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Cancer employees and the right to fair labour practices in terms of the Labour Relations Act 66 of 1995

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SUMMARY

Cancer is a medical condition that affects all of mankind and does not take into account the race, religion and socio-economic position of a person. The effect of cancer on people living with this medical condition goes beyond physical and psychological distress. This is because persons living with cancer experience discrimination in the workplace due to cancer and this affects the employment status or position of cancer employees. Cancer employees if they are not dismissed from work their working conditions is in most instances unbearable due to the unfair labour practices they experience at the hands of employers and fellow employees. Awareness about cancer in the workplace is encouraged and championed in this contribution as one of the measures to eradicate unfair labour practices that are experienced by cancer employees in the workplace.

1 Introduction

Employment is one of the most important socio-economic factors, which affect cancer patients.[1] As a result of their condition, cancer employees are often victims of unfair discrimination in the workplace.[2] In some instances, this may lead to affected employees losing their jobs, and consequently becoming economically dependent on family and friends.[3]

It is necessary to give special attention to the meaning of cancer and how it develops in the human body. Various unfair labour practices which cancer employees experience daily in the workplace will also be discussed herein.[4] The relevant unfair labour practices, which will form part of this discussion, include: demotion, denial of promotion and unfair performance appraisals. These different forms of unfair labour practices will be explored with an aim of asserting that cancer does not necessarily deter an employee from working, despite its aggressive nature, and that in actual fact one can lead a normal and productive life in spite of having to live with cancer. For purposes of dealing with the research problem, one has to understand that cancer employees experience unfair

1 Doyal and Hoffman "The growing burden of chronic diseases among South African women" 2009 *CME* 458.
2 Doyal and Hoffman 2009 *CME* 458.
3 Doyal and Hoffman 2009 *CME* 458.
4 Doyal and Hoffman 2009 *CME* 459.

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discrimination mainly because of the stigma attached to the disease and the ignorance exhibited by some employers and employees in relation to cancer.[5] In addition, a comparative analysis between South Africa and England will also be explored due to the historical links both countries share.[6] Reference will also be made, to the United States of America, as the United States, in general, has taken great strides in recognising the vulnerability of cancer employees and the need to protect the latter within the American legal system.

2 The meaning of cancer

As a point of departure, it is essential to look at the definition of the term "cancer". In the 12th century, Hippocrates also known as the "Father of Medicine" discovered cancer.[7] Cancer is defined as a process where cells in the body grow in an uncontrollable way.[8] The word cancer is derived from the Latin word *"crab"*, which describes the way in which cancer spreads or appears in the human body, and which has a crab-like appearance.[9] These include cancers from covering tissues, skin cancer, mucous membrane cancer and cancer from the glands.[10] Further, the Regulations Relating to Cancer Registration,[11] define cancer as all malignant neoplasms and conditions suspected to be such, as contained in the International Classifications of Diseases for Oncology.[12] Another word used to describe cancer is *"sarcoma"* which is the type of cancer that targets supporting body structures such as the bones, tendons, muscles and fibrous tissues.[13]

From these definitions it becomes clear that cancer can spread through the human body to an extent where it is uncontrollable and unmanageable. One can be sure that cancer is indeed a very dangerous disease, which affects all of mankind without prejudice.[14] However, because of its complex nature, new knowledge is discovered daily and

5 Amir, Neary and Luker "Cancer Survivors views of work three years post diagnosis: A United Kingdom perspectives" 2008 *EJOJ* 192.
6 Joubert *et al*, *The Law of South Africa* (2004) 8-9.
7 Barrow "Portraits of Hippocrates" 2001 *Medical History* 85-88.
8 Friedberg *Cancer Answers* (1993) 2.
9 David *Cancer Care* (1995) 2.
10 Scott 2.
11 Regulations Relating to Cancer Registration GN R380 in GG 34248 issued in terms of the National Health Act 61 of 2003 dated 26 April 2011.
12 S 1 of the Regulations Relating to Cancer Registration GN R380 in GG 34248 issued in terms of the National Health Act 61 of 2003 dated 26 April 2011.
13 Heney, Young and Dixon-Woods *Rethinking Experiences of Childhood Cancer* (2005) 21.
14 Carnevali and Reiner *The Cancer Experience* (1990) 1. Further, it is a reasonable argument and an unfortunate fact that nearly anyone across the globe has had his or her life touched by cancer to a lesser or greater extent, such as they themselves being affected by cancer directly; or indirectly, having a family member or loved one affected by cancer. Cancer is a disease that preys on all of us; both young and old people are affected.

there is still a lot to be learned about cancer, both in the medical profession and society in general.[15]

2 1 Cancer as a disability

Depending on what kind of cancer a person suffers from, and the stage at which the cancer is diagnosed, it can result in a person experiencing either permanent or temporary disability.[16] As such, it is important to explore the meaning of disability and link it to the medical condition of a cancer patient.

Disability can be defined as different functional limitations that occur in any group of people and in any country across the globe, and can be in the form of intellectual impairments, physical impairments, sensory impairments, medical conditions and mental illnesses; all of which can be temporary or permanent in nature.[17]

When dealing with the concept of disability, it is important to note that there are two schools of thought regarding the meaning of disability; namely the medical model and the social model of disability.[18] The medical model of disability places emphasis on the medical condition or impairment of the person with a disability.[19] For example, in the context of a cancer employee, the medical model focusses on the employee instead of focussing on the ability of the employee to do work. For this reason, the medical model of disability is criticised because it personalises disability and makes it the problem of the individual concerned, which can be solved through cure or treatment of that disability.[20] The social model of disability is based on the notion that the adverse circumstances, which people with disabilities experience and the unfair discrimination which they are subjected to daily, do not emanate from their disability or impairment but emanates from society.[21] In terms of this school of thought, society is characterised as being unable

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Cancer holds no respect for national boundaries, ethnicity, race and social class because all of us are equal when it comes to the epidemic of cancer. Striking as much from within as without; cancer damages our individual and collective sense of health and well-being, and thus forms an integral part of our whole life. This is due to the fact that its human and economic effects are potent, measured each year in millions of productive years lost and billions of health care money spent. Cancer is a fearsome adversary, leaving tragedy in its wake; as we can see today cancer is the reason why millions of lives are lost annually. See Greenwald *et al, Cancer Prevention and Control* (2001) 9.

15 Carnevali and Reiner 2.

16 Carnevali and Reiner 3.

17 Article 17 of the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities Adopted by UN General Assembly Resolution 48/96 of 20 December 1993.

18 Olivier and Smit Labour *Law and Social Security Law (*2002) 230.

19 Olivier and Smit 230.

20 Olivier and Smit 231.

21 Chapter 1 of the White Paper on Integrated National Disability Strategy: The Social Model of Disability 1-2 1997.

to accommodate people with disabilities; and disability is not seen as an inability, which takes away the affected person's ability to do work.[22]

The social model of disability is also known as the human rights model of disability, because it centralises the person with a disability and his or her human dignity as enshrined in the Constitution without any focus on the impairment.[23] The social model to disability is in line with substantive equality and this has been affirmed by Ngwena, who argues that no country follows the social model to disability in its purest form, but both the medical and social model to disability are required when disability is interpreted for a better understanding.[24] This view is correct because cancer can be construed in line with both the medical and social model of disability. The challenges which cancer employees experience in the hands of employers who view cancer as only a problem of the employee concerned, takes the form of a medical model to disability; whereas the myths and the stigma maintained by society about cancer which result in the discrimination of cancer employees, is in line with the social model of disability.

In South Africa, persons who suffer from unfair discrimination on grounds other than the ones listed in terms of the Employment Equity Act, must first of all convince the court that the unlisted ground on which they claim to be discriminated against affect them adversely or may potentially affect them in an adverse manner. Once the court is satisfied with this view then the affected employee will have to prove the alleged unfair discrimination on the basis of the unlisted ground.[25] With regard to people who suffer from a progressive or recurring condition such as cancer, we follow the medical model and not the social model to disability. Ngwena argues that the non-recognition of progressive conditions such as cancer, which can leave a person with a temporary or permanent disability, makes a person vulnerable to discrimination in both society and in the workplace.[26]

Contrary to the South African approach, which places focus on persons with actual disabilities while neglecting those who suffer from progressive diseases such as cancer; in countries like England and

22 Chapter 1 of the White Paper on Integrated National Disability Strategy: The Social Model of Disability 1-2 1997.

23 S 10 of the Constitution of the Republic of South Africa, 1996. See Wookman, Roux and Bishop *Constitutional Law of South Africa: Student Edition* (2007) 35-38.

24 Ngwena "Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability)" 2005 *Stellenbosch Law Review* 211.

25 S 6(1) of the Employment Equity Act 55 of 1998, prohibits unfair discrimination on the basis of race, sex, disability, religion, HIV status, culture and language in the employment context.

26 Ngwena 2005 *Stellenbosch Law Review* 230.

America, cancer is recognised as a progressive condition, which constitutes a disability.[27] More on the English and American approach will be covered later on in this paper. The approaches adopted in those countries are surely in line with the argument raised by Ngwena and Pretorius, that disability must be interpreted widely without imposing a substantial limitation requirement on people with disabilities, which tends to exclude those people who suffer from progressive conditions such as cancer.[28] Cancer patients don't only suffer as a consequence of their disabilities being substantially limiting in themselves, but they suffer because of the approach which people adopt in their engagements towards people who have cancer.[29] This is the common trend when it comes to the discrimination of cancer employees, because most of them are discriminated against unfairly in the workplace, not because they are unable to work but merely because they have cancer.

3 Unfair labour practices and the right to fair labour practices

The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution), which guarantees the right to fair labour practices, and the Labour Relations Act which stipulates what constitutes unfair labour practices, brought certainty and stability to the meaning of unfair labour practices.[30] In terms of section 23(1) of the Constitution, everyone has a right to fair labour practices,[31] which means this is a right that is constitutionally entrenched and is thus given force by legislation.

Section 186(2) of the Labour Relations Act provides that unfair labour practices can only occur in the context of an employer-employee relationship and does not extend beyond this relationship. This means a job applicant who happens to have cancer, does not have a right to fair labour practices; which in turn means that unfair labour practices cannot be committed against an applicant, as he or she is not an employee.[32]

27 Blanpain 24.
28 Ngwena and Pretorius "Conceiving Disability, and Applying the Constitutional Test for Fairness and Disability: A Commentary on *IMATU v City of Cape Town*" 2007 *Industrial Law Journal* 747.
29 Ngwena and Pretorius 2007 *Industrial Law Journal* 747-748.
30 S 23(1) of the Constitution of the Republic of South Africa, 1996 and see the court case of *Kylie v CCMA and others* 2010 31 ILJ 1600 (LAC), where the court ruled that every person involved in a relationship of employment, including sex workers, regardless of the fact that sex work is still illegal under the South African law, has a s 23 constitutional right to fair labour practices and that this right involves at the minimum, being treated with dignity by employers.
31 S 23(1) of the Constitution of the Republic of South Africa, 1996.
32 S 186(2) of the Labour Relations Act 66 of 1995. *Hoffmann v South African Airways* CCT 19/00 2000 ZACC 17; 2001 (1) SA 1; 2000 11 BCLR 1235; 2000 12 BLLR 1365 (CC).

In *South African Defence Force Union v Minister of Defence*,[33] the Constitutional Court re-affirmed this principle when it held that the constitutional right to fair labour practices only goes as far as an employment relationship that is constituted in a contract of employment as well as a relationship akin to an employment relationship. Therefore, effect of this provision is that unfair conduct on the part of the employer that is prejudicial towards an employee will not permitted in an employment relationship, or a relationship equivalent to that of employment.

A job applicant who suffers from cancer is only protected from unfair discrimination in terms of the Employment Equity Act.[34] The Employment Equity Act aims to promote economic development, social justice, labour peace and democracy in the workplace.[35] It is apparent that a job applicant with cancer, who has been refused employment on the basis of his or her condition, has a leg to stand on, and can take the employer to court on the basis of unfair discrimination.[36] This position was confirmed in the court case of *Hoffmann v South African Airways*,[37] in which an applicant was denied employment on the basis of his HIV/AIDS status, as the conduct of the employer was found to be discriminatory towards the applicant and thus unlawful.[38]

Based on this assessment, a cancer patient applying for a job can rely on both the Employment Equity Act, and the *Hoffmann v South African Airways* case, in raising an argument about unfair discrimination upon being denied a job on the basis of their health condition.[39] This is significant in our legal system because job applicants, particularly those affected by health deformities such as cancer, are protected by the law with regard to their enjoyment of the right to human dignity and the right to choose a profession or an occupation.[40]

In the case of *National Education Health & Allied Workers Union v University of Cape Town*,[41] it was stated that the right to fair labour practices is about the continuation of the relationship between the

33 *South African Defence Force Union v Minister of Defence* 1999 6 BCLR 615 (CC), this case dealt with the right of members of the South African Defence force to join a trade union as well as take part in collective bargaining. This was due to the fact that members of the defence force were restricted from joining a trade union as well as entering into collective bargaining, but this was declared unconstitutional by the court.
34 S 2 of the Employment Equity Act 55 of 1998.
35 S 2 of the Employment Equity Act 55 of 1998.
36 S 2 of the Employment Equity Act 55 of 1998.
37 *Hoffmann v South African Airways supra.*
38 *Hoffmann v South African Airways supra*.
39 *Hoffmann v South African Airways supra*.
40 S 10 and S 22 of the Constitution of the Republic of South Africa, 1996.
41 *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC).

employer and the employee on terms that are fair towards both parties.[42] In this context, fairness will relate to both economic and societal factors such as health, safety, environment and the economy.[43] This will surely make the right to fair labour practices more inclusive. Fair labour practices are not aimed at restricting the pursuit of gain on the part of employers, but instead are aimed at ensuring that a balance is maintained between the rights of employees and the right of the employer.[44] The Labour Relations Act should facilitate the realisation of both the employer's and the employees' rights, as provided in terms of the law.

3 1 Unfair labour practice in terms of the Labour Relations Act 66 of 1995

Section 186(2) of the Labour Relations Act outlines what constitutes unfair labour practices in the workplace.[45] Unfair labour practice refers to any unfair act or omission that arises between an employer and an employee involving the following matters:

(a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) A failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement;

(d) An occupational detriment, other than dismissal in contravention of the Protected Disclosures Act 26 of 2000, on account of the employee having made a protected disclosure defined in the Act.

It is important to define what promotion and demotion actually means as stated in the abovementioned provision because these are the unfair labour practices, which cancer employees may commonly experience in the workplace.[46]

42 *National Education Health & Allied Workers Union v University of Cape Town supra*.
43 Vettori "The role of human dignity in the assessment of fair compensation for unfair dismissals" 2012 *PER/PELJ* 102.
44 Brassey *et al*, *The New Labour Law* (2007) 98.
45 S 186(2) of the Labour Relations Act 66 of 1995. Further, please refer to section 1 of the Labour Relations Act 66 of 1995, which states that the purpose of this Act is to advance economic development, social justice and labour peace in the workplace.
46 Du Toit *et al, Labour Relations Law: A Comprehensive Guide Sixth Edition* (2015) 545, and please refer to Doyal and Hoffman 2009 CME 459.

3 2 Common law and statutory law provisions for promotion

Under the common law, employees have no legal entitlement to be promoted to higher positions, unless the employees can prove that a contractual right thereto exists. In the case of employees in the public sector, if they are in a position to prove a legitimate expectation exists for them to be promoted, then they may assert such a right.[47] Promotion or demotion granted under the common law fall squarely on executive prerogatives or the powers of the employer.[48] However, in terms of Labour Relations Act, promotion is now considered as one of the grounds for unfair labour practices.[49]

Promotion refers to the change of the employee's terms and conditions of employment that result in material increase to the salary, responsibilities and status of the employee.[50]

Nel argues that promotion is based on merit and responsibility, as it is meant to enhance the development of the employee, while at the same time it is directed towards the interests of the company.[51] From this reasoning one can surely argue that in order for an employee to be promoted, the employee must be qualified and competent enough to carry out the tasks expected of him or her in that particular position. Therefore, it is clear that promotion does not take into account the disability or health status of the employee in question because such concerns may not necessarily have a negative impact on the employee's

47 John *Dismissal, discrimination and unfair labour practices* (2008) 52.

48 S 186(2) of the Labour Relations Act 66 of 1995. See *Aries v CCMA & Others* 2006 27 ILJ 2324 (LC) the court held that there are limited grounds on which an arbitrator, or a court, may interfere with discretion which had been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision-making powers inherent in the exercising of discretion by a party (including the exercise of the discretion, or managerial prerogative, of an employer) ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. The court held further that an employee can only succeed in having the exercise of discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner.

49 S 186(2)(a) of the Labour Relations Act 66 of 1995.

50 Martin *Profiting from Multiple Intelligences in the Workplace* (2001) 206. See further, the International Labour Organisation (ILO) 2009 ILO 2-3, which states that The International Labour Organisation, of which South Africa is a member, places an obligation on employers to provide career information to employees who suffer from disabilities or health deformities. The information must be accessible to these employees to ensure that they are well informed about the various opportunities which are available to them in the workplace. This duty also encompasses the duty to encourage the relevant employees to apply for promotions, particularly in cases where there is evidence that the employee would otherwise be reluctant to do so, on account of their state of health or disability.

51 Nel *et al*, *Human Resources Management* (2001) 272.

ability to work. This argument is also expanded by O'Brian, who argues that disability or health status of an employee does not take away the competence of the employee although it can have an effect on the ability of the employee to do his or her work to a lesser or greater extent; and therefore this does not take away the right of the employee to be granted a promotion.[52]

Grogan advances the argument that, for a cancer employee to succeed with a claim of unfair labour practice with specific reference to promotion, he or she must prove certain factors, which are burdensome due to the lack of recognition of cancer as either a disability or grounds of unfair discrimination.[53] The employee must show that the employer has exercised his or her discretion capriciously, or for unsubstantiated reasons, or that the decision was taken based on a wrong principle or was even biased.[54] Furthermore, Grogan states that employers can be held liable for unfair labour practice with regard to promotion, if they have created a reasonable expectation that the employee will be promoted, and then without adequate reasons frustrate the employee by refusing to grant the employee a promotion.[55]

If the employee is qualified and competent enough based on the requirements of the position, then there is no way that their health status or disability can be used as a justification to prevent the employee from being promoted. Should this be the case, then it will amount to an unfair labour practice in terms of the Labour Relations Act, and the onus of proving the unfair labour practice rests with the employee alleging the unfair labour practice.[56] Based on this analysis, one can see the risk of employers possibly using the condition of cancer employees, as scapegoats to deny them promotion. Employers may attempt to do so due to the lack of a specific recognition of cancer as grounds of unfair discrimination because in effect, cancer employees may not seek to go through the burdensome process of having to show that unfair labour practices have indeed occurred, as illustrated by Grogan's view in the discussion above.

Furthermore, in the case where an employee is excluded from promotion due to disability and health deformities, it can be argued that this amounts to systematic discrimination; which is a combination of direct and indirect discrimination.[57] Systematic discrimination in the employment context simply emanates from the established rules or procedures of recruitment, hiring and promotion; and which are not designed to promote discrimination. In this instance, the discrimination is reinforced by the exclusion of disadvantaged groups, because the

52 O'Brian *Crippled Justice: The history of modern disability policy in the workplace* (2001) 152.
53 Grogan *Workplace Law* (2009) 75.
54 Grogan 75.
55 Grogan 76.
56 S 186(2) of the Labour Relations Act 66 of 1995.
57 Hunter *Indirect Discrimination in the Workplace* (1992) 12.

exclusion promotes the belief that they are incapable of qualifying for a promotion due to their state of health or disability.[58] To combat or fight systematic discrimination is important for purposes of creating a working environment in which negative attitudes and practices are rightfully challenged and discouraged.[59] The process in eliminating systematic discrimination in the workplace goes hand in hand with the obligations set by the International Labour Organisation as briefly discussed earlier,[60] to ensure that those employees with disabilities and those who suffer from health deformities are well informed about the opportunities, which are available to them, and that they know their rights in the workplace.[61]

The case of *Joint Affirmative Management Forum v Pick n Pay Supermarket*,[62] involved the promotion of staff members from being causal workers to becoming permanent employees, and thus the question at hand was whether this kind of change constituted promotion. The employer had a policy in place in which an employee would first be appointed as a causal worker and after a reasonable time, the employee would be appointed as a permanent employee.[63] In this case, the Commission for Conciliation Mediation and Arbitration (CCMA) accepted the policy of the employer on the basis that such changes from a causal worker to a permanent employee with benefits amounted to promotion.[64]

The principle of promotion was furthermore considered in the court case of *Department of Justice v CCMA & Others*;[65] in this case, the Department of Justice advertised vacant senior positions and both internal applicants, which are people who worked in the Department, and external applicants were invited to apply for this opportunity.[66] This meant that the internal employees of the Department would compete with external applicants for the vacant positions. The internal employees of the Department held the view that if they were appointed for the advertised position it would not constitute promotion.[67] However, the Labour Court held that if the internal employees of the Department were appointed for the advertised senior post, this would surely amount to promotion because they did not occupy the same rank or position as the ones advertised by the Department. The claim of the employees was thus dismissed by the Labour Court, on the basis that the conduct of the

58 Hunter 12-13.
59 Hunter 14.
60 Martin 207.
61 ILO 2009 *ILO* 2.
62 *Joint Affirmative Management Forum v Pick n Pay Supermarket* 1997 18 ILJ 1149 (CCMA).
63 *Joint Affirmative Management Forum v Pick n Pay Supermarket supra*.
64 *Joint Affirmative Management Forum v Pick n Pay Supermarket supra*.
65 *Department of Justice v CCMA & Others* 2004 4 BLLR 297 (LAC).
66 *Department of Justice v CCMA & Others supra*.
67 *Department of Justice v CCMA & Others supra*.

employer did not amount to unfair labour practices on the basis of promotion.[68]

3 3 Common law and statutory law provisions for demotion

Demotion is the opposite of promotion. A demotion occurs in the case where there is a change in the employee's terms and conditions of employment that causes material reduction of the employee's responsibilities, remuneration and status.[69] It is important to understand that in certain instances, a change in the work of an employee does not amount to demotion. For instance, if the employee experiences being placed in a slightly different work station where the scope of the work falls within the scope of the employees initial duties, or where the employer makes a change to the title of the employee's position.[70] It must be noted that employees cannot be demoted from posts, which they were not formally appointed for.[71]

At common law, the demotion of employees without their consent amounts to a repudiation of a contract between the employer and the employee concerned.[72] In this regard the demoted employee has the choice to either uphold the contract while instituting a claim for damages, or the employee can seek for an order to compel the employer to restore him or her to the original position.[73] However, it is important to take into account the fact that in terms of section 186(2) of the Labour Relations Act an employer by implication is allowed to demote an employee, provided that this is done in a fair manner.[74] The onus of proving that unfair demotion has occurred rests with the employee who alleges the unfair demotion on part of the employer.[75]

68 Department of Justice v CCMA & Others supra.
69 Venter and Levy *Labour Relations in South Africa Fifth Edition* (2014) 248.
70 Du Plessis and Fouche *A Practical Guide to Labour Law Eighth Edition* (2015) 355, and please refer to Grogan 79.
71 Grogan 79.
72 Venter and Levy 249.
73 Grogan 264.
74 S 186(2) of the Labour Relations Act 66 of 1995 and see the court case of In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others* 2008 29 ILJ 2708 (LAC) the court considered whether the decision to transfer the employee temporarily to Pollsmoor constituted a demotion. It was held that the status, prestige and responsibilities of the position were relevant to the determination of whether or not a transfer constituted a demotion. In light of the detailed and uncontested evidence of the employee in regard to the status, prestige and responsibilities of his position in Cape Town, the court did not hesitate to conclude that that position was of a higher status and prestige and held greater responsibilities than the position he was to occupy at Pollsmoor. The employee's transfer to Pollsmoor therefore constituted demotion. Since the employee did not consent to the demotion, it was unlawful in terms of the common law and unfair in terms of the Labour Relations Act.
75 Grogan 265.

In *Solidarity obo Kern v Mudau & Others*,[76] the concept of demotion was considered. This case involved an employee who was moved from the position of senior personnel officer to the position of committee officer after the restructuring process of the company of the employer, who is the respondent in the proceedings.[77] The employee took the matter to arbitration, and the case was decided against him on the basis that the current position he was occupying was not different from the position he used to occupy initially. It was held that the change, which took place in his employment position, did not amount to demotion and that no unfair labour practice was committed against him.[78] However, when the matter went to the Labour Court, the judge held that the employee was in fact demoted as he had fewer responsibilities in the present position and consequently received a lower salary, owing to the newly restructured position.[79] The court held that the decision of the employer amounted to a demotion. The judge went further to state that the arbitrator was lacking knowledge as to what the concept of demotion entails. Accordingly, the company was ordered to compensate the employee for the loss he had endured due to the demotion, as well as the salary he was entitled to.[80]

Another case which deals with demotion is *SA Police Services v Salukazana and Others*.[81] In this case the employee was transferred to another area, and the transfer brought about change to the conditions of service of the employee.[82] The transfer resulted in change of status of the employee, with regard to the position he occupied; and resulted in him having fewer responsibilities than before he was transferred to the new area. The Labour Court found that indeed the employee was demoted and the conduct of the employer amounted to unfair labour practice.[83]

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76 *Solidarity obo Kern v Mudau & Others* 2007 6 BLLR 566 (LC).
77 *Solidarity obo Kern v Mudau & Others supra*.
78 *Solidarity obo Kern v Mudau & Others supra*.
79 *Solidarity obo Kern v Mudau & Others supra*.
80 *Solidarity obo Kern v Mudau & Others supra*. See the recent case on the aspect of demotion which is hidden under the aspect of transfer of an employee by an employer. In *SA Police Services v Salukazana & Others* 2010 31 *ILJ* 2465 (LC) the employee was notified by a letter headed 'lateral transfer' that he had been permanently transferred to a new position. The effect of the transfer was that although he remained on level 13 and his salary and benefits were not changed, his status had been diminished. In the past he reported to the area commissioner, in his new position he was expected to report to a person in a lower position than the area commissioner. The court found that demotion can manifest itself in many ways. It can arise through a reduction of salary, a change to terms and conditions of employment and a transfer. In fact, a demotion and a transfer have common attributes - there is a movement in both a demotion and a transfer. If the movement leads to a reduction in status, it is a demotion. Thus, if a transfer leads to a change in terms and conditions of employment which amounts to demotion, an employee is entitled to bring a claim relating to an unfair labour practice.
81 *SA Police Services v Salukazana and Others supra*.
82 *SA Police Services v Salukazana and Others supra*.
83 *SA Police Services v Salukazana and Others supra*.

3 4 Workplace promotion and demotion in the context of cancer patients

It is common for employers to engage in unfair labour practices by way of side-lining employees who suffer from cancer when it comes to considerations for promotion.[84] Similarly, some employers end up demoting cancer employees due to the belief that once an employee is diagnosed with cancer, they are incapable of working in the same capacity as they were, prior to them being diagnosed with cancer.[85] This is the kind of attitude and belief that must be discouraged, through educating the employer and fellow employees about cancer.[86] Apparently in South Africa, employees who are mostly affected by the possibility of unfair dismissal as a result of cancer are those who are particularly suffering from breast cancer.[87] This occurs as a consequence of the fact that breast cancer is a leading cause of death cancers and affects many employees in South Africa.[88] In addition to the possibility of unfair dismissal, cancer employees may find themselves receiving unfavourable performance reviews.[89] The unfavourable performance reviews are commonly caused by a lack of reasonable accommodation in the workplace, as this tends to make cancer employees look as if they are floundering in their jobs.

Reasonable accommodation means the duty of the employer to provide support to the employee by adjusting working conditions and hours of the employee.[90] The duty is placed on employers to provide reasonable accommodation because it is a non-discriminatory mechanism in its constitutional form, and a juridical tool which is aimed at achieving substantive equality among people,[91] and in this context, specifically cancer employees. Undoubtedly, the employer's duty is a measure of eliminating arbitrary unfavourable performance reviews because the working environment will be made conducive and productive for the cancer employee to work if this duty is fulfilled.[92] Reasonable accommodation was also emphasised in the court case of *MEC for Education, Kwazulu Natal v Pillay*,[93] the Constitutional Court stated "reasonable accommodation requires that the employer must take positive measures such as removing access barriers, even if it means

84 Mehnert *et al*, "Employment challenges for cancer survivors" 2013 *Cancer* 2151-2152.
85 Mehnert *et al*, 2013 *Cancer* 2152.
86 Cooper, Low and Grunfeld 2010 *Occupational Medicine* 612.
87 Business Day (2010-04-13) 7.
88 Business Day (2010-04-13) 8.
89 Macmillian-Cancer-Support http://www.macmillan.org.uk/Cancerinformation/Livingwithandaftercancer/Workandcancer/Supportforemployees/Workcancer/Your%20rights/Protectionfromdiscrimination.aspx (accessed 2014-03-29).
90 S 15 (2) of the Labour Relations Act 66 of 1995.
91 Bernard "Reasonable accommodation in the workplace: To be or Not to be?" 2014 *PER/PELJ* 2871.
92 Cooper, Low and Grunfeld 2010 *Occupational Medicine* 612.
93 *MEC for Education, Kwazulu Natal v Pillay* 2008 1 SA 474 (CC).

incurring additional hardships or expenses to ensure that all employees enjoy their right to equality".[94] In light of the above, Bernard argues that the duty of reasonable accommodation on the part of employers may be both positive, such as making alterations to the working environment to enable the disabled employee to work; and negative, such as dismissing the disabled employee due to incompetence and in the interest of the company in order to achieve the right to equality of all employees in the workplace.[95] However, Bernard cautions that such a duty on the part of employers to reasonably accommodate employees is not absolute, in the sense that no court can expect an employer to excessively incur expenses, if it cannot reasonably accommodate the employee due to his or her state of health.[96] In this context, it is very clear and important that more education and communication about cancer is required in the workplace, as well as the amendment of policies in the workplace can work.[97]

Brassey argues that the restriction of unfair labour practices is not designed to restrict the gain or profit of the employer; but to ensure fairness is established in the workplace.[98] Unfortunately employers see cancer as deterrence for them in their profit-making ventures. However, this should not be the position at all because a balance must be maintained between the gains of the company and the rights of employees; which in turn will result in a healthy company that will be profitable for all stakeholders. Furthermore, maintaining a balance between the gains of the company and the rights of employees will also assist the employer in providing all the necessary support and making reasonable accommodation in the workplace to enable the employee to perform his or her duties well, as required by law.[99] A balance between the gains of the company and the rights of employees will dispel the myth or stigma that is attached to cancer, namely that those diagnosed with cancer are incapable of working effectively and this can be achieved through effective communication and support from the employers side.[100]

Witzel argues that the demotion of an employee in the workplace for a reason such as cancer must be taken as a last resort and thought out carefully on how to execute it in line with the operational requirements of the company, in order to avoid legal proceedings being instituted by

94 *MEC for Education, Kwazulu Natal v Pillay supra*.
95 *MEC for Education, Kwazulu Natal v Pillay supra*.
96 Bernard 2014 (17) *PER/PELJ* 2881.
97 CANSA http://www.cansa.org.za/letter-to-corporates-world-cancer-day-4-feb-2014/ (accessed 2014-03-22).
98 Brassey *et al*, 99.
99 S 15(2) of the Employment Equity Act 55 of 1998, makes provision for the employer to make means in the workplace through adjusting the working conditions in such a way as to accommodate the cancer survivor who has returned to work and who cannot perform his or her duties than before; due to the adverse effect of cancer treatment.
100 CANSA-http://www.cansa.org.za/letter-to-corporates-world-cancer-day-4-feb-2014/ (accessed 2014-03-22).

the employee concerned.[101] Witzel goes further to support her assertions about how demotions must be exercised diligently, because companies demote employees with the aim of avoiding the severity of completely firing the employee concerned.[102] Witzel correctly states that the demotion of an employee can be justified on the part of an employer, if the employer demotes a good employee in trying to retain them in circumstances where the particular employee cannot remain in the current position, due to issues such as the inherent requirements of the job, such as the core activities or skills of the relevant job position.[103]

Willey takes the views of Witzel a step further by putting emphasis on how demotion must be handled in the workplace, and he argues that it must be done with grace as well as with respect. According to Willey, open communication between the employer and the employees about the grounds of demotion as well as encouraging the concerned employee to improve on his or her performance will result in no claim for unfair labour practices on the part of the employee.[104] This approach may leave the employee concerned still feeling attached to the company despite the demotion, and may also encourage the employee to improve where he or she has been lacking competence. However, this is unfortunately not the case when cancer employees are demoted as they are left emotionally aggrieved, due to lack of communication, as outlined in the previous paragraph.

Therefore, it is clear that demotion can amount to unfair labour practice, but it can also be justifiable if it is found to be in the interests of the company to do so. The process of handling demotion must be open, taking into account that the employee has the right to human dignity and respect. This clearly affirms that an employee with cancer who has been demoted on the basis of the inherent requirements of the job, and with the aim of retaining them through an open and transparent process which does not violate any of their human rights, can improve and contribute to the well-being of both the cancer employee and the company.

It is positive law that if an employer fails to carry out his or her duties in terms of the employment contract, the employee will have recourse to approach either the CCMA or the labour court on the basis of breach of contract.[105] Therefore, in the context of this study, a cancer employee can have recourse against the employer in cases were the employer fails to treat all employees equally and fairly, by way of directing unfair

101 Operational requirement means the technological, structural or similar needs of the employer to justify dismissal of an employee. Please refer to Witzel *Origins of the World's Myths* (2013) 21.
102 Witzel 22.
103 Willey available at http://www.workforce.com/articles/21366-dealing-with-demotions-from-hrs-perspective (accessed 2016-05-16).
104 Willey available at http://www.workforce.com/articles/21366-dealing-with-demotions-from-hrs-perspective (accessed 2016-05-16).
105 S 191(1) of the Labour Relations Act 66 of 1995.

treatment towards the cancer employee on the basis of his or her condition. In this case the cancer employee will have two forms of recourse. On the one hand, the employee can claim breach of contract on the basis that the employer has failed to discharge his or her duties by not treating all employees equally in accordance with the provisions of Basic Condition of Employment Act;[106] and on the other hand, the cancer employee will have recourse on the basis of section 6(1) of the Employment Equity Act,[107] which prohibits employers from engaging in any form of unfair discrimination in the workplace.

4 Comparative analysis between South Africa, England and the United States of America

Owing to some historical connections and some commonalities between the South African and English legal systems, an assessment of relevant laws may be instructive for South Africa.[108] The comparative analysis is aimed at seeing whether the English law position may reveal some improvements that can be made to existing laws and policies in South Africa, with regards to the legal protection of cancer employees against unfair discrimination and other social ills.

As far as English law is concerned, the Equality Act of 2010 provides protective measures that also apply to cancer patients in employment contexts, offering protection from unfair discrimination, which they may experience on the basis of their health status.[109] The Equality Act has put England ahead of South Africa by making special provision for the protection of cancer patients and recognising cancer as a progressive medical condition which can result in a disability.[110]

However, a discussion about the challenges facing cancer employees in the workplace would not be complete without reference to the American system.[111] Some valuable lessons can be drawn from its jurisprudence when it comes to the protection of cancer employees in the workplace because America has flexible legal instruments in place. One relevant example here is the Americans with Disabilities Amendment Act (ADAA) of 2008, which is described as a very important piece of legislation aimed towards the protection of people who suffer from disabilities, which include cancer.[112]

106 S 10 of the Basic Condition of Employment Act 75 of 1997.
107 S 6(1) of the Employment Equity Act 55 of 1998.
108 Joubert WA (ed) *LAWSA* (2004) 8-9.
109 Equality Act of 2010.
110 S 3 of the Equality Act of 2010.
111 Russell "Sickness Absence and Disability Discrimination" 2013 *TUC* 4.
112 Russell 2013 *TUC* 5.

4 1 The protection of employees with cancer in England and the Equality Act of 2010

Discrimination towards employees with cancer in England has been rising steadily over the past few years, as some of these cancer-stricken employees may be denied sick leave and consequently may miss some of their doctor's appointments.[113] Employees with cancer are often harassed by employers and fellow employees to an extent where they feel like abandoning their jobs.[114] The British government has thus identified a number of considerations which can assist cancer employees to be fully rehabilitated and capable of returning to work after being diagnosed with cancer.[115] Among other things, these include; providing fast and cost effective treatment to cancer employees, providing personal and psychological agencies to cancer employees in helping them to cope with cancer symptoms in order to build self-confidence regarding their ability and skills to work; providing empowerment to the employee to set achievable goals which will boost their self-confidence; having the employer modify the workplace for the employee returning to work in order to assist the employee to perform his or her duties.[116]

Over 100 000 people of working age are diagnosed with cancer every year in England,[117] and almost half of these people continue to work when they are diagnosed with cancer and have to make changes to their working habits; with around four out of ten of them changing jobs or leaving work altogether due to the unfair discrimination in the workplace.[118] Some of the injustices

113 Bailey and Corner *Cancer Nursing Care in Context* (2009) 623.
114 Devane 2013 *Macmillian Cancer Support* 11.
115 Devane 2013 *Macmillian Cancer Support* 12.
116 Devane 2013 *Macmillian Cancer Support* 13.
117 Blanpain *The Changing World of Work* (2009) 24, and please refer to Krebs and Pelusi "Understanding Cancer-Understanding the Stories of Life and Living" 2015 *JCE* 12.
118 Hope 2013-05-02 *Mail Online* 2. Examples of the two incidences in which cancer employees suffered unfair discrimination in the workplace in England owing to their cancer include: In 2006 a designer and studio manager never got the justice that he deserved due to the injustices he suffered in the hands of the employer. Jack had colon cancer that resulted in him being unfairly discriminated against by the employer. The employer refused Jack time off, he constantly reduced his salary when he was not at work; though he was working from home; took away some of his responsibilities, harassed him and constantly abused him verbally. All of this occurred despite the commitment of Jack working day and night and additionally, working at home, which led to unrecognised efforts. When Jack approached management for assistance he was informed that he can sell his house or car to comply with his medical bills. Owing to the depression, ailing health, financial and work stress which Jack had endured; he died on his way to work. Another unfair discrimination case of cancer in the workplace occurred in 2010. A man by the name of Paul Ware, who was diagnosed with blood cancer, asked for time off from the employer and as a result, his employment was terminated. The employer reasoned that he was not fully committed to the company as a result of his cancer. He questioned this decision in the equality court, but due to expensive legal costs, he was forced to accept a settlement from the employer, which was very low.

> that employees face as a result of cancer include how they tend to not be allowed some time off from work in order to see their doctors.[119] This has resulted in the government providing effective treatment mechanisms to cancer patients, with the aim of alleviating discrimination in order for cancer employees to return to work and not require further time off or reasonable accommodation.[120] It is important for employees with cancer to, as far as possible, continue to work and earn a living. Blanpain describes the importance of work in the life of any human being and further states that: Work is a fundamental aspect in the life of any person, it gives the individual means of financial support and most importantly, it gives one a contributory role to society. A person's work is an essential component of his or her sense of identity, self-worth, and emotional well-being. Accordingly, the working conditions where a person works are very important in shaping or developing the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.[121]

Considering the importance of employment in the general make up of any human being, it is important that the right to work for cancer employees be protected through legislative reform, amongst others; for purposes of their survival in both society and in the workplace. Furthermore, the government developed means to protect disabled employees and cancer employees in the workplace from unfair discrimination.[122] In England, cancer is recognised as a progressive condition which could result in a disability and thus render an employee suffering from cancer to be regarded and protected as a disabled employee.[123]

In contrast, South Africa has not yet developed a framework recognising cancer management in the workplace. It is in this regard that South Africa should take note of the developments in England in improving the current situation.[124]

The aim of the Equality Act[125] is to bring harmonisation, simplification and modernisation of equality laws, through the express declaration that every human being is entitled to equal protection and benefit under the

119 Bailey and Corner 624.
120 Bailey and Corner 624.
121 Blanpain 23.
122 Krebs and Pelusi 2015 *JCE* 13.
123 Krebs and Pelusi 2015 *JCE* 14.
124 Krebs and Pelusi 2015 *JCE* 15.
125 Equality Act 2010. This is the Act that seeks to take away any form of discrimination which people suffering from disability can experience on the hands of other people such as the employer. The Disability Discrimination Act 1995 (DDA) is important to take into account, as it was one of the first pieces of legislation in England that was used to fight unfair discrimination on the basis of disability in the workplace. The Disability Discrimination Act 1995 was replaced in 2005; but finally in 2010 the Equality Act 2010 was developed which is considered as a combination of various pieces of legislation which fight unfair discrimination in one legislation. According to the Equality Act 2010, cancer is recognised as a disability and all people with cancer are protected by this legislation.

law regardless of their background or social being.[126] The Equality Act makes provision for protective feature under section 4, which include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[127] Hepple,[128] argues that the reason why the Equality Act provides a specific list of prohibited grounds of discrimination is because the open-ended approach to defining the prohibited grounds is subject to abuse and criticism. It is argued that such an approach, as adopted by the European Convention on Human Rights, is not clear and specific.[129]

Hepple's view is correct because having a specific list of prohibited grounds makes it easy for people to immediately know and understand their rights, and it gives them certainty without having first to make an inquiry regarding the interpretation of the law in order to establish the rights to which they are entitled. Similar to the position in England, South African law also makes provision for the prohibition of discrimination on the basis of the grounds which have also been outlined in terms of the Equality Act, through section 9 (e.g the equality clause) of the Constitution.[130] The understanding of "disability", however, differs in these two jurisdictions. In terms of section 6 of the Equality Act,[131] in England a person is said to have a disability if he or she has a physical or

126 S 2 of the Equality Act 2010. The importance and broad scope of the Equality Act as outlined above is affirmed by the reasoning of Ashtiany, who argued that the Equality Act is one of the pieces of legislation that makes England one of the progressive countries across the globe. This is attributed to the fact that the Equality Act is a codification and simplification of existing laws because it brings together 9 major pieces of legislation and around 100 statutory instruments. Ashtiany further argues that the reach of the Equality Act is far greater than the codification and simplification of existing laws, because the intention of this Act is to bring together a coherent set of provisions for the 21st century and to enhance the existing law at the same time. This argument is indeed correct because this Act makes provision for the rights of all people in spite of their socio-economic status, disability or ill health because that aim of this Act is to attain equality as outlined in the purpose of the Act. See Ashtiany "The Equality Act 2010: Main Concepts" 2011 *IJDL* 29-30.

