach is therefore required to reflect on social controls that impact homeless persons to determine whether the legal framework, mostly property rules, should be adjusted, or whether normatively established ways of living should continue. In later sections, the City of Cape Town case study

offers a systemic perspective on when normatively established practices overrule property rules in the context of rough sleeping.

## Rough Sleeping

Homelessness is conceptually unclear as it varies across the socio-global context. For purposes of this article the Institute of Global Homelessness offers a workable definition based on three broad categories: people without accommodation; people living in temporary (or crisis) accommodation; and people living in severely inadequate (and insecure) accommodation. Of interest to this article is category 1 'People without accommodation', and specifically subcategories 1A: 'People sleeping in the streets or in other open spaces (such as parks, railway embankments, under bridges, on pavement, on river banks, in forests, etc.)' and 1D: "'Pavement dwellers" – individuals or households who live on the street in a regular spot, usually with some form of makeshift cover'. Subcategories 1B and 1C deal with people sleeping in roofed spaces (such as derelict buildings) and forms of transport (such as vehicles), respectively. These subcategories are also covered under the internationally recognised term, 'rough sleeping', which includes 'people sleeping, or bedded down, in the open air (such as on the streets, or in doorways, parks, or bus shelters); people in buildings or other places not designed for habitation, such as barns, sheds, car parks, derelict boats, stations, or "bashes"' (BBC News, 2010). People living in public places have also been referred to as 'rough sleepers', the 'street homeless' or the 'unsheltered' (Parsall and Phillips, 2014: 186).

Parsall and Phillips argue that a state's response to rough sleeping can be grouped into three non-mutually exclusive categories: (a) to conceptualise and approach persons living in urban public places as in fact 'homeless'; (b) to regulate urban public places for consumers use and the sake of an 'attractive city' – accordingly, the marginalised are ousted from the public sphere as their presence fails to align with the purpose of public spaces; and (c) to frame homelessness as a form of extreme social exclusion or displacement from society.<sup>1</sup> In terms of the second category, street people are problematised from the perspective of having to control urban public places to achieve public order. This approach views homelessness as a form of antisocial behaviour. In response, local criminal laws are used to sweep the homeless, often the indigenous and young people, from public places through forced evictions and laws that criminalise their use of the urban sphere (Parsall and Phillips, 2014: 187).

In line with global trends to adopt egalitarian, human-rights approaches, the more recent strategy adopted in Europe, the United Kingdom,<sup>2</sup> North America, and Australia falls under the third category and is structured to reduce incidences of homelessness by way of a more welfare-oriented approach. 'A key focus is directed towards those individuals deemed to be most vulnerable and this is often taken to be synonymous with living in public places' (Parsall and Phillips, 2014: 187). Contemporary responses focus on social welfare and housing delivery; the rationale for intervention is couched in participatory citizenship and social inclusivity, rather than simply moving the 'problem' elsewhere through criminalisation or handouts.

The modern-day policy intent is however difficult to achieve in practice due to an inherent contradiction, that of sanitising public spaces and coercive compassion

(Parsall and Phillips, 2014: 188). In subsequent sections, the City of Cape Town analysis shows that the way in which rough sleeping is addressed, in practice, is often disconnected from its welfare-oriented policy framework. The case study critically reflects on conflicting contemporary responses to excessive rough sleeping within a progressive human-rights framework.

The City was chosen due to South Africa's constitutional commitment to address homelessness and provide access to adequate housing in a progressive manner; the magnitude of its rough sleeping predicament; and the fact that rough sleeping is criminalised via the property system in a manner that fails to adhere to the constitutional order. Inherent contradictions within this framework highlight a range of theoretical problems that would likely emerge in any urban environment that adopts similar property controls within a rich human-rights paradigm centred on the right to human dignity (specifically, EU states and the United Kingdom). The case study reflects on the centrality of property and its continuous distribution demand to maintain common spaces for various social and recreational purposes, to adhere to constitutional directives. Crucially, it shows how the lack of property, for constitutional housing-related aims, directly hampers other proprietary social imperatives (Rose, 1994).

