# How Not to Legislate About Begging and Rough Sleeping

## A critique of the Government's proposals for replacing the Vagrancy Act 1824

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# About the Author

**Sir Stephen Laws KCB, KC (Hon)** is a Senior Fellow in Policy Exchange's Judicial Power Project and former First Parliamentary Counsel

Published by
Policy Exchange, 1 Old Queen Street, Westminster, London SW1H 9JA

www.policyexchange.org.uk

ISBN: 978-1-913459-98-7

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## Introduction

The Vagrancy Act 1824[1] has a long and controversial history, the next instalment of which – maybe the last – was delayed when Parliamentary business was suspended following the late Queen's death. It is due to be resumed when the Commons' Public Bill Committee on the Government's Levelling-up and Regeneration Bill considers the few remaining provisions of the Bill that it had not reached by 8 September. The committee is due to meet again, for the first time since then, on Thursday 13 October.

The latest instalment, with its historical contexts, provides some, perhaps useful, insights into legislative policy-making and the working of Parliament, together with what does or does not make good legislation and good legislative practice.

One of the remaining provisions of the Bill to be considered by the committee is a clause for replacing provisions of the 1824 Act about begging and rough sleeping which have been repealed but the repeal of which has not yet been brought into force. The clause is currently in a form that cannot be recommended; but it has been included in the Bill in an unacceptable form only as a "place holder" for replacement provisions to be proposed at a later stage - a use of the legislative process that merits criticism.

## The historical background of the Vagrancy Act 1824

The enactments from before the constitutional watershed of the Great Reform Act 1832 that continue in force and remain relevant do so mostly because they are part of the constitutional narrative of the United Kingdom, and so survive because of their constitutional significance. It is very rare for an Act of the antiquity of the 1824 Act to continue to be in practical use in day-to-day policing or to be a source of ordinary business in the magistrates' courts. But the provisions of the 1824, did continue in practice to be used in that way throughout the 19th and 20th centuries and their use has continued into the 21st.

Over time, elements of the Act's provisions that made it a catch-all, and often controversial**,** remedy for enforcing public morality were removed or superseded. It ceased to be a legislative tool for combatting obscenity and prostitution. It ceased to be the mechanism for licensing pedlars. Its provisions for arresting and prosecuting those found "loitering with intent" – the infamous "sus" law – were repealed in 1981. Its role in prosecuting indecent exposure was replaced by a new offence in the Sexual Offences Act 2003. What survived into the current decade were the provisions that provided a means of prosecuting those engaged in begging or rough sleeping.

The original context for the 1824 Act were social problems resulting from the discharge from the Army and Navy, following the end of the Napoleonic Wars, of large numbers of soldiers and sailors. Unable to find work and frequently separated by their service from their parishes of origin and without the skills or indeed the temperament needed for civilian work, many of them found themselves on the streets of London

1. This paper is confined to a discussion of the Act in its application to England and Wales. Some of its provisions had effect outside England and Wales. It no longer has any effect in Scotland but some of it continues to have effect in a modified form in Northern Ireland.

and other large cities, or just wandering the countryside in search of new occupations.

The Act, though, was not just an urgent reaction to the consequences of contemporary decisions about the funding of the country's armed forces. It was also the latest development in a much longer thread of legal history that began in Tudor times or before and, after the passage of the 1824 Act, continued and accelerated with the growth of industrialisation.

Throughout the history of the Poor Law the concept of "vagrancy", in one form or another, was central to how poor relief was provided in England and Wales. The provision of relief for the poor was used as the policy justification for the suppression of begging and (in a paradoxical but, to us, familiar way) the reverse was also true. Vagrancy and conduct covered by related concepts were significant because they provided a particular challenge to the parish-centred way in which the poor law system was funded and provided.

The issues that dogged the development of poor relief in England and Wales, throughout its history, were , first, the difficulty of producing a satisfactory system for spreading the burden of providing relief between different parishes and, secondly, the perceived need to distinguish and discriminate between those who were poor because they were unable to work and those who were poor because they were unwilling to do so – the difference (as George Bernard Shaw had Alfred Doolittle articulate it in Pygmalion) between the deserving and the "undeserving" poor.