127 S 4 of the Equality Act 2010.

128 Equality Act 2010. This is the Act that seeks to take away any form of discrimination which people suffering from disability can experience on the hands of other people such as the employer. The Disability Discrimination Act 1995 (DDA) is important to take into account, as it was one of the first pieces of legislation in England that was used to fight unfair discrimination on the basis of disability in the workplace. The Disability Discrimination Act 1995 was replaced in 2005; but finally in 2010 the Equality Act 2010 was developed which is considered as a combination of various pieces of legislation, which fight unfair discrimination in one legislation. According to the Equality Act 2010, cancer is recognised as a disability and all people with cancer are protected by this legislation.

129 Hepple "The New Single Equality Act in Britain" 2010 *TERR* 12.

130 S 9(3) of the Constitution of the Republic of South Africa, 1996 states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sexual orientation, sec, age, religion, belief, disability, culture, language and birth.

131 S 6 of the Equality Act 2010.

mental impairment and the impairment has a substantial and long term adverse effect on the person's ability to carry out normal day to day activities.[132] This definition of disability was taken further by the British Council Organisations for Disabled people, an organisation which champions for the rights of disabled people in society.[133] In terms of the British Council of Organisations for Disabled People, disability is defined as "the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activities".[134]

In terms of the UN Convention on the Rights of Persons with Disabilities, it is argued that a disability is an evolving concept which is not stagnant; and therefore has to be accommodated by the adaptation of legislation.[135] The Convention states that since the definition of a disability is evolving, it must not be seen as something that resides within an individual as a result of his or her impairment. Disability must be understood within the context of the interaction between an individual with his or her environment.[136] This understanding is supported and recommended in this paper, because health conditions such as cancer may lead to disability, because of the impact cancer may have on the individual's interaction with his or her environment, and more specifically, the workplace.

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132 S 6(1)(a)-(b) of the Equality Act 2010. The aspect of a substantive and adverse effect was also discussed in the court case of *Swift v Chief Constable of Wiltshire, SCA Packaging Ltd v Boyle* HL 2009. In this case the court made an inquiry as to what constitutes a substantive and adverse effect which could have an impact on the ability of an employee to continue or do work, and the court held that the following questions needs to be answered in the affirmative for the condition of one to be recognised as a disability that has the ability to substantively and adversely affect the ability of an employee to do work. Firstly, was there impairment on the employee? Did the impairment have a substantial adverse effect on the ability of the employee to do work? Did the adverse effect cease to have a substantial adverse effect on the ability of the employee to continue to do work and if so, when was this? Lastly, an inquiry will deal with the aspect as to whether the same adverse effect on the employee is likely to occur again in the near future.

133 The British Council was established in 2006 as an advisory body with the aim of protecting and championing the rights of disabled people due to the hostile environment they experience in the workplace through discrimination. This Organisation has grown incredibly and has committed staff members that are well qualified and it provides guidance as well as advice to employers and government as to how employees who suffer from disability need to be treated and protected from unfair discrimination. Please refer to the British Council guide on promoting disability equality (2009) 11.

134 British Council of Organisations of Disabled People *British Council guide on promoting disability equality* http://britishcouncil.org/sites/default/files/promoting_disability_equality.doc (accessed 2016-08-22).

135 Hendricks "Selected Legislation and Jurisprudence: UN Convention on the Rights of Persons with Disabilities" 2007 *Eur. J. Health. L* 273.

136 Hendricks 2007 *Eur. J. Health. L* 274.

4 2 The protection of employees with cancer in the United States of America and the Americans with Disabilities Amendment Act (ADDA) of 2008

More than 800 000 people are diagnosed with cancer every year in America, and of this number approximately 400 000 will be cured of the cancer.[137] The American Cancer Society states that 90 % of employees with cancer face discrimination in the workplace due to the employers' ignorance regarding cancer.[138] This confirms the view that the struggle of cancer survivors follows them from the hospital into the workplace.[139] Cancer employees experience different forms of discrimination in the workplace, which may include job denial, wage reduction, denial of a promotion and outright dismissal.[140]

In the United States, employers often justify their conduct of discrimination by ignorantly arguing that cancer is contagious, and that

137 Streicher "Cancer-Based Employment Discrimination: Whether the Proposed Amendment to Title VII Will Provide An Effective Anti-Discrimination Remedy" 2010 *Ind.L.J* 827. Furthermore, in America the position regarding the protection of cancer patients generally, and cancer employees in particular, was best described by Professor Epstein, who was a scientist in the field of medicine. According to Epstein, cancer remains one of the deadliest diseases known to mankind across the globe; and beyond the millions of lives which are claimed by cancer, millions of more people live in fear of being diagnosed with the disease. This is all attributed to the stigma and less investment that is placed on cancer research and treatment by governments across the globe, including the United States of America. Epstein, in collaboration with some of his colleagues in the medical field argued for a more aggressive approach or assault when it comes to the preventable causes of cancer that people are unknowingly exposed to daily, especially at home and in the working environment. These causes of cancer which people are often exposed to, result in socio-economic problems which cancer patients experience because they end up unemployed as a result of the cancer. This can result in a dent on the economy of the state due to the high rise of unemployment. The analogy of Epstein has resulted in making the American government to take heed of the cancer epidemic and to device the necessary legislation, in particular the Americans with Disabilities Amended Act, with the aim of protecting the rights of cancer patients, in particular cancer employees against unfair discrimination in the workplace. This is to dispel the myths as well as the stigma that is surrounds the area of cancer. Please refer to Epstein *Cancer-Gate: How to Win the Losing Cancer War* (2005) 5. In this book Epstein provides an analysis of the American struggle against cancer, in relation to reducing the incidence and mortality rate, and he proposes a complex strategy on how to fight the war against cancer. It is currently evident in the American system, that the contribution made by Epstein when it comes to the fight against cancer is recognised by the government and as a result of this, America today has made great strides when it comes to cancer regulation.

138 Streicher 2010 *Ind.L.J* 827-828.

139 More cancer survivors return to work after being diagnosed with cancer but will be subjected to discrimination and their ability to work questioned by employers due to their cancer. See Bazamore "Employment Discrimination against Cancer Survivors: A Proposed Solution" 2001 *Vill. L.Rev* 1550.

140 Streicher 2010 *Ind.L.J* 827-829.

other employees will not be keen to work with a cancer employee; in addition to arguing that a cancer employee will be unproductive and will thus be a liability to the company.[141] All of these arguments were revealed to be unfounded and based on incorrect perceptions or ignorance.[142] Employees with cancer in South Africa suffer from similar types of discrimination in the workplace, and the justifications of employers resemble those of some of the English employers. This indicates that false perceptions and ignorance regarding cancer are shared by employers across the world alike. The need for legal intervention to address these perceptions and their harmful impact is evident.

Much focus has been placed on this area of the law in America. Section 3 of the Americans with Disabilities Amendment Act (ADAA), defines disability as a physical or mental impairment that substantially limits one or more major life activities of an individual, and a record of such impairment is necessary for the purpose of this Act, in order to be considered as a disability.[143] Further, section 3(2) of the Amended Americans with Disabilities Act states that, major life activities for the purposes of this Act include operation of a major bodily function; including but not limited to the functions of the immune system; normal cell growth; digestive; bowel; bladder; neurological; brain; respiratory; circulatory; endocrine, and reproductive functions.[144]

Benfer argues that the definition of the term substantially limits the rights of disabled persons and should be given a broader interpretation as intended by the Americans with Disabilities Amendment Act.[145] Such a broad interpretation will allow a number of chronic diseases, which can cause disability to be incorporated under the category of disability.[146] Benfer provides a list of chronic diseases, which can substantially limit the ability of an individual to work, and those which are recognised by the Americans with Disabilities Amendment Act such as cerebral palsy, HIV/AIDS, Hepatitis B and cancer.[147]

Benfer correctly advances an argument which leads to cancer being recognised as a disability in terms of the Americans with Disabilities Amendment Act.[148] This is evident from the court case of *Ellison v Software Company*.[149] Miss Ellison was an employee of the defendant company and had breast cancer. She had surgery and was required to go

141 Canfield "Cancer Patients Prognosis: How Terminal are their Employment Prospects?" 2001 *Syracuse Law Review* 801.
142 Wheatly "Employability of Persons with a History of Treatment of Cancer" 1975 *CANCER* 441.
143 S 3 of the Amended Americans with Disabilities Act of 2008.
144 S 3(2) of the Amended Americans with Disabilities Act of 2008.
145 Benfer "*The American with Disabilities Amendment Act: An overview of recent changes to the American with Disabilities Act"* 2009 *ASC* 6.
146 Benfer 2009 *ASC* 6.
147 Benfer 2009 *ASC* 6.
148 Benfer 2009 *ASC* 7.
149 *Ellison v Software Company*, Inc, 85 F3d 187 (5th Cir. 1996).

for radiation six days a week as part of her treatment, which caused her to go to work late on a daily basis. This however, did not prevent her from executing her duties in the company because she worked during her lunch breaks and often left the office late in order to catch up with some work. During this period of receiving treatment, Miss Elliot received an unfavourable performance appraisal and she was told that she would be demoted; this is despite all the efforts she has put in ensuring that her work was up to date.[150] She was later dismissed by the employer, and she brought a claim against the employer to assert that she has been unfairly discriminated against on the basis of her suffering from cancer; which amounted to a disability.

The court dismissed her claim on the basis that cancer does not amount to disability in terms of the then Americans with Disabilities Act of 1990 (ADA), which was replaced by the current legislation of Americans with Disabilities Amendment Act.[151] In determining whether a person with cancer is indeed disabled, a court must consider cancer in its active state, whether or not an individual is in remission.[152] This decision by the court was widely criticised because it excluded cancer employees from the protection of the law. Employers discriminated against cancer employees in America, and the ignorant belief of cancer being contagious made it worse for cancer employees to even finding employment.[153] The impact of this is that employers may tend to view cancer employees as liabilities, because they are likely to become ill at work, perform poorly and also to be absent frequently or all the time.[154] Such harsh treatment towards cancer employees constitutes a violation of their basic human rights, because work has been an important component of the survival of human beings from the beginning of time.[155]

Morrell,[156] correctly states that work is a symbol of independence, competence and accomplishment which any human being desires on earth, because work does not only provide for the needs of physical desires in order to survive but work actually serves as a means to define one's self or establish one's sense of worth in life. In the context of

150 *Ellison v Software Company*, *supra*.
151 *Ellison v Software Company*, *supra*.
152 S 3 of the Amended Americans with Disabilities Act of 2008.
153 Morrell "Aids and Cancer: Critical employment discrimination issues" 1990 *J.Corp.L* 851.
154 Morrell 1990 *J.Corp.L*851.
155 Feldman M *Wellness and Work, in Psychosocial stress and cancer* (2000) 173.
156 Morrell 1990 *J.Corp.L*855. Further, please refer to Wheatley "The Employability of Persons with a History of Cancer 1974 *CANCER* 441-445, in this article Wheatley provides that a Metropolitan Life Insurance Company did a study of its employees who were known to have cancer and confirmed that the work performance of employees with cancer is nearly similar to the work performance of employees without cancer. The company concluded that cancer employees were excellent employees and this is when Wheatley argues that, for cancer employees to thrive in the workplace they must be given an opportunity and provided with all the necessary support in the workplace.

cancer, it has been argued earlier in the study that work actually forms part and parcel of the healing process of the cancer employee. Excluding them from working actually means taking away their self-worth and basic human rights as asserted by Morrell.

As will be seen from the cases referred to below, some of the US cases dismissed the claims of cancer employees on the ground that cancer is not a disability.

For example, in *Lynos v Heritage House Restaurant Inc*,[157] the employee, a kitchen manager of the employer, who was diagnosed with cancer of the uterus, was dismissed by her employer after her medical condition became known. She then brought a claim against the employer on the basis of unfair discrimination due to her medical condition i.e. cancer, asserting that her condition amounted to a disability.[158] The employee argued that despite being diagnosed with cancer, she was still efficient and capable to do her work without any problems. The court, however, dismissed her application and ruled in favour of the employer. The reasoning of the court was that the applicant was not disabled or handicapped because she was still able to do her work and cancer does not amount to disability in terms of the law.[159]

Korn,[160] argued that the problem with cancer is that it has compounded issues which society in general and the legal system in particular are not willing to discuss.[161] This is due to the fact that society views disability as a static physical problem and cancer unfortunately does not fit into that pattern. In its active state, cancer substantially limits the normal cell growth function and thus an individual with cancer is protected by the Americans with Disabilities Amendment Act.[162] Korn asserts that cancer is viewed in a similar dichotomous manner, in the sense that we think that a person with cancer will most probably die and less likely to be cured, and this is a wrong perception.[163] From the *Elliot* case and the arguments presented by Korn, it is clear that at some point in the American jurisprudence there was a denial and exclusion of cancer patients from the protection of the law, which resulted in unfair discrimination of cancer patients and employees. This example may be compared to the situation in some African countries where HIV/AIDS denial led to devastating consequences, and millions of lives lost in the process.[164]

Scott,[165] believes that this definition of disability by the Americans with Disabilities Amendment Act restored the definition of disability of

157 *Lynos v Heritage House Restaurant Inc* 89 III App NE 270 (1982).
158 *Lynos v Heritage House Restaurant Inc supra*.
159 *Lynos v Heritage House Restaurant Inc supra*.
160 Korn 2001 *S. Cal L Rev* 400.
161 Korn 2001 *S. Cal L Rev* 401.
162 Benfer 2009 *ASC* 13.
163 Korn 2001 *S. Cal L Rev* 404.
164 Nattras "Aids Denialism vs Science" 2007 *Sketical Inquiry* 109.
165 Scott *Principles and Applications of Assessment in Counselling* (2013) 314.

the initial Americans with Disability Act of 1990, while at the same time broadening the definition of disability to include both physical and mental impairment which can render a person disabled. He further argues that this approach of including both the physical and mental impairment will be of great benefit for the people, as many people will be protected from being unfairly discriminated against by both employers and society.[166] One can surely attest to this argument that such a flexible definition of disability is one that is required in South Africa, where disability is still mainly dependent on the physical impairment of the patient.

Incorporating a flexible definition of disability which recognises both mental and physical impairments which substantially limit the ability of the patient or employee in the South African jurisprudence will be helpful in broadly covering different types of deformities. This approach may assist to correct the problem created in our law by the recognition of some health conditions, for example, the recognition of HIV/AIDS as a disability, while leaving behind health conditions such as cancer which can have the same or more adverse effects than HIV/AIDS. This flexible approach may potentially rule out the unfair operation of our employment laws for cancer employees, as cancer can either render a person temporarily or permanently disabled, and thus in need of legal protection in the workplace.[167]

The Americans with Disabilities Amendment Act regards cancer as a disability in instances where it substantially limits the ability of an individual to do daily activities or if at some point the cancer limited the ability of an individual to do daily activities.[168] Whether an individual employee will be covered by the provisions of the Americans with Disabilities Amendment Act is a question of fact and is determined on a case by case basis. A cancer employee who does not experience a substantial limit of their ability to do daily activities will not be deemed to have a disability. From this reasoning, it is apparent that in the American context, cancer will constitute as a disability if it has an effect or impact on the ability of the individual to do daily activities. Moreover, it is also clear that a diagnosis of cancer does not automatically render a cancer patient as a person who suffers from a disability.

166 Scott 315. Furthermore one can argue that these assertions by Scott resemble or take into context what Senator Tom Harkin said when the Americans with Disabilities Act was adopted in 1990. He stated that: "The ADA is based on a single premise that disability is a single natural part of human experience. Disability in no way diminishes the right of people to live independently, enjoy self-determination, make choices, pursue meaningful careers, and enjoy full inclusion and integration in the economic, political, social, cultural and educational mainstream of American society". See Harkin "The Americans with Disabilities Act: Four years later – commentary on blanck" 1994 *IOWA.L.R* 936.

167 Curtis *et al, Glass Office Gynaecology* (2014) 533.

168 S 3 of the Amended Americans with Disabilities Act of 2008.

5 Conclusion

Cancer does not take away the human dignity and ability of employees with cancer, which is something that employers must learn and take into consideration. This understanding of the disease will be achieved through education and awareness of cancer, that can contribute to the development and amendment of workplace policies among other things and it will alleviate things such as unfair discrimination and unfair labour practices which come as a result of the stigma and ignorance that is attached to cancer not only in the workplace, but in society in general.

Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post"-apartheid constitutionalism

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SUMMARY

This article reflects on the limits of "post"-apartheid constitutionalism through an extended theoretical discussion and close reading of the Constitutional Court decision in *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC). It focuses in particular on how South Africa's history of colonial conquest, white supremacy and racism – and the nation's failure to reckon with that history – introduced a "constitutional irresolution" in the case. Developed by Emilios Christodoulidis as a critique of constitutional optimism in all its forms, "constitutional irresolution" describes what happens when constitutionalism, because of its institutional and rigid character, is unable to address political or legal contestations which challenge its own terms and norms. In this article, this irresolution is then related to the work of Mogobe Ramose and specifically his critique of how the negotiated settlement and transition of the 1990s followed a path of democratisation, which not only negated the exigency of decolonisation and historical justice but also resulted in the "constitutionalisation of the injustice arising from the unjust war of colonisation". Since *City of Tshwane* raised questions concerning race, belonging and the still colonial character of South African spaces, mind-sets and power relations, it illustrates the persistence of the colonial-apartheid past into the constitutional present. Among other things, I take this blurring of the divide between the past and the present to be an exposure of the limits, or irresolution, of "post"-apartheid constitutionalism and "post"-apartheid jurisprudence:

> Race lives even as it is being constitutionally buried. In South Africa, race and racism constitute an impermanent conundrum, a conceptual incorrigibility in and for a society trying to imagine itself as non-racial.[1]

* This article draws on a chapter from my doctoral thesis entitled "The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the 'Afterlife' of Colonial-apartheid" (PhD thesis 2018 UP), completed under the supervision of Professor Karin van Marle. My thanks to Karin for her support and critical insights. My gratitude is extended also to close colleagues Yvonne Jooste, Rantsho Moraka and comrades from the Azanian Philosophical Society for generative conversations relating to the research in this article.

1 Farred "Shooting the White Girls First: Race in Post-apartheid South Africa" in *Globalization and Race: Transformations in the Cultural Production of Blackness* (eds Clarke and Thomas) (2006) 66.

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> The postcolony, however hard it may try, sees the persistence of an infinite colonial sovereign imposition – that is, colonial sovereignty is rendered finite by adjusting, archiving, transforming the social and juridical order through a national liberation struggle, but to the extent that colonial juridical, economic, and social orders persist, the colonial usurpation has an infinite reach.[2]

1 Introduction: shades of a problematic

In this article, I provide an extended reading of the recent Constitutional Court case of *City of Tshwane Metropolitan Municipality v Afriforum*.[3] This is a case that stands out as particularly desperate for critical analysis given how dramatically the contradictions of South Africa's unresolved history of racial oppression, colonial conquest and white supremacy introduced an unsettling fracture not only between the judges of the Court but also in the foundations of the very idea of non-racial "post"-apartheid constitutionalism. Although the case deals with a largely procedural and administrative dispute concerning the process of re-naming streets in the city of Tshwane, it more significantly raises questions of memory, race, power, and how to respond to the almost four-centuries history of trauma, terror and tragedy that define colonial-apartheid in South Africa.

I will thus read *City of Tshwane* as a case that highlights some of the fundamental complexities and limits – maybe even failures – of South Africa's present constitutional dispensation. I take as a starting point the many critical voices who have argued over many years that the choice in the early 1990s by the negotiators for a "new" South Africa to follow a path of post-conflict reconstruction based on liberal constitutionalism, rights discourse, amnesty and "reconciliation without justice" would be unsustainable and only reproduce unfreedom and inequality.[4] For these critical voices, the constitutional transition in South Africa was characterized by statist and top-down discourses of forgiveness, unity and nation-building to the exclusion of justice, responsibility and reparations. The empty symbolism of the former discourses is evidenced

2 Motha "Archiving Colonial Sovereignty: From Ubuntu to a Jurisprudence of Sacrifice" 2009 *SA Public Law* 300.

3 *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 6 SA 279 (CC).

4 See generally, Mamdani "Reconciliation without Justice" 1996 *SA Review of Books* 3-5; Mamdani "When Does Reconciliation Turn into a Denial of Justice?" in *Sam Nolutshungu Memorial Lecture Series* (1998) 1; Mutua "Hope and Despair for a New South Africa: The Limits of Rights Discourse" 1997 *Harvard Human Rights J* 68; Sibanda "Not Purpose Made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty" 2012 *Stellenbosch LR* 482; Madlingozi "Social Justice in a Time of Neo-apartheid Constitutionalism: Critiquing the Anti-black Economy of Recognition, Incorporation and Distribution" 2017 *Stellenbosch LR* 123 – 147. See also Modiri "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" 2018 *SAJHR* 300-325.

by the way in which the terms of the negotiated settlement exonerated perpetrators and beneficiaries of colonial-apartheid of all historical and political responsibility and failed to comprehensively address questions of the restoration of land, economic redistribution and the reclamation of African culture and epistemologies.[5] It follows from this that by failing to address the problem of historical and corrective justice, the new legal and political order would ultimately reveal irresolvable cracks and tensions that would overwhelm the coherence of the very idea of "post-apartheid South Africa".

If, as the historical record shows, the very idea and name of "South Africa" is a construct and artefact of colonial sovereignty, having been imposed on this land by its two conquering powers in the Union of 1910 as part of a larger project of remaking the entire territory in the image of Europe, into what would be called "white South Africa",[6] then "South Africa" itself emblematises the dispossession, suffering, oppression and unsovereign existence of the indigenous conquered peoples of this part of the world. On this view, the project of a number of critical legal scholars in South Africa to develop a "post-apartheid jurisprudence" that, through mourning, transformation and critique, could repudiate the conservative legal culture of apartheid and its lack of an ethical politics,[7] is analytically and historically misplaced since it was the *longue durée* history of colonial conquest and white supremacy and not the half-century juridical formation of apartheid that is the *founding* of South Africa's contractions.[8] Whereas post-apartheid jurisprudence conceives of the present South Africa as an imperfect and complex formation of political community struggling to overcome its past, this note works from the prism of *post-conquest jurisprudence*, which in contrast treats the idea of South Africa as an unjust and unethical formation and also as a foundationally impossible site of community, subjectivity and relation.

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5 Ramose "An African Perspective on Justice and Race'" 2001 *Polylog* http://them.polylog.org/3/frm-en.htm "In Memoriam: Sovereignty and the 'New' South Africa" 2007 *Griffith LR* 318-319; "Reconciliation and Reconfiliation in South Africa" 2012 *J of African Philosophy* 33.

6 Fredrickson *White Supremacy: A Comparative Study in American and South African History* (1981) 179 – 198; Saul and Bond *South Africa – The Present as History: From Mrs Ples to Mandela & Marikana* (2014) 36.

7 For some representative writings, see Van der Walt *Law and Sacrifice: Towards a Post-apartheid Theory of Law* (2005); Le Roux "The Aesthetic Turn in Post-Apartheid Constitutional Rights Discourse" 2006 *TSAR* 101-120; Cornell "Ubuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa" 2009 *Law & Critique* 43 – 58; Van Marle "Reflections on Post-apartheid Being and Becoming in the Aftermath of Amnesty" 2010 *Constitutional Court Review* 347 – 366. See also the writings collected in Van Marle and Le Roux (eds) *Post-apartheid Fragments: Law, Politics and Critique* (2007).

8 See Dladla *Here is a Table: A Philosophical Essay on the History of Race in South Africa* (2016) and Cavanagh "Settler colonialism in South Africa: land, labour and transformation 1880 - 2015" in *Routledge Handbook of the History of Settler-colonialism* (eds Cavanagh and Veracini) (2017) 291 – 308.

This is a significant distinction since the primary jurisprudential contention in this case revolved around the relationship between the Constitution and South Africa's history of colonial racism and spatial injustice. The Court had to answer the question of whether the Constitution's professed vision of a non-racial, democratic and united society accommodates, protects *and affirms* both the historical memory and experience of the historically oppressed Black community as well as the political worldview and cultural history of the white minority population. Another way to put this is whether the Constitution can contain the fundamentally incommensurable and conflicting histories of both the conquered and the conqueror. But does settler-colonialism not have as its ultimate aim the elimination or disappearance of the native subject?[9] Is it truly possible to reconcile the forms of life of Black people in South Africa, still reeling from an unliveable history of subjugation and of being made foreigners in the land of their birth, to those of white South Africa, descendants of European colonialists and immigrants whose existence and presence has its historical basis in domination and racism?

It is in the quite different formulations of the above problematic by the majority judgment (authored by the Chief Justice with the concurrence of all the black judges of the Court) and the minority judgment (authored by the only two white judges of the Court) that the "post"-apartheid Constitution – as historical text, civic language, political culture and social consciousness – appears fragile and malleable, unable to hold together the civic bonds of the nation, and incapable of reckoning with the past and the present. To my mind, the very event of this case attests to the "non-constitutive" character of the post-1994 South African Constitution – the fact that it did not reconstitute or bring about a truly new society and polity. This failure of the Constitution to constitute and represent a non-racial "we" that could share the space of the city of Tshwane is not unrelated to its overall historical inability to address the injustice of colonial conquest and its afterlives – structural racism, land dispossession, economic inequality, spatial segregation, violence, epistemicide and perennial social disharmony. As I will attempt to illustrate, the affective, political and historical lines of reasoning developed in the different judgments that compose this case reflect something of a structurally and symbolically overburdened project of constitutionalism, a constitutionalism that can no longer conceal its failures and silences.

This article will unfold as follows: In the section that follows (section 2), I engage with the notion of "constitutional irresolution", as put forward by Emilios Christodoulidis, through an interlocution with the work of Mogobe Ramose and other scholars. The aim will be to situate the reading of the *City of Tshwane* judgment(s) within the context of the critique of constitutional optimism and of the faulty terms of the negotiated settlement, which gave rise to the new constitutional

9 Wolfe "Settler colonialism and the elimination of the native" 2006 *J of Genocide Research* 387 – 409.

dispensation. I shall thereafter (in section 3), draw on the foregoing discussion to examine the *City of Tshwane* judgment through a close reading of its rhetorical structure and the interpretive tensions between the majority judgment by Mogoeng CJ, the minority judgment by Froneman and Cameron JJ as well as the separate concurring judgment by Jafta J. The constraints of space may not allow the full argument as sketched in the background above to come through so what is offered here is only shades of a much larger and longer critical project.

2 The irresolute constitution

In thinking through a critique of "the constitutional optimism that pervades our political rationality",[10] legal theorist Emilios Christodoulidis introduced the notion of "constitutional irresolution" as a way of drawing attention to that which dominant modes of legal-constitutional representation "both brings into presence and misses".[11] Christodoulidis argues for emphasis to be placed on "bearing witness to what is missed".[12] With this notion of constitutional irresolution, Christodoulidis opposes conceptions of constitutionalism which claim or attempt to contain politico-historical tensions in the polity and play host to plurality. He is critical of a variety of constitutional optimisms – from those which insist on the need for consensus, unity and shared normative interpretation to those more ambitious attempts to include organised and disorganised elements of civil society into the structure of constitutional construction and negotiation.[13] For Christodoulidis, all forms of constitutional optimism ignore the fundamental "institutional constraints" that come with constitutionalism, by which he means that the coupling of law and constitutionalism with the political, plurality, agonism and contestation is a structural impossibility due to law's systematic inclination to fix and reduce social complexities.[14]

Christodoulidis' arguments here serve as a particularly apposite response and problematisation of attempts also in South Africa to figure the Constitution and constitutionalism variously as (1) a vehicle for nation-building and reconciliation;[15] (2) a normative framework for historically-responsive social transformation;[16] (3) a fundamental

10 Christodoulidis "Constitutional Irresolution: Law and the Framing of Civil Society" 2003 *European LJ* 401.
11 Christodoulidis 2003 *European LJ* 403.
12 Christodoulidis 2003 *European LJ* 403.
13 Christodoulidis 2003 *European LJ* 404.
14 See generally Christodoulidis *Law and Reflexive Politics* (1998).
15 See e.g. Langa "Transformative Constitutionalism" 2006 *Stellenbosch LR* 351 – 360; Mbembe "Apartheid Futures and the Limits of Racial Reconciliation" (2015) Unpublished paper available at http://wiser.wits.ac.za/system/files/documents/Mbembe%20-%202015%20-%20Public%20Positions%20-%20Apartheid%20Futures.pdf.
16 See e.g. Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146; Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous

rupture with the legal and political values of the "old" order of colonial-apartheid,[17] and as (4) a founding instrument that binds South Africans together into a "people" with a shared national identity.[18] At once deified and sentimentalized, the South African Constitution is optimistically cast not only as the supreme law of the nation but also as the governing blueprint and grammar of South African social, legal and political life, a *supreme rationality* that defines the parameters of all speech and action. But as Christoudilidis illustrates, such attempts by constitutional optimists to develop an all-inclusive and democratic constitutionalism are terminally non-performative and incapable of resisting the "top-down logic" of constitutionalism as well as the "the fixity of constitutional determinations".[19]

Christodoulidis critically examines two dominant strands of constitutional optimism – which he names "constitutional pluralism" and "constitutional agonism" respectively –and concludes that both theoretical approaches to constitutionalism "invite constitutional orders to exhibit *an impossible reflexivity*".[20] Christodoulidis elaborates on this further through a critical legal rendition of Systems theory. He argues that constitutional optimists fail to realize the inherent "institutional limits of constitutional politics": precisely the ways in which (constitutional) law fixes contingency, draws lines and stabilizes meaning through institutionalization and thereby forecloses contestation and excludes certain voices and perspectives from legal discourse:

> Institutionalisation imports a mundane sort of violence to this effect: not everything can be contested, not everything finds its way into legal categories. The ambit of all that could be contested is delimited by institutional categories that determine there who, the how and the when of constitutional politics.[21]

This regulatory and stabilizing institutional function of law also has the effect of providing norms and procedures that allow all conflicts to be treated, indeed ordered, as resolvable.[22] Constitutional politics, as a politics that grounds an order, is not open to conflicts that cannot be resolved. It is not open to antagonisms that call either dominant power

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Jurisprudence of Equality" 1998 *SAJHR* 248-276; De Vos "The Past is Unpredictable: Race, Redress and Remembrance in the South African Constitution" 2012 *SALJ* 73 – 103.

17 See e.g. Van Der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 term" 2008 *Constitutional Court Review* 77 – 124; Cornell *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (2014); Davis "Transformation: The Constitutional Promise and Reality" 2010 *SAJHR* 85 – 101.

18 See e.g. Ndebele "Our Dream is Turning Sour" (2011-09-25) *The Sunday Times* http://www.timeslive.co.za/opinion/commentary/2011/09/25/part-1-our-dream-is-turning-sour; Sachs *We, the People: Insights of an Activist Judge* (2017).

19 Christodoulidis 2003 *European LJ* 405.

20 Christodoulidis 2003 *European LJ* 411; see discussion on pages 403 – 411.

21 Christodoulidis 2003 *European LJ* 413.

22 Christodoulidis 2003 *European LJ* 414.

arrangements of a society or a constitution's own terms and foundations into question. In this respect, constitutional law also imposes a particular, official and hegemonic historical and national narrative, a way of understanding the social, the political and the historical that accords with its assumptive legitimacy and authority. As Christodoulidis explains, legal and constitutional argument and reasoning "is *always-already* disciplined by the contextual conditions, therefore no longer reflexive about them."[23] A constitution's own capacity for inclusivity, democratic openness and political deliberation is undercut by its aversion to "structure-defying challenges":

> The asking price for a politics of law, for a constitutional politics, is that the legal structure in the situations that it structures is not itself put to the test.[24]

Christodoulidis further highlights two paradoxes or "irresolutions" inherent to constitutionalism, namely its drive for closure which undercuts its ability to host the "irreducible disagreement" at the heart of politics,[25] as well as its inability to simultaneously effect and represent, while also enabling the renegotiation of, a "we", a *demos* or a constituency.[26] It occurs here that there is a striking parallel between Christodoulidis' critique of constitutionalism and that of Mogobe Ramose.

In his critique of the paradigm of constitutional supremacy in South Africa, Ramose points out an essential distinction between constitutionalism (*-ism*) and the "*-ness* aspect" of Ubuntu philosophy.[27] For Ramose, African philosophy works from the premise that "motion is the principle of being". Consequently, the African ontology of law proceeds as a *–ness* and not an *–ism* – the former evoking dynamism and motion; the latter denoting fixity and immutability.[28] The implication of this philosophical and linguistic distinction is that it is inherent to constitutional-*ism* to construe the Constitution as fixed, transcendent and immutable and therefore not responsive to contingency, radical openness and political contestation. Since everything in human life – including law, politics and society – is in incessant and perpetual flow, it is necessary, argues Ramose, "to remain open to change and not to block it by imposing an arbitrary finality …".[29] Yet it is the drive to finality that is the source of the "irresolution" Christodoulidis identifies as inherent to constitutional-*ism*.

In the reading of *City of Tshwane* judgment below, I will attempt to trace how the histories of race and conquest in South Africa introduced a similar "irresolution" that thwarts the closure, finality and stability to

23 Christodoulidis 2003 *European LJ* 415.
24 Christodoulidis 2003 *European LJ* 416.
25 Christodoulidis 2003 *European LJ* 417.
26 Christodoulidis 2003 *European LJ* 421.
27 Ramose "Ubuntu: Affirming a Right and Seeking Remedies in South Africa" in *Ubuntu: Curating the Archive* (eds Praeg and Magadla) (2014) 133.
28 Ramose *Ubuntu: Curating the Archive* 133.
29 Ramose *Ubuntu: Curating the Archive* 133.

which constitutionalism aspires. In *City of Tshwane*, the Court was confronted with a matter that troubled the terms and foundations of the Constitution and yet was strained to resolve it within the parameters of that text. In other words, the Court was haunted by a history that we have failed to reckon with. The constitutional vision of a multicultural nation, a non-racial, united and free society came up against "the insistent persistence of the colonial",[30] the resilience of white social and economic power and the intransigence of colonial spatialities and mindsets. On display in the case was a nominally "post-apartheid" society that still adheres to a colonial-apartheid spatial imaginary; a white political community that *still* refuses democratic Black majority rule in a legal system that enables such refusal; and the shattering of Human relationality that results in an historical, experiential and political incommensurability and lack of mutuality between the Black and white inhabitants of Tshwane and more broadly, South Africa. The paradox is that the present Constitution claims to have dismantled the old colonial-apartheid order and instituted a new one, based on transformative and democratic values, but is faced in this case with the living falsity of this claim. This case is thus a remarkable instance of "constitutional irresolution" since it poses a challenge that defies or undermines the very structure and logic of the Constitution.

A central theme throughout Ramose's oeuvre on South African jurisprudence is that the irresolution described above is closely tied to the faulty foundations of the negotiated settlement and the process of transition from colonial-apartheid to constitutional democracy undertaken in South Africa in the early 1990s. Ramose analyses the constitutional negotiations for a "new" South Africa in terms of the two contending paradigms that were at play during that time, namely the democratisation paradigm versus the decolonisation paradigm.[31]

The democratisation paradigm assumes that the major problem of apartheid was one of racial disenfranchisement and denial of basic civil rights to Blacks. In this paradigm, a key fundament of achieving a new democratic dispensation would be the inclusion of Blacks into the existing legal, political and economic regime and the promulgation of democracy and non-racialism.[32] Because of the focus on apartheid – a fleeting event (from 1948 – 1994) in the now almost four centuries of white supremacy's reign in South Africa – the democratisation paradigm entirely lost sight of the question of land which is a problem that predates the formal institutionalisation of apartheid.[33] Already in 1993, Ramose,

30 Tuitt "Used Up and Misused: The Nation State, the European Union and the Insistent Presence of the Colonial" 2012 *Columbia Journal of Race and Law* 490 – 498.

31 Ramose "I Conquer, Therefore I am the Sovereign" in *The African Philosophy Reader* (eds Coetzee and Roux) (2003) 570.

32 Ramose *The African Philosophy Reader* 570.

33 Ramose *The African Philosophy Reader* 570. See also Ramose "Historic Titles in Law" in *The African Philosophy Reader* (eds Coetzee and Roux) (2003) 541 – 543.

together with Lesiba Teffo, had hypothesised that a core ideological constituent of the democratisation paradigm was "the illusion of freedom" through which Blacks would be inserted into a new order of racial domination "not by coercion as in the past, but by consent."[34] Democratisation thus results in the moral and political maintenance of the racist foundations of South Africa and the continuation of racially oppressive conditions in the guise of a liberal democratic state where the exigency of restoring parity and equality would remain forever deferred. As such, Ramose concludes that the democratisation paradigm is perfectly "consistent with the conqueror's claims" to land, property, power and wealth unjustly acquired through conquest and violence.[35] The democratisation paradigm is thus fundamentally preservative of the colonial-apartheid social (and spatial) fabric. It maintains the accumulated inequalities through the new legal order and envisages the equal participation of all members of a society in a still unjust and unethical polity.

On the extreme opposite, the decolonisation paradigm involves precisely the "dissolution of the conqueror's South Africa" through the restoration of title to territory and sovereignty over it to its indigenous people.[36] Decolonisation seeks to effect a fundamental alteration in the power relations, and the epistemological and ontological framework, of South African society. It aspires not merely to the enfranchisement and inclusion of the oppressed into the existing framework but a reorganisation and repair of the polity. It abolishes the polity as imagined and instantiated by the European colonialist and dissolves the very categories of coloniser and colonised, settler and native, and Black and white as material social realities and not merely nominal juridical labels. Decolonisation, then, marks both the end of the white settler State and the opening to a post-conquest world. The decolonisation paradigm represents a deeper and more expansive and extensive conception of justice that responds to the experience of the indigenous conquered peoples of South Africa. Yet, it was of course the rights-based democratisation paradigm and its illusory freedom that carried the day in the constitution-making and nation-building process of the early 1990s, resulting in what Ramose calls "the constitutionalisation of injustice"[37] or what he elsewhere describes as the "forced transmutation of injustice into justice".[38]

The ultimate choice for the democratisation paradigm is also epistemological for Ramose, as it is linked to the adoption of a Western legal paradigm and discourse that is neither autochthonous nor

34 Teffo and Ramose "Steve Biko and the Interpreters of Black Consciousness: a response to Lotter" 1993 *Acta Academica* 11.
35 Ramose *The African Philosophy Reader* 570.
36 Ramose *The African Philosophy Reader* 570.
37 Ramose *The African Philosophy Reader* 570,
38 Ramose *The African Philosophy Reader* 560.

democratically legitimate since the majority of the population had no real say in its adoption.[39] This reinforces the epistemicide that was central to the original injustice of colonialism and apartheid. By annihilating and dismissing the experiences and knowledges of the indigenous people and replacing it with the coloniser's own unilaterally defined meanings of truth, knowledge and experience, the epistemological structure of the "new" constitutional dispensation tacitly legitimises the colonial assumption that African people by virtue of their lack of civilisation and rationality are incapable of producing knowledge with which to govern themselves and to make sense of the(ir) world.[40]

Accordingly, the "transformation" brought about by the Constitution could be described as profoundly *"non-constitutive"* in the sense that the formal abolishment of apartheid was followed only by a general reform of constitutional law and the processes, systems and rules of South African law but not by a fundamental reorganisation of the way in which South Africa is economically, socially and politically constituted and organised. Put differently, the transition to constitutional democracy in South Africa was non-constitutive in the sense that it did not bring about *radically new* values and social relations. Hence Ramose's assertion that the Constitution represents a "second conquest" not only in its legitimation of the results of colonial land dispossession and exploitation, but also in its subordination of indigenous law and African jurisprudence.[41] He thus reads the Constitution as a form of reiterative violence in the sense that the fundamental injustice of the "old" order was preserved in the making of the putatively "new" order. In his words:

> [T]he injustice of conquest ungoverned by law, morality and humanity was constitutionalised. This *constitutionalisation of injustice* places the final constitution on a precarious footing because of its failure to respond to the exigencies of natural and fundamental justice [that is] due to the indigenous conquered peoples.[42]

Ramose's prediction that "post"-apartheid constitutionalism will always stand on a "precarious footing" due to its failure to reckon with the history of conquest suggests that the foundations of the South African constitutional order will continue to be unstable, overwrought, and lacking the grounds for universal legitimacy.[43] As he explains:

> [L]egal justice is not always the same as natural and moral justice. The option for democracy and non-racialism cannot replace the exigencies of justice in the form of restoration and restitution. Nor can it erase these from the

39 Ramose 2007 *Griffith LR* 320. See also Ramose "The King as Memory and Symbol of African Customary Law" in *The Shade of New Leaves. Governance in Traditional Authority: A Southern African Perspective* (ed Hinz) (2006) 353 – 355.

40 See Ramose *African Philosophy Through uBuntu* (1999) 5-28.

41 Ramose 2007 *Griffith LR* 310 – 329.

42 Ramose *The African Philosophy Reader* 572. My emphasis.

43 Ramose "The Philosophy of the Anglo-Boer War" in *A Century is a Short Time: New Perspectives on the Anglo-Boer War* (eds Snyman *et al*) (2005) 22-23.

> memory of historical justice. For these reasons a post-conquest South Africa is yet to be born …[44]

This is why the Constitution and its attempts at closure and consensus will always be haunted, rendered irresolute, by the demand for true and concrete justice.

3 *City of Tshwane*: history beside itself

3 1 Factual background

City of Tshwane,[45] concerns the renaming of 25 streets in the city of Tshwane/Pretoria.[46] The Council had earlier passed a resolution to implement changes to the street names in the inner city of Tshwane/ Pretoria to reflect the "shared heritage" of all South Africans.[47] After requesting that the City remove the new street names, Afriforum instituted an application for a restraining order preventing the City from removing the old street names pending a review of the Council's decision. Some months later however, after Afriforum had failed to launch a review application, the Mayor announced that the old street names would be permanently removed. Afriforum then applied for an urgent interdict ordering the City to retain the old street names underneath the new street names and to restore those that had already been removed pending the finalization of the review application which was still pending in the High Court. In its review challenge, Afriforum argued essentially that the Council's decision to rename the streets was invalid on the grounds that the City had not facilitated adequate public participation in the renaming process and moreover that the decision violated the cultural and environmental rights of the white Afrikaner community.