## **The City of Cape Town: A Case of Controversies**

### *Introduction*

The South African property clause is characteristically progressive in its pursuit to redress apartheid-led segregationist divisions and widespread dispossessions across the property landscape. Property is institutionally, and systemically, central to South Africa's transformation agenda as access to resources, and specially land, underscores core constitutional rights, such as human dignity (*Government of the Republic of South Africa and Others v Grootboom and Others v Grootboom and Others* 2001 1 SA 46 (CC)). Section 25(5) of the Constitution mandates the state to progressively foster spaces where landless persons, and specifically previously dispossessed persons, may reside,<sup>3</sup> whereas section 26 confirms everyone's right of access to adequate housing.<sup>4</sup> These rights are mainly directed at persons who are destitute, homeless, and desperately in need of a space to live.

It is generally accepted that property (land or a dwelling) should be distributed to landless/homeless persons or realigned entitlement-wise, to shore up resilience (Viljoen, 2022a). Even though the de facto realisation of both rights is exceedingly challenging, they form part of a distinct culture of rights and values that aspire to create a more egalitarian society, one in which human dignity and equality serve as the cornerstone of the constitutional order (Viljoen, 2021: 407). Adherence to this culture and the gradual maturity thereof is however largely dependent on the actions of the state and the way in which it regulates property, specifically the social controls that impact all community members (Viljoen, 2022a: 8). Property law regulates access to resources for both constitutionally directed housing rights and all other societal pursuits that benefit the entire community. Central to this article is the dynamic interplay at work between these governmental objectives. The City of Cape Town study sets out that which transpires when

social controls at the local level – intended to protect common property – conflict with the reality of extreme homelessness due to misallocated resources.

The City is bound by the Constitution, the human rights framework and the fundamental values that underpin the creation of an egalitarian society. In line with this vision, the City adopted an inclusive strategy, that of a caring, safe and opportunistic city. The City has identified five strategic focus areas: the *opportunity city* focuses on the creation of an environment that incites job creation, investment and economic growth; the *safe city* seeks to create an environment where citizens feel safe, safety is approached as a well-rounded concept with due regard for social factors; the *caring city* looks after the people of Cape Town, especially those in need; the *inclusive city* provides access to opportunities, where people feel safe and are cared for; and the well-run city aspires to be responsive to individuals' needs and support various programmes and projects by delivering services efficiently and effectively (City of Cape Town, 2017).

Yet, the City's actual stance on homelessness is evident when considering the laws that regulate the use of public places, which underscores the central role that property rules play in both dictating the state's day-to-day approach to vulnerable groups and their burgeoning struggle to survive. Before I look at the regulatory framework, the extent of homelessness in the City requires some contextualisation. In 2020, it was estimated that 14,357 people lived on the streets of Cape Town (Hopkins et al., 2020: 7). In comparison, 2000 rough sleepers are estimated in Darwin, Australia,<sup>5</sup> 2648 in New York City, 12,977 in Los Angeles City and 446 in London (Parsall and Phillips, 2014: 191). Cape Town therefore has a very high percentage of rough sleepers. Even more worrisome is the high percentage (71% of the homeless population) of 'chronically homeless' individuals who are described as people who have experienced homelessness constantly for a minimum of one year, or repeatedly over different time periods. 'To put this figure into context – 24% of the homeless population in the US is classified as Chronic Homeless – less than half the Cape Town figure' (Hopkins et al., 2020: 6). From a global perspective, the South African housing clause is considered as one, if not the most progressive governmental commitment to offer housing for all, and yet, the City of Cape Town has a rough sleeping crisis, alongside high levels of informal housing.