In 1824, it was local justices of the peace who, in the absence of a structured system of local government, both supervised the provision of poor relief in the discharge of their "county functions" and punished vagrancy and vagabondage as members of the local judiciary. The issues of poor relief and begging were both linked in policy terms and combined in the dual roles of local justices of the peace. It was not until the "new poor law" of 1834, ten years after the 1824 Act, that the administrative role of magistrates in supervising poor law relief was transferred to boards of local "guardians".

It seems that there is nothing new about the phenomenon by which a desire to find a legislative solution for a social evil results in legislation that addresses its symptoms, while the policy that is needed to address its causes is more complex, takes longer to be effective and is something to which legislative change is likely to be only peripherally relevant.

## The need for repeal

In 2018 the Government had announced that it would carry out a review of rough sleeping which would include a review of the 1824 Act. The Government confirmed that it would consider a range of options, including retention, repeal, replacement or amendment of the Act. But the review was delayed by the Covid pandemic.

Nevertheless, by 2021, it was clear that the remaining provisions of the Vagrancy Act 1824 were ripe for repeal, and that the UK Government accepted as much. The then relevant Secretary of State described the Act

as an "antiquated piece of legislation whose time has been and gone."[2] It was accepted that, insofar as the 1824 Act made "rough sleeping" a criminal offence, the law had to be made compatible with international commitments - and, it has to be said, with a moral imperative - not to allow homelessness itself to be punishable as a crime.

Also in that year, the European Court of Human Rights issued a judgment in the case of *Lacatus v Switzerland*[3] that decided that an **outright** ban on begging in public places violated Article 8 of the European Court on Human Rights (respect for family life). Interestingly, the judgment seemed to adopt the same approach to the facts of the case in question that had been adopted by William Wilberforce in criticising the original Bill for the 1824 Act: that the ban in that case did not take sufficient account of the individual circumstances of the individual to whom the law applied.

The judgement of the Strasbourg court is relevant, of course, not only to the 1824 Act, but also to the construction and survival of miscellaneous local Acts and byelaws that also impose prohibitions on begging in particular places. But that is not an issue for this paper.

Unfortunately, the Strasbourg court, in the way of such judgments, while imposing a practical constraint on future policy making, failed to give clear or satisfactory guidance on where precisely the parameters of that constraint were to be understood to be. Any legislator seeking to regulate begging in a way that fell short of an outright ban was left more or less in the dark as to what is likely to be found compatible and what is not. Obviously, a quite open discretion to take account of individual circumstances could not possibly be made compatible with what the rule of law requires by way of certainty in the case of a criminal offence. The judgment creates a similar undesirable unpredictability to that already produced by the requirement of s. 4 of the 1824 to be able to "give a good account of himself" (see the text of s. 4, which is set out below).

## The Act is repealed

What happened next was that, during the passage through Parliament of the Bill for the Police, Crime Sentencing and Courts Act 2022, an amendment was moved in the House of Lords to repeal the whole of the 1824 Act for England and Wales. The argument was that the continued criminalisation of homelessness and of the poverty demonstrated by a resort to begging was no longer tolerable and was also, from a policy point of view, counterproductive. The Government opposed the amendment on the ground that consideration needed to be given to "how and why the Vagrancy Act was still used to tackle begging and what impact any changes to the Act will have."

The Government was defeated, and the repeal became law in section 81 of the 2022 Act; but the repeal but did not come into force immediately, because it was subject to a provision that left it to the Government to decide a date for its commencement.

2. Hansard Official Report, Commons 25/2/21 col 1138.
3. 14065/15, [2021] ECHR 37

## Replacement provisions

Concerned about bringing the repeal into force without giving further thought to whether the repeal would leave undesirable gaps in the law applicable to begging, the Government ran a consultation from 7 April 2022 until 5 May 2022. The consultation reiterated a pledge to repeal the 1824 Act and sought views on "proposals to respond to begging, potential penalties for harmful begging and how to encourage vulnerable people to engage with rehabilitative support." The Minister launching the consultation said, "No-one should be criminalised simply for having nowhere to live, and it is right that we repeal the outdated Vagrancy Act. We must balance our role in providing essential support for vulnerable people with ensuring that we do not weaken the ability of police to protect communities."