The City on the other hand responded that it was exercising its exclusive constitutional powers to govern the City in line with its vision for Tshwane/Pretoria to become a "new African Capital City, reflective of a common heritage, identity and destiny". The City also embarked on the renaming process in an effort to celebrate and honour the heroes and heroines of the "formerly" oppressed Black community. Among the new street names were iconic activists and intellectuals of the anti-apartheid struggle: Steve Biko, Robert Sobukwe, Jeff Masemola, Charlotte Maxeke, Lillian Ngoyi, Nelson Mandela and Walter Sisulu. Also included were three white anti-apartheid activists – two of whom were prominent Afrikaner theologians: Johan Heyns, Nico Smith and Helen Joseph. The High Court ultimately ruled in favour of Afriforum and granted the order restraining the City from removing any of the old street names and

44 Ramose *A Century is a Short Time: New Perspectives on the Anglo-Boer War* 22- 23.
45 *City of Tshwane Metropolitan Municipality v Afriforum supra*, para 1.
46 *City of Tshwane v Afriforum supra*, para 1.
47 *City of Tshwane v Afriforum supra*, para 1.

directing them to restore those that had been removed. The City's appeal of the High Court's decision serves as the basis of the case in the Constitutional Court which as we will see addressed itself to the substantive questions regarding constitutional rights, history, race and culture rather than the more formal questions concerning the principle of legality and the procedure relating to interdicts.

3 2 Majority judgment

As has become standard in racially and historically contentious cases, Mogoeng CJ begins the judgment with a narration of the history of South Africa that led to the dispute over street names. Although he opens with a rehearsal of the peculiar doxa of South Africa as a country now "liberated" from a system of institutionalised racial oppression, he does tie this to a recognition that "colonialism or apartheid is a system so stubborn that its harmful effects continue to plague us and retard our progress as a nation …".[48] In the context of the case at hand, Mogoeng CJ notes that this continuing plague of the past is evidenced by the fact that almost all major cities, towns and street names in South Africa still bear references to figures of the colonial and apartheid "past". He thus takes issue with the fact that when attempts are made to progressively change these names, they are repeatedly faced with legal challenges.[49]

For Mogoeng CJ, the "all-inclusive constitutional project" that was formally embarked upon in the early 1990s in pursuit of national unity and reconciliation requires that the injustices of the past "not be pampered …".[50] He adds that "the immeasurable damage racism or cultural monopoly has caused requires strict measures be taken to undo it."[51] In markedly combative language, the Chief Justice argues that maintaining symbols that resonate with our oppressive "past" and which venerate the heroes and heroines of a single racial group perpetuates the historical denigration of African people and indeed constitutes racial domination. The fact that South Africa "still looks very much like Europe away from Europe"[52] is, in his view, antithetical to the "constitutional reality" and "constitutional vision in South Africa".[53] As he further states:

> A very insignificant number of names of our cities, towns and streets gives recognition to the indigenous people of this country and other black people. Very little recognition or honour is given to their heritage, history, heroes and heroines in their own motherland. This does not reflect but rather belies a commitment by all to the spirit of genuine unity, transformation and reconciliation.[54]

48 *City of Tshwane v Afriforum supra*, para 2.
49 *City of Tshwane v Afriforum supra*, para 4.
50 *City of Tshwane v Afriforum supra*, para 6
51 *City of Tshwane v Afriforum supra*, para 6.
52 *City of Tshwane v Afriforum supra*, para 12.
53 *City of Tshwane v Afriforum supra*, para 7, 9, 11 and 14.
54 *City of Tshwane v Afriforum supra*, para 12.

The work of the Constitution for Mogoeng CJ is to contain political community through its promulgation of a singular rationality and mind-set and sameness of vision – what he calls "shared values".[55] In his own words:

> All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of "ubuntu". "Motho ke motho ka batho ba bangwe" or "umuntu ngumuntu ngabantu" (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interests. South Africa no longer "belongs" to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realized.[56]

Within the judge's non-racial constitutionalism, the nation-building tropes of "inclusivity", "reconciliation", "unity", "transformation" and "social cohesion" stand central. He is at pains to invoke and affirm a "oneness", however elusive, between South African citizens and so argues that the Constitution militates against the respondent's (Afriforum) "never-ending determination to oppose change to city, town and street names".[57] Indeed, according to Mogoeng CJ, the Constitution places on all of "us" a "duty to transform".[58] It is inarguable that Mogoeng CJ is clearly unsympathetic to Afriforum's application. For him, as a matter of both law and political morality, the preservation of colonial-apartheid era street names and the promotion of sectarian white interests through legal technicalities is fundamentally irreconcilable with the constitutional project.[59] Afriforum's claim that the old street names are a core part of their right to culture and that their removal threatens their very sense of belonging as South Africans was thus firmly rejected by the majority.[60]

Mogoeng CJ's decision with the support of all the Black judges of the Constitutional Court comes out quite openly as a refusal to entertain discourses of white victimhood and reverse racism upon which the respondents' claim was based. This importantly undermines the oft-noted phenomenon of well-resourced and litigious individuals and organisations representing the vested interests of beneficiaries of historical injustice using their massive economic power to convert courts

55 *City of Tshwane v Afriforum supra*, para 9.
56 *City of Tshwane v Afriforum supra*, para 11.
57 *City of Tshwane v Afriforum supra*, para 14.
58 *City of Tshwane v Afriforum supra*, para 14.
59 *City of Tshwane v Afriforum supra*, paras 18-19.
60 *City of Tshwane v Afriforum supra*, paras 26-27.

into instruments for opposing democratic rule through procedural technicalities. In that sense, Mogoeng CJ is speaking back to the more optimistic, conciliatory tone of the earlier Constitutional Court jurisprudence on matters of race, highlighting that the promise of a reconciled, and united society has not materialised. The South Africa that is the scene of the *City of Tshwane* case appears still profoundly unsettled by race and it is evident that through his unambiguous language, the Chief Justice is also responding to the climate of increased race-consciousness in public discourse and vocal doubts concerning the transformative capacity of the Constitution. He may also have been paying attention to protests in South African universities calling for decolonisation of South African institutions and spaces.

However, because he must rely on the constitutional text for both rhetorical substance and legal justification, his judgment also works within a set of unresolved tensions or paradoxes which, if pressed, can reveal contradictions and instabilities within the constitutional archive itself. These paradoxes include: (1) the memory of a putatively overthrown colonial order which nevertheless persists presently in the spatial organization and symbolic order of South Africa; (2) the articulation of a "strong" politics of race mediated through a moderate and liberal constitution; (3) a critique of the colonial "past" that relies on a largely Western legal paradigm; (4) the (Africanist) claim that South Africa is the "motherland" of indigenous African peoples but also (the Charterist assertion) that it belongs to all who live in it; and (5) a non-racial constitutionalism tied to the relentless naming of racial groups as "Black" and "white".

The irresolution that results from these paradoxes suggests among other things that the Constitution by design compels the *co-existence* rather than *resolution* of historically opposed forces. This is problematic given that there is certainly an irreconcilability between the histories and cultures of the conqueror and of the conquered – since the former exists through the subjugation and annihilation of the latter or put differently, since the two can only exist in Manichean opposition. The point may be precisely for white South Africans to disavow (without forgetting) their heritage in the world of European conquest and white supremacy in order to be reconciled to this place and to its people. In the philo-praxis of Black Consciousness intellectual, Steve Biko, to overcome the human apartness that settler-colonialism instantiates between the white settlers and the native African population in particular, the subject-positions (including cultural identities) that the settler population inherited from colonial-apartheid must be fundamentally transformed, not accommodated. Repeatedly utilising the metaphor of the "table", Biko articulates a conception of decolonisation that is not a mere inversion in power relations or a simple "turning of tables".[61] It also does not amount

61 Biko *I Write What I Like* (1978) 108.

to acceding to white power and seeking a "place at the white man's table".[62] Instead he writes:

> We knew he had no right to be there; we wanted to remove him from our table, strip the table of all trappings put on it by him, decorate it in true African style, settle down and then ask him to join us on our own terms if he liked.[63]

Thus both the extreme opposites of vengeful expulsion of the settler population and acquiescent submission to the extant colonial order are ruled out in Biko's liberatory vision. Biko instead envisions the reclamation of sovereignty by the indigenous conquered peoples and the reconstitution of a plural society on African terms. White South Africans, having relinquished title to territory, disavowed European supremacy and renounced white privilege, can only at this point be incorporated into a decolonised, non-racial Azania on condition that they accept democratic African political rule. As we noted in the discussion of Ramose above, it is precisely this decolonisation vision of post-conflict reconstruction that was negated by the democratisation logic of the present constitutional order.

3 3 Minority judgment

The tension in *City of Tshwane* would nevertheless deepen in the dissenting judgment written by the only remaining white judges of the Court – justices Johan Froneman and Edwin Cameron. In a way, the divergence in opinion between Mogoeng CJ and the Black judges who support his majority decision and Froneman and Cameron JJ is a metaphor for the persistence of race as a critical fault-line in society and a reflection of the still "unsettled" character of South Africa. The central basis of Froneman and Cameron JJ's dissent concerns their interpretation that the majority judgment is effectively suggesting that "reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history finds no recognition in the Constitution because that history is inevitably rooted in oppression".[64] (I say "their interpretation" because as may be evident in the discussion of the majority judgment above, nothing written by Mogoeng CJ gives this reader such an impression). For Froneman and Cameron JJ, this apparent "constitutional discountenancing" of white cultural history – irrespective of its roots in the genocidal and brutal oppression of African peoples – has "momentous implications for a substantial portion of our population".[65] (Statistically, whites make up less than 10% of the South African population).

Although they also raise a procedural or technical quarrel regarding the issue of leave to appeal against interim interdicts, the more

62 Biko 23.
63 Biko 75.
64 *City of Tshwane v Afriforum supra*, para 81.
65 *City of Tshwane v Afriforum supra*, para 81.

fundamental question they address themselves to is the question of whether the cultural heritage of white South Africans is inevitably tainted by historical injustice, to which their answer is a strained but resounding "no". For Froneman and Cameron JJ, the white community in South Africa, and specifically Afrikaans-speaking whites, do have a real claim to their culture and this should be recognised by the Constitution. This is a point they believe is being denied by the majority judgment.[66] They continue to argue that cultural diversity and the legal right to culture are a legitimate part of our "constitutional society" and need to be safeguarded. To this reader, the dissenting judgment is at once defensive and anxious to make a case not only for white South Africans but for a historically neutral approach to race, culture and identity.

For the two judges, the untidiness or complexity of South African history undermines any attempt to legally wipe away the cultural traditions of white South Africa. As illustrations, they cite the controversial legacies of King Shaka Zulu and his role in the *Difaqane* and Mahatma Ghandi's odious anti-black racist views.[67] Moreover, the presumed tainting of white culture as wholly rooted in oppression and the implicit assumption in the majority and separate concurring judgments that Afriforum is a "racist" organisation goes against what the judges view as the need for "longer, gentler and more accommodating debate".[68] In other words, according to Froneman and Cameron JJ, the majority judgment is insensitive to the feelings of white South Africans. There is an insistence in their judgment on judicial restraint or jurisprudential discipline, the clear function of which is to prescribe a particular way in which the law should approach racially-contested cases. This suggested way entails racial neutrality, politically-tempered language, a judicial voice discipline by legality, tolerance of radically different views and opinions and in this case, sensitivity to white people's feelings and anxieties. It remains to be asked why the judges construe the issue of street names and cultural identity as an issue of differences in opinion and diverse worldviews when it more pertinently appears to raise questions of power and belonging. Both the question of who belongs to South Africa and to whom does South Africa belong are entangled in the histories of settler-colonialism and racial oppression – a nearly 400-year history characterized by a specifically colour-coded

66 *City of Tshwane v Afriforum supra*, para 125.

67 Space does not permit an examination of Froneman and Cameron JJ's uncritical reliance on a largely conservative historiography to portray Emperor Shaka of the Zulu kingdom as a despotic and bloodthirsty conqueror. The historical villanisation of Shaka, and the historically contested narrative of the *Mfecane* period, is generally associated with white settler historical revisionism tied to the downplaying of the effects of European colonial domination. See Kunene *Emperor Shaka the Great* (2017). There is also no inconsistency between the political repudiation of colonial and apartheid-era cultural histories, monuments and street names and the legitimate critique of Mahatma Ghandi's now well-known anti-black racism, class prejudice, anti-Semitism and attachment to Empire. See Desai and Vahed *The South African Ghandi. The Stretch-Bearer of Empire* (2015).

68 *City of Tshwane v Afriforum supra*, para 134; but see also paras 131-134.

asymmetry of power, dispossession and violence – not merely differences in opinion.

Closer to the end of their judgment, Froneman and Cameron JJ move however to deny the politically and historically contested nature of the issue of street names by claiming that beyond the issue of street names, this case raises "an issue of the rule of law".[69] In any case, the judges tell us, "the historical past of white people also includes much to not be ashamed of".[70] They do not enumerate what this "much" is and nor do they show which of the old colonial-apartheid street names in Tshwane/Pretoria or elsewhere for that matter were not placed there as part of the violent process of making South Africa a "white man's country".

3 4 Separate concurring judgment

The schism in the judgment would be continued by Jafta J's reply to the dissenting judges, in which he appears troubled by their suggestion that historically oppressive cultural traditions and symbols which are "racist to the core" do in fact have a place under the Constitution.[71] In contrast to Froneman and Cameron JJ's call for a "gentle" constitutionalism, Jafta J articulates an aggressive constitutionalism – one which instantiates a "clean break from our ugly past of racial oppression".[72] He affirms in stark terms the majority judgment's constitutional repudiation of the "shameful" racial past:

> How can that unquestionably transformative Constitution be expected to recognize cultural traditions rooted in the racist past? The answer must be, if there is such expectation, that it is misplaced. The fact that the oppressive racist history exists at the level of fact does not mean that it deserves any recognition in the Constitution. Therefore, the implication which the second judgment says may be drawn from the first judgment, would be the correct one … It was the shameful racist past properly described in the first judgment which led to streets and buildings in every town in this country, including Pretoria, reflecting exclusively the names of white people. Black people were precluded from residing in these areas, which constituted nearly 90% of the entire country. They were forced to live in segregated townships designed exclusively for black people and usually far from towns and cities in which they were regarded as providers of labour and nothing more.[73]

For Jafta J, the transformative path prescribed by the Constitution is correctly reflected in the majority judgment. He thus disagrees with the dissenting judgment's construal of the majority decision as a deviation from the rule of law. He concludes on this score that Froneman and Cameron JJ's argument that the Constitution creates scope for the recognition of a legal right or interest based on a sense of belonging tied to a culture rooted in a racist past is untenable: "It does not conform with

69 *City of Tshwane v Afriforum supra*, para 152.
70 *City of Tshwane v Afriforum supra*, para 158.
71 *City of Tshwane v Afriforum supra*, para 163.
72 *City of Tshwane v Afriforum supra*, para 164.
73 *City of Tshwane v Afriforum supra*, paras 165, 167.

the clean break from the history characterized by discrimination, humiliation and indignity suffered by black people and which the Constitution loudly rejects."[74]

4 Closing remarks: the "limits" of post-apartheid constitutionalism

There is no easy way to think and write about the different judgments in this case. The discursive atmosphere they create for the reader is palpably tense, heated and polarized. Of interest in this particular instance is how the level and *tone* of disagreement and recrimination between the nine Black judges and the two white judges – as well their very different treatments of social history – reflects a deep fracture across post-1994 society. To my mind, this case takes place at the edge, the limit, of the "post"-apartheid constitutional dispensation as it confronts the judges, the Constitution and the country as a whole with the incalculable weight of South Africa's history, the irreparable historical trauma of colonial conquest and the unpayable debt of racial injustice. Although these are not dilemmas specific to historically settler-colonial societies such as South Africa, they do emerge with particular acuteness within them. How, we might ask, can a constitutional text and constitutional jurisprudence enable the ethical reharmonisation of Blacks and whites when their social relations have not yet undergone a process of psychic, economic, spatial and political decolonisation?

It turns out that although the judgments reflect significant differences in the identities and political worldviews of their author-judges at the rhetorical level, they all remain within the same paradigm of constitutional patriotism, liberal multiculturalism, and reconciliation without justice. Despite the sharp contrasts between the vigorous and aggressive constitutionalism of Mogoeng CJ and Jafta J and the gentle constitutionalism of Froneman and Cameron JJ, the Constitution as a governing episteme and truth regime is invoked by all the judges in their embrace of diversity, unity and a shared national identity. Because of the institutionalizing function of constitutionalism, which impairs its ability to be reflexive about its own norms and terms, the judges of the Court were not open to the possibility that the explosive racial contradictions at the heart of this case cannot be resolved within the extant constitutional frame precisely because they trouble that frame. It has been voiced before that the political compromises and negotiated settlement that delivered the 1993 and 1996 constitutions elided fundamental questions of justice in favour of unsustainable considerations of stability and peace – and thereby arrested the radical remaking of South African subjectivities and social positions. This is a contention captured by Achille Mbembe's observation that:

74 *City of Tshwane v Afriforum supra*, para 176.

> [South Africa] is the only country on Earth in which a revolution took place, which resulted in not one single former oppressor losing anything. In order to keep its privileges intact in the post-1994 era, South African whiteness has sought to intensify its capacity to invest in what we should call the *resources of the offshore*. It has attempted to fence itself off, to re-maximize its privileges through self-enclaving and the logics of privatization.[75]

In the making of the new constitutional dispensation, at least three pertinent issues were left unaddressed and predictably returned in *City of Tshwane* to haunt the Court. These are (1) the spatial dimension of colonial-apartheid as tied to the broader exigency of land restoration; (2) the possible dangers of "constitutional supremacy" as a device for limiting and opposing Black majority rule and thereby preventing large-scale transformation and redistribution and (3) the *specific* need for white South Africans to assume individual and collective moral, political and historical responsibility in the building of a truly non-racial society. The foreclosure of these questions could be what explains the impulse expressed in the judgment towards democratising the naming of streets and other public spaces to reflect the "diversity" of South African racial and cultural groups in a way that masks the specificity of South Africa as a *black-majority African* country under ongoing settler-colonial hegemony. The appeal to a common South African identity, suffused by the Constitution, and marked by an equal sense of belonging for all who live in South Africa, conflates the ideal with the actual by overlooking the fact that white South Africans continue to wield massive social, economic and cultural power despite the constitutional commitment to the values of non-racialism, freedom and equality.[76] In actuality, therefore, South Africa remains a fundamentally unequal and unreconciled society.[77]

It was precisely because of the *persistence* of this power and violence of whiteness that one commentator named South Africa "a strange and morally tangled place to live".[78] This strangeness accounts in some ways for why the struggle to remember and mourn the past in South Africa tends to produce conflict, denial and division. How can a past be mourned when it is ongoing? The repeated references in the judgment to colonial-apartheid in the *past tense* shows the Court to be blind to the degree of the intransigence of intersubjective and structural racism in South Africa. It is now commonplace in public and academic discourse

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75 Mbembe "The State of South African Politics" (9-09-2015) *Africa Is a Country* http://africasacountry.com/2015/09/achille-mbembe-on-the-state-of-south-african-politics/. The one contention to register against Mbembe's formulation is that precisely because the "former" oppressor lost *nothing*, it is historically and politically inaccurate to refer to the formal legal transition from apartheid to constitutional democracy in South Africa as a "revolution".

76 See Modiri "The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-)apartheid South Africa" 2012 *SAJHR* 405 – 435; Modiri "Law's Poverty" 2015 *Potchefstroom Electronic LJ* 224-273.

77 See Durrheim *et al Race Trouble: Race, Identity and Inequality in Post-apartheid South Africa* (2011) and Terreblanche *Lost in Transformation* (2012).

78 Vice "How do I Live in This Strange Place" 2010 *J of Social Philosophy* 323.

to hear talk of the "unfinished business" or incompleteness of the transition to constitutional democracy in South Africa. This underscores an increase in varying levels of recognition that the historic "1994 moment" constituted neither a rupture or radical break with the social and political order of colonial-apartheid nor an introduction of new values, relations and ways of life that could counter those of the old order. If both the material as well as psycho-social conditions that resulted from colonial-apartheid persist into the post-1994 present, it seems then that the stark, even overstated, distinction between the colonial-apartheid "past" and the constitutional-democratic present, as well as the attendant marking of the 1994 multiracial elections and adoption of a new constitution as indexes of freedom, cannot really be assumed or taken for granted.[79]

What the *City of Tshwane* case ultimately illustrates is that the unresolved history of conquest, which is to say the *afterlife of conquest*, fractures the very possibility of belonging, reharmonisation and nation-building.[80] This of course implicates the Constitution as well since as the product of a faulty negotiated settlement centered on compromise and the protection of white social, economic and cultural interests rather than justice, the Constitution will always only inadequately contend with these fractures, leaving us with an incomplete and unsustainable experience of (un)freedom. We may conclude then that the challenging insight to be drawn from Ramose's call for historical injustice in South Africa and Christodoulidis' notion of constitutional irresolution is that the irreducible antagonism at the heart of the racial politics in South Africa must be fully reckoned with if there is to be any possibility for the reconstruction of a *truly* new polity and society, and part of this reckoning will entail a quite critical confrontation with the spirit and letter of the Constitution itself.

> [W]hile South Africa may dream a non-racialist future; it resides in a racist present. How to live in a present that assumes the ethics of a not-yet-realized future?[81]

79 See e.g Cavanagh "History, Time and the Indigenist Critique" 2012 *Arena Journal* 16-39.

80 See Qunta *Why we are not a nation* (2016).

81 Collis-Buthelezi "The Case for Black Studies in South Africa" 2017 *The Black Scholar* 13.

Opening Pandora's box: a legal analysis of the right to food in South Africa

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SUMMARY

The right to food (RTF) is a popular concept in South Africa. Its inclusion in the 1996 Constitution raised the hopes and promised a better life for many. By enshrining a broad spectrum of (civil/political and economic/social) rights, the Constitution symbolised a commitment and a bold statement by the state to promote the fundamental rights of every individual. Nonetheless, after two decades since its adoption, the lofty ideals of the Constitution remain a pipe dream to many (who continue to face abject poverty, endemic hunger and malnutrition). It is clear that although the RTF under sections 27 and 28 is noble in purpose; its operationalisation has been fraught with several legal hurdles. To overcome these challenges, this article outlines some recommendations on how human rights activists and legal practitioners can overcome assertion often advanced against the realisation of this right. As such, there is a need to provide policy options and legal clarity on how to enforce the RTF. To this end, the paper provides claims which could be submitted before a court or domestic human rights bodies on why government must momentarily adopt reasonable steps to fulfil its obligation under section 27(1)(b).

1 Introduction

The main motivation for the inclusion of the concept of the right to food (RTF) in the 1996 Constitution by South Africa's democratically elected government, was the failure of its predecessor (the apartheid regime) to respond appropriately to the prevalence of food poverty (inability to produce or afford food) which plagued many black South Africans.[1] In documenting the food insecurity situation of the majority of South Africans during the apartheid regime, Dugard succinctly avows that:

> [a] vast web of statutes and subordinate legislation confine the African to his tribal homeland and release him only in the interest of the agricultural and industrial advancement of the white community. When he visits a 'white area' as a migrant labourer he does so on sufferance, shackled by the chains of legislation and administrative decision.[2]

1 The Preamble of the Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution) states that "through our freely elected representative, adopt this Constitution as the supreme law of the Republic so as to improve the quality of life of all citizens and free the potential of each person".

2 Dugard *Human Rights and the South African Legal Order* (1978) 73.

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It was against this backdrop that Nelson Mandela avowed that:

> [a] simple vote, *without food*, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanize people. It is to create an appearance of equality and justice, which by implication socioeconomic inequality is entrenched. We do not want freedom without *bread*, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.[3]

The 1996 Constitution, thus, provides for an unprecedented RTF for everyone, regardless of race, religion or sex. Section 27(1)(b) of the Constitution specifically provides that *everyone* has the right to have access to sufficient food, while section 28(1)(c) of the Constitution guarantees the right of every child "basic nutrition".[4] These provisions make the RTF undeniably justiciable. For even though section 27(1)(b) of the Constitution is watered down by subsection 2 (which entreats the state to fulfil its obligation based on available resources), there is no clawback clause limiting the enjoyment of section 28(1)(c) of the Constitution.[5] Section 27(2) of the Constitution further imposes an obligation on the state to adopt positive measures to ensure that everyone has adequate access to food. Positive measures simply refers to the framing and operationalisation of suitable polices to enhance the fulfilment of a specific right.[6] Besides the Constitution, food right is informed by a rich international law jurisprudence,[7] and Constitutional Court decisions, which have demonstrated an inclination to give economic and social rights substance.[8] Moreover, various pieces of sectoral legislation, related in one way or another to RTF, have also been enacted.[9]

Nonetheless, in stark contrast to these gains are a series of setbacks, which militate against the meaningful realisation of the RTF. The slow pace of land reform coupled with poor implementation of RTF related interventions, including poor (and inadequate) provision of social security grants imply that millions of South Africans are still confronted

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3 Mandela "Address: On the Occasion of the ANC's Bill of Rights Conference" in A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee (May 1991) 12. Own emphasis.

4 Unless otherwise stated, the Constitution refers to the Constitution of the Republic of South Africa.

5 Constitution ss 27 & 28.

6 Nkrumah *Mobilizing for the realisation of the right to food in South Africa* (Dphil Thesis 2017 UP) 38.

7 *Social and Economic Rights Action Centre and Another v Nigeria* (2001) ACHPR 60.

8 *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).

9 DSD "National Food Emergency Scheme" 2013 http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=%20%0B515&Itemid=39 (last accessed 2019-04-08); DAFF "Integrated Food Security Strategy" 2019 https://www.daff.gov.za/daffweb3/Programme/Integrated-food-Security-and-Nutrition-Programme (last accessed 2019-04-08).

with chronic hunger and undernourishment.[10] According to Statistics South Africa (StatSA), 6 million South Africans are experiencing to chronic hunger.[11] This begs the question, does the government's current food programmes meet the benchmark of sections 27 and 28 of the Constitution? In order to adequately respond to this question, the paper assesses food related programmes such as social assistance programme (SAP), National Student Financial Aid Scheme (NSFAS) and school feeding programme to determine whether they comply with constitutional guarantees. In this paper, "chronic hunger", "food insecurity" and "food poverty" are used interchangeably. Indeed, this latter usage reflects the paper's preference for identifying individuals' with limited or no access to food with poverty. Before assessing how to safeguard the right of this vulnerable group, a definition of the RTF suffices.

2 Beyond cheap promises: right to food and the Constitution

In his 1981 landmark essay titled *Poverty and Famine*, Amartya Sen intimated that food insecurity is not triggered by less production of food, but rather the inability of some to afford the available food on the markets.[12] He concluded that hunger cannot be alleviated by simply increasing yield, rather, by addressing the poverty situation of the marginalised and most vulnerable groups in society.[13]

The RTF serves as a safeguard for people to feed themselves in dignity. In order to achieve this objective, this right, further, imposes a legal obligation on the state to ensure that there is sufficient food in the local market, its citizens have the means to buy them, and they meet the dietary requirements of the people. It is a right for all and serves as a "compass" to ensure that legal frameworks and strategies are adopted and implemented towards the alleviation of hunger.[14] As set out in its General Comment 12, the Committee on Economic Social and Cultural Rights (CESCR) stated that the RTF is fulfilled:

> [w]hen every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense, which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, *states have a core obligation to take*

10 Constitution s 27(1)(b).
11 StatSA "General Household Survey" 2017 Statistical Release P0318 6.
12 Sen *Poverty and Famines: An essay on Entitlement and Deprivation* (1981) 154-5.
13 Sen 39.
14 De Schutter "Countries Tackling Hunger with a Right to Food Approach" 2010 UN Briefing Note 1.

> *the necessary action to mitigate and alleviate hunger* […] even in times of natural or other disasters.[15]

At the domestic level, the 1996 Constitution represents an overarching commitment by the state to advance the RTF. Specifically, while section 27(1)(b) of the Constitution guarantees the rights of everyone to "sufficient food", section 28(1)(c) provides for the rights of every child to basic nutrition, and section 35(2)(e) of the Constitution further sets out the rights of every detained person and prisoner to sufficient nutrition.[16] Other essential rights linked to the RTF are the rights to life, dignity, equality, work and social security.[17] These far-reaching safeguards, in and of themselves, should trigger the drive towards the effective operationalisation and realisation of individual RTF.

Akin to other socioeconomic rights, section 7(2) of the Constitution imposes an obligation on the state to "respect, protect, promote and fulfil" the rights to food.[18] This provision implies that the state must: (i) adopt necessary steps to ensure that everyone has access to adequate food; (ii) adopt measures to prevent third parties from breaching this right; and (iii) refrain from any action which might interfere with individual enjoyment of this right. Yet, given that millions of South Africans are food insecured, it is apparent that the state has breached the first leg of this three-legged stool. It is against this backdrop that this paper considers some of the best approaches which could foster RTF. To this end, a two-pronged approach is adopted. On the one hand, the contribution considers direct court litigation where the food insecured (otherwise, the food poor) may claim that their food right has been breached. On the other hand, it considers the possibility of a court creatively interpreting legislations as a means of safeguarding the RTF.

3 Food for thought: claims *for* or *against* right to food

Section 27(2) of the Constitution obliges the state to "take reasonable legislative and other measures" to achieve the RTF.[19] Given that there is no universal definition of reasonableness, the Constitutional Court framed three key thresholds, which a policy must meet in order to meet the reasonable test. Such a policy must: (i) not exclude a disproportionate percentage of the population; (ii) take into consideration the situation of those in crisis; and (iii) address the needs of those in desperate condition.[20] Yet, before an aggrieved group of people could approach a

15 CESCR "General Comment 12" E/C.12/1999/5, para 6; Own emphasis.
16 Constitution ss 27(1)(b), 28(1)(c) & 35(2)(e).
17 See ss 10, 11, 23(2), 27(1)(c) & 36.
18 Constitution s 7(2).
19 Constitution s 27(2).
20 See *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC), paras 43, 44 & 64.

court with a claim that a section of their right has been breached, they must first consider how they intend to substantiate that claim.

Although it is obvious that government has failed to comply with its RTF obligation, the question of the probability of such a claim being successful stands to be contested. In order to determine the degree to which such a claim can be filed, the article turns to weigh the claims why the state must not fulfil food rights. But, before that an introspection on why it must fulfil this right is in order.

3 1 Still hungry: claims for the food poor

The celebrated economic and social rights decisions whereby the Constitutional Court expanded the scope of these rights provide the most useful benchmark against which one could test the possible success (or failure) of a RTF claim.[21] It can be said that these judgments, in short, demonstrate that current legislations and programmes which (unreasonably) deny a person or a group, specific economic and social right will not pass constitutional muster.[22] Perhaps, the most obvious violation which could be the subject of constitutional claim might be the failure of ongoing programmes to adequately address the needs of a certain group of desperate people. For instance, a report issued by Oxfam indicated that government's food policies have not only been fragmented and poorly implemented, but have also failed to improve the conditions of millions.[23] In considering the state's economic and social rights programmes, Bilchitz avers that it is imperative for such programmes to prioritise the urgent needs of those in desperate situation, whose very survival is threatened by their present conditions.[24] This statement opens up a Pandora's box for us to re-examine cases of alleged 'desperate conditions' where one could launch a claim concerning the RTF. Four major cases come to the fore.

First, even though the key objective of SAP is to address the triple challenge of malnutrition, hunger and poverty, it excludes those without *special needs*.[25] At the risk of stating the obvious, special needs applies to children under the age of 18, children or adults with a specific kind of

21 *Grootboom* supra; *Minister of Health and Others v Treatment Action Campaign and Others* (2002) AHRLR 189 (SACC 2002); *Khosa & Others v Minister of Social Development & Others* 2004(6) BCLR 569 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

22 Chenwi & Hardowar "Promoting Socio-economic Rights in South Africa through the Ratification and Implementation of the ICESCR and its Optional Protocol" 2010 ESR Review 7

23 Oxfam "Hidden hunger in South Africa: The faces of hunger and malnutrition in a food-secure nation" 2014 https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/hidden_hunger_in_south_africa_0.pdf (last accessed 2019-04-08).

24 Bilchitz "Towards a Reasonable Approach to the Minimum Core: Laying the foundations for future socio-economic rights jurisprudence" 2003 *SAJHR* 1.

25 Constitution s 27(1)(c).

disability, people caring for foster children, the aged, and war veterans. This special needs-based system implies that the food poor who are unable to tie their situation to natural causes such as age or disability, will not be a recipient of ongoing SAP.[26] Hence, those who are excluded could launch a legal claim that since they are unable to feed themselves, the state has denied them their right to access sufficient food under section 27.[27] It was in this light that Abbey Kutumela, the first applicant in *Kutumela v Member of the Executive Committee (MEC) for Social Services, Culture, Arts and Sport in the North West Province,*[28] in his founding affidavit stated that

> [w]e struggle to survive, and often went hungry. Our only income at the time was what my wife could earn doing part-time domestic and cleaning work in the area. She earned about R60 per week. It was not enough to feed us**.** We had to beg and borrow food.[29]

In order to realise the RTF as well as interrelated rights (including equality and dignity of individuals whose circumstance is akin to Mr Kutumela), it is apparent that such victims of chronic hunger require urgent food assistance.[30] One of the best remedies to address the circumstance of the applicants in the *Kutumela* case could have been the court ordering the provincial government to extend the Social Relief of Distress Grant (SRDG) to other food insecured people in the province.[31] This grant, still, is inadequate since it is limited in terms of duration and application.[32] The programme only provides a limited amount of food vouchers to individuals in exceptional distress for a period of three months, which can only be renewed for additional three months. [33] Thus, the food poor (like Mr Kutumela), who are excluded from the conventional SAP or still face hunger after receiving a grant (due to the insufficient payout) could justifiably claim that the state's SAP does not conform to the Constitutional Court's definition of reasonableness, especially as it excludes the most desperate.[34]

Second, tertiary students who are food insecured and yet do not qualify or are excluded from tertiary funding, could claim that, for instance, the National Student Financial Aid Scheme (NSFAS) does not

26 Nkrumah "Averting looming tragedy: a review of the *Black Sash Trust v Minister of Social Development and Others*" 2017 *ESR Review* 14.
27 Nkrumah 2017 *ESR Review* 15.
28 *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* Case 671/2003 (unreported).
29 *Kutumela v MEC* supra para 21 of the founding affidavit.
30 Ferguson "Formalities of Poverty: Thinking about Social Assistance in Neoliberal South Africa" 2007 *ASR* 86.
31 DSD "Social Relief of Distress" 2018 http://www.sassa.gov.za/index.php/social-grants/social-relief-of-distress (last accessed 2019-04-08).
32 Nkrumah 155.
33 The SRDG was created by the 1978 Fund Raising Act 107 which provides for immediate, yet temporary material intervention to individuals or groups in distress.
34 See *Grootboom supra* para 33.

meet the reasonable test as set out by the Constitutional Court.[35] The students could argue that they also deserve similar school feeding programmes as their basic school counterparts since they cannot concentrate on their studies due to hunger. In so doing, it could be argued that sections 27 and (in some cases) section 28, have been infringed upon, since they have been excluded from benefiting from state resources. Hence, the fact that some tertiary students who do not have the financial means to access adequate food are denied access to study loans and bursaries appears unconstitutional and a reasonable basis for a court action.

Third, other food poor could launch a direct food claim on the basis that the operationalisation of RTF interventions have been ineffective. There exists a very useful role for legal claims whenever the government unduly delays in disbursing social grants, which has an impact on the RTF. Such a constitutional claim was demonstrated in a series of court cases filed by the aged in the Eastern Cape regarding late payment of old age pensions.[36] A legal claim of this nature (by extension) will ensure that national and provincial school feeding programmes (which could be perceived as a component of the SRDG), are being operationalised effectively. For instance, an SRDG recipient can make an application for extension for a second three-month period of food stamps.[37] Moreover, applicants in situations of dire poverty could claim that a denial of the extension of a SRDG for a second period is unconstitutional. This claim can equally be used to litigate against any unreasonable roll-out of government's food programmes.

Further, it is imperative that NGOs and advocacy institutions educate the food poor of their food rights and what it comprises. Such educational drive will enable the food poor to contest the constitutionality of current food interventions. It is important that all the food insecured have knowledge of their food right since insufficient information will limit their prospect of successfully arguing out their case in a court. Also, in instances where there is a lack of awareness of an existing or new policy, potential beneficiaries might not know whether they qualify to receive the grant and/or the procedure involved in the submission of an application to the appropriate court if the state deals with their grant application unfairly.[38] It is in this light that two observers touted that the SRDG, for example, has been underutilised due to lack of awareness that

35 *Grootboom supra*.

36 Examples of such cases include *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 2 SA 849 (E); *Kotze v Minister of Health* 1996 3 BCLR 417 (T); *Kate v MEC for Department of Welfare, Eastern Cape*, 2006 4 SA 478 (SCA); *Mbanaga v MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE).

37 Cluver, Gardner & Operario "Poverty and psychological health among AIDS-orphaned children in Cape Town, South Africa" 2009 AIDS Care 734.

38 Nkrumah "National Monitoring by NHRIs in South Africa" in M Mayrhofer *et al* International Human Rights Protection: National Human Rights Institutions – A Case Study 2016 7th Framework Programme (FP7 Collaborative Project) 98.

such a grant exist.[39] Thus, it is submitted that an improved awareness or community engagement on the grant would considerably expand the number of applicants and grant holders. NGOs and social movements are well positioned to assist worthy applicants in applying for grants as a means of accessing adequate food.

A final claim, from a procedural viewpoint, is the wide *locus standi* of section 38 of the Constitution read with the right to access to court as set out in section 34.[40] When section 34 is applied to cases of food insecurity, the food poor have the right to approach a court alleging an infringement of their section 27 rights, while section 38 of the Constitution provides *locus standi* for a very broad range of interested parties. Here, it is envisaged that one or more grounds contemplated in subsections (a) to (e) of section 38 of the Constitution could potentially provide the *locus standi* for food right violation.[41] The claims for the food poor could be concluded with a quote from Liebenberg, who averred that should the state continuously fail to heed calls to fulfil the RTF, government departments "will be vulnerable to constitutional challenge".[42]

The above recommendations for RTF could, however, be countered by a claim that none of the contemporary RTF authors in South Africa has advocated for such a legal action against the state.[43] Nonetheless, simply because this claim has not conceived does not imply that it should not be put to test. This assertion is substantiated by a 2005 court case relating to gender discrimination in respect of access to SAP for the elderly.[44] Prior to filing this case, one could have assumed that age difference for old age grants for men and women was a form of positive discrimination, therefore, the practice was fair and undeserving of constitutional claim. The issue only became a subject for academic scrutiny only after the applicants have approached the court.[45]

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39 Brand "Between Availability and Entitlement: The Constitution, *Grootboom*, and the Right to Food" 2003 *LDD* 12; Van Zyl & Kirsten "Food Security in South Africa" 1992 Agrekon 178.

40 Bailey "Judicial Discretion in Locus Standi: Inconsistency Ahead" 2010 *Galway Student Law Review* (*GSLR*) 9.

41 Khoza "Realising the Right to Food in South Africa: Not by Policy Alone – A Need for Framework Legislation" 2004 *SAJHR* 668.

42 Liebenberg "The Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa" (2001) *SAJHR* 246.

43 None of the extensive academic writings of these scholars has suggested direct litigation, namely, S Hendriks "Food Security in South Africa: Status quo and Policy Imperatives" 2014 Agrekon 1-24; Van Zyl & Kirsten 1992 Agrekon 170-184; Khoza "Realising the Right to Food in South Africa: Not by Policy Alone – A Need for Framework Legislation" 2004 SAJHR 664-683; Moyo "The Future of Food: Elements of Integrated Food Security Strategy for South Africa and Food Security Status in Africa" 2007 *ASIL* 103-108; Tung "Organic Food Certification in South Africa: A Private Sector Mechanism in Need of State Regulation" 2016 *PELJ* 1-48.

44 The Herald (2005-09-16) 03.

45 Krftger "'Come Back When You are 65, Sir:' Discrimination in Respect of Access to Social Assistance for the Elderly" 2006 *LDD* 70-81.

3 2 Is the nation listening? counter-claims against the food poor

Although there is some merits to argue that ongoing government's food programmes are highly unreasonable, it must be noted that one key RTF policy exist, namely, the SRDG. As indicated above, this programme provides direct food assistance in the form of food stamps for a limited duration to recipients in order to counter emergency food crisis. It is important to indicate that the SRDG has somewhat improved people's access to food through the allocation of food stamps. Thus, it seems irrelevant to request an order from a court for the creation of an extra food system at this stage. Thus, if the time is not yet ripe to file a claim based on current food policies, it is imperative to frame some feasible solutions to address the needs of the food poor. It is against this backdrop that the multi-faceted approach discussed underneath, may provide some relief.

4 What must be done: taking food insecurity seriously

Akin to other socioeconomic rights, the RTF is tied to other fundamental rights and freedoms such as equality (section 9); dignity (section 10); life (section 11); health care (section 27(1)(a)); water (section 27(1)(b)); social assistance (section 27(1)(c)); and education (section 29).[46] Thus, an obvious solution for providing greater access to sufficient food lies in improving access to these ancillary rights in ways that might positively impact on sections 27 and 28 of the Constitution. This approach requires a creative interpretation and application of laws and polices related to these rights. It was against this backdrop that Brand and Heyns avow that the RTF often finds protection through other constitutional rights, given that it is often not directly safeguarded by law or court rulings.[47] This argument leads us to the next section which takes a look at some of the creative means which can be adopted by court towards the realisation of the RTF.