### *The Regulatory Framework*

In Cape Town, the Streets, Public Places and the Prevention of Noise Nuisance By-law, 2007 (Western Cape Provincial Gazette no 6469) administers public nuisances, the use of public places, traffic and aggressive, abusive or obstructive behaviour in the public. Section 1 defines a 'public place' to include a public road (further defined as any road, street or thoroughfare as well as the verge of any such road, any bridge, ferry or drift traversed by such road) any parking area, parks and squares, beaches, vacant municipal land and all public land that is not leased or alienated by the City. The bylaw prohibits all citizens – when in a public space – from interfering with the safe or free passage of pedestrians or motor vehicles (section 2(1)). No person may in a public place use abusive language; fight; urinate or defecate (except in a toilet); bath or wash himself/herself; perform any sexual act; appear nude (except where nudity is permitted); consume any liquor or drugs; be drunk or under the influence of drugs; start or keep a fire (except



where officially authorised to do so); or 'sleep overnight or camp overnight or erect any shelter' (section 2(3)). Any person who contravenes the bylaw shall be guilty of an offence.<sup>6</sup>

[I]n 2019, each month the CCID [Cape Town Central City Improvement District] received more than 1000 complaints from businesses and members of the public relating to homelessness, each which had to be responded to by security officers. (Hopkins et al., 2020: 9)

In response to increased complaints about anti-social behaviour, non-compliance with bylaws and crime committed by people living on the street (specifically during COVID-19), the mayor assured residents that it aims to provide social assistance to persons in need and uphold the Rule of Law. Yet, the state's primary objective is to uphold the law; the City is guided by its laws and policies and 'every single resident has to comply with by-laws, and the law in general' (City of Cape Town, 2021). In response to increased rough sleeping, the City has made it clear that it opts for across-the-board evictions to uphold the rule of law, in the interest of its communities, and to promote the development goals of the city. The eviction of homeless persons is also important for the retention of the 'existing right of all public and private landowners to protect property' (City of Cape Town, 2021). The City's regulatory framework in relation to common property is clearly embedded in the logic and exclusivist norms that underpin neoliberalist approaches to property law.

Street people, as all other residents of the City, must therefore abide by laws that regulate the use of public spaces. Non-compliance with by-laws is first met with a compliance notice, whereafter (in the event of non-compliance) an admission-of-guilt fine is issued, to be paid to admit guilt and avoid court proceedings. Failure to pay the fine will result in a summons to appear in court and failure to appear in court results in a warrant of arrest (Inkathalo Conversation, 2013: 165). The By-law resonates with the second responsive approach to homelessness as explained by Parsall and Phillips: it depicts the day-to-day living of homeless persons as anti-social behaviour and responds with criminalisation (2014: 187). Rough sleeping conflicts with the Metropolitan's objectives to control public places for public order and create a safe and inclusive urban environment for all. Unsurprisingly, the City has openly adopted a proactive crime prevention methodology, underscored by the Broken Window Theory (Gossar, 2021).

In terms of this theory, Wilson and Kelling argue that enduring minor disorder both disturbs an urban environment on its own account and signifies that social controls are indeed weak at that locale. Unchecked street misconduct can arguably have a multiplier effect in that diminished forms of control can lead to more serious criminal acts (1982: 35–38).<sup>7</sup> Accordingly, there is a direct relationship between neighbourhood disorder and fear of crime (Hinkle and Weisburd, 2008) as physical and social disorder can lead to fear amongst citizens, leading to retreat into their homes (Chappell et al., 2011: 522). In consequence, informal social control mechanisms break down, which suggests that a neighbourhood is not only uncontrolled, but also uncontrollable (Wilson and Kelling, 1982: 33). This leads to more serious crimes as 'disorder causes fear, and fear leads to activities that cause serious crime' (Chappell et al., 2011: 523). The broken window theory has had a profound impact on policies in the policing arena, generally

termed 'quality of life policing' (or antisocial behaviour) that focus on issues pertaining to panhandling, public drunkenness, noise, littering and dilapidated buildings. This form of community policing adopts a zero-tolerance approach to 'misdemeanour crimes' as it operates against more serious crimes (Chappell et al., 2011: 523). The broken window theory also suggests that disorderly behaviour has a profound impact on the quality of urban life; some have even argued that fear (rooted in physical and social disorder) 'produces a loss in personal well-being' (Chappell et al., 2011: 523; citing Moore and Trojanowicz, 1988: 3).