No analysis of the consultation has been published but, when the Government's Levelling-up and Regeneration Bill was presented to the House of Commons on 11 May 2022, just after the closure of the consultation period, the Bill contained the following clause—

> **"187 Vagrancy and begging**
>
> 1) The Secretary of State may by regulations make provision about conduct which is, or is similar to conduct which is, an offence under—
>
> (a) section 3 of the Vagrancy Act 1824 (offences relating to begging), or
>
> (b) section 4 of that Act (persons committing certain offences deemed to be rogues and vagabonds),
>
> disregarding the repeal of that Act by the Police, Crime, Sentencing and Courts Act 2022.
>
> 2) Regulations under subsection (1) may, in particular, include provision—
>
> (a) creating criminal offences or civil penalties;
>
> (b) about providing assistance to people who engage in conduct within subsection (1)."

The Government's explanatory notes for this clause explained—

> "The Government position is that the Vagrancy Act should be repealed in full but that this should not come into force until the Government (sic) legislates on suitable replacement legislation. This is because elements of the Act, including Section 3 that creates the offence of begging, continues to be used by police to respond to harmful instances of begging that

> are not otherwise covered under other legislation. Delaying commencement until the Government legislates for more suitable, appropriate replacement for some elements of the 1824 Act ensures the Police have the ability to respond to begging where necessary.
>
> The clause is a placeholder which allows for a substantive clause to be brought forward by amendment later in Bill passage."

As mentioned above, the committee stage of the Bill in the Commons is due to resume on 13 October. Clause 187 has not yet been reached, but it will be reached soon. No Government amendment has yet been put down to offer an alternative to clause 187. However, an amendment to leave out the clause has been put down in the name of Conservative MP Nickie Aiken and a large number of members from across the parties in the House have added their names to it. In terms of Commons procedure, this is notice of an intention to vote against the motion that clause 187 stand part of the Bill.

Two things need to be said about the way the Government has proceeded.

First, the "placeholder" clause proffered by the government would, if it remained in the Bill, be something that it would be quite inappropriate to allow to reach the statute book. It should be removed from the Bill as soon as possible.

Secondly, the process of inserting such a provision, as a dummy clause in the presentation version of a Bill, in order to secure that the Bill can be used during its passage as a legislative opportunity for doing something that is unrelated to its other provisions (apart from the identity of the department of state promoting it) is an abuse of Parliament's procedures.

## The defects of Clause 187

The principal defect of clause 187 is that it creates a power which, for all practical purposes, it would be impossible to exercise with any confidence.

There is always a "Catch 22" when creating an enabling power. If you do not know what policy it will be used to implement, you cannot be confident that the power will be adequate for the purpose. If you do know, you will be asked to justify not putting the intended provision in the primary legislation – something it may be more or less difficult to do.

In this case, though, the form of the power itself destroys any reasonable confidence that it would be capable of being exercised lawfully and without a serious risk that regulations made under would be found to be ultra vires. That is true even disregarding the further complications produced by the ECtHR case of *Lacatus v Switzerland* (which is referred to above) and any need to construe clause 187 and the regulations made under it in accordance with section 3 of the Human Rights Act 1998.

The subject matter of regulations made under clause 187 is required by that clause to be conduct that is "similar" to the conduct that is made an

offence under section 3 or 4 of the 1824 Act. There is a wealth of room for subtle arguments about "similarity". But it is absurd to think that a clear and usable power is capable of being created with parameters that are defined by adopting and applying the structure and effect of an Act that will no longer be on the statute book and was framed in the language of two hundred years ago and in a context that ceased to exist when the Poor Law was superseded by the establishment of the welfare state in the course of the first half of the 20th century.

To illustrate the difficulty, it may be sufficient just to set out the terms of sections 3 and 4 of the 1824, as they now have effect until their repeal comes into force—

> **"3 Persons committing certain offences how to be punished.**
>
> Every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do; shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and, subject to section 70 of the Criminal Justice Act 1982, it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction for any time not exceeding one calendar month.
>
> **4 Persons committing certain offences to be deemed rogues and vagabonds.**
>
> Every person committing any of the offences herein-before mentioned, after having been convicted as an idle and disorderly person, every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, and not giving a good account of himself or herself, every person wandering abroad, and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence, every person being found in or upon any dwelling house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; and every person apprehended as an idle and disorderly person, and violently resisting any constable, or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended; shall be deemed a rogue and

> vagabond, within the true intent and meaning of this Act; and , subject to section 70 of The Criminal Justice Act 1982, it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction, for any time not exceeding three calendar months."