4 1 The politics of food: Reframing national food security interventions

Section 33 of the Constitution avers that any administrative action concerning section 27 and 28 of the Constitution must be reasonable, procedurally fair and lawful.[48] Thus, any application concerning RTF should also consider measures for improving administrative justice. Put differently, people's entitlement to various economic and social rights

46 See Constitution ss 9-29.
47 Heyns & Brand "Introduction to Socio-economic Rights in the South African Constitution" (1998) *LDD* 156.
48 Constitution ss 27, 28 & 33.

such as the RTF and the right to administrative justice should work together as a means of ensuring that all persons have lawful, procedurally fair and reasonable access to food.[49] The significance of such an assessment becomes even more apparent if one accepts the connection between the RTF and other substantive economic and social rights, and their enforcement.[50] If the state's feeding and nutrition programmes are to address the needs of the food poor, then the roll-out of such programmes must be fair and reasonably administered. To ensure that an administrative action is reasonable and promotes fundamental rights, a proportionality test must be conducted.[51] Such an enquiry encompasses assessing the harms which will be created for not adopting certain measures, as compared to the advantages to be gained from implementing such measures.[52] Undoubtedly, such a balancing act is required in administrative decision-making concerning the RTF. In other words, administrative action which promotes a generous application as well as broad interpretation of RTF is needed considering that food is a necessity for human existence.[53]

In terms of the requirement of procedural justice, any administrative action (in)directly impacting on individual's RTF must be supported by adequate reasons while following the prescribed steps for implementing such measures.[54] Yet, any such procedural justice must also include the process being executed as expeditiously as is reasonably possible due to the fact that undernourishment have dire consequences, including the likelihood of death.[55] For instance, an applicant for SRDG may suffer great hardship or even die if he/she was to wait unduly long for the reasons for the denial of his/her application, in order to submit a claim to the appropriate court challenging the administrative decision.[56] It is, therefore, imperative that courts play a primary role in ensuring that all administrative decisions affecting RTF are just and fair.

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49 Davis "Socioeconomic rights: do they deliver the good?" (2008) *International Journal of Constitutional Law* (*IJCL*) 703.

50 Quinot & Liebenberg "Narrowing the band: reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" 2011 *SLR* 648.

51 Contiades & Fotiadou "Social rights in the age of proportionality: global economic crisis and constitutional litigation" (2012) *International Journal of Constitutional Law* (*IJCL*) 667.

52 Steinberg "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" 2006 *SALJ* 278.

53 Stewart "Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socioeconomic rights of others" 2008 *SAJHR* 479.

54 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 44.

55 Wesson "Grootboom and reassessing: beyond the socioeconomic jurisprudence of the South African Constitutional Court" 2004 *SAJHR* 292.

56 Liebenberg "The value of human dignity in interpreting socio-economic rights" 2005 *SAJHR* 13.

4 2 Job creation: means of entitlement

Besides the strategies discussed above, one of the (in)direct approaches which could be used to enhance people's RTF is the creation of job opportunities. As income earned can be used (in)directly to produce or purchase food, the ability to earn an income is important for people to feed themselves.[57] For instance, people could use their wages or salaries to buy agricultural land or farming implements. Nonetheless, the actual means through which one could generate an income fall outside the ambit of this legal assessment and will for that reason, not be taken further in this paper.

4 3 Gaining ground: A call for land reform

One of the best approaches to assist people fulfil their RTF is by improving access to agricultural land. To the extent that millions of black South Africans are living in the infertile former homeland,[58] it is necessary that an efficient land reform programme is rolled out to address the food insecurity situation of most blacks.[59] However, in certain parts of the country, specifically in the Eastern Cape, a contentious situation exist regarding instances where substantial parcels of land (mainly for commercial livestock) are being converted into game ranching.[60] A counter-claim could, however, be mooted that South Africa's hunger situation is not so much about shortage of production but rather unequal supply of food.[61] Yet, regardless of this justification, it is contentious that given the limited amount of available land for redistribution, the conversion of agricultural lands into game farms is unreasonable.[62] For purposes of ensuring that local farmers have access to food, it is imperative that the state prioritises the use of land for farming purposes rather than recreational activities.

Land dispossession in terms of the threshold set out under sections 25(2) and 25(3) of the Constitution, may only occur after all relevant requirements have been satisfied (including fair compensation).[63] These provisions implicitly implies that the dispossession of land meant for food production should only be considered as a last alternative. Again, where agricultural land is dispossessed from individuals for non-agricultural purposes, this factor should reflect in the amount of reimbursement given to the owner. Besides being fair, this submission is also reasonable, given that, although, a dispossession may sometimes be

57 Nkrumah in Cobbinah & Addaney *The geography of climate change adaptation in urban Africa* (2019) 314.
58 Pringle "Land reform and white ownership of agricultural land in South Africa" 2013 *HSF* 39. Also see Mail and Guardian (2014-09-15) 04.
59 The Herald (2017-11-01) 02.
60 Farmer's Weekly (2017-009-12) 05.
61 Nkrumah IX.
62 Snijders "Wild property and its boundaries-on wildlife policy and rural consequences in South Africa" 2012 *Journal of Peasant Studies* (*JPS*) 508.
63 Constitution ss 25 (2) & 25 (3); Keep & Hall "Land redistribution in South Africa: Towards decolonization or recolonization?" 2018 *Politikon* 129.

necessary in the broader interests of the society, any dispossession, which denies an individual's ability to feed herself, triggers the need to provide such dispossessed owner with alternative means of accessing food.

It is, also, important to indicate that land reform legislation can play a key role in the realisation of the RTF. Two of these major legislations are the Extension of Security of Tenure Act (ESTA),[64] and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE).[65] The provisions of ESTA and PIE take great strides in enhancing the tenure of land occupiers, considering that racist policies under apartheid such as the Illegal Squatting Act,[66] and Bantu Laws Amendment Act,[67] "enabled the government and landowners to drive millions of urban and rural blacks from their land".[68] The connection between RTF and these laws (ESTA and PIE) is that by becoming land owners through ESTA or having greater rights to lawfully possessed land, there is the likelihood to utilise this security of tenure to secure food by tilling the soil.

Such farming activities could assume either commercial or subsistence nature where the occupiers and their dependents could generate other forms of food for themselves. The obvious relation between the RTF and ESTA is clearly set out in section 1 of the Act which protects the right of rural land occupiers to engage in farming by prohibiting their arbitrary eviction.[69] This point is better illustrated in the *Ntshangase v The Trustees of the Tereblanche Gesin Familie Trust* the applicant's livestock were denied access to water and grazing on a piece of land.[70] In its judgment, the court held that indeed an unlawful eviction has occurred.[71]

Both instruments (PIE and ESTA) further, aver that before ordering the eviction of any occupiers, an appropriate court must first consider whether such eviction is just and equitable. It is submitted that in line with sections 27 and 28 of the Constitution, in assessing such an eviction application, the court must consider the rippling effect of this act on the RTF of affected parties (and their dependents). In so doing, a court must adopt a purposive interpretation of the ESTA and PIE in view of sections 27 and 28 of the Constitution, which guarantees groups and individual's RTF.[72]

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64 Extension of Security of Tenure Act 62 of 1997.
65 Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.
66 Illegal Squatting Act 52 of 1951.
67 Bantu Laws Amendment Act 7 of 1964.
68 Yates "Constitutional Court delivers a vision for land restitution" 2007 *ESR Review* 20.
69 ESTA s 1.
70 *Ntshangase v The Trustees of the Tereblanche Gesin Familie Trust* [2003] JOL 10996 (LCC).
71 *Ntshangase v The Trustees of the Tereblanche Gesin Familie Trust supra* para 11.
72 Constitution s 27 & 28. See Cock "A feminist response to the food crisis in contemporary South Africa" 2016 *Agenda* 128.

Further, the Land Reform Act, PIE and ESTA enhance RTF by safeguarding land rights against its denial by private actors.[73] These instruments ensure that the rights of occupiers are not unfairly denied by subjecting the process of eviction to several safety measures as well as limiting the ambit of lawful eviction.[74] For instance, both PIE and ESTA aver that before any occupier is evicted, an appropriate court must first determine whether upon eviction, there is an alternative land for such persons.[75] To this end, it would be fair and reasonable to apply this benchmark in all judgements, but interpreting alternate land to imply another fertile land which could be used for grazing or food production purposes.

An additional piece of legislation, which has become a matter of consideration by the Constitutional Court, is the Restitution of Land Rights Act.[76] In the *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, the applicants who are Popela community claimed that they had been dispossessed of their land due to the racially discriminatory practices of the apartheid regime.[77] The Court held that the applicant must be granted restitution or equitable redress as contemplated by the Restitution Act, considering that as a result of the racially discriminatory laws of the past, the community were wrongfully evicted from their lands.[78] This groundbreaking decision by the Constitutional Court holds great potential to improve the RTF of this community, since they have been entitled to receive sufficient financial compensation or have their land restored. In order to meet their food needs, such successful litigants could use the restituted land to embark on commercial farming (for income) or produce food for subsistence.[79] Otherwise, they could acquire an alternative land for commercial or subsistence agriculture, especially in cases where they are granted compensation instead of restitution of land. Evidently, a financial pay-out equally provides a source of entitlement in terms of RTF. In summary, any interpretation of the above land legislations must take into cognisance individual and group's RTF as set out under sections 27 and 28 of the Constitution.

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73 Land Reform Act 3 of 1996; ESTA supra; PIE supra.

74 Skuse & Cousins "Spaces of resistance: informal settlement, communication and community organisation in a Cape Town township" 2007 *US* 979.

75 Hall & Keep "Elite capture and state neglect: new evidence on South Africa's land reform" 2017 *Review of African Political Economy* (*RAPE*) 129.

76 Restitution of Land Rights Act 22 of 1994.

77 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* CCT69/06 (unreported).

78 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd supra* para 53.

79 Karriem & Hoskins "From the RDP and NDP: A critical appraisal of the developmental state, land reform, and rural development in South Africa" 2016 *Politikon* 328.

5 Parting shot: enforcement of the right to food

Economic and social rights have not always been adequately recognised or properly protected by South African courts even in post-1994 (although they enjoy the status of full justiciable rights). Moreover, the enforcement of economic and social rights is confronted with government's lack of resources to meet, for instance, its RTF obligation. As a result, what is called for, is an activist judicial body which adopts a creative judicial decision which converts the RTF into reality while acknowledging resource scarcity. It is in this light that Scott and Alston aver that the purposive approach to RTF implies that judgments of the court should reflect the need to improve food security.[80] The next section takes a closer look at some of the suggestions, which may be useful towards the enforcement of the RTF.

5 1 Creative judicial remedies: hollow hope?

Sections 38 and 172(1)(b) of the Constitution set out guidelines within which to produce creative judicial remedies relevant to RTF.[81] These provisions oblige a court to prevent threat to, or actual infringement of, the RTF by granting "appropriate relief" or making an order that is "just, fair or equitable".[82] Considering the wide parameters provided in the Constitution, it then remains to identify relevant court remedies, which could best promote RTF. Such an assessment takes on greater relevance if one agrees with the notion espoused by leading legal scholars, that to date there is a lack of effective remedies to give real impetus to the notion of "appropriate relief", in terms of socioeconomic rights. Against this backdrop, the forms of relief advocated out in *Fose v Minister of Safety and Security* by Ackermann J could serve as a useful starting point in understanding the meaning of "appropriate relief".[83] According to the judge, an appropriate relief is an order that is handed down to protect and enforce the Constitution.[84] Depending on the circumstances of each particular case, a relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are enforced.[85]

Given the almost lack of case law on RTF in South Africa, a useful starting point for enforcing it may be a declaration of rights which indicates the nature and extent of this right. It may be useful for a court deciding on an application brought by the food insecured to set out the scope of the right by means of a declaration. Nonetheless, without a

80 Scott & Alston "Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney*'s legacy and Grootboom's promise" 2000 *SAJHR* 217.
81 Constitution ss 38 & 172(1)(b).
82 Constitution ss 38 & 172(1)(b).
83 *Fose v Minister of Safety and Security* (1997) 3 SA 786 (CC).
84 *Fose v Minister of Safety and Security supra*.
85 1997 3 SA 786 (CC) para 19

further guideline as to how to realise this right in practice, a declaration of rights would ultimately be an inadequate remedy.[86]

Moreover, the granting of an interdict or *mandamus* by a court could appear to address the question of a more practical judicial remedies concerning the RTF. The handing down of these (provisional) remedies would cause private entities or individuals (in some cases), or the relevant state functionary to do the needful, or terminate their unconstitutional conduct which infringes on people's RTF. An important precedent for this remedy could be traced to the *Grootboom* judgment where the court issued a declaratory order requiring the government to meet its constitutional obligations under section 26(2) of the Constitution.[87] Yet, as demonstrated in the case, judicial remedies in the form of *mandamus* or interdicts with no order as to what steps must be adopted or avoided similarly fails to sufficiently take the matter further. Consequently, when handing down appropriate relief related to socioeconomic rights, courts must include an order guiding the executive and legislature to introduce reforms in accordance with their respective mandates. Further, the judiciary must maintain a supervisory role of monitoring the operationalisation of orders, specifically be ensuring that the actions of these two arms of government are reasonable, logical and tailored towards the promotion of the RTF.[88]

Apparently, even more useful is the concept of supervisory jurisdiction of state compliance with the order of the court. There is always the problem of executive's failure to comply with the order of the judiciary, as was clearly demonstrated in the *Grootboom* case. In this case, there was clearly lack of monitoring and follow-up by the (quasi)judicial institution to ensure that the government fully complies with the decision of the court.[89] The lack of monitoring evidently resulted in the state's non-fulfilment of the remedies accorded to the victims for more than two years after the judgment.[90]

Besides the judiciary, it is important that a Chapter nine institution periodically monitors state's compliance of court's decisions. Thereafter, at a particular date, such a Chapter nine institution should be mandated to report its findings to the court (ideally the court which made the decision) concerning the degree of enforcement of the order by the state.[91] The court order should, moreover, mandate the Chapter nine institution to send feedback at an earlier date, especially in cases where

86 Scott & Alston 2000 SAJHR 218.
87 *Grootboom supra*.
88 Mbazira "Non-implementation of court orders in socio-economic rights litigation in South Africa: is the cancer here to stay?" 2008 *ESR Review* 5.
89 Mbazira 2008 *ESR Review* 7.
90 Mbazira 2008 *ESR Review* 5.
91 Nthai "Implementation of socio-economic rights in South Africa" 1999 *De Rebus* 41.

non-compliance by the state poses serious threats to the applicant(s) and victims involved.[92]

It is important to shed more light on the proposed supervisory role of Chapter nine institutions, especially in terms of gathering and evaluating information.[93] In the course of the assessment of compliance, it is imperative that officials of the state department whose compliance with a judicial decision is under scrutiny are not allowed to be part of the assessors. Such independent and objective evaluation is crucial for true impartiality and accountability in the assessment process.[94] In *Grootboom*, the lack of monitoring and enforcement implied that although in theory the SAHRC was mandated by the court to play a supervisory role, it was unable to effectively execute this mandate, given that it could not access all the relevant information relating to the enforcement of the court's decision in all the provinces.[95] It is submitted that in order to avert a recurrence of such a setback in a RTF situation, the supervisory body should be mandated by the court to gather information independently of government department reports. It is in view of this constraint that the SAHRC advocated for the effective monitoring of government's programmes to determine the extent to which the RTF has been realised or violated.[96]

To further ensure greater performance or compliance, it is important for a court to clearly set out precise duration within which its orders are complied with. This could be achieved by setting out precise timeframes for compliance by the state. Thus, in the context of the RTF, if a court decides that the current school feeding programme is inadequate, then it must set out specific deadlines within which specific benchmarks must be met. In the process of setting out such deadlines, it must consider section 27(2) of the Constitution which relates to resource limitation.[97]

It is important to indicate that monitoring of compliance and timeframes for fulfillment of court order are inextricably linked, given that where deadlines have been set for fulfillment of different parts of the judgement, it becomes significantly easier to monitor compliance.[98] For instance, drought victims could successfully argue that the state has failed to adopt adequate measures (preventive and reactive) measures to

92 It could be said that the SAHRC's expansive mandate under s184 of the Constitution makes it well placed to address socio-economic rights challenges.
93 Nkrumah 98.
94 Rideout *et al* "Bringing home the right to food in Canada: challenges and possibilities for achieving food security" 2007 PHN 569.
95 Nkrumah 108.
96 SAHRC "SAHRC – Economic and Social Rights – The Right to Food" (2004) http://www.sahrc.org.za/home/21/files/Reports/5th_esr_food.pdf (last accessed 2019-04-08).
97 Constitution s 27(2).
98 Tushnet "The Issue of State Action/horizontal Effect in Comparative Constitutional Law" 2003 *International Journal of Constitutional Law* (*IJCL*) 87.

address their urgent need.[99] The question then arises how long it should take the state to launch a suitable programme to meet its obligation under sections 27 and 28.[100] This question could satisfactorily be addressed by a court order setting out the deadline for enforcement of its order.[101] It must be noted that the poor track record of the state in conforming to court orders provides the impetus for the inclusion of deadlines for enforcement.[102] The urgent need for the inclusion of deadlines to court orders is reinforced especially by sections 27 and 28 of the Constitution, given that an unreasonable delay in enforcement may result in serious circumstances, such as undernourishment and in some instances death. As discussed below, the inclusion of deadlines for government conformity is an important component of framework legislation relating to the RTF.

In summary, for the court to achieve effective implementation of its orders, such an order must set out: (i) deadlines for implementation of the order; (ii) what should be contained in a report on the steps adopted to conform to the order; and (iii) how monitoring of implementation will take place. Any order without these indicators runs the risk of being considered questionable, considering that while the RTF under sections 27 and 28 of the Constitution may be, in theory, progressive, yet, in practice the food poor continue to be subjected to chronic hunger.

5 2 Setting the agenda: Reflections on right to food advocacy

In order to effectively enforce economic and social rights, specifically the RTF, there is a need for awareness creation backed by financial resource to enable the food poor litigate. It was in this regard that the SAHRC touted that the widespread ignorance of what key socioeconomic rights entail has exacerbated the difficulty in realising them.[103] This constraint could be traced to the inadequate legal education among victims of socioeconomic rights violation, as well as lack of funding for civil society organisations (CSOs) to advocate, educate and assist the food poor seek redress in court.

99 Van Rensburg & Naudé "Human Rights and Development: The Case of Local Government Transformation in South Africa" 2007 *PAD* 394.

100 Klug "Five Years On: How Relevant is the Constitution to the New South Africa" 2001 *VLR* 803.

101 Huchzermeyer "Housing rights in South Africa: invasions, evictions, the media, and the courts in the cases of *Grootboom*, *Alexandra*, and *Bredell*" 2003 UF 85.

102 One of the cases where the government responded slowly to the judgement of the court was *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E).

103 SAHRC "Economic & social rights report: sangoco's report on poverty and human rights vol V" 1997 https://www.sahrc.org.za/home/21/files/Reports/ESR%20Sangogo%20Report%20on%20Poverty%20and%20Human%20Rights1997-1998.pdf (last accessed 2019-04-08) 37.

It is in this light that the SAHRC averred that the key to effective realisation of economic and social rights specifically the RTF is improved advocacy or education.[104] It is, therefore, imperative that relevant NGOs and social movements constantly launch an across-the-board campaign on issue of RTF. Such a campaign could face potential threats of lack of resources for advocacy or litigation in courts. Hence, it is important for organisers of such initiatives to draw inspiration from some of the strategies adopted by successful CSOs such as the Treatment Action Campaign (TAC) in advocating free treatment for HIV/AIDS patients.[105] Such innovative strategies of TAC worth emulating stretch from fundraising activities, strategic litigation to enhanced collaboration between social movements and NGOs.[106]

6 Conclusion

South Africa is confronted with serious challenge of food poverty. In view of the recent data on chronically hungry, it could be said that the policies and programmes of the government are woefully insufficient in addressing this crisis. Probably, this problem is not because of incapacity or lack of political will to realise the RTF, but because there is poor operationalisation of the various government efforts that are aimed at ensuring the fulfilment of the RTF.

This article has analysed a range of possible remedies that are likely to positively impact on the realisation of people's RTF, including a court claim to the constitutionality of current food interventions. Such a claim must contest the exclusion of millions of food insecured South Africans from existing SAP and other food related programmes. To serve as an incentive to efficiently roll out programmes thereafter, costs should be sought against the state in each application. As indicated above, the broad nature of the RTF undoubtedly calls for a multi-faceted approach towards the protection, promotion and fulfilment of sections 27 and 28 of the Constitution. In order to effectively address the current chronic hunger situation, the government's efforts must encompass inputs from all arms of government, namely, the judiciary, legislative and executive. It is important that these organs collaborate in closing the gap between the theory and operationalisation of the RTF.

104 SAHRC 1997 https://www.sahrc.org.za (last accessed 2019-04-08) 37.
105 Friedman & Mottiar "A rewarding engagement? The treatment action campaign and the politics of HIV/AIDS" 2005 *Politics & Society* 514.
106 Friedman & Mottiar 2005 *Politics & Society* 517.

A critique of the Swazi Constitutional rules on succession to kingship

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SUMMARY

Several aspects of Swazi constitutional law oftentimes present a jigsaw puzzle to many scholars of constitutional law. The promulgation of the new Constitution in 2005 purportedly marked an end to absolutism and ushered in liberal constitutionalism. However, it would seem that the strong role given to customary law in the constitutional design of Swaziland has provided an avenue for absolutism of the monarch. One area of customary law which is still very controversial is the succession to office of King. The Constitution is not elaborate on the rules of succession; it cagily provides that succession to office of King shall be regulated by "Swazi law and custom". In practice, this has effectively given 'Swazi law and Custom' pre-eminence over the Constitution. The purpose of this article is to critique the rules of succession to the office of monarch in Eswatini. The paper contends that the Constitution can regain its supremacy by incorporating the customary rules of succession into the Constitution. When those roles have been codified in the Constitution, they can easily be synchronised with other devices of constitutionalism such as human rights and supremacy of the Constitution.

1 Introduction

The Constitution of Swaziland,[1] since independence from Britain in 1968, has been consistent in its deference to "Swazi law and custom" in general, and on matters relating to succession to office of King in particular. There is a legion of authorities to the effect that Swazi tradition became much more powerful in Constitutional and political discourse

1 It is important to note that the country's name "The Kingdom of Swaziland" has been changed since April 2018 to the "Kingdom of Eswatini". This change has been effected by the King in accordance with Legal Notice No. 80 of 2018. In terms of the Gazette, the King proclaimed that "[i]n exercise of the powers conferred on me by section 64(3) of the Constitution of Swaziland Act 1 of 2005, I, Mswati III, King and Ingwenyama of Eswatini makes the declaration that the name of the Kingdom of Swaziland is changed to Kingdom of Eswatini." The gazette further provides wherever in any written law or international agreement or legal document to Swaziland shall be read and construed as reference to Eswatini. The Constitutionality of the gazette is a matter of considerable controversy; but for purposes of this paper, the 'The Kingdom of Eswatini' will be used and the word "swazi" will be used as a descriptive word for anything (people, laws, traditions) related to the Kingdom. However, where context demands reference to 'Swaziland', the name will continue to be used.

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than most countries in Southern African sub-region.[2] The ascendancy of tradition and custom was obviously bolstered by the collapse of the independence Constitutional edifice in 1973.[3] Thus, customary law – which is the basis for rules of succession to office of king – is unusually strong in Eswtini than in most countries.

Although African indigenous systems sometimes may "reveal sufficient similarity of procedure, principles, institutions and techniques",[4] Swazi customary law has certain features that distinguish it materially from other systems. Most African customary systems are largely unwritten. But the general trend during colonialism has been towards codification of some sort – either through official reports, persuasive codes or actual legislation.[5] The Swazi indigenous system has resisted all these and remains largely unrecorded. It is a startling outcome of the age-old tradition that has been transferred orally from one generation to the other. However, as Marwick rightly observes, "the repository of these traditions is chiefly the old men, particularly those associated with the King's village where they are continually in attendance listening to and taking part in cases and making use of the code which is to them a living body of precepts".[6]

This observation by Marwick makes another striking revelation about the Swazi law and custom – that it is largely the preserve of the royal dynasty. Even today, customary law remains largely known by senior princes in the royal family. This certainly negates the established principle that customary law is the natural outcome of the generally accepted usage by the general body of the people expected to obey such law. Another speculation has been that customary law in Eswatini, by virtue of it being mainly unwritten and being mainly in the hands of the ruling dynasty, has been disturbingly vulnerable to abuse.[7]

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2 In general, see Kuper *An African Aristocracy: Rank and the Swazi* (1947). Also see Macmillan "Swaziland: decolonisation and the triumph of tradition" 1985 *Journal of Modern Africa Studies* 643. The author traces the ascendancy of Swazi tradition in an attempt to explain the post-independence state in Swaziland. For the analysis of the tumultuous period between 1973 and 1988, see Maqonqo Kingship and Transition in Swaziland 1973-1988 (MA dissertation 2009 UNISA).

3 See Proclamation by His Majesty King Sobhuza II of 12th April 1973.

4 Whelpton "Swazi law and custom in the Kingdom of Swaziland" (1997) 20/3 *South African Journal of Ethnology* 145 at 146; see also Allott "The people as lawmakers: custom, practice and public opinion as sources of law in Africa and in England" 1977 *Journal of African Law* 1.

5 See Allott "What is to be done with African customary law?" 1984 *Journal of African Law* 56; See also Shadle "Changing traditions to meet the current altering conditions: customary law, African courts and the rejection of codification in Kenya" 1999 *The Journal of African History* 411.

6 Marwick *The Swazi: An Anthropological Account of the Natives of the Swaziland Protectorate* (1966) 280.

7 This indictment originates mainly from the anti-monarchist informants who mainly come from the progressive organisations namely churches, civil society and trade unions.

Another feature of the Swazi customary law is that it has attracted very scant intellectual attention until recently when it occupied centre stage in Constitutional discourse. Writing in 1985, Bennett argues that 'Swaziland is in the unhappy position of having no comprehensive texts concerned with customary law and very little in the way of precedence'.[8] The only classic works which have been relied upon heavily in Eswatini for ascertainment of Swazi customary law are Marwick, *The Swazi* (1940) and Kuper, *An African Aristocracy* (1947) and Kuper, *The Swazi* (1963).[9]

Another striking feature of Swazi law is that, unlike other African systems that have suffered the flurry of manipulations by statute, Constitution and other forms, Swazi law has received protection and reinforcement from statutory law and the Constitution. Statutory law, and the Constitution in recent times, have been used to preserve certain aspects of socio-political life for customary law. Institutions such as offices of *iNgwenyama*, *Ndlovukati*, chieftaincy, the National Council, regency and many more remain protected terrains of Swazi law and custom.[10]

Ever since Swaziland (now Eswatini) got independence,[11] the Constitutions have always embodied provisions on succession to the office of monarch. However, these provisions have been consistent in their deference to "swazi law and custom" as the basis for succession to the office of monarch. The Constitutional provisions on succession are not elaborate beyond cagily providing that succession shall be based on "swazi law and custom". This Constitutional formulation evokes two Constitutional problems. The first one is that the Constitution abdicates its supremacy to another branch of the law which, however important it may be, is an ordinary law. In that way, customary law continues to occupy undue socio-legal pre-eminence in the Swazi society which renders misuse inevitable.[12] Another Constitutional conundrum brought about by this formulation is that Swazi customary rules of succession to kingship are largely shrouded in uncertainty and secrecy.

The purpose of this paper is to critique this Constitutional formulation. In its critique, the paper analyses both the Constitution and Swazi customary law with a view to sustain an argument that the Constitution can regain its supremacy by codifying the customary rules of succession. When those roles have been codified in the Constitution, they can easily

8 Bennett *The Application of Customary Law in Southern Africa* (1985) 36.
9 Kuper *The Swazi: A South African Kingdom* (1963) 54.
10 Generally, see Chapter II of the Swaziland Constitution of 2005.
11 Swaziland (now Eswatini) got independence from Britain on 6 September 1968.
12 Hlatshwayo *The ideology of traditionalism and its implications for principles of Constitutionalism: the case of Swaziland* (LLM Thesis, York University 1992); Potholm *Swaziland: the dynamics of political modernization* (Berkeley, Los (1972); Booth *Swaziland: tradition and change in a Southern African Kingdom* (1983).

be synchronised with other devices of Constitutionalism such as human rights, supremacy of the Constitution and many others.[13]

The paper is largely divided into three sections. The first section presents an analysis of the swazi Constitutional rules of succession since independence. The second part critically presents the customary rules and institutions governing succession to kingship. The third part presents a liberal critique of the broader notion of patriarchy in succession to leadership under custom, and kingship in particular.

Methodically, the paper pieces together the decided cases, the historic reports of the formative years and the classic works on the history of the country. The paper also makes intermittent comparisons with the Kingdom of Lesotho – which the Kingdom of Eswatini shares a lot of historical and Constitutional conventions with – and the Republic of South Africa which is a trailblazer on the development of customary law in a modern Constitutional state.[14]

2 Rules of succession under swazi post-independence Constitutional designs

The post-independence Constitutional trends in Eswatini regarding accession to the office of king depict constant pattern; customary law has been, and still remains, the central determinant of succession. The trend of Constitutional deference to customary law on matters of succession to office of king started to take ground with the 1967 pre-independence Constitution.[15] The Constitution provided that:

> When an announcement is made to the Swazi nation in accordance with Swazi law and custom that the office of king is vacant by reason of the death of the holder thereof or any other cause, such person as, in accordance with Swazi law and custom, is declared to be King shall become King.[16]

13 See Fombad "The Swaziland Constitution of 2005: can absolutism be reconciled with modern constitutionalism?" 2007 *South African Journal on Human Rights* 93. At 93 the author observes that, "despite its veneer of Constitutionalism and Constitutional legitimacy, the new Constitution does little to protect the Swazis against the excesses of the authoritarian tendencies and practices of their King and his officials. The Constitution fails to reconcile the monarchy with modern Constitutionalism because it neither provides the barest minimum conditions for a functioning Constitutional monarchy nor for a democratic order".

14 Himonga and Bosch "The application of African customary law under the Constitution of South Africa: problems solved or just beginning" 2000 *South African Law Journal* 306; Albertyn ''The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa" 2009 *Constitutional Court Review* 165; Rauterbach "South African common and customary law on intestate succession: a question of harmonisation, integration or abolition" 2008 *Journal of Comparative Law* 119.

15 See the Swaziland Constitution Order 1967 (SI 1967 No 241).

16 S 18.

The same principle applied in the case of *Ndlovukazi* (queen mother),[17] and the Regent.[18] This principle of recognising the office of *Ngwenyama* as king and head of state, whose succession was to be governed by Swazi law and custom seems to have occupied the centre-stage in the run-up to independence. It was mooted in the Constitutional proposal of 1966.[19]

The independence Constitution of 1968 did not introduce any change to the enduring principle of deference to "Swazi law and custom" on matters of succession to the office of king. [20] The principle appears to be so enduring in the Swazi Constitutional design of post-independence that it appears to have even survived the country's 1973 Constitutional crisis. Instead, it could be safely argued that the 1973 Constitutional crisis marked the victory of "Swazi laws and custom" over the rival scheme brought about by the Westminster Constitutional design. In fact, King Sobhuza II himself said in the 1973 Proclamation:

> The Constitution has permitted the importation into our country of highly undesirable political practices alien to and incompatible with the way of life in our society and designed to disrupt and destroy our own peaceful and constructive and essentially democratic methods of political activity …[21]

The repeal of the 1968 Constitution in 1973 ushered in a new Constitutional dispensation in which customary law grew beyond the mere role of determining succession to the office of King but occupied the entire political and Constitutional space of the kingdom thereby fortifying the power base of the monarch.[22]After almost three decades of the rule by Decree,[23] the new Constitutional dispensation was ushered in

17 S 19, which provides,
"(1) The person who is Ndlovikazi (Queen Mother) immediately before the making of the Swaziland Constitution Order 1967 is hereby recognized as the Ndlovukazi.
(2) When the Office of Ndlovukazi becomes vacant in accordance with Swazi law and custom, a person shall, in accordance with Swazi law and custom, be designated as the holder". It is important to note that both for Ngwenyama and Ndlovukazi the Constitution delegated provides that succession shall be regulated by "Swazi law and custom". It did not have any detailed guideline in the subject of succession to these offices.

18 S 20.

19 See the "Swaziland Constitutional Proposals" Cmnd. 3119 of 1966, London.

20 Section 29 of the Swaziland Constitution of 1968 provides, "when announcement is made to the Swazi nation in accordance with Swazi law and custom that the office of King is vacant by reason of the death if the holder or any other cause such person as in accordance with Swazi law and custom is declared to be king shall become King".

21 Proclamation by His Majesty King Sobhuza II (No 578) of 1978.

22 Wanda "The shaping of the modern Constitution of Swaziland: A review of some social and historical factors" 1991 *Lesotho Law Journal* 177.

23 For the analysis of the adoption of the new Constitution, see Langwenya "Recent legal developments – Swaziland" 2005 *University of Botswana Law Journal* 167.

by the controversial 2005 Constitution.[24] Its clause on succession to the throne provides that:[25]

> (1) Succession to the office of King and *iNgwenyama* is hereditary and governed by this Constitution and Swazi law and custom.
>
> (2) Where the office of king and *iNgwenyama* becomes vacant, the successor to the throne shall be determined and declared in accordance with Swazi law and custom.

The slight difference in the newly introduced principle is that succession is no longer exclusively governed by "Swazi law and custom". The new formulation provides that succession "shall be governed by this Constitution and the Swazi law and custom". Ironically, nowhere does the Constitution itself articulate rules or guidelines governing succession, which suggests that customary law still remains the arbiter on matters of succession to the throne. The net effect is therefore that rules of succession to the throne are based on "Swazi law and custom" as discussed above.

3 Swazi customary rules and institutions governing succession to kingship

3 1 Customary rules of succession

Law of succession is another aspect on which Swazi customary is different from that of most African countries, in that whilst it is still patrilineal in nature, it does not follow the rule of primogeniture *strictu sensu* – a right of inheritance does not necessarily belong to the eldest son of the king.[26] Unlike in other African countries, where it is a matter of common course that the first son of the first wife succeeds, the successor in Eswatini is selected only after the death of the father. "The heir to the throne is not usually or widely known during the life of the *Ngwenyama*".[27]

This is in keeping with the Swazi saying that 'no King can appoint his successor'. According to custom, *inkosi yinkhosi ngenina* (a king is king through his mother). The only settled principle is that "the King inherits his position in the male line. He is chosen from among the sons of his

24 The Constitution of Swaziland Act No 001 of 2005. For the analysis of the Constitution was adopted and the fault-lines in the process see Maseko "The drafting of the Constitution of Swaziland, 2005" 2008 *African Human Rights Law Journal* 312.

25 S 5 of the Constitution of Swaziland.

26 Voster and De Beer "Succession to *Bukhosi* among the Swazi of Mpumalanga Province" 2000 *South Africa Journal of Ethnology* 143 at 145.

27 Potholm "Swaziland under Sobhuza II" in Daniel *et al* (ed), *Politics and Society in Swaziland* (1975) 233.

father by virtue of his mother's rank in the harem".[28] Whilst it is commonly known that in countries like Lesotho that the heir owes his position to the rank of his mother, the Swazi system demonstrates distinction in that it does not automatically accept the first wife as the main wife.[29] According to Swazi maxim, "a first wife does not dispute the homestead".[30] The main wife is so designated and ranked by the council guided by several factors. Voster and de Beer identity these factors as, "the origin of the wives of the former traditional leader, the manner in which they joined the ruling family and substitution, as well as physical and natural characteristics of the successor".[31]

Perhaps it may be proper to explain these factors briefly, as they are critical in the ultimate choice of the heir.

First, it is a matter of customary practice that the King's first wife, although she still has important functions in the harem, cannot be the Great Wife. The king's first and second wives must come from the Matsebula and Motsa clans respectively. They have ritual importance as *sisulamsiti esikhulu* (first wife) and *sisulamsiti esincane* (second wife) respectively.[32] Thereafter the King is at liberty to marry from the 'foreign' clans from whom the Great Wife will come. In the past, the Great Wife has been from the clans of Mkhatshwa, Khumalo, Simelane, and Hlophe.[33]

The rank of her family is very important. According to Marwick, "the main wife of a king may be selected by the royal family council from the family of a leading chief, and married with a ritual".[34] The manner in which the wife is married is also critical. The girls who are married through arranged marriages stand a high chance of being main wives. Arranged marriages refer to a marriage, which is the affair of the families of both the future man and the wife. Their views as future husband and wife are of less importance; in fact, they are often not even consulted. "If the initiative is taken by the man or his family, they 'beg' the girl from her group with special beast to 'open the mouth' and her position as Great Wife is almost definitely assured".[35] Furthermore, a girl who chooses a husband for herself (*utiganela*) stands very little chance of

28 Kuper 2 at 54. The author provides the theoretical basis for this posthumous selection in that 'Swazi laws of succession and inheritance "… demonstrate a conscious attempt to overcome the lines of fission that are likely to endanger the unity of the group concerned', 88. Ironically, my field work at Mbabane, Lobamba and Mazini demonstrates that succession disputes in Swaziland are rifer, arguably because of the uncertainty that characterises the rules that govern it".
29 Kuper 88.
30 Kuper 91. This means that she is not expected to claim the position of the main wife.
31 Kuper 145.
32 Marwick 255.
33 Marwick 255.
34 Marwick 254.
35 Marwick 93.

being ranked high as the main wife. The factors of how one was married and the social rank of the parents of the wife are interrelated because "aristocrats … seek men of equal rank for their daughters, in order that a girl may retain the high social status, and they ask for more marriage cattle than do commoners as a mark of rank and wealth".[36]

Another determinant factor is the character of the wife. Although it is generally believed that the character and rank of the parent determine that of the daughter, the character of the daughter itself is still a character. According to Kuper:

> … in certain cases 'good character' – defined primarily as kindness and generosity – may win for individuals who would otherwise remain insignificant the positions of main wife and heir.[37]

As it would immediately appear, character is one of the most subjective factors in the process of choosing the main wife. However, there is evidence to the effect that Queen Mother *Labotsibeni Gwamile Mdluli,*[38] was chosen almost exclusively on the basis of her good personality because her father was not even the highly ranked chief, save to say that she was allegedly the child of the levirate.

Most of the informants consulted in this study, particularly those who were related to the royal family largely confirmed these factors although there is still much secrecy when it comes to the finer details.[39] The widely held view among the ordinary Swazi is that the actual knowledge of these factors is the exclusive preserve, sometimes the machinations, of the royal family.

The non-exhaustive nature of these factors only attests to one thing – that the ruling family council, like the *lelapa* (family) in the case of Sesotho custom, has significant discretion in choosing the successor. Matsebula, one of the revered authorities on Swazi history and custom, attests to the fact that, according to Swazi law and custom, succession does not go according to primogeniture. However, he seems to contest the argument that Swazi custom on succession to *bukhosi* (kingship) is not definitive. He contends, "the Swazi King inherits his position in the male line, and is chosen from among the younger sons of the previous King. Because of our polygamous system, those who do not understand our custom feel that our method of choosing a king is complicated".[40]

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36 Marwick 93.
37 Kuper 103.
38 Queen Mother Gwamile was the mother of King Bhunu and grandmother of King Sobhuza II. She ruled Swaziland as the regent in the period 1899-1921. For a detailed discussion of her special character, see Ginindza "Labotsibeni/Gwamile Mdluli: The power behind the Swazi throne 1875-1925" 1997 *Annals of the New York Academy of Sciences* 135.
39 The informants on swazi customary rules on succession largely prefer anonymity because the rules are generally not up for general public engagement.
40 Matsebula *A History of Swaziland* (1976) 8.

According to Matsubula, the choice of the successor is generally deferred to the time when the incumbent is dead. In other words, during the lifetime of the father, ordinarily no one knows who the heir will be – not even the father himself. It is only after the demise of the father that the royal family council meets and decides who among the queens will be the queen mother. Matsebula confirms what Voster and De Beer say, namely that there are certain factors considered when choosing the queen mother. One of the principal criteria is "the mode of marriage of different queens".[41]

The main theory of the Swazi law of succession is peace and unity of the family. It is based on the presumption that if the heir to the throne can be known before the death of the incumbent father there will be strife for the power and wealth that come with the office. Kuper aptly captures the theory as thus:

> … strife for succession often intensifies factions within each hostile faction, it weakens the larger unit. Swazi consider that when the heir is not known, the kingship group has greater solidarity: co-wives and their sons are likely to remain on terms of equality and friendship, and the position of the father is more secure, since there is less likelihood of … a possible attempt to hasten his death.[42]

While this presumption holds at times, it has not always proved accurate as the uncertainty about the heir gives rise to competing ambitions and tacit strife.

3 2 Traditional institutions and procedures for succession in Eswatini

The key institution that customarily deals with succession is *bantfanenkosi* (princes of the blood). The *bantfanenkosi* comprises the male members of the royal family only. When it meets for the purposes of succession, the sons of the deceased King from whom selection is going to be made, do not participate. The next brother of the late King normally chairs the council.[43] In terms of procedure, when the king passes away the *bantfanenkosi* together with the *indvuna* (chairperson) of the *Indlovukati's* village and with the *tinsila* (blood brothers) of the late King, meet to decide succession.[44] Although the incumbent *Indlovukati* does not physically sit with the council for the choice of the heir, she is very much involved in the process as she remains referable on points of material significance.

When the choice has been made by the *bantfanenkosi*, the national *libandla (*the general assembly of all men of the nation) and *Indlovukati* are informed of the choice. The minor heir will be called *umtwana* (child)

41 Matsebula 8.
42 Kuper 89.
43 Marwick 257.
44 Marwick 257.

until his time of installation as the *Ingwenyama*. His mother, because of whose status the child was chosen, will then be the *Indlovukati.*

Although public presentation of the newly appointed heir appears to be a critical step in the process of appointment, there is no evidence that national *libandla* can object or otherwise express any meaningful dissatisfaction to the choice. The choice is predominantly the preserve of *bantfanenkosi.* However, according to custom, the choice of the heir is completed by public presentation to the *libandla.*

4 A critique of customary rules

The question of how the currently ruling dynasty came to power is a matter of considerable controversy. However, the tribe can be traced back to King Ngwane III, which has survived and established hierarchical and successive institutions, which, according to Motsebula, "have survived to the present day".[45] Although Matsebula would want us to believe that Swazi custom on succession is 'fairly simple', the deeper one sinks into its research the more complications surface. There are certain general rules like the ones outlined above, which are straightforward and which need no further elaboration, but there are certain rules plagued by deliberate vagueness. The polygamous nature of marriage in Eswatini, also further compounds the problem. The rules that guide the royal council (*bantfanenkosi)* during the choice of the queen mother are not so obvious, thereby leaving much room for discretion or, at times, whims. For instance, while it is one of the criteria that the queen mother must have only one son, there is some evidence that for Labotsibeni Mdludi, mother of King Bhunu and grandmother of Sobhuza II had three sons, but her character was so strong that the royal council agreed that she must be *Ndlovukazi.*[46] Whilst in other countries like Lesotho the major uncertainty has in the past been the choice of a regent,[47] in Eswatini it would seem that the problem is really choosing the mother of the King. If the King is still a minor, the new *Ndlovukazi* acts as regent, helped by the King's brother. The royal council must also appoint the brother.[48]

This open-endedness of the rules of succession has never gone without much of succession disputes. Since the early days of the Swazi tribe, succession disputes have been rife. In fact, every time there is a new King to be appointed, there are succession disputes. According to Gillis:

> … the first disruptions were domestic family dissention among the *Dlamini* over *Sobhuza's* successor. Other sons, offspring from the late King's polygamous marriages, had valid claims to the kingship and were not slow to press them.[49]

45 Marwick 8.
46 Marwick 8.
47 See *Bereng Griffith v. Mants'ebo Seeiso* 1926 HCTLR 53.
48 Matsebula 8.
49 Gillis *The Kingdom of Swaziland: Studies in Political History* (1999) 20.