Despite the City's legislative and executive approach against social disorder and its outright drive to build a safe, inviting urban sphere, everyday life on the streets and sidewalks manifests that the bylaw is inconsistently enforced, at least in relation to rough sleepers. Most magistrates are reluctant to issue warrants and 'where warrants of arrest are issued and executed, street people appearing before a court seldom face any consequences' (Inkathalo Conversations, 2013: 166). It is therefore not surprising that homelessness costs the City R744 m per year; reactive or punitive spending amounts to 45% (R335,3 m) of the total cost and includes costs that are responsive to the problem (Gaetz, 2012).<sup>8</sup>

The bylaw, as a core regulatory mechanism against social disorder, is arguably at variance with the socio-economic reality of homeless residents who regularly use and occupy public spaces in the urban sphere – the extent of rough sleeping is extreme, which inevitably means that the use of at least some public spaces is shifting. This progression is driven by the desperate living conditions of the most vulnerable individuals in society. The legislative framework and state intent to control social behaviour in the public realm conflicts with both the everyday living experiences of the homeless community and the normative framework that has at least partly been established in relation to rough sleepers. Even though the state should arguably opt for social control in public spaces for various objectives, such as public safety, 'to provide a fair basis on which all citizens could make use of the public spaces of their city' (Waldron, 2000: 373) or ensure recreational activities, quality of life policing cannot be upheld when: (a) all laws must adhere to a human-rights directive, driven by human dignity, equality and the progressive realisation of access to land/housing; (b) rough sleeping is excessive; and (c) the state is failing to provide the requisite land/dwellings (Viljoen, 2022b). Waldron correctly argues that 'the less the society provides in the way of public assistance, the more unfair is its enforcement of norms for public places that depend on complementarity that simply doesn't apply to a considerable number of citizens' (Waldron, 2000: 399).

The second part of the regulatory framework is focussed on the general well-being of street people and is set in the Street People Policy (City of Cape Town, 2013),<sup>9</sup> which resembles the third policy approach to rough sleepers as explained by Parsall and Phillips (2014: 187). Even though it is welfare-oriented, it is problematic from a property perspective as it fails to provide access to land/housing, which affects human dignity, and the extent to which social controls (the Noise Nuisance By-law) can be enforced in a constitutionally compliant manner.

The main objective of the Policy is to formulate the City's:

processes to identify and provide street people with the necessary development assistance to access accommodation, health services, skill-development services, employment and social

grants and aid in facilitating the reintegration or reunification of street people into families, community and society. (City of Cape Town, 2013: 2.1)

The Policy articulates the roles and responsibilities of different role-players, makes provision for supportive networks and ultimately aligns the City's response to street people with the City's core strategic plans and priorities (City of Cape Town, 2013: 2.2, 2.3, and 3). Street people are supported by social workers to facilitate their referral to an assessment centre where they aid in the development of the person's personal development plan; assist with the detection of mental health problems; assess the person's general physical health; identify substance abuse; and conduct a job readiness assessment to facilitate a job replacement and ultimately enable reunification or reintegration into community structures (City of Cape Town, 2013: 7.2).

Contrary to the Noise Nuisance By-law, the Street People Policy focuses on social inclusivity, although from a property perspective, it fails to accommodate and include the destitute as dignified members of the urban environment. Temporary accommodation is only provided if the social worker requires more time for assessment purposes and the street person entered the assessment centre after business hours; or when a street person 'appears to be in distress' (City of Cape Town, 2013: 7.3). 'Secondary Accommodation' is only available if a social worker refers a street person to a shelter for 'rehabilitation or a diversion programme following a decision by the community court' (City of Cape Town, 2013: 7.4). The constitutional right of access to adequate housing remains a serious obstacle for the state, not only in relation to street people, but millions of others who live in deplorable, unsafe and informal conditions (Kok et al., 2010; Muller and Viljoen, 2021). The right applies to all who are destitute and stuck in living conditions that are generally considered to be 'inadequate'. Yet, such inadequacy varies across a spectrum of types and forms of deficient housing, from shacks clustered in big informal settlements, and unlawful occupation in inner-city buildings, to rudimentary, makeshift tents under bridges.