If it has not yet been possible to find a formulation in modern language for the elements of those prohibitions that might suggest that a lacuna in the modern law would be created by their repeal, it is difficult to believe it ever will be. It would not be necessary, for the drafting of a power to identify the actual lacuna. All that would be necessary to create a coherent power would be a description, in contemporary language, of the broad categories of behaviour about which any lacuna might require provision to be made. That has to be preferable to saddling the drafter of any regulations with an obligation to be faithful to the established meaning of the archaic drafting and the very long interpretative history of the 1824 Act.

Moreover, and perhaps less seriously, it is very difficult to see what provision is contemplated by subsection (2)(b) of the proposed clause. What is the mischief in the law it is trying to fill? It says too little to be sure what is intended and so would be difficult to exercise in practice.

## Only a "placeholder"

But, it will be said, the clause is only a "placeholder"; it is not in the Bill because it is intended ever to reach the statute book. It is there because replacing sections 3 and 4 of the 1824 Act would not otherwise be within the scope of the Bill. Without the clause, any replacement would have to wait until the Government could find another place in its legislative programme for replacement legislation.

The overt use of Government Bills in this unapologetic way is a cause for concern and criticism. It is also very unwise of the Government to attempt to game the rules of scope in the House of Commons, when the rules usually operate in favour of the Government. It makes the Government ill-placed to complain when others seek to game them to the Government's disadvantage, which is often attempted and is already frequently difficult to resist. Furthermore, it is not sensible to expose and seemingly to endorse drafting you know is unsatisfactory and does not achieve what you intend for it. It is capable of attracting adherents whom it is then difficult to persuade to abandon it, or who may choose to adopt it, or use it as a precedent, in another even less suitable context.

It would be misleading of course to suggest that Bills have never been introduced with a view to being amended or supplemented during their passage. The frequent mismatch between the timetabling needs of the Government's legislative programme and the minimum time required to perfect a legislative provision often guarantee that that happens. Even more justifiably, Bills often need to be introduced in a form that accepts

the need for Parliament's views on their content to be accommodated at a later stage.

But that is different from asking Parliament to accept that you have decided from the start to abbreviate the legislative procedure for a particular provision because you have not yet decided what your policy on the subject is. That is only likely to attract the sort of opposition and condemnation that may make the achievement of the ultimate objective more difficult.

It may be that the Government has decided already that it will not, after all, seek to replace sections 3 and 4 of the 1824 and, without more ado, will accept that clause 187 should not stand part of the Bill. If not, it seems certain that it will have to have some very clear answers when the clause is reached in committee on what precise form the replacement will take.

## Conclusion

It is a large part of the premise for the critique by Policy Exchange's Judicial Power Project of the current relationship between the courts and the political institutions of the state that, when it comes to the law, it is the function of legislators to draw the lines and the function of the courts to identify where the lines are for the purpose of resolving the disputes that come before them. In a healthy polity, that demarcation of functions requires the judiciary to accept responsibility, when they identify where the lines are, for not blurring them or seeking to move them. But it also requires those involved in the legislative process to accept and to take seriously the responsibility for ensuring that the lines are drawn as clearly as possible, and that the legitimacy conferred on legislative output by that process is not tainted by the way it is conducted in practice.

This healthy situation has often, recently, seemed under threat. Some, in that connection, see an increasing tendency on the part of legislators to rely on "enabling powers" and so to be less responsible about the clarity or finality of their legislative decisions, and they attribute this to declining standards in political life. In a great many respects this is a misconceived and unjustifiably alarmist analysis. It is often doing no more than identifying a long-standing dynamic and creative tension in the constitution that has been in play since at least C K Allen's "Law in the Making" in the 1930s. It does involve some interesting questions about whether the tension has been aggravated by legal and other innovations that have affected the approach of the courts to their own functions, and also about whether Parliament, as a political filter for legislative output, should be taking more interest than might reasonably be expected of it in matters without any political salience.

Nevertheless, the way the repeal and proposed replacement of the Vagrancy Act provisions has been handled does warrant straightforward criticism of the Government for neglecting its responsibilities when legislating. The Government should not ask Parliament to consider legislation in a form which bears no relationship to what it would wish to reach the statute book. And it should not present a Government Bill to

Parliament which contains a clause that consists of no more than an empty box to be filled during the Bill's passage.

£10.00
ISBN: 978-1-913459-98-7

Policy Exchange
1 Old Queen Street
Westminster
London SW1H 9JA

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