The succession dispute did not only follow the death of Sobhuza; even that of his successor Mswati was fraught with controversy. Gillis notes that the King's demise was followed by a decline in Swazi influence and power. Part of the reason was that custom left open the door to succession and as had happened before, too many aspirants passed through so "when the question of succession arose twenty of his sons had supportable claims to the kingship".[50]

It would seem that the Constitution of Swaziland will continue to cause trouble regarding succession as long as the matter is left exclusively to custom. Custom is dynamic, and develops from time to time and as a result, the rules that regulated succession during the reign of Sobhuza I may have been changed by practice. The challenge with this *modus operandi* is that, despite the significance of monarchical succession in the Constitutional design, rules remain largely unwritten at the behest of the *bantfanenkosi*.

5 Patriarchy, primogeniture rule and the liberal Constitutional theory

Clearly, the most discernible trend since colonialism has been the steady decline of the power of hereditary monarchy yielding to the emergence of electoral democracy. Even the Constitutional designs have been attuned to this trend. The outcome of the investigation of the customary modes of accession give mainly three results which will, at first sight, appear to sit rather uncomfortably with the demands of the post-colonial Constitutional designs – which, by the way, are largely informed by the conceptions of colonial state craft. Firstly, determination of hereditary succession is the preserve of a certain exclusive dynastic group-styled *bantfanenkosi*, or the College of Chiefs, whatever the case may be – not the entire society within the polity. Secondly, aspiration to accede to the office of King is limited to those borne within a certain family – therefore the exclusive privilege of the few individual offspring of that lineage. Thirdly, the rules of succession are largely patriarchal. These three variables in themselves put hereditary succession in a position of perpetual tension with the Constitutional design, whose lodestar is Constitutional democracy. It is therefore befitting to examine how

50 Gillis 25. The succession disputes still rages within the Swazi royal family even to this day. The crux of it is captured more accurately by Vilane and Daniel. According to them, one of the critical elements that sharpened and complicated the conflict situation in Swaziland is the "division within the royal family dating back to the controversial selection in 1899 of Sobhuza as successor to King *Bhumu (Mahlokohla)*. Today this schism centres upon the personage of Prince *Mfanasibili* who is held in awe by many within the aristocracy as he is a son of Prince *Makhosikhosi* who, according to Swazi oral tradition (or one interpretation of it), was the true heir to *Mahlokohla* throne, and not Sobhuza". See Daniel and Vilane "Swaziland political crisis: regional dilemma" 1986 *Review of African Political Economy* 54 at 58.

heredity contends with the colonial imprints, which have come to be the whirlwinds of the contemporary Constitutional design.

As demonstrated in the preceding sections, accession to high office in Eswatini is hereditary. As Schapera captures it:

> Chieftainship is hereditary … a chief succeeds automatically to his office by right of birth … a chief is a chief because he is born to it …[51]

Accession is not subject to an electoral process. This underlying feature of a monarch, at least at first instance, appears "to remove from this institution any semblance of democracy".[52] This tension is further heightened by the promise given since independence that the kingdom will be "democratic".[53] The assault on heredity has been rife in the post-colonial Constitutional debate not only of the Kingdom of Eswatini, but also of many other African states. Scholars, even African scholars, contend that the fall of colonialism and ascendancy of electoral democracy in the middle of the 20th century in Africa marked the consequent collapse of any form of government whose authority to rule is not subject to popular participation of the people. Rugege, for instance, contends, "the right of hereditary rule is fundamentally undemocratic".[54] Some scholars like Makoa have been very radical and unsympathetic to the institution of chieftainship to the extent that they argue for its dispensability. Makoa, who appears to juxtapose the institution with militarism, argues that countries must reappraise their systems of rule and structure of government "by applying an economic and political criterion. Thus, assessed in these terms chieftainship and the military are first of all the institutions that are clearly dispensable".[55]

The careful consideration of the stream of authorities that degrade monarchism because of heredity demonstrates that these are scholars whose conception of democracy is not Western but they are a rubric of democrats that Fayemi calls minimalists – scholars whose viewpoint on democracy is election.[56] The leading minimalist democrat, Schumpeter, contends that democracy is a "method by which decision making is

51 Schapera "Political institution" in Schapera (ed), *The Bantu Speaking Tribes of South Africa: An Ethnographical Survey* (1937) at 173-175.

52 See Mokgoro "Traditional authority and democracy in the Interim South African Constitution" 1996 *Review of Constitutional Studies* 60 at 62.

53 S 1(1) of 2005 Constitution provides that 'Swaziland is a unitary, sovereign, democratic Kingdom'. Another precept of liberal Constitutionalism – Constitutional supremacy – is embodied under section 2(1) of the same Constitution. It provides that '[t]his Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'.

54 Rugege "The future of traditional hereditary chieftaincy in a democratic Southern Africa: The case of Lesotho and South Africa" in Santho & Sejanamane (eds), *Southern Africa after Apartheid* (1991) 48 at 156.

55 See Makoa "The military Kingdom: A case for restructuring the system of government in Lesotho in the 1990" in Santho & Sejanamane 182.

56 Fayemi "Towards an African theory of democracy" 2009 *Thought and Practice* 101.

transferred to individuals who have gained power in a competitive struggle for the votes of the citizens".[57] For minimalists, election as opposed to heredity is the central theme of democracy. However, contemporary debate on the discourse of democracy while it does not necessarily downgrade the essence of elections in a democracy is inclined to suggest that democracy is more than election.[58] Diamond, one of the leading contemporaries in this latter trajectory, opines that further to elections, liberal democracy – which is arguably the one bequeathed to the Kingdoms of Eswatini at independence – demands institutions accountable to somebody else other than themselves.[59] Although it is not immediately clear whether Diamond would accept liberal democracy – executive authority with Constitutionally constrained powers – without elections, what is clear though is the fact that liberal democracy is not so much obsessed with elections but with Constitutionalism. In fact, Huntington has dared to contend quite convincingly that:

> Elections in non-Western societies may lead to the victory of political leaders or groups that seriously threaten the maintenance of democracy. Elected chief executives in Latin American countries and in former soviet republics have often acted arbitrarily and undemocratic ways …[60]

Thus, the growing disenchantment with elections and the growing mass of literature re-affirming African governance systems,[61] have obviously weakened the indictment of electoral democrats on hereditary succession. Thus, the salient question for hereditary rulers is no longer about the manner in which they get to power but, rather, whether their executive power is limited and accountable to other institutions when they are in power.

One of the daunting challenges in the modern-day hereditary monarchy in general, and in the case of Eswatini in particular, is that

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57 Schumpeter *Capitalism, Socialism and Democracy* (1942) 269.

58 See Diamond "Is the third wave over?" 1996 *Journal of Democracy* 20 at 21.

59 Diamond 23.

60 Huntington "After twenty years: the future of the third wave" 1997 *Journal of Democracy* 3. This article was his own appraisal of the arguments raised by himself about six years earlier in *The Third Wave of Democratization in the Twentieth Century* (1991, University of Oklahoma Press).

61 See Fayemi 109. The author argues that: "[I]n a bid to justify the imposition of civilized government on their colonial territories, European imperialists characterized African pre-colonial political structures as autocratic and oppressive. Nonetheless, that conception was grossly inaccurate for many traditional African societies … An investigation into their socio-cultural history will reveal the democratic structure of their political-cultural heritage, evident in their process of choosing leadership …". The equally impassioned attack on the imposition of Western democracy is made by Ake *The Feasibility of Democracy in Africa* (2000) *34* as thus: "Africa, it has been claimed, has its own unique history and traditions and the introduction of democracy, an alien concept, would violate the integrity of African culture. This argument premised on the misconception that democracy is solely a Western creation, stems from confusion between the principles of democracy and their institutional manifestation".

accession to high office is preserved for the male line. This is the aspect of customary norms and values, which even the Westminster Constitutional model adopted in Swaziland at independence, never dared to challenge. As has been demonstrated earlier, one of the critical challenges of the post-independence Constitutional designs in Eswatini is that as it relates to monarch, is that the Constitution is not self-contained – it demonstrates substantial deference to customary law and the general rubric of customs. Thus, male domination is one of the most pervasive features of custom. Yet, one of the streams that nourish the contemporary Constitutional theory is equality. The Constitution of Swaziland (latterly Eswatini) embodies this value.[62] Equality, freedom (liberty) and justice are the fundamental pillars of Constitutional theory based on liberal democracy.[63] In addition, in an effort to uphold these values, the Bill of Rights in the Constitution of Swaziland also embodies, in a broader way, these values.[64]

This conflict-ridden relationship between contemporary values of Constitutionalism based on liberal political philosophy,[65] and custom has become a subject of intensive judicial,[66] as well as scholarly,[67] engagement in other countries in the sub-region like in South Africa.[68] The post-apartheid South African Constitutional dispensation had to grapple with the role of chieftaincy within the new Constitution based on liberal values – but much more specifically with the rule of primogeniture. As Bank and Southall point out:

62 S 20 of the 2005 Constitution provides that: (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. (2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability. (3) For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

63 MC Vile *Constitutionalism and Separation of Powers* (1998, 2nd ed, Liberty Fund) at 1.

64 See Chapter III of the 2005 Constitution of Swaziland styled "Protection and Promotion of Fundamental Rights and Freedoms".

65 See Loughlin "Constitutional theory: a 25th anniversary essay" 2005 *Oxford Journal of Legal Studies* 183.

66 *Mthembu v Letsela and Another* 1998 2 SA 675 (T), which was later upheld in *Mthembu v Letsela and Another* 2000 3 SA 867 (SCA); *Zondi v President of the RSA* 2000 2 SA 49 (N); *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

67 Kerr "Customary law, fundamental rights, and the Constitution" 1994 *South African Law Journal* 720; also Mireku "Judicial balancing of parallel values: male primogeniture, gender, equality and chieftaincy succession in South Africa" http://www.enelsyn.gr/papers (accessed 2018-08-24) and Kerr "The Constitution, the bill of rights and the law of succession" 2006 *Speculum Juris* 1.

68 Omotola "Primogeniture and illegitimacy in African customary law: the battle for survival of culture" 2003 *Speculum Juris* 181; Juma "From 'repugnancy' to 'bill of rights': African customary law and human rights in Lesotho and South Africa" 2007 *Speculum Juris* 88.

> … the Constitution is based primarily upon notions of liberal and Constitutional democracy. Nonetheless, it simultaneously provides for the recognition of existent legally constituted traditional authorities …[69]

The Constitutionality of the primogeniture rule, although it was not dealing with succession to monarchy, came into issue in the Constitutional Court through the case of *Bhe v Magistrate Khayelisha.*[70] Langa DJC clearly impugned the rule as:

> The principle of primogeniture … violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property … Their dignity is further affronted.[71]

While the court was more cautious in the *Bhe* case not to extend its ruling to cover the cases of succession to traditional chieftaincy, it was not long before a direct case of succession to chieftaincy was brought before the court. The court was directly confronted by the Constitutionality of the primogeniture rule with regard to chieftaincy in the landmark case of *Shilubana v Nwamitwa*.[72] The facts of this case are interesting and of peculiar relevance to Eswatini. The dispute arose in the Valoyi traditional community in the province of Limpopo in South Africa following the death of Hosi (chief) Richard Nwamitwa in 2001.The appellant, Ms Shilubana, was the daughter of former Hosi Fofosa Nwamitwa who had died without a male heir around 1968. Customary law of succession at the time, like that of Eswatini, went according to male line, thereby disallowing the daughter, Ms Shilubana, to succeed despite being the eldest child.[73] Instead, Hosi Fofosa's brother succeeded. In 1996 and 1997, the Valoyi traditional authorities resolved that in view of the new Constitutional dispensation, which cherished gender equality, Ms Shilubana would succeed Hosi Richard. Hosi Rechard's eldest son, Mr Nwamitwa contested the resolution. Both the High Court[74] and the Supreme Court of Appeal upheld his contest.[75]

When the appeal was launched in the Constitutional Court, the main issue was whether the decision by the traditional authorities to appoint Ms Shilubane as the heir was Constitutional. The court held that:

> The Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution. Several provisions of the Constitution require the application of the common law and customary law, as well as the practice of culture or religion, to comply with the Constitution. Sections 1(c) and 2 establish the supremacy of the Constitution over all law. Section 30 recognises the right to participate in the

69 Bank and Southall "Traditional Leaders in South Africa's New Democracy" 1996 *The Journal of Legal Pluralism* 407.
70 *Bhe v Magistrate, Khayelisha* supra.
71 *Bhe v Magistrate, Khayelisha* para 92.
72 2008 9 BCLR 914 (CC).
73 *Shilubana v Nwamitwa* para 51.
74 *Nwamitwa v Phillia* 2005 3 SA 536 (T).
75 *Shilubana v Nwamitwa* 2007 2 SA 432 (SCA).

> cultural life of one's choice, but only in a manner consistent with the Bill of Rights.[76]

The purport of this ruling is therefore that the primogeniture rule in South Africa is as unconstitutional with regard to private inheritance,[77] as it is with succession to chieftainship. As Bank and Southhall perhaps poignantly observe, the Constitutional dispensation in the Republic of South Africa would still, at some point in its development, have to deal with that paradox.

They argue that the new Constitutional order is based on liberal values but at the same time seeks to preserve the traditional values.[78] This observation may be equally true of the contemporary Constitutional dispensation in Eswatini. The 2005 Constitution of Swaziland, for instance, cherishes the right to "equality before the law".[79] The Constitution of Swaziland is so outright on this principle to the point of being superfluous that it provides "for the avoidance of any doubt, a person shall not be discriminated on the grounds of gender". Lesotho is no exception. However, while Lesotho's Constitution still generally cherishes liberal values and equality in particular, it is still cautious in its preservation of patriarchy. It places "the application of customary" as the justifiable exception to the principle of equality.[80] Be that as it may, it can still be observed that the principle of primogeniture, although it is so central and the bulwark of customary law of succession, will remain in constant tension with the contemporary Constitutional theory.

Another comparative lesson is from the recent decision of the Court of Appeal of Lesotho on this tension is in the case of *Senate Masupha v Senior Resident Magistrate for the Subordinate Court of Berea*.[81] Although the case relates to the application of customary rules to the lower tier of chieftainship, – principal chieftainship – it attests to these continuing tensions between customary rules and virtues of liberal democracy in the Constitution. *In casu* the appellant was an unmarried woman whose father was, until his death the principal chief of Ha 'Mamathe, Thupa-

76 *Shilubane v Nwamitwa* para 68. For the dedicated analysis of this *dictum*, see Mmusinyane "the role of traditional authorities in developing customary law in accordance with the Constitution: Shilubane and Others v Nwamitwa 2008 BCLR 914 (CC)" 2009 *Potchefstroom Electronic Law Journal* 136. See also Khunou "Traditional Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism Beyond Apartheid" 2009 *Potchefstroom Electronic Law Journal* 81, who uses this decision to demonstrate that the new Constitutional dispensation in South Africa does not allow any form of discrimination. The author at 110 argues that: "[t]raditional leadership is recognized subject to the 1996 Constitution and is required to be compatible with the Constitution. This Constitutional provision requires the traditional leadership to change its own rules and practices not to be in conflict with the Bill of Rights".

77 See *Bhe v Magistrate supra*.

78 Bank and Southall 408.

79 See s 20(2).

80 See s 18(4) (c).

81 C OF A (CIV) 29/2013 (yet unreported).

Kubu and Jorotane in the Berea district. His widow, the appellant's mother, succeeded the father. Upon her death in December 2008, the office of principal chief fell vacant.

In February 2009, a family meeting was held pursuant to which Lepoqo David Masupha, the then minor son and only issue of a subsequent marriage entered into by the appellant's late father, was named as successor to the chieftainship, and a regent was appointed pending his majority. The decision of the family council was based on customary rule of primogeniture, which has since been codified under section 10,[82] of the Chieftainship Act.[83] The appellant challenged the decision of the family council based on the principle of no-discrimination,[84] and equality,[85] enshrined in the 1993 Constitution of Lesotho. Both the High Court and the Court of Appeal were unanimous in dismissing the challenge. The main reason as extolled by the Court of Appeal was that since the Constitution itself sanctions the limitation to the rights to equality and non-discrimination based on customary law, it cannot be argued that customary rule of primogeniture is unconstitutional.[86] The court simply confirms that the tension of values of liberal Constitutionalism and customary law have permeated, in a major way, the post-colonial Constitutional designs in both kingdoms under study.

82 The section codifies the rule as thus, (2) When an office of Chief becomes vacant, the firstborn or only son of the first or only marriage of the Chief succeeds to that office, and so, in descending order, that person succeeds to the office who is the first-born or only son of the first or only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection. (3) If when an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the Chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority of marriages according to the customary law, that person succeeds to the office who is the first-born or only son of the senior marriage of the Chief or of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection. (4) If when an office of Chief becomes vacant there is no person who succeeds under the two preceding subsections, the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief, and when that office thereafter again becomes vacant the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing such an eldest brother, the eldest surviving uncle of that male Chief in legitimate ascent, and so in ascending order according to the customary law. The Court of Appeal confirmed in the same case that customary law of succession has been codified under the aforesaid section. At para 15 the Court decided that: "the Act, and s 10 in particular, make provision – as stated in s 18(4)(c) of the Constitution – for the application of the customary law of Lesotho with respect to (chieftainship succession) in the case of persons who, under that law, are subject to that law".

83 Act 22 of 1968 (as amended).

84 S 18.

85 S 19.

86 See para 18 and 19.

The South African Constitutional edifice is distinguishable from that of the Kingdom of Eswatini in that it has a more comprehensive scheme in dealing with customary law and the Constitution. Whilst diversity of cultures is respected in South Africa,[87] section 39(2) of the Constitution specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Constitution. This is the main distinction between the place occupied by customary law in the Constitution of South Africa and the place it occupies in the Kingdom of Eswatini. Under South African Constitutional jurisprudence as confirmed by courts of law,[88] customary law derives its validity from the Constitution – not the other way round. In the Kingdom of Eswatini, the Constitution appears to relinquish its supremacy to customary law.

7 Conclusion

The purpose of this article has been to study the rules of succession governing accession to the office of king in Eswatini. The article showed that the Constitutions of this kingdom, since independence in 1968, have consistently embodied a clause on succession to the office of king. What is striking, though, with the Constitution, is its deference to customary law.

Two important aspects appear problematic about this design. Firstly, besides establishing the office of king, the Constitution can generally be regarded as wanting on the guidelines governing accession to that office. Secondly, by demonstrating such consistent deference to customary law, the Constitutional design of Eswatini appears to abdicate its supremacy to customary law. This downplaying of the Constitution in favour of customary law became rife in Eswatini since 1973.[89]

Furthermore, reliance on customary law for the rules of succession to such high office – although it assists in retaining the traditional and customary content of this office – has also proved problematic over the years.[90] In Eswatini, almost as soon as a new King has to be installed the transition is riddled with succession disputes. This may primarily be because customary law is a dynamic system of law and in the process

87 See s 31 of the 1996 Constitution of South Africa.

88 It the case of *Alex and another v Richterveld Community* 2003 12 BCLR 1301 (a) at para 51 the court held that "while in the past indigenous law was seen through the common law … it must now be seen as an integral part of our law, like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law but to the Constitution".

89 See the cases of *Lucky Nhlanhla Bhembe v The King Criminal Case* 75/2002 (unreported); *Gwebu & Another v Rex* (2002) AHRLR 229 (SwCA 2002).

90 The problem is not only unique to Eswatini. It is a common problem throughout Africa. See White "African customary law: the problem of concept and definition" 1965 *Journal of African Law* 86.

marred by uncertainties and ultimately renders the system open to abuse.[91] This is confirmed by the relative disagreement on the rules of customary law governing succession. This divergence of views on customary law even transcends the efforts intended at codifying the system such as the Lerotholi Code in Lesotho. Confirming the fluidity of customary law in 1943, Lansdowne, J, in the regency case pointed out that:

> In a country like Basutoland where customary practices are in general inconstant, tending under the influence of Christianity, education and others forces, to the improvement of a primitive social system, to the elimination of feudal privileges, and to the evidence from the idea of the family unit towards a larger appreciation of the rights of the individual, it is found undesirable to endeavour to reduce custom to written law, for thereby that which is course of wholesome development would tend to become static.[92]

Thus, even codes such as Lerotholi Code in Lesotho cannot be regarded as safe records of customary law.[93]

Lastly, it appears that notwithstanding the legitimate nature of hereditary succession to the office of King, the patriarchal nature of customary law poses a unique challenge in the contemporary Constitutional theory.[94] The rule of primogeniture, which prefers males to females, is experiencing considerable problems in co-existing with the contemporary ethos of equality and dignity. The South African jurisprudence has taken a bold step forward to impugn the rule.[95] Arguably, since the South African context is not so much remote, as it retains both hereditary and elected rulers, it may be safely expected that the Kingdoms of Eswatini will follow its precedence, at least progressively.

It can therefore be recommended the Constitution clause on succession to office of King be amended to elaborate the rules of succession. It serves Constitutionalism best when the rules by which

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91 For the methods of ascertaining customary law, see Palmer and Poulter *The Legal System of Lesotho* (1972) 101-105. See further Poulter "An essay on African customary law research techniques: some experiences from Lesotho" 1975 *Journal of Southern African Studies* 181. The author opines that: "students of African affairs who come fresh to the field of customary law research will immediately be struck by three notable facts. First, it is a domain frequented as much by anthropologists as by lawyers. Second, it is an area presently experiencing rapid growth in terms of fieldwork … Third, despite this … progress towards consensus regarding the most appropriate research techniques to employ seems to be emerging only rather slowly".

92 *Bereng Griffith v Mantsebo Seeiso Griffith* n49 at 58.

93 Juma "The Laws of Lerotholi: Role and status of codified rules of custom in the Kingdom of Lesotho" 2011 *Pace International Law Review* 92.

94 Tebbe "Inheritance and disinheritance: African customary law and Constitutional rights" 2008 *The Journal of Religion* 466.

95 *Bhe v Magistrate, Khayelitsha supra*; *Shilubane v Nwatiwa* supra.

rulers accedes to office are clearly articulated and Constitutionalised.[96] The Constitutionalisation of the customary rules will resolve a two-pronged problem with the rules of succession currently – the problem of uncertainty of rules and their non-Constitutional nature.

96 The view accords with de Smith's formulation that: "Constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content". See de Smith "Constitutionalism in the Commonwealth today" 1962 *Malaya Law Review* 205.

Impact of global food and agriculture laws on Africa's food security

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SUMMARY

This study considers expanding beyond the current collective understanding of research on the impact of global food and agriculture laws on Africa's food security. This paper aims to answer two basic questions: are the current global food and agriculture laws capable of facilitating and supporting the goal of ending hunger in Africa and increasing food security; will the existing global food law promote fair and equitable food production and supply practices to benefit all who need it?

This paper will answer the questions by using a qualitative approach to Africa's experience in dealing with the existing global food and agriculture laws. This will provide insight into understanding the law, the behaviour of society and the outcome of the application of the law in real life. This will enable us to identify the gap in the global food law addressing food security. The qualitative data in the study will help the in-depth explanation, exploration and understanding of the root cause of food insecurity.

This is significant because of the growing tension between population growth and the demand for food which are incompatible, especially in Africa. Currently, Africa's population is estimated to be 1.3 billion people[1] and food production is not sufficient to feed the people. Of the almost 800 million people who are considered to be living with chronic hunger globally, the majority are from Africa.[2]

A contemporary study suggests that the population growth in Africa is expected to double to 2.4 billion by 2050.[3] The question we have to ask

1 *Africa Population* 2019 available at www.worldometers.info/world-population/africa-population/ (accessed 2019-03-29).

2 *World Hunger, Poverty Facts* 2016 available at http://www.worldhunger.org/2015-world-hunger-and-poverty-facts-and-statistics/ (accessed 2016-10-31).

3 *World Population Prospects the* 2015 Revision available at http://www.esu.un.org/unpd/wpp/publications/files/key_findings_wpp_215.pdf (accessed 2016-10-31).

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here is if we cannot feed the current population, how can we feed the ever growing population and what can be done to overcome the deficit?

This paper has sought to expose the primary gaps in the existing global food and agriculture laws, weakness and constrains. It is argued that the primary failing of the current global food and agriculture law in addressing food security should be tackled with great concern. It was found that negotiations on agriculture and food at various international forums should bear partial responsibility for the lack of commitment, consistency and transparency in addressing food security.

In order to resolve the issue, it is argued that appropriate change in the system is needed, to ensure the fair distribution of benefits and burdens in society. The global food and agriculture law should, therefore, be able to provide a clear method to determine the future global food security.

1 Introduction

This paper goes beyond the existing understanding of the global food and agriculture law and examines a holistic and equitable approach to food security. The emerging understanding of the existing global food and agriculture law will be utilised in order to contribute to the most appropriate solutions for the current issues surrounding Africa's food crisis.

In a world where food security is threatened by factors such as a massive increase in urbanisation and climate change, the changes in the community food systems by new trends and globalisation are putting a major strain on food accessibility, availability and sustainability of the most vulnerable communities. The principal failing of the system and the missed opportunity of providing sufficient food in Africa is a tragedy and must be addressed and used to mitigate the current food crisis.

This paper advocate that the right to food does not warrant the distribution of free food to all citizens, rather it advocates the moral duty of governments, institutions and corporations to take sufficient steps to guard and protect the food security of the globe.

This paper analyses the application of global food and agriculture laws and their effect on Africa's food systems. It also looks at the structure of global food and agriculture laws' economic benefit and burden allocation across the social order.

For the purpose of this paper the source of the global food and agriculture laws investigated are: the Food and Agriculture Organisation (FAO) treaty, the Convention on Biological Diversity (CBD), the International Treaty on Plant GRs for Food and Agriculture (ITPGRFA), the Union for the Protection of New Varieties of Plants (UPOV) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

2 The ongoing discussion on the global food and agriculture laws

Lord John, the first director general of the FAO in his speech said: *You cannot build peace on an empty stomach*.[4] In support of this argument, there is nothing the hungry man can do as he/she loses rationality to build peace without food. Food is power, it fuels our bodies and our communities, but it has been taken for granted by the world leaders. It is important to take a serious look at the persistence of food insecurity, especially in Africa. The failure of a response to the call for the improvement in the current mode of the 'one-size-fits-all' application of the international food and agriculture law has dire consequences.

Analysts projected that by 2024 a 60% increase in food trade in Africa can be expected.[5] The continuous debate in Africa is centred on how domestic, regional and international agricultural trade can be harmonised to foster an appropriate sustainable framework to address food security.

The solutions so far prescribed were all rooted in the existing policies and norms which left the continent a net importer of food and agricultural products. According to the *African Green Revolution Forum Report* of 2014, Africa's food production capability in comparison to its population growth is not sufficient or sustainable.[6]

Currently the continent spends an estimated US$35 billion annually to import food from other parts of the world, which could be produced locally.[7] The present total value of agriculture in Africa accounts for US$313 billion per year; this could even be tripled if given the enabling environment and the right policies that support agriculture.[8]

The current global food systems have been widely criticised for failing to end hunger. This has most often been attributed to the existing systems that are not consistent and not well informed to respond to the present food insecurity. Poor food policies and norms could further aggravate food insecurity unless changes in the law are pursued.

Food is an essential part of the survival of any society and common to all humanity. It is important to protect and promote the food industries

4 Borlaug *The Green Revolution Peace and Humanity* 1970 available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1970/borlaug-lecture.html (accessed 2015-04-20).

5 Inouye *Turning Point for Agricultural Exports to Sub-Saharan Africa* 2015 available at http://www.fas.usda.gov/data/turning-point-agricultural-exports-sub-saharan-africa (accessed 2016-09-06).

6 Kofi *African Green Revolution Forum Report* 2014 available at http//:www.africaprogresspanel.org/panelmember/kofi-annan/ (accessed 2015-03-10).

7 Kofi 2014.

8 Brooks *Agriculture as a Sector of Opportunity for Young People in Africa* 2013 available at http://www.ypard.net/sites/ypard.net/files/Agriculture%20opportunity%20youth%20africa.pdf (accessed 2017-09-22).

to introduce fair and equitable legal framework to give clear direction resulting respect to the right to food, environment and preserve cultural and traditional farming practices which are more sustainable. Food not only fuels our bodies, but a lack thereof could create social and political instability.

This study supports the view that food security is an international issue. Desperation for food causes migration and global instability. It needs to be addressed with careful consideration of providing moral guidance to the legal framework that affects the right to food for all who are born on this earth and not some.

Food and agriculture organisation treaty (FAO)

The FAO is the primary international intergovernmental organisation dealing with global food and agriculture. The organisation created a global network of gene bank to store and safeguard *ex-situ*, the main varieties of plant genetic resources (GRs) and associated information or Traditional Knowledge (TK) of food for conservation.[9] The gene bank opens to the public. The treaty has no provision for describing the legal status of plant, GRs and information or knowledge kept in the gene bank. In the absence of protection global food corporations often access and patented resources only with minimal systematic gene fixing for exclusive commercial exploitation. This has come to the attention of member states who kept the work of their ordinary farmers' GRs and associated information which has been exploited without their knowledge and excluded them from gaining the benefits. As a consequence of the misappropriation of the GRs and information kept in the gene bank, the exploitation for an exclusive commercial benefit, and to offset the misallocation of rights and benefits, the Convention on Biological Diversity was adopted in 1992.[10] Since then some of the provisions of the FAO treaty have been proposed for revision by concerned member states, but remain unresolved.[11]

The innate gap created by the treaty firstly entails that the interpretation and realisation of the right to food for the global citizen as a paramount right are neglected. Secondly, the provision lacks legal recognition in identifying and protecting the plant, GRs and associated information kept in the bank. As a consequence, the provision strengthens the corporate action to take a free ride accessing other's resources and information or knowledge kept in the gene bank. This creates an imbalance in the distribution of economic benefits and burdens across societies that need to be corrected.

These are some of the weaknesses examined in this paper. The failure to safeguard the resources and information kept in gene banks results in

9 Gillespie *Conservation Biodiversity and International Law* (2011) 522.
10 Lightbourne *Food Security, Biological Diversity and Intellectual Property Rights – Intellectual Property Theory, Culture* (2009)146.
11 Lightbourne 146.

the misappropriation of exclusive commercial exploitation other than that envisaged in the provisions of the treaty. Furthermore, Article 7(10) (a) of the treaty intended multinational networking to benefit the international community as a whole and not to benefit only individuals.[12] Without a stable and strong commitment and change in the treaty, agriculture, especially in Africa, continues to suffer leading food insecurity remaining a vicious cycle for quite some time. It is vital to change the law to a more realistic and appropriate mode to introduce fair and equitable systems to mitigate the existing global food crisis.

2 Convention on biological diversity (CBD) (1992)

The CBD promotes international cooperation to safeguard biodiversity.[13] To balance the misallocation of rights and benefits in agriculture among nations, the CBD inspired an access and benefits law, the Nagoya protocol. This came into effect in 2014 to introduce legal certainty and transparency and to safeguard global biodiversity.[14]

The CBD gives sovereign rights to the states where plant, GRs and associated knowledge is discovered.[15] The provision further provides access to the users and enables the users to share the benefits from the utilisation of plant, GRs and information or knowledge from that specific jurisdiction.[16] Article 15 of the CBD states that both provider and user shall take legislative and administrative measures as appropriate to achieve their fair share from the utilisation of plant, GRs and associated knowledge.[17] The controversy surrounding access and benefit sharing (ABS) is that the right and obligations are hard to enforce once the jurisdiction is transferred to the user. The compliance depends on whether the parties take their international duties seriously, in the absence of clear direction in the provision, to accomplish the duty of compliance in question.

The CBD, in contrast to FAO treaty, focuses on linking access with benefit sharing for the utilisation of plant, GRs and associated information or knowledge for commercial purposes. This approach has been frequently seen by developed countries as divisive and impossible to comply with the requirement of disclosure of origin.[18] Despite the call

12 Chiarolla *Intellectual Property, Agriculture and Global Food Security: the Privatization of Crop Diversity* (2011)124-125.
13 United Nations *Living in Harmony with Nature: Convention Biological Diversity United Nations decade on biodiversity* 2011-2020 available at http://www.cbd.int/2011-2020/ (accessed 2016-10-31).
14 United Nations *About the Nagoya Protocol* available at http://www.cbd.int/abs/ (accessed 2016-06-14).
15 Kamau and Winter *Genetic Resources, Traditional Knowledge & the Law: Solution for Access and Benefit Sharing* (2009)19.
16 Kamau and Winter 19.
17 Kamau and Winter 24.
18 Chiarolla 124-125.

for FAO treaties to be modified and harmonised with the CBD ABS laws remain unchanged.[19]

Although the convention tries to fill the gap in balancing the right of users and providers it still lacks in providing a clear indication in harmonising the sovereign rights and intellectual property rights. The mere positive objectives placed in the convention has no legal power over the users or providers to comply with the provision.

Considering the nature of the plant, GRs and associated knowledge once it has left its jurisdiction, the sovereign state loses control. Although Article 15 (7) prescribed that the user state must share the benefits with the provider state, there is no indication in the provision of how the shared benefit reaches the particular state or what happens when it fails to comply. The benefit sharing should be to balance the economic benefits and burdens across the nations, but it is not certain that countries take their international duty seriously. It is therefore essential to adopt a clear set of rules to prevent further biodiversity loss, misallocation of benefit and increases global food insecurity.

The primary objectives of the CBD as set out in the provision are:[20]

(a) the conservation of biological diversity;

(b) the sustainable use of biological diversity, and

(c) the fair and equitable sharing of the benefits arising from the utilisation of GRs.

The convention left it to the individual countries to implement the convention by introducing their individual implementing procedures and practices without any additional regulatory framework.[21] Furthermore, Article 1 of the convention provides that a country or custodian of the plant and GRs gives access to the user in return for fair and equitable benefit sharing for the utilisation of the GRs and associated knowledge but has no legally binding framework.[22]

3 Nagoya protocol (2010): economic benefit and burden sharing in agriculture

As a consequence, the supplementary legally binding agreement to the CBD was negotiated and adopted in the Nagoya Protocol in 2010.[23] The objective of the protocol is to bring a legally binding framework into the CBD. Once again the protocol focuses on the implementation of ABS

19 Lightbourne 146.
20 United Nations *Living in harmony with nature* 2011-2020.
21 United Nation *Convention on Biological Diversity Chapter 2* available at http://www.cbd.int/gbo1/chap-o2.shtml/ (accessed 2016-10-31).
22 United Nations *Nagoya Protocol on Access and Benefit-Sharing* 2014 available at http://www.cbd.int/abs (accessed 2016-06-14).
23 United Nations *About the Nagoya Protocol*.

agreements but lacks details on how the implementation processes can be enforced. The ambiguity of the legal text in the protocol further creates legal uncertainty. In this regard, the protocol is still evolving and requires a clear, firm and binding legal framework for enforcement.

The other problem involving the protocol is its non-retrospective effect on the cases that had been reported before the protocol was added to the convention. Most reported cases under the CBD are still pending due to lack of the agreements legally created by the system. It is unfair to have the protocol with no retrospective effects on the cases lost in the past. So much wrongdoing was done against the traditional farmers in the past through the misappropriation of the plant, GRs and associated knowledge. These discourage communities growing their local economies. The poor economies resulted in failure to support their farming practices and in the process losing their biodiversity, associated information and cultural traditional practices. This situation should be remedied ensuring fair and balance farming practises across society.

The question to ask is where to start? Does it mean the neglected community or the ordinary farmers have to build up from the ground on their own after the unjust action hampering their progress in the past? Must they endure the burden of providing the modern world with their GRs and associated information flow for free without any fair benefit sharing, leaving these communities with nothing?

The argument in this paper is that the legal framework should apply retrospectively to the legitimate pending cases. The law should consider fairness and undo the wrong. The system should provide moral guidance for the legal process and provide the structure that can result in the distribution of justice by putting the community where they were supposed to be if it were not for the misappropriation, unfair distribution and unfair competition they were subjected to.

The Nagoya protocol was adopted with the objective to offset the misallocation of economic benefits and burdens across nations from the utilisation of plant, GRs and associated knowledge and to respect and protect general interest of humanity in conserving biodiversity to ensure just farming practices which respects and preserve culture and tradition in farming.

The other area identified in this paper is that the convention should have an additional mechanism for global tracking of the use of GRs in patent applications. It also must be able to identify misappropriation of any biological material and associated information or knowledge, which might have been used in various innovation processes and patented to legitimise misappropriation.

The other challenge identified that should be addressed when changing in the law, is that there is little or no scientific study about the nature and extent of the problem in monitoring the movement of the plant, GRs and associated knowledge once they have left their

jurisdiction. The law and sciences should intertwine in this regard and need to be addressed.

The various barriers to safeguarding biodiversity at every level and endangering food security identify the need for a unifying commitment not only from team players, but also individuals that believes interdisciplinary cooperation is vital.

4 International treaty on plant genetic resources for food and agriculture (ITPGRFA) (2001)

The ITPGRFA provides a general framework for the conservation and sustainable use of plant GRs for food and agriculture by creating a commonality.[24] Article 12(3)(f) and (g) of the treaty allows the intellectual protection of biotechnology, but Article 12(3) prohibits the intellectual protection of plant GRs and associated traditional knowledge,[25] subject to the reciprocated benefit to the multinational system.[26] According to the treaty, member states who had received plant and GRs from international gene banks can apply for intellectual property (IP) protection, subject to sharing the benefit tributary or flows to a multilateral system.[27] In other words, it replicates plant and GRs common to the FAO gene bank, except that the treaty promotes benefits derived from the utilisation of plant and GRs to flow to the multilateral system.

The problem is that the treaty allows IP protection to the biotech farmers, but denies it to the traditional farmers. This in itself has the potential to create unfair competition in agricultural trade between traditional and biotech farmers. Even though the farmers' right is mentioned in the treaty, it does not give a clear direction of how farmers, rights should be protected at the multinational level.[28]

The ITPGRFA, on the one hand, is the result of the emerging IP driven agriculture. The CBD, on the other hand, emerged from the sovereign right over resources.[29] The complexity and challenges of the sovereign rights in the CBD and multilateral common rights of the ITPGRFA resulting intellectual protection are not easy to grasp. The international communities supposedly are equally responsible to carry out their duty to support farmers of all nations to continue and progress with their

24 Tansey and Rajotte *The Future Control of Food: a Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security* (2009)115.
25 Bibber-Klemm and Cottier *Right to Plant Genetic Resources and Traditional Knowledge Basic Issue and Perspectives* (2008) 208.
26 Chiarolla 124.
27 Pisupati *The Ten Question to be Addressed While Developing National ABS Framework19-20* available at http://www.unctad.org/meetings/en/Contribution/ditc-ted-18102016-10-Questions-on-ABS.pdf (accessed 2016-11-01).
28 Bibber-Klemm and Cottier 285-286.
29 Tansey and Rajotte115.

farming and responsible to provide the plant, GRs and associated knowledge. Failing to promote equitable economic benefits and burdens among nations at all levels will aggravate food insecurity and result in greater loss of resources and knowledge to farming. The solutions so far given all are rooted in the same rules and policies that have created the imbalance in the distribution of benefits and burdens in food and agriculture and need to be corrected.

5 The union for the protection of new varieties of plants (UPOV)

In 1961 the UPOV was adopted for the purpose of protecting breeders' rights to plant varieties. The convention has been amended several times. In 1991 the convention was amended to ensure the member states recognised and protected the discovery of new plant varieties by breeders.[30] The UPOV is the primary convention to bring the identical system of IP into agriculture, although it differs with respect to its approach from that of patents.[31]

The eligibility criteria of the UPOV are:[32]

(a) Novel – (not been sold before). This particular criterion only addresses the commercialisation of the plant varieties not sold before. Prior existing plant varieties are problematic.

(b) Distinct – The variety must bear an unquestionable characteristic. This approach seams narrow in its approach considering the plant varieties might vary in various environments and through climate change, but at the same time be similar to others.

(c) Stable – The composition of the new plant varieties must be steady. To this effect farmers' plant varieties also often called landrace include the region of origin. This can't at all times be absolute. The variety could easily adapt its routine to a different environment.

(d) Uniform – The seedlings propagated must have a uniform composition. Plant variety in nature could adapt to a different atmosphere and situation. It is hardly realistic to expect uniform results in all circumstances.