The local, and state response to the last-mentioned category of 'street people' is generally to offer temporary, overnight, accommodation in the form of shelters.<sup>10</sup> Overnight shelters are provided on an ad hoc basis by various state-like institutions and are not specifically regulated; they operate extemporaneously. Empirical studies show that overnight shelters fail to accommodate homeless individuals' autonomous way of living, because of the strict rules imposed, specifically in relation to opening and closing times.<sup>11</sup> As voiced by a homeless person:

[T]here's certain things that we need to do to that "skarrel" ... you need to be up at 4:30 – you need to be at the bins – and you need to know what bins you're gonna scratch in ... and that means getting up early ... A shelter ... you would need to follow a set of rules, now that set of rules might not apply with our way of living ... The best thing for us then would be: get your own place be your own person. (Inkathalo Conversation, 2013: 282)<sup>12</sup>

From a property perspective, the Street People Policy is clearly inconsistent with rough sleepers' preoccupation to freely perform essential acts (Waldron, 1991: 303). These include not only the ability to take much-needed rest but also being on the streets at certain times to survive. Shelters enforce social controls that impede marginalised

individuals' means to earn some income. To date, the City of Cape Town has not taken the most basic, fundamental steps to provide a physical space, let alone decent housing, where its most vulnerable residents can take occupation and live with autonomy. In consequence, rough sleeping continues and brings about an array of social predicaments as already identified. Arguably, any state that endorses a humane, dignified way of living must proactively identify and make state property available for what society would consider essentially private acts. Once rough sleeping is framed as access to a property problem, which should be addressed in a progressive manner to protect destitute groups' human dignity, the state approach shifts to that of not only setting in motion ways to actually provide adequate spaces to gradually solve the problem but also establishing a nuanced balance relating to the use of public property.

### *The Policy Response, and Why It Fails*

Social policies that are aimed at tackling social exclusion by reconnecting marginalised, homeless groups to the formal labour market have been heavily criticized for 'equating social inclusion with participation in paid employment' (Kennedy and Fitzpatrick, 2001: 2011). From a social inclusivity perspective, it follows that a great deal more should arguably be done about preventative interventions that are crucial at 'crisis points' (such as eviction or discharge from institutions), which can lead to homelessness. There is however a debate in Britain and the United States about the merits of a targeted approach to the prevention of rough sleeping as it merely tinkers at the edge of more fundamental problems (Kennedy and Fitzpatrick, 2001: 2011). Overall, it has been suggested that neither accommodation nor social security benefits are sufficient to assist rough sleepers out of their state of vulnerability; instead 'street homelessness and begging should be reconceptualised as manifestations of social exclusion, recognising the existence of "compound disadvantage" which is persistent and resistant to traditional policy solutions' (Johnsen et al., 2018; Kennedy and Fitzpatrick, 2001: 2012; Wilmot and Murie, 1988).

Cape Town's regulatory framework confirms these sentiments that conventional policies are inadequate to address the complex social problem of rough sleeping. Before I consider the reasons, I share my regret with Waldron that the inevitable presence of thousands of rough sleepers in public spaces necessarily forces all other residents to share in their company as the homeless perform private acts in areas that should preferably be used for exercising civic rights and social pursuits. From a human rights perspective, for any person to conduct private acts in public is undignified – the governmental allowance thereof sanctions an inhumane way of living that essentially conflicts with core constitutional rights and values. It is also regrettable as the consequence may well be 'an impoverishment of the public dimension of culture and civil society, as those who have a choice flee the downtown streets and parks and take refuge in cyberspace, suburban malls, or gated communities, leaving public places to the mercy of those who have no option about remaining there. But it is important to see that this is not the sort of dilemma that we can solve by simply adjusting the regulations' (Waldron, 2000: 399). Traditional policies, or even some adjustment thereof, will grapple to address rough sleeping if (a) the regulatory framework is at variance with what is normatively established – social norms include informal customs and practices, to which state law often takes second place (Waldron, 2000: 400) and (b) property remains

inaccessible for welfare-oriented, human-right objectives. The article shows that the former is largely a result of the latter.