The UPOV is administered by the World Intellectual Property Organisation (WIPO) in providing certain administrative and practical services. However, the UPOV focuses on a *sui generis* form of intellectual property protection enabling plant breeders to provide multinational protection.[33] This is similar to a patent, granting breeders exclusive

30 United Nations *UPOV report on the impact of plant variety protection* available at http://www.upov.int/about/en/pdf/353_upov_report.pdf (accessed 2017-02-21).
31 Bibber-Klemm and Cottier 81.
32 United Nations *UPOV report on the impact of plant variety protection*.
33 United Nations *UPOV report*.

rights to plant varieties deemed newly discovered.[34] Another argument in the UPOV is its opposition to the mandatory disclosure of the origin of plant and GRs utilised in producing the new variety as a condition expressed in the CBD.[35]

In terms of the TRIPS agreements of the WTO provision in Article 27(3)(b) it is detrimental for member states to select an effective *sui generis* system if they choose not to use patent protection for the protection of plant varieties.[36] Although UPOV did not introduce patent within its framework, the 1991 amendment of the convention allows dual protection for both plant breeder's rights under UPOV and patent at the same time.[37] Patent protection differs from the UPOV as it covers genes and the processing of the variety.[38] The convention as it stands does not protect the interests of ordinary farmers, but only that of commercial and industrialised farmers. Currently, 27 African countries including South Africa customise *sui generis* local legal frameworks to local circumstances in avoiding UPOV.[39]

The mix of and complex existing global rules that govern agriculture and food create non-inclusiveness and prevent ordinary farmers from progressing in farming. As a consequence the traditional farmers are dislocated from farming practices and due to the erosion of biodiversity and knowledge, these farmers are lost altogether. The latest FAO report indicates that 75% of crops diversity was lost between 1990 and 2000, and predict that as much as 22% of the wild relatives of important plant and seed for food will disappear by 2050.[40] It is important that changes to laws must be made to help elevate, preserve cultural practices and safeguard biodiversity for food needed for the growing global human population.

6 The agreements on trade-related aspect of intellectual property rights (TRIPS)

The TRIPS agreement seeks to establish an enforceable universal minimum protection for plant varieties. The provision of TRIPS, Article 27(3) (b) in particular, provides protection to plant varieties whether by patent or any other available harmonisation of protection in order to comply with the provisions of the agreement.[41] The provision further

34 Tansey and Rajotte 32.
35 Lightbourne 150.
36 Lesser and Lynch *IP Handbook of Best Practices* (2006) 381.
37 Lesser and Lynch 381.
38 Lightbourne 44-48.
39 Spoor & Fisher *Kenya Accedes to the 1991 Act of the UPOV Convention* 2016-04-14 available at http://www.spoor.com/en/news/kenya-accedes-to-the-1991-act-of-the-upov-convention/ (accessed 2017-02-21).
40 Food & Agriculture Organisation *Crop biodiversity: use it or lose it* available at http://www.fao.org/news/story/en/item/46803/icode/ (accessed 2016-04-23).
41 Venson and Santaniello *Regulation of Agricultural Biotechnology* (2004)110.

confirms the supreme importance of Article 27(3)(b) as paramount,[42] despite countries' choice of interest that could benefit their social need. Contrary to this view, Article 8 of the TRIPS agreement stresses that member states must adopt a mechanism to protect public health and nutrition.[43] These two views are in conflict with each other, where the obligation on the member states is on the one hand to protect plant varieties and on the other hand the provision prescribes to them to adopt a mechanism to protect public health and nutrition. It also recommends that in case of conflict, the supremacy of Article 27(3)(b) will prevail.

Many developing countries view the application of IP to agriculture in its present form as problematic and serving only the interests of advanced agricultural sectors and not that of the vulnerable communities and ordinary farmers.[44] That is why it is argued that the TRIPS agreement, in general, is a bad deal to developing countries.[45] As a consequence developing countries have long been calling for a review of Article 27(3) (b) of the TRIPS agreement.[46] The review of TRIPS not only focused on the procedure but also expanded to the relations with the CBD and the protection of GRs and associated knowledge.[47] The TRIPS agreement negotiation on the review of particularly Article 27(3)(b) is far from over.

Unlike WIPO negotiations on the review of IP protection, the WTO negotiations have a tendency to lead to the political recognition of the validity of some review and demands made by developing countries.[48] The provision is clearly an exception to the rule that permits the patenting of micro-organisms and biological processes but excluded GRs and associated traditional knowledge. This has been seen by developing countries as permission to bio-piracy.[49] The rules that regulate the distribution of economic benefits and burdens of nations concerning agriculture are uneven as it stands now. The 2013 report by World Bank states that, despite the world's impressive economic growth, developing countries' poverty has increased from 21% in 1981 to 59% in 2010.[50]

It is argued that this deterioration in poverty levels was often created by changing farming methods from centuries-old farming practices to

42 Venson and Santaniello 110.
43 Blakeney *Intellectual Property Rights and Food Security* (2009) 87.
44 Venson and Santaniello 110.
45 Khor *Intellectual Property, Competition and Development* available at http://www.wipo.int/edocs/mdocs/mdocs/en/isipd_05/isipd_05_www_103984.pdf (accessed 2016-01-29).
46 Yu "*Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*" 2007 46.
47 Yu 46.
48 Yu 46.
49 *Patents on Life Patently Undermine Food Security* available at *http*//www.sis.org.uk/trips3.php (accessed 2016-01-27).
50 *The Remarkable Decline in Global Poverty and the Major Challenge Remains* available at http://www.worldbank.org/.../remarkable-declines-in-global-poverty-but-major-challenges (accessed 2016-12-09).

bioengineering. Furthermore, the high cost of buying those seeds by ordinary farmers further increased the global poverty level. This unfortunate situation is created by the effect of systems on the ordinary farmers where the lack skills and lack of resources have resulted in them being unable to practice the same farming methods as industrialised farmers.

The law and the economic benefits focused on bioengineering have resulted in ordinary farmers being forced to buy food instead of farming for themselves and their communities. As the population of the majority of the developing countries have been engaged in conventional farming practices, they are now being dislodged from farming to join the unemployed urban populations. According to the World Bank, the demand for food will double by 2020, with the majority of consumers located in Africa.[51] The question we have to ask is what can be done? There is a need to change the law to be just and inclusive ensuring sustainable farming practice.

The concern about the failure to protect and promote GRs and associated knowledge rightfully raises fundamental questions about the moral and ethical justification of the law, which has personalised itself and aims to protect and promote industries and neglect ordinary farmers.

The appropriate starting point for developing countries to devise a new approach and alternative proposal, which can promote the transformation of GRs and associated knowledge into industrial to gain equitable protection must be identified. Furthermore, the lack of investment in IP has so far restricted the developing countries in terms of their global economic participation and they bear the burden of providing GRs and associated knowledge. Africa needs skills to assist in IP negotiation and ways to find alternative strategies to protect GRs and associated knowledge.

This may help to avoid over-exploitation and further degradation of the plant, GRs and associated knowledge and may support the local economy and mitigate food insecurity. In this way, distributive justice could be achieved by providing moral guidance for the political process between developed and developing countries and structures the legal framework appropriately to influence the creation of an inclusive legal system.

51 Brenton et al *Africa Can Help Feed Africa: Removing Barriers to Regional Trade in Food Staple* available at http://www.siteresources.worldbank.org/INTAFRICA/.../Africa-can-feed-Africa- report.pdf (accessed 2016-09-12).

6 Critical approach to patent application and its economic implication on agriculture

There is a greater challenge in today's agriculture than has ever been faced in its 13 000 years of history.[52] As the general rule, the existing patent law criteria are novelty, non-obviousness and usefulness. However, it is argued that the application of patent criteria on agriculture is not satisfactory or appropriate.[53] The dispute raised by ordinary farmers about the authenticity of bioengineering is the challenge to proof its prior existence considering the complex processes that are seen as too costly, sophisticated and time consuming for them.[54] As a consequence, the ordinary farmers have lost the economic benefit of their own inventions due to their inability to claim or seek protection under the existing system. Thus it is very likely true that the application of patent law to agriculture has a negative incentive for small-scale farmers who are the principal providers of food to local communities. The result is that food insecurity persists in these communities.

The question is not whether bioengineering increases agricultural production, but whether the moral guidance of the application of the patent law and the structure of the legal framework are designed appropriately. The challenge lies in the understanding of the legitimacy of bioengineering and the distribution of economic benefits and burdens across society.

In addressing food security, the increased food production alone does not guarantee accessibility of food due to the systematic genetic fixing. The available food in the marketplace often is not accessible to the low-income population. This leads to the ethical question of what is in the best interest of countries with a high deficit in food production. Is it continuing granting patents on food? It is argued that the existing patent law application on agriculture is more focused on trade and monopoly and unfavourable for countries with high shortages of food.[55]

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52 Stapleton *Protecting Crop and Feed diversity Enhances Food Security While Reducing Green House Gases* (2016-04-14). Reported that the Executive director of the global crop diversity trust Marie Haga speaking at a high-level seminar held, at Addis Ababa state… if food security were easy, we would have it by now. The complexities are all well understood and it is clear that crop diversity is prerequisite for a sustainable food system. Crop diversity can be conserved and shared among the world community, but it needs global leadership and strong partnership available at https://news.ilri.org/2016/03/01/protecting-crop-and-feed-diversity-enhances-food-security-while-reducing-greenhouse-gases/ (accessed 2016-06-14).

53 Rimmer *Intellectual Property and Biotechnology: Biological Inventions* (2007) 50.

54 Rimmer 50.

55 Oddi *The International Patent System and Third World Development: Reality or Myth* 1987 Duke Law Journal vol 36 no 5 832 available at http://www.scholarship.law.duke.eduke.edu > … > journals > DLJ > vol. 36 > No. 5 (1987) (accessed 2016-06-03).

The increasing imbalanced application of patent law in agricultural industries aggravates the situation of small-scale farmers preventing them from progressing from the use of agricultural innovation to address local food security. According to the executive summary of the 2013 report the world five largest IP offices, by the end of 2012, there were 8.5 million patents filed and 90% of them are put into effect globally.[56] Currently, 90% of the genetically modified food products that can be found in grocery retailer stores are owned by eight (8) companies from the developed world, such as Kraft (USA), Nestle (Switzerland), Coca-Cola (USA), PepsiCo (UK), Kellogg's (USA), Mars (UK), General Mills (USA) and Unilever (Dutch-UK).[57] This creates monopolies in certain jurisdiction than other and increases unfair competition.

It is very important to identify the economic cost and benefit of patent applications by examining the impact it has on innovation at every level of society. However, in practice, there is certainly no equalising evidence that patent law benefits society in particular.[58] This does not suggest that we should scrap the patent law application in agriculture, but rather suggests that the system should be changed appropriately to result in the distribution of economic benefits and burdens morally and to constitute fairness.

This paper did not attempt to precisely measure the full social benefits and burdens of patent law in agriculture. It was rather to provoke further discussion on the subject based on available studies to contribute to the possibility of restructuring the existing patent law application in agriculture and to offset the misallocation of resources and rights.

It would be fair to say that unfair exclusion created by the existing patent law applications in agriculture in economic terms has led to lower outputs and less competition in society, which in the process dislodged millions from farming and aggravated food insecurity. Future hopes for more innovation, especially in the traditional communities through cumulative knowledge in agriculture, will be eroded. This results in resources being concentrated in a few hands, with the majority of vulnerable ordinary farmers and their communities still unable to put food on their tables unless changes in the law are pursued.

56 Five IP Offices *Statistics Report – Five Intellectual Property Offices* 2013 available at http://www.fiveipoffices.org/statictics/statisticsreport/2013 edition/ip5sr2013corr.pdf (accessed-07-04-2016).

57 Wilton *The 8 Companies that Stock 90% of Grocery Foods-All Use Genetically Ingredient* available at http://www.twitter.com/i_am_jessicah/status/64542 4616672923648 (accessed 2017-08-23).

58 Bessen and Meurer *The Cost and Benefit of the Patent to Innovators* 2008 4 available at http://www.patentlyo.com/patent/2008/03/the-costs-and-b.html (accessed 2017-03-12).

7 Agricultural trade battle in the world trade organisation (WTO)

The agricultural trade battle in the WTO began in Doha in 2001. This negotiation was supposed to be completed by January 2005 but has since been extended indefinitely.[59] In practice, the developing countries have little or no major influence in the decision-making process in the agricultural trade battle in the WTO and their fate is often determined by the deals brokered between the developed worlds.[60] Mostly, delegates from the developing countries come to international negotiations without a clear mandate from their local government and without particular expertise. They, therefore, failed to negotiate to their advantage.[61]

The battle for agricultural trade in the international forum between the developing and developed world remains unresolved.[62] The developing countries' concern is solely to support and protect their farming community in the multilateral system, but they have failed.[63]

In 2013, the first time in almost 20 years, the battle of agricultural trade at the WTO reached an agreement on certain ideas; however, failed on the challenge of food security.[64] Developing countries had long expressed their displeasure, particularly with the application of patent law in agriculture and the lack of preferential arrangements in the translation of works to verify novelty.[65] In cases, they claimed bioengineering was derived from the substantial work of the existing plant, GRs and associated traditional knowledge and patented. The law certainly failed to establish where and to what extent the patentee disclosed the origin of the knowledge and resources.[66] The burden of proving the prior existence of the knowledge and resources by the complainant, which process requires resources, time and scientific skills, is something of which most developing countries are not capable of.[67] The battle is yet to be resolved and negotiations are still on hold.

59 Clapp *WTO Agriculture Trade Battles and Food Aid: Third World Quarterly* 2005 vol 25 No 8 1452/2004.
60 Blakeney 2.
61 *Developing Countries in GATT/WTO Negotiations* available at http://www.odi.org/resources/doc/4738.pdf (accessed 2016-07-05).
62 Donna *The Business of Global Food Security 2014 2* available at http://www.ft.com/reports/global-food-security (accessed 2016-03-15).
63 *Hunger Facts* 2017 available at http://www.wfp.org/share-a-hunger-fact (accessed 2017-08- 23).
64 Donna 1.
65 Tansey and Rajotte 50.
66 Tansey and Rajotte 149.
67 Tansey and Rajotte 149.

8 Conclusion and Findings

This paper investigated and evaluated the existing global food law in addressing food insecurity, particularly in respect of weaknesses and constraints on its significance to countries with a high shortage of food production such as Africa. In doing so, change in the global food laws including the application of IP law in agriculture has been pursued.

A particular restricted approach to answering the research questions:

8 1 Are the current global food and agriculture laws capable facilitating and supporting the goal of ending hunger in Africa and increasing food security?

Although food insecurity is a complex issue and has one too many faces, achieving food security must not be considered as impossible. It is argued that protecting the erosion of biodiversity and associated traditional know-how through effective rules and regulations is a prerequisite to having sustainable global food system in ensuring just farming practice.

It is apparent that the existing global food laws have failed to adequately protect and recognise the right to food, respect and preserve culture and tradition in farming. Currently, there are no existing disclosure provisions that could capture all the existing concern about the plant, GRs and associated TK relevant to patented inventions. As a result, traditional communities suffer the most.

8 2 Will the existing global food law promote fair and equitable food production and supply practices to benefit all who need it?

For a number of years, countries have been proposing the introduction of fair and equitable application and interpretations of international laws beyond countries' political and economic positions. However, this proposal seems to lack an in-depth assessment of the extent of harm aggravated by the system with regard to the critical area of present and future global food security. The current global food systems create gaps in promoting fair and equitable practice in the production and distribution of food across society.

In stressing the positive look toward the future food security the current global food system need to change which is more sustainable ensuring just farming practices, preserve culture and tradition in the production and distribution of food. There is a need to create international legal certainty, provide clear direction and participation of the affected communities in the restructuring of an appropriate global legal framework.

The aim of this study is to expand the collective understanding of research on global food systems including IP law, to examine a holistic and inclusive approach in restructuring the proposed laws governing food and agriculture. This is significant because the increasing pressure on the current food system especially in Africa to ensure adequate food supply for the ever-growing population is huge. Often the effect of the global food law on food security has been overlooked but has had a clear detrimental effect.

During this study, a number of sources on global food laws were consulted and discussed in the context of complex political, economic and historical backgrounds. However, this study focused on the non-inclusive formulation of the laws governing food and agriculture to place it in context.

The study also addresses the importance of the main disciplines to be taken into account in restructuring the law namely agriculture, trade and the law. The three disciplines are intertwined. Agriculture without economics can't sustain itself and therefore fair and equitable trade in agriculture are compulsory to improve agricultural productivity to mitigate food insecurity. Without an appropriate and inclusive legal framework, there will also be no expectation of justice. Therefore, change in the existing laws governing food and agriculture may lead to a fairer result for future food security. It is argued that the law should represent the right of ordinary farmers in building a sustainable food system. It is in the interest of the wider community forming appropriate legal reform in agriculture to guard future food security.

The lack of improvement of the system in the near future, as suggested, would cause an unnecessary delay in solving the long-standing social ills and would therefore further aggravate food insecurity. For this reason, the study recommends that a solution is carefully sought in an inclusive and balanced legal framework resulting in the distribution of economic benefits and burdens fairly across the member of society. The principle of distributive of justice is therefore seen as providing moral guidance for the restructuring of the legal framework. This could result in more sustainable farming practices ensuring food security and preserving culture and tradition.

Recent case law

Taming the mechanics of mortgage foreclosures: The case of *ABSA Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ)

1 Introduction

The issue of foreclosures has for a while now, been of immense public interest (see e.g. Brits 'The "reinstatement" of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act" 2015 *Dejure* 5; Sham "Executed in execution: discussion and suggestions regarding the immovable property foreclosure process in South Africa" Available at https://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/15030/Sham_Nikhil_2017.pdf?sequence=1&isAllowed=y)). It is a well-known subject and only needs a brief recital. To put that assertion into perspective, it is reported that South Africa has historically been characterised as having one of the most uncompromising, aggressive and highest number of executions against homes in the world (Shaw "Too quick to execute – how does SA's new rules on sale in execution compare internationally?" 2016 De Rebus). Traumatic anecdotal evidence from the media and decided cases points to an unfair system which for many decades now – aided by judicial indecision and want of legislative intervention – has led to bourgeoning numbers of foreclosure applications and subsequent home losses (see e.g. Chemwi *Evictions in South Africa* Community Law Centre; Truter "Evictions – a sad reality in South Africa" 2016 *De Rebus* 30). For instance, the Local Division of the High Court in Johannesburg railed that it "has had to adjudicate the substantial rise in foreclosure applications. These applications have at times exceeded hundreds per week' (*Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014) at Para 9). The chaotic regime through which these repossessions were undertaken engendered reservations about the possibility of collusion between banks and 'bargain hunters.' It was associated with an environment where primary residences of financially distressed people were auctioned for unreasonable amounts and in circumstances, which were manifestly irreconcilable with the debtor's constitutional rights.

On 2 May 2018, the Judge President issued a directive in terms of section 14(1)(a) of the Superior Courts Act through which he ordered a full Bench of the High Court to deliberate on the issue of home repossession judgments and to prescribe procedures that have to be complied with in cases where execution of judgment is sought. This was a salutary attempt to bring sanity to what had emerged to be a muddle of inconsistent judgments.

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From the vantage point of the land mark case of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) (herein after '*Mokebe*'), this case note seeks to discuss the intervention introduced to bring the issue of foreclosures within the parameters of the Constitution and related socio-economic rights jurisprudence.

2 Facts

In terms of section 14(1)(a) of the Superior Courts Act 10 of 2013, a full bench of the High Court was assigned to make a ruling on the procedures that banks have to follow when foreclosing mortgages on primary residences as well to pronounce on the correctness of the practice of the courts of granting applications for money judgments against judgment debtors (defaulting homeowners) while postponing the associated applications for sale in execution. Equally, the High Court was tasked to consider when it would be appropriate for the courts to set a reserve price for the hypothecated property in terms of rule 46A (8) (e) of the Uniform Rules of Court.

Having considered the applicable statutory provisions such as section 26 of the Constitution of South Africa, 1996 (which guarantees the right to adequate housing) and section 129(4) of the National Credit Act 34 of 2005 (which provides that reinstatement of a credit agreement is no longer possible after the sale of property pursuant to an attachment). The court held that in all cases where the debtor's primary residence was subject to execution the entire claim, including the money judgment, had to be adjudicated at the same time. If there was a need for postponement, it had to be postponed in its entirety.

Further, the court ruled that in terms of section 129(3) of the National Credit Act, until the proceeds of the auction sale have been realised the judgment debtor, despite the existence of a money judgment and order for executability, could still resuscitate the mortgage contract by paying the outstanding amounts. More importantly, it was held that except in exceptional circumstances, the court was bound to set a reserve price in all cases where execution was granted against the primary residence of the mortgagor. The court reiterated that reserve price was crucial in balancing the misalignment between the banks and the debtors where execution orders are granted. More specifically, a reserve price would ensure that the defaulting homeowner does not suffer prejudice arising from the low prices accepted at sales in execution. It was further stated that the mortgagor and applicant for execution have an obligation to set relevant facts with regard to Rule 46A of the Uniform Rules of Court to enable the court to properly exercise its discretion appropriately.

3 Discussion

To better understand the public and media frenzy exulting *Mokebe,* one needs to consider the context within which the new dispensation comes from. It should be understood that until recently Rule 46 of the Uniform

Rules of Court and Rule 43 of the Magistrates' Court Rules, have always permitted the sale of the judgment debtor's property in execution to the highest bidder without a reserve price.

Ownership of a residence has always served several social objectives in South Africa. As such, the inherent arbitrary deprivation of immovable properties through executions has been seen as a threat to the attainment of basic human socio-economic rights as provided in the Constitution of South Africa (Brits; Sham *supra*). As such, there is recognition that foreclosures should not be dealt with solely as ordinary commercial matters (see e.g. *Moneyweb* "Calls for inquiry into home and car repossession abuses" (2017-12-1); South African Human Rights Commission "Report on the Public Hearing on Housing, Evictions and Repossessions" at https://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf). More specifically, there is an acknowledgment that selling one's property for a price lower than its real value constitutes an arbitrary deprivation of one's property in contravention of to section 25 (1) of the Constitution which provides that no one may be deprived of property 'except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

Furthermore, section 26 states that:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In essence therefore, 'access to adequate housing is linked to dignity and self-worth' (Mogkoro J *in Jaftha v Schoeman* 2005 (2) SA 140 (CC) para 27). In the same manner, research has shown that homeownership is associated with greater control and better responsibility over people's living environment. Additionally, it is said to secure neighbourhoods and strengthen communities (Baum and Kingston "Homeownership and social attachment" 1984 *Sociological Perspectives* 27 159; DiPasquale and Glaeser "Incentives and social capital: Are homeowners better citizens?" 1999 J*ournal of Urban Economics* 354).

Despite that, more than 100 000 homes were repossessed in South Africa since 1994 (Ryan "SA banks sued for R60bn in home repossession case" available at https://www.fin24.com/Companies/Financial-Services/r60bn-home-repossession-suit-against-banks-20170816). Furthermore, "the 10 year period between 2006 to 2015 statistics show that 112,325 properties in South Africa were sold in execution – over 11 000 a year. This is exponentially higher than both the United States of America and the United Kingdom over the same period of time" (Sham *supra* at 7).

The inequitableness of the process has seen houses being sold for a pittance. For instance, a house worth R470 000 was sold for R40 000 to settle a debt of R370 000 (*Nkwane v Nkwane and Others* (36700/2016) [2018] ZAGPPHC 153 (22 March 2018). Politicians have been quick to notice the public's condemnation of the perceived mercantilist approach and have openly fed the frenzy of public disapproval. Government has labelled the manic style through which sales in execution have been undertaken as amounting not only to subversion of the country's transformation agenda, but is also a setback to social justice and the right of access to housing (see e.g. Nzimande "We must transform banks and fight financialisation" *Politics Web* (2015-10-4); *Moneyweb* "Calls for inquiry into home and car repossession abuses" (2017-12-11); South African Human Rights Commission "Report on the Public Hearing on Housing, Evictions and Repossessions" at https://www.sahrc.org.za/home/21/files/Reports/Housing%20Inquiry%20Report_2008%20web.pdf). One cabinet minister deplored the level of evictions as:

> Comparable to apartheid-era group areas removals. The homes are then sold at auction, very often at a fraction of their market value. The worst-case scenario involved a house sold at R10, and a house taken away for nothing but corruption involving the concoction of title deeds; the owner was dispossessed and jailed for a while. All this is inhuman (Ground up 'Residents fight back against banks' eviction tactics' at https://www.groundup.org.za/article/residents-fight-back-against-banks-eviction-tactics_3572).

The deluge of home losses came on the backdrop of rising homelessness in the country. Reports indicate that despite extensive government efforts to deliver affordable housing through initiatives such Reconstruction and Development Programme (RDP) houses and the National Housing Subsidy Programme. The housing backlog still remains very high with around 12 million people lacking decent accommodation and an estimated 1.5m households living in slums ("Housing Finance in Africa: A review of some of Africa's housing finance markets" at http://housingfinanceafrica.org/app/uploads/CAHF_Housing-Finance-in-Africa-Yearbook-2016.09.pdf; Affordable Housing in Africa: A fact or a Fiction? Available at https://housingfinanceafrica.org/app/uploads/olivier-vidal-presentation-Cape-town-July-2017-.pdf). Several challenges have been cited, suffice to say that untrammeled foreclosures have been a contributory factor. The majority of the evicted defaulters have ended up in shantytowns with limited chances of reintegration into the economy (Sibiya 'The case against banks' abusive home repossession practices' at https://www.iol.co.za/capetimes/opinion/the-case-against-banks-abusive-home-repossession-practices-11267091).

The judiciary has not been oblivious to the systemic losses of homes through repossessions. Despite that, several judges recognised the legality of and endorsed sales in execution without reserve price as provided by Rule 46(12) of the Uniform Rules of Court. For instance, *Mouton v ABSA* (Case number 17922/2014) *and Haylock v ABSA* (Case number 24820/2015) restated that Rule 46(12) did not amount to an indefensible curtailment of the debtor's right to adequate housing. The

same was adopted in *Bartezky and Another v Standard Bank of South Africa Limited and Others* [2017] ZAWCHC 9 of 16 February 2017.

Besides justifying repossessions on the practical expediency, other members of the judiciary based their decisions on economic considerations, arguing that repossessions and subsequent flogging of properties are a facilitative mechanism for the health of mortgage industry and as such is paradoxically a beneficial aspect of the home ownership cause (see e.g. *Mouton v Absa supra* at 11; *Nkwane v Nkwane and Others* para 23; *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA); *Nedbank Ltd v Fraser and Another and Four Other* Cases 2011 4 SA 363). It is such decisions that have been associated with a perception that the judiciary is obstructive or tend to frustrate reinstatements of mortgage agreements.

Fortunately, and in a way that demonstrates inconsistency and lack of unanimity on the bench, the debtor-unfriendly style was not replicated in other cases. Some judges have demonstrated exasperation with, and openly vilified the disproportionate processes associated with most of the applications for repossessions. For instance, in *ABSA Bank v Ntsane* (2007 (3) SA 554 (T)) Bertlesman J found it unjust and unequitable to authorise execution against a debtor when the arrears in issue were a measly R18.46. Similarly, in *FirstRand Bank Ltd v Maleka* (2010 (1) SA 143 GSJ), CJ Claassen refused foreclosure where the arrears were low. In a clear departure from the reasoning in cases such as *Mouton v Absa* and Nkwane *v Nkwane and Others,* the court stressed that:

> [W]henever a bondholder calls up the bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at date of application for judgment is so small that it should readily be capable of settlement by execution against movable assets, taking all circumstances into account, the declaration of the immovable property as executable would constitute an infringement of the debtor's fundamental right to adequate housing (*ABSA Bank Ltd v Ntsane and Another* (2007 3 SA 554 (T) para 86)).

There was a realisation that the outstanding amount could be too low to justify the taking of the person's primary residence. Likewise, some courts also considered whether the benefit to be gained by the creditor outweighs the prejudice suffered by the debtor. As such, some judges adopted a more pragmatic and sympathetic route and refused to grant an execution and instead suggested that the debtor be given an opportunity to explore other means of settling the arrears. Execution was to be the last resort. In *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another*). Similarly, in another case the court refused to grant an execution and recommended that the creditor pursue other less injurious and "less invasive" means to satisfy the debt. "[W]here it is sought, an order that has the potential of encroaching drastically upon the fundamental rights of a person, the applicant who seeks such an order, must first exhaust other less invasive remedies before resorting to a cause that is much more invasive" (*Standard Bank of South Africa v*

Molwantwa and Another (15043/2009) [2011] ZAGPPHC 108 (5 May 2011)).

That narrative is arguably an eloquent demonstration of the disarray on the bench in as far as the issue of repossessions is concerned. Large-scale legal uncertainty and inconsistency resulted in absurd, prejudicial and manifestly unconstitutional outcomes (see e.g. "Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report" at http://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf). Equally damaging is that the "dignity of the court is bound to suffer irreparable harm if every one of the … judges can go his own merry way (*Trade Fairs and Promotions (Pty) Ltd v Thomson & Another* (1984 (4) SA 177(W) at 187)).

It was also observed that "despite a number of landmark judgments confirming the state's obligation to take reasonable measures to ensure the progressive realization of socio-economic rights, the apex courts always adopted a constrained approach when adjudicating on disputes involving socio-economic rights" (Final Report "Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society" at ii. Available http://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015-Final.pdf). So extensive was the disparity in how these cases were to be disposed of that Van der Linde J implored for "even relevant *obiter dictum* from a full court [to] provide guidance in an area where currently individual judges' approached are so inconsistent" (*Absa Bank v Mokebe et al* Case number: 2018/00612 footnote 19).

In self-justification, courts countered the public denunciation on the basis that "these differences of opinion are not the kind of issues courts should interfere with too readily. They are mostly instances of legislative facts where courts should not easily interfere with the choices made by legislatures" (*Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* (2015 (6) SA 125 (CC)). On the unfairness of the debtor losing equity through the absence of reserve price, it was contended that "a mandatory reserve price is a policy matter that must be left to the legislature" (*Nkwane v Nkwane and Others* at para 18).

Furthermore, until the 2010 amendment to High Court Rule 46(1)(a)(ii) there was no judicial control over the whole process of execution as the registrar and the courts had the prerogative to grant executions. Judges had resigned to the reality that the whole process was an 'executive matter which is dealt with by the Registrar' (*Gerber v Stolze and Others* (25 1951 (2) SA 166 at 171E)). Much as the amendment to High Court Rule sought to align executions in line with the Constitution, it did not assist as anticipated as it still allowed for repossessions as long as the property was declared executable.

What makes *Mokebe* laudable is that it has not only reinforced transformative constitutionalism in the form of the right to access to adequate housing but has also ushered the much needed clarity and judicial comity to the issue of repossessions. It is hoped that the dispensation will bring to an end the public distrust in the judiciary as well as the elimination of unfair home repossessions.

Much as the court is not obliged to set a reserve price but to consider the factors under Rule 46A(9)(9b) of the Uniform Rules of Court when making a determination, the existence of the mechanism upon which a determination for a reserve price can be made is a commendable one. Furthermore, *Mokebe* reinforces judicial oversight regarding the executability of the judgment debtor's primary residence. Equally noteworthy is that it does away with the previous environment, which was characterised by a "misalignment of incentives" and provided fertile ground upon which syndicates managed to buy properties for cheap and resold them at higher prices. More specifically:

> There are benefits in setting a reserve price. Doing so prevents or inhabits fraud and collusion intended to keep the sale price low. A reserve price will also account for the misalignment in the incentives between creditor and debtor: Banks seeks to recover the amount owing plus costs and nothing more, any amount in excess of all this will only be to the debtor's benefit. Whereas, the debtor seeks to obtain the maximum sale price. Therefore, the bank has no incentive in realizing the full price (*Standard Bank of South Africa Limited v Hendricks and Another* Western Cape High Court 11294/18 at para 59).

Additionally, a "reserve price enables the former house owner to realise equity from the home. Likewise, it would assist in avoiding or minimising a deficiency in the judgment" (see e.g. Hughes "Taking personal responsibility: A different view of mortgage anti-deficiency and redemption statutes" 1997 *Ariz. L. Rev*. 124). As such, the "introduction of a requirement that a sale in execution … be subject to a market value related reserve price might have some societal value" (Binns-Ward J in *Ricardo Baretzky Anor v Standard Bank Of South Africa Limited and Others* High Court Of South Africa (Western Cape Division, Cape Town) Case No. 13668/2016 at para 14).

Over and above these justifications, judicial intervention has the beneficial effect of minimising the unequal bargaining power and related information asymmetry associated with foreclosures. It has been shown that in a foreclosure 'the bank is likely to have superior information about the quality of the property, since lenders typically spend significant resources on appraisals to get a more precise value of the collateral before granting mortgages' (Niedermayer, Shneyerov and Xu "Foreclosure Auctions" Discussion Paper No. 522 at 2. See also *Absa Bank Limited v Lekuku* at para 29).

4 Conclusion

By empowering courts to postpone execution applications to allow customers time to pay arrears, this ruling gives much needed relief to judgment debtors. Until *Mokeb*e, the issue of the executability of a primary residence had come to one crossroads and turned left, that is to the path of mercantilist considerations and banking sector expedience. *Mokebe* has changed that and in many ways, the borrower-protective provisions have yielded a positive change. It has injected a measure of consistency, uniformity and has marshaled the South African home ownership terrain firmly within constitutional rights. More importantly, *Mokebe* has arguably moved the foreclosure process from merely being an act of balancing the competing interests of the parties to a mortgage dispute and elevated it to a level where that process reflects broader public interests in housing policy. It has also brought the South African approach in conformity with international trends and more specifically, to mirror approaches in France, Ghana and Germany, Malaysia and Korea where banks are enjoined to sell repossessed homes at fair market value.

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S v Frederiksen (33/2016) ZAFSHC 161; SACR 29 (FB) (14 September 2017)

Human tissue in a freezer: a crime or not?

1 Introduction

This case is about applications in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA). According to this provision, a trial court may return a verdict of not guilty at the close of the case for the prosecution, if the court is of the opinion that there is no evidence that the accused committed the offence with which he is charged. The focus of this case discussion is only on the request by the accused for discharge on counts 8-17 regarding section 58 of the National Health Act 61 of 2003 (NHA) and counts 18-27 regarding section 55 of the NHA (the first part of the reported case).

Counts 8-17 (S 58 of the NHA) concern the removal of human tissue from living persons without their written consent and outside a hospital or an authorised institution over the period January 2010 to June 2015 (par 5). Counts 18-27 refer to section 55, read with section 56 of the NHA, insofar as human tissue were removed from women without written

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consent and the removal was not done in accordance with prescribed manners and procedures (par 5).

Daffue J concluded that the NHA does not create crimes in those sections unlike for example sections 53 and 60. The judge accepted that section 89 of the NHA creates criminal offences, but concluded that none thereof related to the transgressions of sections 55 and 58. Unfortunately, neither the judge nor the prosecution made mention of the Regulations (Regulations Relating to Tissue Banks R 182 in GG 35099 of 2 March 2012 and Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes R 180 in GG 35099 of 2 March 2012) in terms of the NHA. The Regulations do create specific criminal offences in terms of the NHA. The charges put to the accused should therefore have included the relevant sections in the Regulations. The judge should also have used the power given to him in section 86 of the CPA to make an order that the charges should be amended, had he known of the existence of the Regulations.

The accused was granted the discharge he sought purely on the basis that the relevant sections in the NHA do not create crimes as per the legality requirement. It is our submission that the prosecution and the judge erred in not taking cognisance of the Regulations in terms of the NHA. The focus of this discussion is therefore on the specific sections quoted in the charges in the NHA and the Regulations in terms thereof.

2 Background

The accused was Mr P Frederiksen, a Danish national who was charged with 58 counts including *inter alia* rape, child pornography, transgressions of the NHA, fraud, transgressions of the Firearms Control Act 60 of 2000 and conspiracy to commit murder (par 1).

Concerning the transgressions of the NHA a female testified *in camera* that her clitoris was cut out ("harvested") by the accused. His bedroom served as the "theatre" (par 6). The accused admitted to cutting and or piercing the private parts of females. He also made notes of the various circumcisions. The mentioned human tissue was stored in the accused's freezer, where it was separately packed and identified with the names of the so-called donors. The witness said she agreed to the circumcision orally for an amount of R2500. The accused denied that payment was made for that purpose. Another female who unfortunately demised before the case, said in statements (considered as hearsay) but allowed by the court, that she was drugged by the accused during the procedure and did not give consent to the removal of the tissue (par 7). The judge concluded that because this was a section 174 application it would serve no purpose to deal with evidence any further pending the outcome of the section 174 application (par 7).

Dealing with the application, it was the judge's view that the legislature failed to create criminal offences in respect of the transgressions concerning sections 55 and 58 of the NHA. His argumentation started by

him saying that the preamble of the NHA intended to establish a health system bearing in mind the imbalances of the past. The objects of the NHA, as set out in section 3 of the Act, are to provide uniformity in respect of health services. Accordingly, the judge argued that this context must be considered when sections 55 and 58 of the NHA are interpreted (par 9). The judge unfortunately erred in our view by placing too much emphasis on the Act itself. What should have been highlighted is the fact that the Act is the skeleton for health in general in South Africa, but the regulations in terms of the Act, provide the proverbial flesh to the skeleton.

Section 55 of the NHA addressing the removal of tissue from living persons, states clearly that the removal of human tissue can only be done with the written consent of the person from whom the tissue is removed. This written consent must be done in a prescribed manner and in accordance with prescribed conditions. The Act and the regulations are silent on what the prescribed manner or the prescribed conditions are. No crime is established in the Act concerning this provision. However, section 55 must be read with section 56, which provides that tissue may only be used for medical and dental purposes. This was clearly not done by the accused. He did not intend to use the female's clitorises for any medical or dental purpose.

Section 58 of the NHA stipulates that human tissue may only be removed in a hospital or authorised institution, on the written authority of the medical practitioner in charge of clinical services in that hospital or authorised institution, or any other medical practitioner authorised by him or her to give permission for the removal of tissue. An authorised institution is defined in the NHA as an institution designated as an authorised institution in terms of section 54 of the NHA. Section 54 determines that the Minister may designate any institution as an authorised institution. Section 3 of the Regulations relating to Tissue Banks explained how an institution should apply to become an authorised institution. The accused's room was not an authorised institution or a hospital and he clearly transgressed the stipulation in the Act. He also did not have the permission of a medical practitioner or any one authorised by such a practitioner to remove the tissue as required by section 58 of the NHA.

According to the judge, no criminal offences were created in any of the NHA sections as discussed above. If, the NHA is read without due consideration of the Regulations, the judge's interpretation is correct. He also referred to the repealed Human Tissue Act 65 of 1983 (HTA) specifically sections 23 and 34. The HTA "created offences and penalties in respect of the acquiring, using, supplying or removal of any tissue from the body of a living person for any purposes other than permitted in the Act" (par 11). The judge remarked: "For an unknown reason the legislature, supposedly being well aware of the offences created in the former Act, failed to create criminal offences in the Health Act [NHA] for similar transgressions" (par 11).

3 Discussion

The judge's argument, which is a very technical view of the NHA, was that no crimes are created by sections 55 and 58 directly in the Act itself. He is correct as mentioned earlier if one only reads the wording in the specific sections in the NHA. Daffue J referred to *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC) on the principles applicable to statutory interpretation, amongst others that the words in a statute must be given their ordinary grammatical meaning and statutory provisions should always be interpreted purposively (par 13). He also referred to *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) where the principle of legality was considered. In the *Prins* case, it was emphasised that the judiciary may not fulfil the role of the legislature (par 14). Daffue J also made mention of the principle of *nulla poena sine lege, which requires that punishment, whether determinate or indeterminate has to be founded in the common,* or statute law. The court cannot venture into the arena of the legislature by creating criminal offences merely because it might be of the view that a crime has occurred (*S v Molendorff and Another* 1987 (1) SA 135 T) at 169 C-J). Reference was also made to section 35(3)(l) of the Constitution of the Republic of South Africa, 1996 that states:

> every accused person has a right to a fair trial, which includes the right - … not to be convicted for an act or an omission that was not an offence under either national or international law at the time it was committed or omitted (par 12).

The judge therefore concluded that according to the rules of statutory interpretation, the principle of legality, the principle of *nulla poena sine lege* and section 35(3) of the Constitution that no criminal offences were created in the NHA concerning sections 55 and 58. He therefore granted the discharges based on section 174 of the CPA concerning the transgressions of the NHA.

It is our view that the prosecution and the judge should have taken cognisance of section 68 (1) of the NHA which authorises the Minister to make regulations regarding anything which may or must be prescribed in terms of the Act. The NHA repealed the HTA and organ and tissue donations are now addressed only in a chapter in an Act (Chapter 8 of the NHA). The rationale behind condensing the previously separate HTA to only a chapter in the NHA was based on the fact that supplementary regulations would be promulgated in terms of Chapter 8 stipulating the processes involved with organ and tissue transplantation. Regulations are easily amended, whereas to amend an act is a lengthy process. Because organ and tissue donations and transplantation evolves with time, the Minister decided it would be better to regulate the processes than by explaining the detail in the NHA itself. The Minister did promulgate Regulations in terms of the NHA in 2012. The Regulations concerning Tissue Banks in section 1 states that "no person shall remove … human tissue from any living … person … store … pack … or in any

other manner dispose of human tissue whether in its original or in any altered form … unless he or she is authorised with the Department in terms of regulation 3(3)(c)". Thus, the accused transgressed this section of the Regulations.

Section 6(1) of the Tissue Bank Regulations states that a tissue bank must record all information concerning a donation. It is specifically stated that the name of the competent person who removed the tissue must be recorded. A competent person is defined in the Regulations as a medical practitioner and registered as such in terms of the Health Professions Act 56 of 1974. In other words, the accused in this case was not allowed to remove the tissue from the females, because he is not a competent person, meaning he is not a medical practitioner registered according to the Health Professions Act. Section 21 of the same Regulations specifies offences and penalties. It states that any person who contravenes or fails to comply with any provision of these Regulations shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 and / or imprisonment for a period not exceeding two years. If the prosecution or the judge consulted the regulations of the Act, they would have realised that crimes are indeed created concerning sections 55 and 58 of the NHA.

Cognisance should also have been taken of the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes. In terms of section 3(1)(a) of these Regulations the only purpose for which a tissue may be removed from a living person is for medical or dental purposes. Section 4 of the Regulations also stipulates who is allowed to be in possession of human tissue. S 25(a) of these Regulations specifically also makes it an offence for any other person not allowed according to the Act or the Regulations who has human tissue in his / her possession to be criminally liable. Section 25(a) states:

> Any person who – (a) except in so far as it may be permitted by or under any other law, acquires, uses or supplies … any tissue, … of a living … person in any other manner or for any other purpose than that permitted in the Act and these regulations; … shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period of 10 years or to both fine and imprisonment.

By having the clitorises (human tissue) in his freezer, the accused clearly transgressed this section. The NHA is by no means perfect (Slabbert "The law as an obstacle in solid organ donations and transplantation" 2018 *THRHR* 70). However, the regulations in terms of the Act help with clarity in certain aspects. It is essential that chapter 8 of the NHA and the regulations in terms thereof should be seen as a whole when determining whether an accused has transgressed any stipulation.

4 Conclusion

This case is an example of a literal interpretation of the NHA without taking notice of the regulations in terms of the Act. The Act specifically

authorises the Minister to make regulations as pointed out above. This the Minister has done. In both sets of the regulations discussed, offences are created. It is thus our submission that the accused should have been charged on all the counts relating to transgressions of the NHA. The prosecution, or the judge, should have amended the charges to include reference to the relevant sections in the Regulations. It is clear that offences have been committed and it is not necessary for the legislature to change the Act.

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The need to provide members of retirement funds which are not regulated by the Pension Funds Act access to a specialised dispute resolution forum

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SUMMARY

This paper discusses the disparity in the manner in which retirement funds members regulated by the Pension Funds Act ("PFA") and those not covered by the PFA are treated in relation to the process they need to follow to resolve their retirement funds related complaints. In particular, this paper argues that there is no rational basis for not extending the services of the Office of the Pension Fund Adjudicator to members whose retirement funds are not regulated by the PFA. It is argued that the services of this office should be extended to all retirement funds in South Africa irrespective of whether they are regulated by the PFA. Once this office has been extended as proposed in this paper, it will be able to adjudicate disputes arising from all retirement funds in South Africa. This office should be made easily accessible to all retirement funds members. It is argued further that there is a need for the state to financially capacitate this office in order to make it available in all the provinces of the Republic. This will allow all retirement fund members irrespective of where they reside to be able to lodge complaints with a specialised tribunal dealing with retirement related disputes.

1 Introduction

In 2001, the first Pension Funds Adjudicator, John Murphy proposed that "South Africa requires a single, one-stop, Pension Complaints Tribunal with exclusive jurisdiction in relation to all pension fund matters arising from whatever quarter".[1] This recommendation can be understood against the crucial role played by the office of the Pension Funds Adjudicator (hereinafter referred to as Adjudicator) in the resolution of complaints relating to retirement funds regulated by the Pension Funds Act,[2] (hereinafter referred to as PFA). Currently, the Adjudicator's

* I wish to thank the anonymous reviewers for their careful reading of this manuscript and their many insightful comments and suggestions. Nonetheless, all the shortcomings in this paper remain solely my own.

1 Murphy "Alternative dispute resolution in the South African pension funds industry: an ombudsman or tribunal?" 2001 *Journal of Pensions Management* 36.

2 24 of 1956

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jurisdiction is limited to retirement funds, which are registered in terms of the PFA.[3] While section 4A of the PFA allows retirement funds to which the government contributes financially to apply to be registered in terms of the PFA, which will subject them to the Adjudicator's jurisdiction, some of these funds have not applied for such registration and continue to be regulated by their own pieces of legislation.[4] Members of retirement funds, which are not regulated by the PFA, do not have a specialised retirement fund dispute resolution institution with relevant expertise to deal specifically with their complaints. Such members are forced to seek assistance from the office of the Public Protector.[5]

This paper aims to highlight the plight of those who are members of retirement funds that government contributes financially when they have complaints against such retirement funds, more particularly, those who do not have the financial resources to seek relief from civil courts. I will demonstrate why the office of the Public Protector, even though it has attempted to resolve pension related disputes, is not an ideal forum for the resolution of these disputes.[6] The importance of the role of the Adjudicator's office in the resolution of pension related disputes has been reflected upon in academic cycles,[7] which demonstrates the dire need for members of retirement funds, which are not regulated by the PFA to also be afforded the same services. While I agree with Murphy's proposal, I am nonetheless, of the view that it is not necessarily about the introduction of a single tribunal for the entire retirement industry but more about affording members who do not have access to the Adjudicator's office a similar specialised forum that will cater for their

3 See section 30D of the PFA.

4 See for instance Pension Funds Act 24 of 1956, as amended (hereinafter referred to as "PFA"); Post Office Act 44 of 1958; Transnet Pension Fund Act 62 of 1990, as amended and the Government Employees Pension Law of 1996, as amended

5 See Public Protector "Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents" (Report No 11 of 2008/09) 3, where the Public Protector was requested to investigate "a complaint of maladministration relating to the payment of pension contributions and undue delay in the submission of pension documents by the Department of Education of the Limpopo Provincial Government … to the Government Employees Pension Fund (the GEPF) and the subsequent delay in payment of pension benefits to a former employee of the Department".

6 Public Protector "An investigation into allegation of improper conduct by the Department of Public Services Administration and the Government Employees Pension Fund during the privatisation of the Venda Pension Fund" (Report No 18 of 2011/2012), in these two reports the Public Protector was requested to resolve retirement funds related complaints.

7 Mhango "Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?" 2016 *LDD* 20-45, Jeram "The Pension Funds Adjudicator-a Jurisdictional nightmare" 2006 *ILJ* 1825, Sigwadi "Dispute resolution and the Pension Funds Adjudicator" 2004 *Juta's Business Law Journal* 2. See also Nevondwe and Odeku "An analysis of the role of the Pension Funds Adjudicator in South Africa" 2013 *Mediterranean Journal of Social Sciences* 817-827.

retirement fund related complaints. In other words, while I agree in principle with Murphy that there must be a specialised forum for the resolution of retirement fund related complaints, I am nonetheless, of the view that there is no need to reinvent the wheel. In that, the current Adjudicator's office should remain as a specialised tribunal but its reach should not be limited to only those complaints raised by members of retirement funds which are regulated by the PFA. It is submitted that necessary amendments to specialised legislation[8] regulating retirement funds not regulated by the PFA should be made to extend the jurisdiction of the office of the Pension Funds Adjudicator to cover those retirement funds.

2 The extent of South African occupational retirement funding

South Africa has an advanced formal retirement funding sector under which individuals are given various incentives to save for retirement, and a means-tested social security system for the aged regarded universally as very successful.[9] Through the establishment of various companies, employers have played a crucial role in assisting their employees in planning adequately for their retirement through the establishment of various retirement fund schemes over the years. According to the 2016 Financial Services Board's annual report (as it was then known),[10] there are 5 000 registered retirement funds in South Africa with the combined value of their assets of over R3.7 trillion.[11] Most of these retirement funds are registered and regulated under the PFA making them subject to the supervision of the Financial Sector Conduct Authority through the Registrar of Pension Funds.[12] The PFA also regulates privately administered funds, underwritten funds, foreign funds and bargaining councils' funds.[13] Certain retirement funds, which the state contributes financially such as the Government Employees Pension Fund (hereinafter referred to as GEPF), are not subject to the regulation of and supervision under the PFA because their own separate statutes established them.[14] The GEPF is a defined benefit pension fund,[15] and

8 Statutes such as Transnet Pension Fund Act 62 of 1990 and Government Employees Pension Law of 1996.

9 Rusconi "Costs of saving for retirement options for South Africa" (paper presented at the 2004 Convention of the Actuarial Society of South Africa, October 2004, Cape Town, South Africa) 43.

10 This institution was replaced by the Financial Sector Conduct Authority, which was established by the Financial Sector Regulation Act 9 of 2017.

11 See https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202016.pdf (accessed 2016-09-20)

12 See *Registrar of Pension Funds and Another v Angus NO and Others* 2007 2 All SA 608 (SCA) para 43.

13 S 2 of the Pension Funds Amendment Act 11 of 2007 ensured that the provisions of the PFA apply to all bargaining council funds, irrespective of when they were established.

14 See FSB 2016 Annual Report 26.

15 See *ICS Pension Fund v Sithole NO and Others* (44886/07) [2009] ZAGPHC 6

the largest pension fund not only in South Africa but Africa as a whole.[16] These funds are supervised directly by the National Treasury.[17] The government also contributes financially towards the Telkom Pension fund, which was established in terms of the Post Office Act. However, unlike the GEPF, the Telkom Pension fund has voluntarily registered in terms of section 4A of the PFA, and its member can now lodge their complaints with the office of the Pension Funds Adjudicator.

While retirement fund schemes play a crucial role not only in the economy but also in the employees' post retirement life, there have been challenges generally regarding their management leading to various complaints from their members.[18] Those whose funds are regulated by the PFA have an option of lodging their complaints directly with the Adjudicator's office, while those whose retirement funds are regulated by their own legislation do not have such an option. While it is clear that the Adjudicator's office was created by the PFA to specifically deal with pension funds related disputes, it is difficult to understand the thinking behind the idea of making this tribunal exclusive only to funds, which registered under the PFA. More particularly, when the same complaints relating to pension benefits issues in practice also arise against retirement funds not regulated by the PFA.

(13 January 2009) para 3, where it was held that "[g]enerally speaking, a defined benefit fund is a pension fund whose pension benefits are determined in accordance with a formula contained in the rules of the fund and which are underwritten by the participating employer If the investments made by such a fund perform well, the members do not benefit proportionately. However, if the investments perform poorly, members have the advantage that their pension benefits remain guaranteed by the employer. The employer carries the risk of the investments and the members' pension benefits are secure". Further that "in contradistinction to being a defined benefit fund, a pension fund can be a so-called defined contribution fund. In a defined contribution fund, the benefits are not underwritten by the employer but the members have the advantage that if the fund performs well, it would reflect in their pension benefits. If the fund performs poorly, the members" pension benefits are reduced accordingly. In short, the members carry the risk of the investments, both good and bad, and their benefits are not guaranteed by the employer" (para 4).

16 http://www.gepf.gov.za/index.php/about_us/article/who-is-gepf (2015-10-15), the Government Employees Pension Fund is governed by the Government Employees Pension Law (or GEP Law), as amended.

17 See for instance the Post Office Pension Fund was established in terms of section 9 of the Post Office Act 44 of 1958 and the Transnet funds, which were established in terms of the Transnet Pension Fund Act 62 of 1990.

18 See generally Marumoagae "The need for effective management of pension funds schemes in South Africa in order to protect member's benefits" 2016 *THRHR* 614-631.

3 Complaints relating to retirement funds to which the state contributes financially

Initially, none of the pension law related statutes including the PFA provided a mechanism, which enabled retirement funds and their members to settle their disputes by means other than approaching civil courts. In 2002, the Mouton Report among others recommended, "provision for the ombudsman should be made in the Pension Funds Act (or equivalent). He should be appointed by the FSB after consultation with the Pension Advisory Committee".[19] Because of this recommendation, the PFA was amended to create the Adjudicator's office with the purpose of disposing complaints against pension fund organisations or employers who participate in retirement funds.[20] It is worth noting that this recommendation was made based on the general Mouton committee's mandated, which was to "review the effectiveness of the retirement provision systems in South Africa and propose guidelines for any changes that are deemed necessary to move towards the goal of providing all South Africans with adequate incomes in their old age".[21] While the Mouton Committee specifically stated that the recommended ombudsman should be provided for in the PFA, sight should not be lost to the fact that the commission also pointed out that the ombudsman could also be provided for in the PFA's equivalent legislation. This demonstrates that the commission was alive to the fact that retirement funds related disputes are not exclusive to retirement funds regulated by the PFA. As such, it remains unclear why the legislature opted to not only create the Adjudicator's office but to also make it exclusive to retirement funds which are registered under the PFA notwithstanding the fact that at the time there were retirement funds which did not fall within the ambit of the PFA.

The Mouton's committee's proposal was made on the basis that the proposed ombudsman should address every dispute relating to members, employers and retirement funds within the retirement industry irrespective of which legislation regulates the member and his or her retirement fund.[22] It cannot be that the committee sought to provide retirement provision guidelines for all South Africans as indicated in its description of its mandate but recommended an ombudsman for only some of the members whose retirement funds are regulated by the PFA. Based on the 1996 amendments to the PFA, the Adjudicator's office was created to deal with disputes arising in the context of the PFA. In terms of section 30B(2) of the PFA, the

19 Report of the Committee of the Investigation into a retirement provision system for South Africa (1992) 325.
20 Jeram "The Pension Funds Adjudicator-a Jurisdictional nightmare" 2006 *ILJ* 1827.
21 Report of the Committee of the Investigation into a retirement provision system for South Africa (1992) 325.
22 Report of the Committee of the Investigation into a retirement provision system for South Africa (1992) 325.

Adjudicator's functions are to dispose of complaints relating to pension funds organisations in a "procedurally fair, economical and expeditious manner".[23]

Retirement funds members raise various complaints against their retirement funds such as: failure of employers to make contributions to the funds;[24] non-payment or delaying payment of withdrawal benefits;[25] death benefits;[26] deductions;[27] housing loans;[28] maladministration of pension funds;[29] quantum of withdrawal benefits;[30] section 14 transfers;[31] and withholding benefits.[32] These complaints are not unique to retirement funds regulated by the PFA. However, members of retirement funds not regulated by the PFA do not have the luxury of having their disputes resolved by a forum similar to the Adjudicator's office. There is no rational basis for providing some retirement fund members with a specialised dispute resolution forum while denying other members the same privilege. This is discriminatory and potentially unconstitutional because members of retirement funds, which are not regulated by the PFA also, have complaints relating to their retirement funds but cannot direct such complaints to a dedicated pension dispute resolution authority like the Adjudicator's office. Other than the fact that the Adjudicator's office is created by the PFA and other pension law legislation do not establish similar entities, there is no reasonable explanation why those members whose retirement funds, which are not regulated by the PFA, should not have a specialised pension dispute resolution forum.

In South Africa "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".[33] Clearly, the differentiation which is evident in relation to access to a specialised pension dispute resolution tribunal effectively deny members of retirement funds which are not regulated by the PFA equal protection against their retirement funds as well as the benefit of specialised expertise in the resolution of their pension related disputes. In order to determine whether failure to provide members of retirement funds which are not regulated by the PFA

23 See also Mhango "Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?" 2016 *Law Democracy & Development* 23.
24 *Masethle v The Private Security Sector Provident Fund* PFA/NW/6167/2013/VPM para 1.1
25 *Solomons v Orion Money Purchase Provident Fund & Another* PFA/13025/07/NS para 1.1.
26 *Malatjie v Idwala Provident Fund* PFA/GA/821/03/FM/ch para 1.
27 *Sibanyoni v Concor Holdings (Pty) Ltd* PFA/GA/608/04/Z/VIA para 1
28 *Fourie v National Fund For Municipal Workers* PFA/GA/21465/2007/LL para 1.1.
29 *Hugh Brown v National Oil Pension Fund & Others* PFA/GA/22/98/AS.
30 *Mabale v Feedmix Provident Fund & Others* PFA/GA/2663/2005/RM para 1.1
31 *Ledwaba & Others v Murray & Roberts Retirement Fund &Another* PFA/GA/580/03/CN para 1.
32 See *Govender & Another v L'oreal South Africa Provident Fund & Another* PFA/GA/1369/04/KM para 2.
33 S 9(1) of the Constitution of the Republic of South Africa, 1996.

amounts to unfair discrimination and thus unconstitutional, guidance can be sought from the well-known test for the violation of the right to equality, first enunciated by the Constitutional Court in *Harksen v Lane N.O and others,*[34] where the Constitutional Court asked whether "the provision differentiates between categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination".[35] With regard to the resolution of pension related disputes, there is a clear differentiation between two categories of persons, those whose retirement funds schemes are regulated by the PFA and those whose retirement funds schemes are not regulated by the PFA, as far as to access to a specialised pension related dispute resolution forum is consent. Given the fact that retirement fund members' complaints are real to them and at times such complaints directly affect their livelihood hence they need speedy and effective resolution thereto, it is difficult to see any legitimate governmental purpose which may be sought to be achieved by this differentiation. Members whose retirement funds are regulated by the PFA do not only seek such effective resolution of pension related disputes.

According to the Constitutional Court, the state should not "regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State".[36] It is submitted that the differentiation identified in this paper demonstrates a clear preference in favour of members of retirement funds, which are regulated by the PFA over those whose retirement funds are not regulated by the PFA. Such preference is undue and amounts to unfair discrimination. The Constitutional Court has further clarified that "… absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under section 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis".[37] Legislative provision of a dispute resolution tribunal to only members of retirement funds, which are regulated by the PFA, confers benefits unevenly and without a rational basis in favour of such members, and thus unfairly discriminates against those retirement fund members whose retirement funds are not

34 1998 1 SA 300 (CC) para 53:
35 Under the Interim Constitution the equality clause was found in section 8.
36 *Prinsloo v Van Der Linde and Another* 1997 3 SA 1012 (CC) para 25.
37 *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) para 28. The court further held that "… arbitrary differentiation … neither promotes public good not advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, in as much as it breaches the 'rational differentiation' standard set by s 9(1) thereof".

regulated by the PFA.[38] This differentiation is similar to that which the court was faced with in *Wiese v Government Employees Pension Fund and Others* where the prejudice arising out of the differentiation emanating from members of retirement funds regulated by the PFA who "could gain immediate access to their share of their former spouse's pension interest, and can obtain an immediate cash payment in respect thereof or transfer such benefit to another pension fund" while "the divorced spouse of a member of the Fund (and other funds not governed by the PFA) can only gain access to his or her share of a former spouse's pension fund interest when an exit event occurs which, of course, may be many years away" was identified and declared unconstitutional.[39] In the same way as it was unconstitutional to differentiate between non-member spouses of retirement funds which are regulated by the PFA and those, whose retirement funds are not regulated by the PFA,[40] it is submitted that failure to accord retirement fund members whose retirement funds are not regulated by the PFA the same privilege clearly amounts to unfair discrimination which cannot be justified under the democratic South Africa. Members of retirement funds, which are not regulated by the PFA, also have a right to have their pension related complaints adjudicated by a specialised tribunal with the necessary expertise in pension related matters.

It is worth noting that section 4A of the PFA allows retirement funds to which the State contributes financially to apply to be registered in terms of the PFA, and an example of that is Telkom Pension fund.[41] Hence, it can be argued that in principle, there is nothing, which prevents all those retirement funds to which the state contributes financially to register under the PFA. Currently, such a debate has not been entertained within the retirement industry and there is no policy directive, which has been issued providing a justification why other retirement funds to which the state contributes financially have not registered with the PFA. Nonetheless, while the argument that such funds are free to register with the PFA is true, it is nevertheless, unfortunate because the decision to register or not to register with the PFA is not made by members but by the retirement fund's board of management which may decide not to register with the PFA in order to avoid the jurisdiction of the PFA. Further,

38 See *Mbana v Shepstone & Wylie* 2015 6 BCLR 693 (CC) para 23, where it was held that "[u]nfair discrimination implicates the right to equality in our Constitution. This is a fundamental right entrenched in our Bill of Rights".

39 *Wiese v Government Employees Pension Fund and Others* 2011 4 ALL SA 280 (WCC) para 18. See also Marumoagae "Breaking up is hard to do, or is it? The Clean Break Principle Explained" 2013 *De Rebus* 38.

40 See *Wiese v Government Employees Pension Fund and Others* 2012 6 BCLR 599 (CC) and *Ngewu and Another v Post Office Retirement Fund and Others* 2013 4 BCLR 421 (CC). In relation to pension interests. See also Marumoagae "Non-member's entitlement to the pension interest of the member's pension fund" 2014 *PER* 2488-2524.

41 See the 2002 Report by the Registrar of pension funds to the minister of finance https://www.fsb.co.za/departments/retirementfund/documents/registrar%20of%20pension%20funds%20annual%20report%202002.pdf (accessed 2015-10-30).

the reality is that such retirement funds are currently not registered with the PFA and the current complaints, which members have against such funds, cannot be addressed in the same manner as those of members whose retirement funds are regulated by the PFA.

In an attempt to level the playing fields, members of retirement funds, which the state contributes financially, have been able to approach an already overburdened office of the Public Protector for relief. This is very undesirable because the Public Protector's office has indicated that it does not have sufficient financial resources to carry out its work given its wide mandate to deal with all the complaints relating to public institutions and officials.[42] This simply entails that the Public Protector does not have the capacity to not only deal with pension related complaints in the same manner as the Adjudicator's office does but also the time to develop the necessary expertise to be able to resolve such complaints on a case to case basis. It can however, be argued that if government provide more funding to the office of the Public Protector, this office can establish a dedicated unit which will deal with retirement fund related disputes and thus over time develop the necessary expertise to deal with retirement fund related disputes. This, however, will be a wishful thought given the fact that this office has from time to time requested more funding to deal with other public related investigations, which it has not always received.[43] However, over and above this, the

42 Mokone "Madonsela: No funds, no public protector" *The Times* (2014-10-23). Protector is a National Ombudsman who is appointed by the President on the recommendation of the National Assembly, in terms of Chapter Nine of the Constitution, 1996. The bearer of this office has jurisdiction to investigate and issue recommendations over all organs of state, any institution in which the state is the majority or controlling shareholder and any public entity as defined in section 1 of the Public Finance Management Act, 1999. As such, since most of the pension funds which are not regulated by the PFA are in actual fact public pension funds or pension funds which the state is either controlling them or have some sort of interest in them, it is understandable why those who are barred from utilising the services of the Adjudicator's office would seek refuge from the Public Protector. "The Public Protector's legal mandate, powers and functions flow from the Constitution and the Public Protector Act, 1994. Section 182(1) of the Constitution provides that the Public Protector has the power, as regulated by national legislation to investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in impropriety or prejudice; to report on that conduct; and to take appropriate remedial action. The Public Protector has additional powers and functions as prescribed by national legislation – section 6(4) of the Public Protector Act, 1994, provides that the Public Protector shall be competent to investigate on his or her own initiative, or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level. In terms of the said section, the Public Protector also has jurisdiction to investigate any alleged act or omission by a person performing a public function".

43 Gqirana "Public protector asks Parliament for less money than she actually needs" *News 24* (2016-04-07) http://www.news24.com/SouthAfrica/News/public-protector-asks-parliament-for-less-money-than-she-actually-needs-20160407 (accessed 2016-10-19).

office of the Public Protector is a constitutional institution by design, and its general mandate does not merit it having a dedicated unit dealing with retirement funds related complaints given the magnitude of complaints, which this institution deals with annually. For instance, during the 2015/16 financial year, the public protector's office handled 17 374 different cases against public institutions and officials, 12 735 of which were finalised and 4251 carried over to the new financial year.[44] On the other hand, the Adjudicator's office for the same financial year dealt with 9 970 pension related complaints and issued 3 476 determinations.[45] While there is no readily available statistics relating to the number of complaints which are made by members of retirement funds to which the state contributes financially generally, nonetheless, given the number of members of the GEPF alone it cannot be disputed that there are a number of such members with complaints which end up not been adequately resolved by an independent tribunal. In the 2008 Report No 11, the Public Protector dealt with various complaints relating to the GEPF and gave her remedial actions on how the GEPF should resolve such complaints. However, this in itself did not necessarily mean that there would be no complaints levelled against the GEPF in future.

All members who have complaints against the GEPF or any of the retirement funds, which are not regulated by the PFA, should be able to lodge such complaints with an independent specialised pension authority which will duly investigate and determine the outcome. It is unfortunate that those who lodge their complaints at the same time with the office of the Public Protector,[46] they will not receive personal and individual assistance which they would have enjoyed had they been allowed to lodge such complaints with the Adjudicator's office.

In 2008, the Public Protector issued a report, which was a result of her investigation into the operations of the GEPF. In this report, without providing the actual statistics, she noted that her office "… had been swamped with complaints about government employee pension benefits. These complaints account for a significant number of the complaints dealt with by the Office, and relate mainly to undue delays in the payment of pension benefits, or to pension benefits that were

44 "New public protector Busisiwe Mkhwebane to brief Parliament on annual report" *Mail & Guardian* (2016-10-19).

45 Office of the Pension Funds Adjudicator's annual report (2015/2016) https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202015%20-%202016.PDF (accessed 2016-10-19).

46 Public Protector "Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents" (Report NO 11 of 2008/09) para 1.2, where the Public Protector highlighted that "[t]he Office of the Public Protector (the Office) received, and continues to receive, numerous complaints relating to the payment of government employee pension benefits. The complaints, although diverse, relate mainly to undue delays of payments of pension benefits and dissatisfaction with the pension benefits received".

allegedly calculated incorrectly".[47] Unlike the Adjudicator's office, the Public Protector due to the magnitude of the complaints received could not provide individual reports specifically addressing individual members' complaints, but issued a report, which encompassed all complaints raised by members and recommended that the GEPF address such concerns. However, she noted in the report that:

> The Office had been dealing with the complaints on a case-by-case basis and usually resolved complaints to the satisfaction of the complainants. Because such interventions by the Office did not reduce the inflow of complaints, the Office embarked on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents. The purpose was to identify patterns or systemic deficiencies that contributed to a large number of complaints received by the Office and to address these deficiencies.[48]

This report was issued at the time when the binding status of the Public protector's remedial actions was not clear and members did not have an idea how to enforce such remedial actions.[49] Even though the remedial actions of the Public Protector have been declared to be binding and consolidated report relating to various complaints dealing with pension related complaints to some extent might be of assistance to members of retirement funds to which the state contributes financially, nonetheless, the potential delay associated with the Public Protector's office given its wide mandate prejudices such members. They too should be accorded the advantage of being able to forward their complaints to a tribunal, which is designed to deal with pension related disputes in a cost effective and expeditious manner. It is worth noting that there has been an isolated instance where the Public Protector has been able to address complaints relating to a retirement fund associated with the state and deliver a report to that effect. In 2011, the Public Protector issued a report wherein she ordered the GEPF to recalculate and pay the pension benefits, which were paid to three former members of the Venda Pension Fund prior to the amalgamation with other funds to form the

47 Public Protector "Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependents" (Report No 11 of 2008/09) para 1.2.

48 Public Protector "Report on a systemic investigation into the deficiencies with the processing of pension benefits payable to former government employees and their dependants" (Report No 11 of 2008/09). It is not clear from the report what is meant by case to case basis and how the complaints were resolved. If there was no report issued regarding a certain case and the fund agreed to act in accordance with the recommendations of the Public Protector but fails to do so, what would then be the member's remedy? With the Adjudicator's office, the member has a determination which he or she can enforce through civil courts in terms of section 30O(1) of the PFA. See *Samancor Group Pension Fund v Samancor Chrome* 2010 4 SA 540 (SCA) para 26.

49 The binding effect of such remedial actions were clarified in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 3 SA 580 (CC).

GEPF.[50] It is unjustified for members of retirement funds to which the state contributes financially to queue with the rest of the members of the public who have complaints relating to public maladministration generally in order to receive assistance from the office of the Public Protector. Members of retirement funds to which the state contributes financially should also be able to queue with other members of retirement funds regulated by the PFA to receive assistance from a specialised pension law tribunal. I am of the view that the office of the Public Protector given the general scope of its work, it is not an ideal forum to address pension related complaints.

4 Office of the Pension Funds Adjudicator

Initially, the Financial Services Board (now the Financial Sector Conduct Authority) as the regulator of the private pension funds received complaints from members of pension funds and the Registrar was tasked with handling such complaints.[51] Due to the magnitude of complaints received by the Registrar and the remedial action, which was required, it became evident that perhaps the office of the Registrar was not an appropriate forum to deal with such complaints.[52] This is because some of these complaints led to disputes, which required thorough investigation and possible litigation as well. Retirement fund members who were not happy with the services they received from their retirement funds or the manner in which their funds were managed had to look elsewhere for relief because they did not have a specialised tribunal where they could lodge their complaints. This led to those members who felt aggrieved or believed that their benefits were threatened, to approach courts of law for an appropriate relief. However, not every aggrieved retirement fund members could have access to the courts due to the costs involved in litigation, which potentially led to some, if not most pension disputes remaining unresolved.

There was thus a need for the establishment of a specialised forum, which would endeavour to resolve pension law related disputes, which would be cost effective and easily accessible to the members of retirement funds at large. The PFA was amended in order to establish the Adjudicator's office.[53] The Adjudicator's office is a creature of statute and can only perform functions and preside over matters, which it is empowered to do so by the PFA.[54] In terms of section 2 of the PFA, the

50 Public Protector "Equitable access to social security" (Report No 18 of 2011/2012) 7.
51 Murphy 2001 *Journal of Pensions Management* 28.
52 Murphy 2001 *Journal of Pensions Management* 28.
53 S 30B of the PFA.
54 See *Meyer v Iscor Pension Fund* 2003 1 All SA 40 (SCA) para 7, where it is held that "it must be borne in mind that, since the office of the Adjudicator is a creature of statute, the Adjudicator has no inherent jurisdiction. His powers and functions are confined to those conferred upon him by the provisions of Chapter V A". See also *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy NO and Others* 2001 (3) SA 683 (D).

provisions of this Act apply only to retirement funds which have been registered in accordance with this Act or which ought to have registered with this Act by 1 January 2008. Generally, the Adjudicator has jurisdiction to adjudicate complaints relating to the manner in which the fund is administered, the way in which the board invests the assets of the fund and/or the dispute over the application and interpretation of pension fund rules.[55] Complaints should generally be lodged by members or former members of pension funds, provident funds or retirement annuity funds or beneficiaries or former beneficiaries of such funds as well as the employer participating in that fund.[56]

The Adjudicator is mandated by section 30A(3) of the PFA to deal with pension related complaints in a procedurally fair, economical and expeditious manner. In order to achieve this main object, the Adjudicator is duly empowered to investigate any complaint and make an order, which any court of law may make.[57] In essence, the Adjudicator is enjoined to treat both the complainant and the person or body against whom the complaint is laid fairly. She must provide them with an opportunity to state their case and respond to each other's allegations in order to ensure fairness, impartiality and rationality of the conclusions she would ultimately reach. This is a particularly important feature of the Adjudicator's office, which positions this office as a credible institution, which is suitable to not only, investigate pension related complaints but to adjudicate over them expeditiously. Surely, every retirement fund member would appreciate access to an institution, which is able to allocate adequate time to his or her complaint and dispose of it independently and fairly. Hence, there is no justification in law why the services provided by the adjudicator's office should not be accorded to members' of retirement funds to which the state contributes financially.

The Adjudicator's office is a quasi-judicial body,[58] which is tasked with the investigation of complaints and to also issue determinations.[59] The Adjudicator's office has been designed to be directly accessible to retirement fund members who have complaints against their funds. The procedure for lodging a complaint has been simplified to such an extent that even without legal assistance, a retirement fund member can have his or her complaint being adequately disposed of. In the Adjudicator's website, there is a four pages complaint form which has been drafted in easy to read English without complicated legal terms which requires

55 Le Roux "A synopsis of the powers, functions and decisions of the Pension Fund Adjudicator"1999 *SA Merc LJ* 227.

56 See s 30A of the PFA.

57 *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* unreported 37226/14 2015 ZAGPPHC 408 (26 June 2015). See also *Mohapi v De Beers Pension Fund and Another* unreported 64/2015 2016 ZASCA 14 (11 March 2016) para 2.

58 *Old Mutual Life Assurance Company (South Africa) Limited v Pension Funds Adjudicator and Others* 2007 2 All SA 98 (C) para 12.

59 See Mhango 2016 *LDD* 44, where he argues that "the Adjudicator performs judicial functions governed by section 34 of the Constitution".

among others: the member's details; his or her employer's details; clearly outlined supporting documents; details of the complaint; and information relating to whether or not the member has commenced legal proceedings in relation to the complaint.[60] This office has also translated some of its documents in other official languages in order to make it easy for complainants to be able to use their own languages when lodging complaints.[61]

In order to ensure procedural fairness, section 30A of the PFA prescribes that retirement fund members should first lodge their complaints with their funds, which should be considered by the boards of management. The board or the employer should properly reply to further that, such complaints within 30 days of receipt thereof. If the member does not receive a reply or is dissatisfied with the reply, he or she may lodge the complaint directly with the Adjudicator.[62] In practice, usually a letter would first be written to the participating employer detailing the circumstances of the dissatisfaction and the relief claimed, with the view that the employer will be able to assist the member to resolve the complaint with the fund concerned. At times, it might be better to issue the letter directly to the fund or the fund's administrator. If the matter remains unresolved, then the complaint should be lodged directly with the office of the Adjudicator with the relevant proof that efforts have been made to resolve the matter first with the fund. This is to ensure that the Adjudicator is not burdened with complaints, which parties can easily resolve among themselves. Normally, upon receipt of a complaint, the Adjudicator will inform and thus challenge the fund and/or the employer concerned with the allegations against them and require that they respond thereto. Sigwadi correctly argues that:

> A direct application to the Adjudicator for relief without first lodging a written compliant with the fund or participating employer or administrator is bad in law for lack of compliance with the Act. Instead of investigating the complaint, the Adjudicator may send it back for failure to comply with the Act. If the Adjudicator intends to investigate a complaint, then under section 30F he or she must allow the fund or person against whom the allegations contained in the complaint are made the opportunity of commenting on the allegations.[63]

The Adjudicator is empowered to investigate the matter to his or her satisfaction and to request that the parties furnish him or her with all the information, which would allow him or her to provide a just

60 https://www.pfa.org.za (accessed 2016-10-30). Perhaps it might be ideal to translate the form to other official languages in South Africa in order to ensure that retirement fund members who cannot understand English can also be accommodated.
61 https://www.pfa.org.za (accessed 2016-10-30).
62 S 30A(3) of the PFA.
63 Sigwadi "Dispute resolution and the Pension Funds Adjudicator" 2004 *Juta"s Business Law* 5.

determination of the dispute.[64] The Adjudicator has determined that "the purpose of this office is not only to determine and dispose of complaints lodged in terms of section 30A(3) but also to investigate complaints".[65] The Adjudicator's office 'is permitted to conduct investigations in an inquisitorial manner in terms of the Act and is not restricted by technical and formalistic arguments based on the scope of pleadings as in traditional adversarial litigation'.[66] Where appropriate, the Adjudicator may facilitate a conciliation of disputes between retirement funds and their members. In order to encourage conciliation, the Adjudicator's office has drafted certain guidelines, which lay down the procedure for the conciliation of disputes referred to that office. The discussion of these guidelines is beyond the scope of this paper, but it suffices to mention that these guidelines set out general procedures and principles to be followed where the adjudicator is of the view that a complaint is appropriate for conciliation.[67]

64 See *Sligo v Shell Southern Africa Pension Fund & Another* 1999 11 BPLR 299 (PFA) 309A – C, where it was held that "Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner."

65 *Sekele v Orion Money Purchase Pension Fund & Another* 2001 6 BPLR 2148 (PFA) 2152B – D. It was further held that "[w]here our investigation reveals any form of maladministration or unlawfulness, which has not been pleaded by the parties, it will nevertheless be further investigated and forms part of the ruling where necessary. Whenever our investigation reveals a related issue not initially raised or accurately formulated by the parties, all interested persons shall be afforded an opportunity to submit further submissions and evidence in respect of this new issue."

66 *Fisher v Basil Read Group Pension Fund & Others* PFA/WE/262/98/NJ para 33. See also s 30J of the PFA, which provides that "[t]he Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner."

67 Pension Funds Adjudicator *Guidelines and Procedures for Conciliation at the Office of the Pension Funds Adjudicator* (OPFA) 22 April 2008. See also Nyenti "Dispute resolution in the South African social security system: the need for more appropriate approaches" 2012 *Obiter* 29 where it is stated that "[c]onciliation hearings will be undertaken by independent third party conciliators appointed by the adjudicator with the approval of the registrar of pension funds. Conciliation proceedings are private and confidential and no party is entitled to legal representation. If the parties to conciliation should reach a settlement of the complaint, the adjudicator will confirm the outcome in writing to all parties by issuing a conciliation determination, which will have the same force and effect as a normal determination. Conciliation matters are organised in such a manner that the whole process is cost effective to all those involved. Where it is possible to involve both parties in a dispute in a telephonic conciliation, it is done. However, the decision is that of the conciliator". See also *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 2 SA 365 (SCA) para 28.

5 Extending the Adjudicator's services to members of retirement funds not regulated by the PFA

The Adjudicator's office has empowered members of retirement funds regulated by the PFA to be able to stand up to both their employers and boards of management of retirement funds who are compromising their social security in relation to their retirement benefits. Every retirement fund member irrespective of which legislation regulates his or her fund deserves to have access to a specialised tribunal, which can adequately and competently investigate his or her complaint and issue a decision, which has a force of law in relation thereto. Murphy has recommended that there is a need in South Africa for the establishment of a single pension's tribunal, which will have exclusive jurisdiction in relation to all pension fund matters arising from whatever quarter.[68] The recommendation for the establishment of such tribunal is premised on the basis that all complaints, which arise within the retirement industry, should be directed at such tribunal in order to ensure that there is no duplication of jurisdiction or even unnecessary forum shopping.[69] But most importantly, this recommendation should be understood from the point of view of extending the important services provided by the Adjudicator's office to those retirement funds members who are currently prevented by legislation from receiving them. This recommendation can be adhered to by repealing all the retirement fund related legislation and enacting a single legislation, which will regulate all retirement funds in South Africa and the entire retirement industry. Alternatively, all existing retirement fund legislation regulating other retirement funds can be amended to bring such retirement funds under the Adjudicator's jurisdiction. According to Jeram "[s]ince all members do not have access to [the Adjudicator's office], a case can be made for

68 Murphy 2001 *Journal of Pensions Management* 36.

69 *See Natal Staff Association v Associated Institutions Pension Fund and Another* 2000 3 BPLR 302 (PFA) 305C where it was determined that "[t]he jurisdiction of the Pension Funds Adjudicator is governed by chapter VA of the Pension Funds Act of 1956, read with various definitions contained in section 1. As I have said elsewhere, it would seem to me that those responsible for drafting the legislation establishing the office of the Adjudicator failed to think through many of the issues relating to the Adjudicator's jurisdiction. It appears that the amendments in Chapter VA were tacked on to a long standing piece of legislation without full consideration being given to the Adjudicator's jurisdiction and powers in relation to the courts, other tribunals and regulatory bodies established by legislation. At present, there are eight institutions with jurisdiction over pension disputes in South Africa. These are the ordinary Courts, the Adjudicator, the Labour Court, Commission for Conciliation Mediation and Arbitration, the Appeal Board established under section 26 of the Financial Services Board Act, the Public Protector, The Life Assurance Ombudsman and a variety of bargaining councils in the public and private sector. This inevitably leads to jurisdictional disputes requiring resolution through litigation".

the consistent and equal treatment of all fund members by allowing them access to this office. This will require an expansion of the jurisdiction of the office as it currently stands".[70] It cannot be doubted that the creation of a single tribunal tasked with the resolution of pension disputes of the entire retirement industry will ease the burden on pension fund members and lead to certainty within the industry.[71] Should this recommendation be adhered to, it would be ideal for the Adjudicator's office to have a presence in all the provinces.

While I agree with Murphy's recommendation in as far as providing access' to members of retirement funds which are not regulated by the PFA to a specialised tribunal dealing with pension related matters, I nonetheless, do not necessarily believe that the establishment of such tribunal is the main issue. I am of the view that it is more about access to the services provided by such a tribunal rather than the establishment of the tribunal itself. As such, retirement fund members to which the state contributes financially should not wait for the establishment of such a tribunal while they have current complaints against their retirement funds, which should be investigated and adjudicated upon. I am of the view that the jurisdiction of the current Adjudicator's office should be extended to other retirement funds. If this proposal is adhered to, then the state should financially resource this office in order to make it easily accessible nationally by creating at least one office in each province. Each office should be duly capacitated to deal with the complaints, which will be lodged with it. Currently, the Adjudicator while assisted by a deputy Adjudicator,[72] and a number of assistant adjudicators, personally takes ownership of the determinations of that office. In the proposed model, there should be a national office, which is headed by the National, or Chief Adjudicator and nine provincial offices, which are presided by the Provincial Adjudicators, entrusted with full powers to finalise determinations issued in their respective provinces. In other words, Provincial Adjudicators should have full powers to take ownership of their own determinations without having to provide them to the National or Chief Adjudicator for approval. All Provincial Adjudicators should be directly accountable to the National or Chief Adjudicator for the administrative and quasi-judicial performance of their offices, and must regularly update the National or Chief Adjudicator of all their internal operations.

National or Chief Adjudicator should be legislatively empowered to determine the appropriate policy for the investigation and determination of complaints and issue policy directives which must be adhered to by all Provincial Adjudicators. He or she should be empowered to intervene in the investigative process when such policy directives are not complied with in order to ensure compliance thereto. He or she should also be

70 Jeram "Who to direct your pension complaint to: pension" 2007 *Personal Finance Newsletter* 7.
71 Jeram 2007 *Personal Finance Newsletter* 7.
72 S 30C(1) of the PFA.

empowered to review a Provincial Adjudicator's decision to investigate or not to investigate a complaint, after consulting with the relevant Provincial Adjudicator. However, he or she should not have the power to either review or decide an appeal based on the Provincial Adjudicator's determination. Previously, any unhappy party had the right to approach the High Court to appeal the Adjudicator's determination.[73] However, section 218(d) and (e) of the Financial Sector Regulation Act considers the Adjudicator as a decision maker for the purposes of that Act thereby effectively granting the Financial Services Tribunal which was in terms of section 219(1) of this Act jurisdiction to hear appeals from the Adjudicator's office. The Adjudicator has recently issued a statement acknowledging recent amendments and confirming "… anyone who is aggrieved with the outcome of the determination, is entitled to lodge an application for the reconsideration of the determination within 30 days of the date of the determination to the Financial Services Tribunal".[74] It is not clear whether this was the intention of the Legislature when considering the fact that there is no explicit provision in the Financial Sector Regulation Act which has amended section 30P(1) of the Pension Funds Act. It is thus not clear whether those aggrieved by the Adjudicator's determination can by-pass the Financial Services Tribunal and directly to approach the High Court. There is an urgent need for clarity on this aspect. Nonetheless, this development does provide a further convenient, inexpensive and hopefully effective forum, which will deal with pension, related appeals.

In the context of either the argument of this paper, all the determinations issued by Provincial Adjudicators or the National or Chief Adjudicator could also be appealed to the Financial Services Tribunal. This would assist in avoiding unnecessary delays, which may be occasioned by many reviews or appeal applications if provision was made that such be lodged with the National office from various provinces. Furthermore, the same criterion, which is used to appoint the current Adjudicator, should be used to appoint the National or Chief Adjudicator and provincial Adjudicators.[75] In other words, only suitably qualified persons who have practised as either attorneys or advocates for a period of not less than 10 years, who possesses the necessary expertise in pension law should be appointed to these offices. This is to ensure that the determinations, which are issued both nationally and provincially,

73 See s 30P(1) of the PFA, which provides that "[a]ny party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the Supreme Court which has jurisdiction, for relief, and shall at the same time give a written notice of his or her intention so to apply to the other parties to the complaint".