In relation to the former (a), rough sleeping has largely become normatively acceptable in the City of Cape Town because of its extent and the lack of response by authorities; a predicament that was exacerbated by COVID-19 and restrictions placed on evictions. The emergence and sustenance of social norms are however neither simple nor predictable; the conditions under which they are constructed mean that they are more conforming (than the regulatory response) to the everyday plight of certain individuals, and others' awareness of those struggles (Waldron, 2000: 403). As a result, the Noise Nuisance By-law (as part of the political stance against social disorder) has become partly obsolete. The extent to which it is no longer enforceable is determined by a complex, norms-based understanding of what is reasonably accepted behaviour in public spaces by those who have no access to private property.

[T]he public peace – the sidewalk and street peace – of cities is not kept primarily by the police, necessary as police are. It is kept primarily by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves ... No amount of police can enforce civilization where the normal, casual enforcement of it has broken down. (Jacobs, 1961: 31–32)

I briefly reflect on the dilemma of living in a society where norms and rules – specifically in relation to the use of public property – conflict and rules become normatively unenforceable, before turning to (b), the inaccessibility of property. Keuschnigg and Wolbring state that human behaviour is generally controlled by social rules, often taking the form of laws or norms, which define the spectrum of acceptable behaviour within a given society, or specific locale (2015: 97). Physical or social disorder can serve as contextual cues that offer an inference on the extent of social control. If there is disorder in a specific location it means that either nobody has prevented the norm (or rule) violation, or someone has previously sanctioned it. Consequentially, 'people lower their expectations about the probability of being punished for deviant behaviour and generally have less incentive to comply with the rules ... disorder as a signal for low social control can promote spillover effects where violations of one norm [or rule] foster non-compliance to non-identical target norms [or rules]' (Keuschnigg & Wolbring, 2015: 100–101).

Non-adherence to antisocial behaviour laws creates the impression that there is a social disorder. The outright manifestation of disorder – the physical observation of a spectrum of illegal activities, without any consequence – signifies that rules may be violated. Such governmental sanctioning conflicts with the basic premise of the rule of law, that rules will be applied without preference, not only by courts but the local authority; the rule of law demands the fair and democratic exercise of public power, grounded in fundamental rights (Kruger, 2010). In South Africa, the Constitutional Court has held that the duty to uphold human dignity and progressively strive to ensure that all persons have access to adequate housing are aspects of the rule of law (*Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC)).

What we see in rough sleeping environments, often found in pockets of Cape Town's Central Business District, is that those communities who continue to unlawfully occupy

such spaces might have an informal, norms-based understanding with the local authority as to what tolerable behaviour is. Crucially, this is not necessarily shared by everyone. An elderly lady who has to travel early in the morning to get to work in the City may feel anger and resentment towards the homeless person occupying the bus stop while she has to stand in the rain. Property rules – here taking the form of bylaws that regulate the use of public spaces – are meant to set behavioural boundaries. If they are not enforced or, even worse, unequally enforced, uncertainty, social disorder, community resentment and compassion fatigue will ensue.

In relation to (b) the property problem, the Street People Policy is essentially misdirected from a property perspective as it fails to either offer accommodation (temporary or more permanent) or simply aid the most destitute of the homeless population to access spaces where they may legally take refuge from the elements and perform every-day acts. Read with the Noise Nuisance By-law, for the homeless, the freedom to perform everyday acts is confined by the property system to that of state forbearance, shaped by a normative, ad hoc understanding of where what is reasonable. Of course, this has a direct, detrimental effect on freedom and human dignity. If actions that are ‘basic to the sustenance of a decent or healthy, in some cases basic to the sustenance of life itself’ (Waldron, 1991: 320) are closed off, or temporarily tolerated, the constitutional promise as underscored by the Bill of Rights, will ring hollow. The Constitution demands that property – land or a dwelling – must be distributed to landless/homeless persons or realigned, entitlement-wise, to shore up resilience. Once this promise is fulfilled, property as an institution can do the heavy lifting and allow marginalised groups to take their rightful place in society and live with dignity. It is accepted that secure tenure is not only critical for poverty alleviation but also directly linked with human dignity (Durand-Lasserre and Royston (2002); Fineman, 2008: 19).

## **The way Forward**

Rough sleeping is a global problem, it sets a precedent that inhumane living conditions are normatively accepted, common property can be utilised for what the community would consider private actions and property rules may be unequally enforced. This predicament has a multiplier effect on a community’s beliefs: social disorder is normal; socio-economic rights are unattainable; and public spaces in the urban sphere are inaccessible, perhaps even unsafe, rendering enclosed communities and suburban malls exceedingly attractive. In the City of Cape Town – similar to jurisdictions that endorse human rights, and specifically the right to human dignity, rough sleeping is an unconstitutional reality as the most destitute live in deplorable conditions, whilst facing continuous threats of forceful eviction and prosecution. The regulatory response to rough sleeping is inadequate as it is grounded in two conflicting, yet conventional approaches, that of curbing antisocial behaviour and offering welfare-oriented types of social assistance. The former essentially outlaws the very existence of rough sleepers as they are spatially proscribed from performing the most basic human activities, whilst the latter is at variance with the central role that property plays in the ability of vulnerable groups to survive, let alone live dignified, fulfilling lives (Alexander, 2013: 452; Penalver, 2008: 828; Viljoen, 2019: 4).<sup>13</sup> The importance of public property for the fulfilment of human flourishing should however not be dismissed;

propriety creates the civic milieu in which the community can live sociable lives (Page, 2021: 68). The state-endorsed utilisation of public property by the homeless underscores an array of social problems that stem from rough sleeping, including the deterioration and abandonment of common spaces.

Some governmental overhaul is arguably required as part of a systemic, streamlined approach to overcome rough sleeping, the details of which extend beyond this article. Two preliminary, yet related, steps in this pursuit are identified here, that of aligning what is normatively accepted with property rules; and recharacterising some public spaces for the homeless to legally occupy. In Cape Town, the property rules, as well as the social controls they impart, must support normatively acceptable ways of living. The problem is that rough sleeping – regardless of whether it is normatively established – is constitutionally impermissible, it endorses an undignified way of living. South Africa, as most other western societies, has taken proactive steps against inhumane living conditions; it is bound by constitutional directives to transform past practices that allowed, and even forced, vulnerable groups to live in deplorable, unsafe spaces. The Noise Nuisance By-Law is therefore not necessarily problematic, provided that there are enough public spaces accessible for homeless persons to conduct everyday acts. To enforce property rules in a humane, constitutionally compliant and fair manner, public property must be set aside for those without private property to perform private actions<sup>14</sup>; this is a threshold requirement for any regime founded on human dignity.


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### **Notes**

1. Parsall and Phillips explain that ‘people have inhabited urban public places throughout modern history, it is only since the late 19th century that this has commonly been framed as homelessness. In the High Middle Ages, poverty was idealized and residing in and travelling around public places could be constructed in spiritual terms’: 187, referring to Kyle, 2005.
2. In Britain, the best-known homelessness initiative is the Rough Sleepers Initiative (RSI), which was launched in 1990. Similar to the Cape Town Street People Policy, the RSI made provision for outreach work, hostel accommodation, ‘move-on accommodation and settlement services’ to prevent the need for rough sleeping in the streets of London. (Kennedy and Fitzpatrick, 2001: 2001–2002). This initiative was extended to other cities in England, with a Scottish RSI launched in 1997. A Rough Sleepers Unit (RSU) has subsequently been introduced to co-ordinate rough sleeping across England, mainly to reduce the number of rough sleepers by two-thirds.
3. See specifically Pienaar, 2014: Chapter 7; Viljoen, 2021; Ntsebeza and Hall, 2007.

4. See specifically Muller and Viljoen, 2021 for a discussion on the fulfilment of this right.
5. Similar to the City of Cape Town, the Northern Territory in Australia embraces a zero tolerance to antisocial behaviour. The short-term response is to remove rough sleepers from public places because of the perceived danger that they pose to the wider community. Darwin's model of outreach is primarily funded to address antisocial behaviour 'as part of a public safety model'. Short-term 'move-on' strategies are usually directed against rough sleepers who engage in antisocial behaviour and entails moving 'Aboriginal people around from one temporary spot to another.' The reason for doing so is rooted in the 'public's concern of Aboriginal people being in public, [yet] there is nowhere to move them to': Parsall and Phillips, 2014: 195–196.
6. Section 23(1). Noting some exceptions, the perpetrator will be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment. Section 14(f) and (g) of The Integrated Waste Management By-law, 2009 (Western Cape Provincial Gazette 6651, 21 August 2009) provides that no person may 'deposit domestic ... waste in a public litter bin; or ... deal with waste in a manner that causes dust, spillage or litter': section. Most of the offences as regulated in the Public Places By-law, as well as the Waste Management By-law can be described as 'petty offences', including nuisance, littering, bathing in public, using abusive language and drunken behaviour. In terms of The Principles of the Decriminalisation of Petty Offences in Africa (2017) 10 of which South Africa is a state party, criminalisation of petty offences (as those listed in the by-laws) contributes to 'discrimination and marginalisation by criminalising poverty, homelessness and unemployment, and impact the poorest and most marginalised persons in our communities.'
7. For empirical findings on this theory, see Keizer et al., 2008 where they found that physical disorder, such as litter or graffiti, encourages further norm violations, including stealing and non-conformity to trespassing, by others.
8. In the United Kingdom, the total cost of homelessness was estimated to be more than \$1,2 billion (U.S. dollars) annually, whereas in Canada the estimate was US \$6,7 billion. In California, which has a population of 3,2 million people, the cost was US \$2999 million in 2014, 2015 (Hopkins et al., 2020: 4).
9. It defines 'street people' as '[p]eople, who for any reason use the outdoors as a place of abode for a lengthy period'.
10. The City of Cape Town's Safe Spaces offers transitional shelter, which is described as 'overnight shelter'. For example, the Culemborg Safe Space (located on the City Foreshore) provides roughly 230 resting places for homeless persons (City of Cape Town, 2021). It is doubtful that the state implemented a programme that includes measures to provide relief for persons in desperate need of housing as it was requested in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 paras 52, 69 and 99.
11. In *Dladla v City of Johannesburg* 2018 2 SA 327 (CC) paras 44 and 47, the house rules of a temporary emergency shelter, including when occupiers had to enter the shelter at night, when they had to leave the shelter in the morning and gender-differentiation of dormitories where held to conflict with the occupiers constitutional rights (human dignity, section 10; freedom and security of the person, section 12; and privacy, section 14).
12. 'Skarrel' is described as a form of economic activity for homeless persons; it includes the act of 'scratching through waste bins or dumping areas in search of food or discarded objects to either use, recycle or resell as a form of income' (Inkathalo Conversation, 2013: 46). Similarly, in England, some sleep rough due to inaccessible temporary housing for certain groups, such as persons with mental health or drug problems. Others rejected hostels because of their previous poor experiences, including violence, intimidation, and restrictive rules (Kennedy and Fitzpatrick, 2001: 2007). In Darwin, Australia, rough sleeping is often 'an act of agency and



- a deliberate response to situations'; it enabled the homeless through purposeful and conscious action to achieve some sense of autonomy, safety, and freedom. Rough sleeping is consequential to other self-sustaining goals, including autonomy enhancement, accessing services, and escaping violent communities or 'home' conditions (Parsall and Phillips, 2014: 198).
13. In South Africa, the Constitutional Court has confirmed that 'human dignity, freedom and equality – the foundational values of our society, are denied those who have no food, clothing or shelter': *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.
  14. Public property does not have to take the form of adequate housing, it can simply consist of physical spaces, including open land or vacant buildings, where homeless persons can access basic services and where they may legally take shelter from the elements. In the absence thereof, homeless individuals are forced to occupy common spaces, such as sidewalks and bus stops. If the state does not have enough property available for this purpose, it can expropriate private property at minimal costs, especially when the property is not utilised by the private owner: Viljoen, 2014, 2022b.

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