74 Statement by the Office of the Pension Funds Adjudicator "Financial Services Tribunal in operation as appeals tribunal for the office of the Pension Funds Adjudicator ("OPFA")" 3 September 2018 https://www.pfa.org.za/Documents/2018%20Covering%20letter%20-%20Administrators%20and%20Funds.pdf (accessed 2018-11-11).

75 S 30C(2) of the PFA.

are of an acceptable quality. An ongoing training of these officials should follow this in order to ensure that they develop the necessary expertise, which will enable them to investigate and determine complaints in accordance with the principles of justice. In order to ensure that these officials are able to carry out their mandate effectively, they should be assisted by assistant adjudicators, as it is the case with the current Adjudicator. This will benefit not only members of retirement funds, which are currently excluded from the jurisdiction of the Adjudicator's office, but also members of retirement funds, which are regulated by the PFA given the fact that these offices would be closer to where they reside. Retirement fund members generally, would be able to lodge complaints in offices, which are nearer to them, and some may even walk into such offices to lodge their complaints. Perhaps, the seat of the national office would also act as a provincial office to ensure that the National or Chief Adjudicator is not reduced to a figurehead but also receives complaints, which he or she will investigate and determine. In other words, he or she should receive direct complaints from the province, which his or her office is situated, and further have the administrative oversight of all the offices situated in all other provinces.

Even though I advocate for the Adjudicator's office to have jurisdiction over the entire retirement industry, such an initiative will not be free from challenges. The first major challenge is that there will be an enormous strain on the current resources of the Adjudicator's office probably making it difficult for that office to adequately and efficiently respond to all the complaints expeditiously. Since its inception, the Adjudicator's office was only able to clear the backlog in 2013 under the leadership of Adv Muvhango Lukhaimane.[76] By making the Adjudicator's office accessible to all the retirement fund members, that may reverse the gains made under the leadership of Adv Lukhaimane and allow for an unwanted backlog of cases. However, that cannot be a reasonable and justifiable reason to prevent other retirement fund members from having access to an effective dispute resolution institution which other retirement fund members have access to. The issue of a backlog needs government intervention in order to capacitate the Adjudicator's office to be able to respond to the needs of all retirement funds members. It is important that government develop an appropriate funding model for the Adjudicator's office over and above the current levy-funding model. In the interim, because the Adjudicator's office is currently funded by an annual levy calculated per retirement fund member,[77] such levies could

76 Pension Funds Adjudicator Annual Report 2013/2014 6 https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202013%20-%202014.pdf (accessed 2018-11-04). In this report, it is stated that "[i]t is in this period that the historical backlog was not only cleared, but new matters were dealt with in a time period more in line with what the mandate requires when referring to 'expeditious'. At the same time, the quality of our correspondence, interaction with stakeholders and determinations were greatly improved".

77 https://www.fsb.co.za/Departments/retirementFund/Documents/Levies%20for%202015.pdf (accessed 2018-11-04).

also be collected from members of retirement funds to which the state contributes financially in order to increase the financial capacity of the Adjudicator's office. In my view, this is the most practical and cost effective option which will not necessitate endless debates as to the model of the new Pensions Complaints Tribunal recommended by Murphy. The current model of the Adjudicator's office while it can be improved, it is nevertheless, adequate to cater for the entire retirement industry. The second challenge may be for the Adjudicator and her entire staff to become conversant not only with the PFA but also all the other legislation regulating different retirement funds which are not regulated with the PFA which would come into play when addressing various complaints. Perhaps, the call for the repeal all these legislation and the enacted of a single pension related legislation which will regulate the entire retirement industry is justified in order to ensure effective and consistent disposal of all complaints which will be lodged with the Adjudicator's office.

The Adjudicator's office as it is currently constituted should be capacitated financially and institutionally to play a pivotal role not only in the resolution of disputes within the entire retirement industry but to generally develop pension jurisprudence in South Africa. Since the establishment of the Adjudicator's office, the binding nature of the Adjudicator's determinations has not been entirely clear. The controversy arose from the fact that the Adjudicator is not a judicial authority in the literal sense of the word and is not recognised as such by the 1996 Constitution. "The judicial authority of the Republic is vested in the courts".[78] The recognised courts in South Africa are the Constitutional Court, Supreme Court of Appeal, various divisions of the High Courts or any High Court of Appeal which may be established by statute, Magistrates' courts or any courts established by statute which has a similar status as either the High Court or Magistrate court.[79] From sections 165 and 166 of the 1996 Constitution, it is thus clear that tribunals and offices of ombudsmen are simply not recognised as courts in South Africa. In simple terms, the Adjudicator's office is not a court of law. The Adjudicator's office performs administrative and investigative functions. Nonetheless, because after investigating a complaint, the Adjudicator should issue an order with reasons that in itself indicates that this office is also a quasi-judicial organ with the power to determine disputes and performs judicial acts after consideration of facts and circumstances.[80] It has been held that:

> It is apparent from the provisions of sections 30D, 30E, 30F, 30L, 30M and 30O of the Act that the intention of the legislature was to constitute a complaints forum which would, for all practical purposes, be equivalent to a court of law but which was not bound by the formalities of procedure which might ordinarily have the effect of delaying adjudication and causing the parties to incur substantial expenses for legal representation. The absence of

78 S 165(1) of the 1996 Constitution.
79 See s 166 of the 1996 Constitution.
80 See *Henderson v Eskom and Another* 1999 BPLR 353 (PFA).

> formal procedural requirements does not, however, detract from the nature of the function, which the Adjudicator must perform which is, plainly, a judicial function. He is required to give reasons for his determination, which, in itself, precludes him from making a determination capriciously or basing it on matters, which are not of record before him.[81]

The PFA uses deeming provisions in order to ensure that the determinations issued by the Adjudicator are binding on those who are affected by them. Section 30O(1) of the PFA provides that "[a]ny determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be".[82] This simply means that while the Adjudicator's office is not a court of law, nonetheless, the determinations issued from that office should be given effect to. Hence, the most plausible way of giving effect to these determinations is by treating them as if they are civil judgments granted by a court of law, but not necessarily equating them to judgments of civil courts. This is a merely simulated situation, which has been specifically created by the PFA in order to grant the Adjudicator's determinations teeth, but most importantly to allow those in whose favour they have been granted, to be able to enforce them. This was confirmed in *Joint Municipal Pension Fund and Another v Marthinus and Another* where it was held that "[t]he determination by the [Adjudicator] is not a judgment by this Court. It is deemed to be for a specific purpose of giving effect thereto. That is the interpretation of the clear wording of the Act, apparent from sections 30M, 30O and 30P".[83]

By deeming the Adjudicator's determination as a judgment of a civil court, the PFA is neither elevating nor granting the Adjudicator's office the status of the High Court. The deeming provision simply entails that the procedure for execution of the Adjudicator's determination is the same as the procedure for execution of an order of a civil court in South Africa. In fact, this means that the Adjudicator is incapable of enforcing his or her determination, but must rely on the civil courts for that purpose. As such, section 30O of the PFA simply lays a basis for a procedure, which will enable the enforcement of the Adjudicator's determinations. In order to enforce the Adjudicator's determinations, section 30O (2) provides that "[a] writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged".[84]

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81 *Otis (South Africa) Pension Fund & Another v Hinton & Another* 2005 1 BPLR 17 (PFA) 18.

82 *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others supra,* para 18.

83 2007 1 BPLR 94 (W) 97.

84 S 30P of the PFA provides that "[a]ny party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has

Once the Adjudicator has issued his or her determination and has provided time frames within which his or her order should be complied with, and those affected by the order fail to adhere to such an order, the other party is at liberty to approach either the Magistrates' Court or High Court to enforce such an order by issuing a writ of execution. On the writ of execution, the Magistrate or the Judge would order the sheriff of the court to enforce the Adjudicator's determination, which might result in the attachment of property of the affected party. The Adjudicator does not have the powers to ensure the enforcement of his or her determinations by instructing the sheriff to assist, as such; civil courts play an essential role in making sure that the Adjudicator's orders are enforced.

6 Conclusion

The PFA creates an environment within which retirement fund members regulated by this Act are able to complain about the administration of their retirement funds to the Adjudicator's office.[85] It has been shown in this paper that, while members of pension funds regulated by the PFA have this office at their disposal, nonetheless, members of other retirement funds not regulated by the PFA do not have access to the same services. As such, retirement fund members who are legislatively prevented from lodging complaints with the Adjudicator's office are forced to seek assistance from institutions, which do not have the same expertise as the Adjudicator's office, such as the office of the Public Protector. Section 182(1) of the Constitution of the Republic of South Africa, 1996 empowers the Public Protector 'to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action'. The Public Protector can only investigate retirement funds to which the state contributes financially and not private retirement funds. As such, due to her public mandate, the Public Protector is not empowered to investigate complaints arising from members of private retirement funds, which are regulated by the PFA. As such, it can be argued that members of retirement funds regulated by the PFA are also unfairly discriminated by being denied access to the office of Public Protector.

It is submitted that while this on the face of it amounts to discrimination, it is nonetheless, not an unfair discrimination because members of retirement funds which are regulated by the PFA already have a more than competent tribunal with the necessary capacity and expertise to attend to their complaints, which is able to provide them

jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint."

85 *City of Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 2 SA 365 (SCA) para 25.

with individual determinations rather than a report which reflects a pattern of complaints. This is the privilege, which members of retirement funds, which are not regulated by the PFA, do not enjoy. Unlike the Adjudicator's office, which is able to issue more than three thousand determinations a year,[86] the office of the Public Protector has only issued two reports relating to retirements funds since its inception.[87] It is doubtful that members of retirement funds, which are regulated by the PFA, can complain about being excluded from the jurisdiction of the office of the Public Protector given their access to the office of the Pension Funds Adjudicator. Should such a complaint arise, it would be based out of either lack of knowledge of how the office of the Pension Funds Adjudicator operates or dissatisfaction with the outcome of the determination of that office or not lack of access to the office. This paper merely advocates for general access to the services of the tribunal with the necessary expertise in pension law matters, which members of retirement funds with are regulated by the PFA already enjoy. Finally, it was shown in the paper that such benefit is denied to members of retirement funds, which are not regulated by the PFA, and thus argued that failure to ensure access to the Adjudicator's important services amounts to unfair discrimination. I argued that this unfair discrimination should be addressed by first extending the jurisdiction of the office of the PFA to all retirement fund members irrespective of which legislation regulates their retirement funds and secondly making this office accessible to all these retirement fund members by at least one office of this tribunal in each province.

86 Pension Funds Adjudicator "2015/2016 Annual Report" 2 https://www.pfa.org.za/Publications/Annual%20Reports/Annual%20Report%202015%20-%202016.PDF (accessed 2018-11-04).

87 Public Protector "An investigation into allegation of improper conduct by the Department of Public Services Administration and the Government Employees Pension Fund during the privatisation of the Venda Pension Fund" (Report No 18 of 2011/2012).

Traditional "juju oath" and human trafficking in Nigeria: A human rights perspective

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SUMMARY

Human trafficking in Africa is currently on the increase due to its benefits to the perpetrators. Despite the African Union's (AU) functional commitment and other African seminal initiatives, to combat trafficking, the menace has remained un-stemmed. Noticeably, to date, women and children are the most vulnerable groups in human trafficking across the world. Africa remains the hub of human trafficking considering the predominance of poverty and conflict within the continent. The prevalence of women and children being trafficked, mainly for prostitution, has compounded the HIV/AIDS infection rate in Africa. In Nigeria, cross-border women and children trafficking for prostitution has been on the increase, as traffickers adopt various means of obtaining slaves. One of the means of recruiting women and children is to subject them to a traditional oath of silence ceremony. This control mechanism is to silence victims and trap them in debt bondage and it has been extremely effective in its implementation. Victims are subjected to the oath prior to their departure from Nigeria to ensure debt commitment and non-disclosure of the identity of the traffickers. However, in the event of non-compliance and violation of the oath by the victims and family members, illness and ultimate death may suddenly occur. The efficacy of the oath as a control mechanism is tantamount to torture as defined by international law. In light of the forgone, this study explores the use of the Oath of Silence in human trafficking and the vulnerabilities, which cause women and children to become victims of human trafficking. Hitherto, the study gives a snapshot of the gross human rights violations that occur therein. Finally, the study proposes new ways forward in safeguarding the rights of individuals.

1 Introduction

Human trafficking refers to the process through which human beings are placed or maintained by force in an exploitative state for economic gain within a country and across borders.[1] Women and children are trafficked for various purposes, such as forced labour in factories, farms or private

1 Msuya "Tradition and Culture in Africa: Practices that Facilitate Trafficking of Women and Children" 2017 *Dignity: A Journal on Sexual Exploitation and* Violence 1.

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households, forced marriages and sexual exploitation.[2] Some of the identified underlying causes of trafficking include inequalities within and between countries, a growing demand for cheap and disempowered labour and increasingly restrictive immigration policies.[3] Violence, discrimination and poverty are considered to be amongst the factors, which also increase individual vulnerability to trafficking.[4] Recently, there has been a widespread acceptance of the need for a human rights-based approach to human trafficking, as human rights form a central core for this new understanding.[5] The Global Report on Trafficking indicates that 79 percent of women and girls are the predominant victims of sexual exploitation form of human trafficking.[6] The rate of Nigerian women and children who have been trafficked to European countries for prostitution has increased in the past three years.[7] Nigeria is considered the leading country in cross-border human trafficking in Africa.[8] A well-organised gang has created a highly successful trafficking operation.[9] One of the procedures they use to recruit victims of human trafficking is to subject them to a traditional oath ceremony, which is an extremely effective control mechanism to silence victims and trap them in debt bondage.[10] Victims are subjected to this ritual prior to leaving Nigeria to ensure that they will pay their debt and keep silent about the identity of the traffickers.[11]

Women and children who are trafficked under the influence of this traditional oath ceremony are uniquely vulnerable to sexual violence and forced servitude, in addition to being subjected to other conditions which render the individual predisposed to being victimised.[12] The evidence of the use of traditional oaths has come to light since early 2000s, as it largely fell outside the recognised push and pull factors that characterise

2 United Nations Human Rights *Human Rights and Human Trafficking Fact Sheet No 36* (2014) 1.

3 ACCORD "Nigeria: COI Compilation on Human Trafficking, Austrian Centre for Country of Origin & Asylum Research and Documentation" 2017 ACCORD 2.

4 International Organisation for Migration (IOM) "Analysis: Flow Monitoring Surveys the Human Trafficking and Other Exploitative Practices Prevalence Indication Survey: May 2016 - August 2016" 2016 *IMO* 2.

5 Loring, Engstrom, Tricia and Mariel "Globalization and Human Trafficking" 2017 *The Journal of Sociology & Social Welfare* 4.

6 Ezeh *Human Trafficking and Prostitution Among Women and Girls of Edo State, Nigeria Possibility of Rehabilitation through Education and Prevention* (2017) 8.

7 Damon, Swails and Laine "The Sex Trafficking Trail from Nigeria to Europe," *CNN* (2018-03-21) 2; United States Department of State *2018 Trafficking in Persons Report – Nigeria* 2018 3.

8 United States Department of State *2018 Trafficking in Persons Report – Nigeria* 2018 3.

9 Ellis *This Present Darkness: A History of Nigerian Organised Crime* (2016) 17.

10 Europol "Joint Action to Tackle West African Human Trafficking Networks" *Europo* (2014-06-12).

11 Baarda "Human Trafficking for Sexual Exploitation from Nigeria into Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network" 2016 *European Journal of Criminology* 259.

12 Daman *CNN* (2018-03-21) 3.

human trafficking for exploitation and enslavement.[13] Subsequently, international instruments and national legislation around the globe, which criminalise trafficking and related crimes, present a gap in addressing the use of traditional and religious beliefs to assert control for trafficking and assist the victims. The surviving victims of trafficking have been silenced for too long by this oath, and they have been denied justice due to their failure to speak.[14] Nevertheless, the traditional oath ceremony is not yet formally recognised as a systematic mechanism, which creates vulnerability and entrapment for human trafficking victims. Numerous human rights abuses occur at different stages of the trafficking sequence, including denial of incontrovertible rights, such as the right to life, security and liberty, and the right not to be subjected to torture and/or cruel, inhuman or degrading treatment or punishment.[15]

This paper seeks to provide a brief but comprehensive overview of the use of traditional "juju oath" in the human trafficking of women and children and its impact on women and girls. It aim to both identify and address ways in which human rights violations arise through the use of traditional oath in the trafficking cycle in Nigeria. It seeks to answer the following questions: What underlies the use of traditional oath of silence (OoS) ceremony in human trafficking in Nigeria? How has the trend affected women and children? What are the vulnerabilities that cause women and children to become victims of human trafficking? In addition, what breach of human rights occurs during this process? The paper, which is an exploratory case study, takes the hypothetical perspective that violations of human rights are both a cause and a consequence of trafficking in persons, making the promotion and protection of human rights particularly relevant to the fight against this.

2 Conceptualising human trafficking

What constitutes human trafficking has been agreed recently internationally in the 1990s, when states initiated the task of separating out trafficking from other practices like facilitated irregular migration, with which this practice was commonly associated.[16] In 2000, the United Nations came up with the first agreed definition of trafficking and incorporated it into the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Trafficking Protocol).[17] The protocol serves as a legal framework for the domestic legislation of its member states across the globe.[18] The protocol

13 Daman CNN (2018-03-21) 3.
14 Siddarth "Juju's Control is Powerful" BBC *News* (2014-10-14)1.
15 Ikeora "The Role of African Traditional Religion and 'Juju' in Human Trafficking: Implications for Anti-trafficking" 2016 JIWS 8.
16 United Nations (2014) 2.
17 Nigeria signed this Convention on 2000-12-13 and ratified it on 2001-06-28.
18 United Nations (2014) 3.

is one amongst three supplemental protocols to the main international instrument in the fight against transnational organised crime called The United Nations Convention against Transnational Organised Crime of 2000. The major aim of the Protocol is to ensure that trafficked persons are treated as victims instead of criminals and are entitled to specific human rights protections, such as temporary shelter, temporary resident status, medical care, psychological services, access to justice and compensation or restitution. Article 3 of the protocol defines trafficking in persons as follows:

> [T]rafficking in persons shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used …[19]

The definition therefore establishes three main components, which must be present in a situation of the existence of human trafficking, which are: (i) action or recruitment; (ii) means threat; and (iii) purpose or exploitation. In other words, the protocol defines human trafficking by stipulating how it is performed (the means), what is done (the act), and why it is done (the purpose). The definition comprehends all forms of exploitation, and not sexual exploitation alone. Other previous definitions of human trafficking referred to only women and children, but this definition recognises that all individuals may qualify as targets of trafficking. Therefore, the Trafficking Protocol is a momentous landmark on the road towards an internationally recognised, standardised definition of human trafficking.

The global legal definition set out above suggests that the level and assortment of possibly exploitative practices related to trafficking is very broad. It has set out a list of example situations in an open-ended manner for any new or additional exploitative purposes, which may be identified in the future. In addition, the definition covers both trafficking which takes place within a country and across its borders. Therefore, human trafficking does not require the crossing of an international border to take place, and it is legally possible for trafficking to take place with a domestic jurisdiction of any state, including that of its victims. The main features set out clearly the difference between trafficking and migrant smuggling. Migrant smuggling does not involve eventual exploitation, as

19 Art 3 of the Trafficking Protocol.

is the case with trafficking.[20] The illegal, facilitated movement across international borders for profit in smuggling may involve deception and/or abusive treatment for obtaining profit from such movement.[21]

Trafficking does not always require the movement of victims, as the definition of trafficking pinpoints movement as one feasible way in which the "action" element can be satisfied. Terms used in the definition, such as "receipt" and "harboring", mean that trafficking does not just refer to the process whereby someone is moved into situations of exploitation, it also include the maintenance of that person in a situation of exploitation.[22] The "means" element of the definition of human trafficking makes it impossible for a person to "consent" to trafficking. The consent is immaterial and cannot be used as a defense once it is established that coercion, deception, force, or other forbidden means have been used. International human rights laws have always recognised that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which this personal freedom is taken away.[23]

The Protocol elaborates further on human trafficking which involves children, in article 3(c) which states that, in trafficking cases where children are involved, "the recruitment, transfer, transportation, harboring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons, even if this does not involve any improper means such as coercion, deception, etc."[24] Therefore, the Protocol acknowledges that a person under the age of 18 cannot be considered to give lawful consent in any circumstance. Under this definition, the "means" component is not required. Therefore, in the situation of trafficking of children, it is necessary to establish that there is an "action" like recruitment, buying and selling, and that this action is for the specific purpose of exploitation. Child trafficking is considered extant if a person under the age of 18 is subjected to some act, like recruitment or transport, for the purpose of exploitation of that person. These definitions have been incorporated into many other legal instruments and domestic laws.[25]

The Protocol under article 5 confers duties to state parties to criminalise any conduct as set out in article 3 in domestic legislation. The new international standards describe trafficking in terms of how the

20 Baarda "Human Trafficking for Sexual Exploitation from Nigeria into Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network" 2016 *European Journal of Criminology,* 258.
21 Ezeh (2017) 10.
22 United States Department of State, Office to Monitor and Combat Trafficking in Persons *2014 Trafficking in Persons Report – Nigeria*.(2014) 9.
23 United Nations Office on Drugs and Crime. *Division for Treaty Affairs Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (2004) 70.
24 Art 3(c) of the Trafficking Protocol.
25 United Nations Office on Drugs and Crime (2004) 27.

victims are exploited, and in terms of the victims being in transit.[26] This protocol is also very helpful for the protection of victims. The implementation of the trafficking protocol is monitored within the context of regular conferences held for state parties to it. The primary purpose of these conferences is the exchange of information and experience and the improvement of international cooperation between state parties with the protocol as a controlling body, which could force a ratifying state to act in a certain manner. There are three major categories of trafficking in persons identified in Africa. These are trafficking in children, mostly for domestic work and farm labour within and across countries; trafficking of women and girls for sexual exploitation, primarily outside the African region; and trafficking in women from outside the African region for the sex industry.[27] Factors such as poverty, internal and external conflict, unemployment, lack of access to education, poor law enforcement, porous borders, cultural misconceptions or abuse, HIV/AIDS, and regional conflict are identified as enabling and contributing factors to human trafficking in Africa.[28]

3 Human trafficking and human rights

Human trafficking is a crime, as well as a gross violation of human rights.[29] The links between human rights and the fight against trafficking are manifold. This is because, from the beginning, human rights laws have clearly proclaimed the essential immorality and unlawfulness of one person taking hold of labour, the legal personality or the humanity of another.[30] Human rights laws demand equality and prohibit discrimination based on race and sex; and they decry and outlaw forced labour, arbitrary detention, forced marriage, debt bondage and the sexual exploitation of children and women.[31] They also champion the right to leave and return to one's own country and freedom of movement.[32]

In reality, human trafficking and associated practices child labour, sexual exploitation, forced labour, forced marriage and debt bondage are themselves violations of basic human rights and are prohibited under international human rights law. Victims of trafficking are entitled to the

26 Harrop "Ties that bind: African witchcraft and contemporary slavery" *Liberty and Humanity* (2012-09-17) 2.
27 Adepoju "Review of research and data on human trafficking in Sub-Saharan Africa" In Laczko and Gozdziak (Eds.), *Data and Research on Human Trafficking: A Global Survey* (2005) 79.
28 Ruby & Benjamin "Anti-Trafficking Legislation in Sub-Saharan Africa: Analysing the Role of Coercion and Parental Responsibility" 2012 in *Fourth Annual Interdisciplinary Conference on Human Trafficking* 17.
29 United Nations Department of State 2017 *Trafficking in Persons Report (*2017) 3.
30 United Nations (2014) 4.
31 United Nations (2014) 4.
32 Thipanyane "Human Trafficking: African Perspective" *JURIST* (2015-03-23).

full range of human rights because human rights are universal.[33] Women and children are amongst the groups, which are specifically recognised under international human rights laws as requiring additional or special protection.[34] International human rights consider different human rights to be relevant at different points in the trafficking cycle. Some are particularly relevant to the sources of trafficking.[35] This occurs when a violation of human rights leads to an increase in the vulnerability of a person, for example a violation of the right to an adequate standard of living.[36] Other human rights are applicable to the actual process of trafficking. Finally, certain human rights concern the response to trafficking, such as the right of access to justice, the right to effective remedies, and the right to a fair trial.[37]

The relationship between human trafficking and human rights is very clear, and it does not essentially follow that human rights will be at the centre of responses to trafficking; rather it places the victims at the centre of actual and credible action. The human rights-based approach extends the emphasis to the root causes, which underlie trafficking, maintaining exemption for traffickers, as well as denying justice to its victims.[38] For example, patterns of discrimination, a demand for goods and services resulting from exploitation, the unfair distribution of power, and the complicity of the public sector.[39] Likewise, human rights laws acknowledge that states are responsible for protecting the rights of all persons within their territory, even non-citizens, and have a legal responsibility to eliminate trafficking and related exploitation.[40] Victims of human trafficking are treated as a commodity, their basic rights are disregarded and they cannot make their own decisions, enjoy freedom of movement, or choose to work where they wish. When addressing human trafficking, a human rights approach is required to restore both the dignity and wellbeing of victims.[41]

In the human rights-based approach, the rights of a person should be central to any anti-trafficking strategy. This approach seeks to identify and redress the discriminatory acts and unequal distribution of power, which underlie human trafficking. The fundamental principles in a human rights-based approach to such trafficking include self-representation, empowerment and the participation of those affected by trafficking.[42] It requires the surviving victims of trafficking to be free,

33 Msuya (2017) 3.
34 Msuya (2017) 4.
35 Sawadogo "The Challenges of Transnational Human Trafficking in West Africa" 2012 *African Studies Quarterly* 97.
36 Obokata "Trafficking of Human Beings as a Human Rights Violation: Obligations and Accountability of States" In *Trafficking of Human Beings from a Human Rights Perspective towards a Holistic Approach* (2016) 18.
37 Obokata (2016) 18.
38 United Nations (2014) 7.
39 United Nations (2014) 7.
40 United Nations (2014) 8.
41 Obokata (2016) 19.
42 United Nations (2014) 8.

active and empowered to reflect their opinions in relevant policies and programs. This is referred to as the participation of rights holders and is recognised in a number of international instruments.[43]

4 Traditional oath ceremony and human trafficking in Nigeria

The International Organization for Migration (IOM) report indicates that in the last three years there has been a rapid increase in the number of girls documented at hotspots, landing sites or detention centres who are victims of human trafficking.[44] Albeit that trafficked women and children are from all West African countries, 80 per cent of them claim to have originated in Nigeria.[45] Most of the people who are trafficked from Nigeria to other parts of the world, such as Italy, Austria, Spain and Russia, are women. A significant number of them are minors who are trafficked for purposes of sexual exploitation.[46]

The traditional oath ceremony has been reported as being one of the powerful means, which is used to control human trafficking victims.[47] It reaches to the depths of their psychological vulnerability, combined with other push/pull factors mentioned above which render women and children vulnerable to being trafficked. Most victims of trafficking are recruited from rural areas, specifically Nigeria's southern regions, with a few of them being from urban areas.[48] Data exacted from 29 counties indicates that Nigerian traffickers exploit most of the victims from Nigeria.[49] It has been established that most of the victims of sex trafficking started to work for their traffickers in exchange for leaving sex trafficking themselves.[50] Victims of trafficking are subject to a popular traditional oath ceremony with a priest who is referred to as "juju priest" before departure for their work abroad.[51] Traditional oaths are part of a supernatural ritual, which plays an important role in African customary practices.[52] The role of the traditional oath is complex and needs to be understood in the context of African traditional beliefs instead of some sort of exotic practice. Some traffickers exploit this tradition and use it as a means of silencing their victims.[53]

43 United Nations (2014) 8.
44 IOM "Human Trafficking Through the Central Mediterranean Route: Data, Stories and Information" 2017 *IOM* 3; United States Department of State *2018 Trafficking in Persons Report – Nigeria* 2018 3.
45 IOM (2017) 4.
46 Ingwe and Ugwu "Transnational Crime, Human Rights Violation and Human Trafficking in Nigeria's oil rich Niger Delta" 2012 *RJSP* 67.
47 Ikeora, (2016) 4.
48 Nwauche "Law, Religion, and Human Rights in Nigeria" 2008 *AHRJ 569*.
49 IOM (2017) 14.
50 Nwauche 2008 *AHRJ* 570.
51 Nwauche 2008 *AHRJ* 570.
52 Ikeora, (2016) 5.
53 Ikeora, (2016) 6.

Traditional beliefs, values and morals are woven into daily life and customs through practices and rituals, which have been passed down from generation to generation-in Africa.[54] Despite the widespread practice of Christianity and Islam in Nigeria, the traditional customs, laws and practices remain a strong foundation within communities.[55] Many Nigerian citizens are either Muslim or Christian, but still live under the influence of traditional culture.[56] They believe that their traditional culture is something, which applies to everything in the universe as God in heaven delegates varying degrees of power to divinities who are referred to as gods or deities, giving them particular domains of influence.[57] It is also believed that there is the existence of two worlds: a visible one, which is earth; and an invisible one, which is heaven. Both worlds are regarded to be full of life, with humankind as inhabitants of the earth who are linked to God as the creator and part of the invisible world.[58] Humankind has a duty to turn parts of the universe into sacred objects, and to use other things for sacrifice and offerings as a system of connecting these worlds.[59] These objects are believed to contain mystical supremacies that connect the oath swearer with the divinities and represent the contract, which has been made.[60]

Faith in the visible and invisible worlds is very strong in Nigeria, as it has been spread over generations, so traffickers do not need to control the way the trafficked victims think of the oath.[61] Traffickers merely take advantage of an existing belief and abuse it. The traditional faith also comes with the belief in order and structure, which comprises moral order amongst the people, mystical order, the laws of nature and religious taboos.[62] It is believed that only people who have access to the power in the universe can maintain mystical order. The belief in this order is held by many societies in Africa that there is supremacy in the universe, which comes from God, and that power is available to spirits and to particular persons.[63] The faith in this mystical order is shown clearly in the practice of magic, witchcraft, traditional medicine and sorcery.[64] The persons who have access to the power are capable of seeing the deceased, see certain sights, hear certain voices, have visions, receive premonitions of coming events, communicate at a distance without using physical means, foretell certain things before they happen

54 Aiyedun and Ada "Integrating the Traditional with the Contemporary in Dispute Resolution in Africa. 2016 LDD *160.*
55 Welton *Belief and Ritual in the Edo Traditional Religion*, (MA Thesis, University of British Columbia (1964) 41.
56 Welton (1964) 41.
57 Welton (1964) 42.
58 Nwauche 2008 *AHRJ* 570.
59 Nwauche 2008 *AHRJ* 570.
60 Women's Link Worldwide *Trafficking of Nigerian Women and Girls: Slavery across Borders and Prejudices* (2015) 12.
61 Ikeora (2016) 4.
62 Mbiti *Introduction to African Religion* (2015) 18.
63 Ikeora (2016) 4.
64 Ikeora (2016) 5.

and perform miracles which cannot be done by other people.[65] People who have access to these powers are intermediaries in both worlds who connect the visible and invisible worlds.[66] These people include priestesses, priests, kings, medicine men, diviners, seers and oracles. Prayers, sacrifices or offerings are made to the invisible world through those powerful people as a form of respect to the deities and to the ancestors.[67]

The traditional oath ceremony is applicable in many circumstances in Nigeria, including weddings.[68] Oaths and rituals for infidelity are applicable in the traditional marriage ceremony of those who adhere to traditional religious practices.[69] The oath-taking for infidelity has been reported to occur even in some independent churches in the Yoruba tribe, since certain traditional religious practices are integrated into the church.[70] There is a popular saying and belief amid Yoruba people that being a Christian does not deter one from performing rituals "*igbagbo ko ni kama soro*". In churches, the woman will be required to kneel and put her hand on the Bible in order to receive the "aura of the oath".[71] It is also reported that in some churches, the ritual takes the form of a "blood oath", where one of the couple is cut and the other swears on the blood.[72] The traditional oath is also applicable in marital faithfulness at a shrine or divinity, before a traditional medicine person, or on the bank of a river or stream. In addition, traditional oaths are sworn for a range of reasons, including proving innocence after an accusation of infidelity, the prevention of infidelity and a promise to be faithful as a newlywed wife. These oaths are usually administered by the chief priest, a traditional priest or, among Christians, by a pastor or priest.[73]

The traditional oath is also used in the justice system, as historically an important function of oracles, priests, tribunal elders and spiritual leaders was to maintain justice. In the pre-colonial era, spiritual leaders were vital within the judicial system.[74] Resolutions and sentencing were based on morals and natural laws instead of written laws.[75] To date, despite the existence of international law, domestic law and globalisation, traditional justice and political systems are still in use.[76] These are used as a method of determining the veracity of evidence in a traditional dispute

65 Nwauche 2008 *AHRJ* 570.
66 Nwauche 2008 *AHRJ* 570.
67 Welton (1964) 57.
68 Welton (1964) 58.
69 Nwauche 2008 *AHRJ* 570.
70 Nwauche 2008 *AHRJ* 571.
71 Ekeke and Ekeopara "God, Divinities, and Spirits in African Traditional Religious Ontology," 2010 *American Journal of Social and Management Sciences* 209.
72 Ekeke 2010 *AJSMS* 209.
73 Ikeora (2016) 6.
74 Ellis *This Present Darkness: A History of Nigerian Organised Crime* (2016) 77.
75 Ellis (2016) 77.
76 Oraegbunam "The Principles and Practice of Justice in Traditional Igbo Jurisprudence" 2009 *OGIRIS: A New Journal of African Studies* 55.

settlement proceeding in Nigeria. The procedure is more applicable in customary law arbitration amongst the Igbo tribe and is commonly used in crime detection in respect to very serious crimes.[77] It is used as a last resort in adultery, land and defamation dispute settlements.[78] Traditionally, women and children were not allowed to participate in the more destructive forms of this oath.[79] The oaths in the justice system take many forms, but the common one is swearing on a dreaded "juju", where the oath is worded in such a way that the swearer raises on themselves a conditional curse and agrees to be punished if they lie.[80] Subsequently, parties to such disputes are supposed to wait for a period of one year for the verdict of the swearer, as it is believed that false swearers die or are afflicted with grave misfortune within a year of taking the oath.[81] If it happens that the swearer survives for a year after taking the oath without death or any severe illness, he or she will be considered innocent and the dispute will be settled in his or her favour.

Swearing the oath prior to leaving the country is viewed within the context of the traditional justice system as a pact with the gods and insurance that the crime of stealing will not occur.[82] If the swearer breaches the promise, it will not only offend the gods, but also break a natural law for which there will be consequences.[83] The affirmative of this oath activity is all about sealing a contract. However, traffickers exploit this tradition and tell those being trafficked that they must obey every order or a curse will harm them.[84] This prevents victims from seeking assistance or cooperating with law enforcement. During the ceremony, the swearers are required to give personal items to the shrine priests to create an object; these including underpants, saliva, menstrual blood, hair or fingernails.[85] It is clear that the oath is very frightening for women and girls, ensuring their silence and obedience. Women and girls in Nigeria have been rendered entirely incapable of resisting criminal acts and human rights violations through this traditional oath ceremony.[86] In fact, even when they have been identified as victims and removed from a trafficking situation by state authorities, they do not cooperate, and hence hinder the authorities attempting to provide sufficient protection to them. Most of the victims refuse to discuss their experiences and end up making oblique references only.[87] Some of the things, which are believed to happen when the swearer does not honour the oath, include, but not limited to, the following:

77 Oraegbunam 2009 *A New Journal of African Studies* 55.
78 Ekeke (2010) 2010.
79 Ekeke (2010) 209.
80 Nwauche 2008 *AHRJ* 571.
81 Nwauche 2008 *AHRJ* 571.
82 Daman CNN (2018-03-21) 2.
83 Daman CNN (2018-03-21) 2
84 Daman CNN (2018-03-21) 2
85 Okojie, Okojie and Vincent-Osaghae Trafficking *of Nigerian Girls to Italy: Report of Field Study in Edo State Nigeria* (Masters Dissertation, University of Benin, Country (2003) 17.
86 Okojie (2003) 17.
87 Ellis (2016) 77.

(i) Not being able to have a child, or dying in the process of giving birth by excess bleeding that would never stop;

(ii) That the swearer or her parents will die;

(iii) That the family of the swearer will be destroyed;

(iv) That the swearer will become insane.[88]

Mechanisms of human trafficking are countless, concealed and variable, with the common systematic feature of imposition and maintenance of order.[89] Trafficked persons are usually recruited by intermediaries, middlemen or agents who are known as madams, ma'am or masters in Nigeria.[90] Thereafter, they pass along the trafficking chain under tight control. It is distressing to note that the individual of first contact and middlemen are often family members and friends and not entirely strangers. The familiar relationship element makes it easy for a victim to accept what is happening to her, and makes it difficult for authorities to conduct investigations and bring about prosecutions.[91] Other victims' family members encourage them to obey their traffickers and endure exploitation to earn money. The relationship element also makes the imposition of traditional oaths easy, believable and readily accepted, especially when the agents of trafficking present themselves as successful within their communities. This places a premium value on wealth and emigration to a better place, regardless of the means used to achieve this.

In some accounts of the oath ceremony, the amount of debt is agreed on during or before the ceremony and is performed as a contract entered into between the trafficker and the one being trafficked for the purposes of secrecy, adherence, confidentiality and repayment of the cost of the victim's journey, which is determined by the traffickers themselves.[92] The victims often cooperate and take the oath voluntarily, although under deceptive promises. Most of them are usually not aware of the extent of the debt and the exploitative circumstances under which they will have to work.[93] Many victims are unaware of the value of exchange rates for money they are promising to pay back whilst taking the oath, as this is mostly communicated to them in Euros.[94] When the victims arrive in Europe they come to realise that the amount of money they have sworn to pay is too large and unaffordable.[95] When they are told, they will have to pay back a certain amount, they usually think in terms of the Naira, which is Nigeria's currency.[96] They thus end up working for their traffickers for a long period. Often the traffickers give the victims false

88 Ekeke (2010) 210.
89 Nwauche 2008 *AHRJ* 569.
90 Nwauche 2008 *AHRJ* 569.
91 Nwauche 2008 AHRJ 570.
92 Nwauche 2008 *AHRJ* 571.
93 Nwauche 2008 *AHRJ* 572.
94 Nwauche 2008 *AHRJ* 572.
95 Okojie (2003) 18.
96 Okojie (2003) 19.

promises of legitimate employment and traditions to gain psychological control over them.[97]

Victims are subjected to different types of the traditional oath ceremony. Some types of the traditional oath ceremony are specific to certain shrines.[98] There is no clear data on how many trafficked women and children from Nigeria have undergone the oath as the ceremony is meant to be secret and undisclosed.[99] It is assumed that there are more instances of the use of the traditional oath in trafficking than are currently being revealed.[100] It is noted that some of the victims may have made such oath covenants many times in their lives for other things that are not connected to human trafficking.[101] It is a common practice, which they grow up with. Human trafficking cases have brought many challenges to the law enforcers in Nigeria, where victims are controlled by traditional oaths and withhold information, claim not to remember, or return to their traffickers to fulfil their agreements.[102]

5 Traditional oath, and violation of human rights in trafficking

Many practices associated with human trafficking are undoubtedly outlawed under human rights laws. The use of traditional oath ceremony as a control mechanism in trafficking goes against numerous human rights instruments, apart from the Trafficking Protocol. The Universal Declaration of Human Rights of 1948 (UDHR) was the first international human rights instrument to acknowledge in its preamble that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world".[103] Article 1 of the UDHR declares that everyone is born free, with equal dignity and rights. The Declaration prohibits, amongst other things, all forms of slave trade, servitude and slavery or slave-like practices.[104] Article 13(1) guarantees the right to freedom of movement and residence in any state to all, while the right to freely choose employment and to obtain just and favourable conditions of work is declared under article 23(1) of the UDHR.[105] There are numerous other relevant human rights treaties, which inform responses to trafficking in persons at a global level, which include:

(i) Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW).

97 Okojie (2003) 19.
98 Okojie (2003) 19.
99 Welton (1964) 78.
100 Welton (1964) 78
101 Nwauche 2008 *AHRJ* 572.
102 Siddarth BBC *News* (2014-10-14).
103 First Paragraph of the Preamble of UDHR of 1945.
104 Art 4 of UDHR of 1945.
105 Art 23(1) of the UDHR.

(ii) Convention on the Rights of the Child, 1989 (CRC).

(iii) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000.

(iv) United Nations Convention against Transnational Organised Crime, 2000 (UNCAOC).

(v) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

(vi) International Covenant on Civil and Political Rights, 1966 (ICCPR).

(vii) International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

(viii) Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD).

(ix) International labour Organisation Convention No. 29, 1930 (ILOC).

(x) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1981 (UNCAT).

(xi) Protocol to prevent, suppress and punish trafficking in Persons, especially in Women and Children, 2000 (UN TIP Protocol).

The two major international human rights instruments, CEDAW,[106] and CRC contain substantive reference to trafficking,[107] while others prohibit practices associated with trafficking, including slavery, child sexual exploitation, servitude, enforced prostitution and the exploitation of prostitution resulting from traditional oath practices. Article 6 of CEDAW is specifically dedicated to trafficking in women. It provides that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[108] This article enjoins parties to CEDAW to take all legislative and other measures to deal with all forms of traffic in women and the exploitation of the prostitution of women. CEDAW establishes that which constitutes discrimination against women and sets up an agenda for state parties to act to end such discrimination. Countries, which have ratified CEDAW, are required to commit themselves to undertake a series of measures to domesticate the principle of equality of men and women and abolish all discrimination against women.

The CRC also dedicates itself to the abolition of trafficking in children, although this form of exploitation is already contained in the Declaration on the Rights of the Child.[109] The instrument banning the illicit transfer of children abroad, and their exploitation and trafficking establishes various measures to safeguard children from such practices. The instrument defines a "child" as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is

106 Nigeria signed CEDAW on 1984-04-23 and ratified it on 1985-06-13 respectively.
107 Nigeria signed this instrument on 1990-01-26 and ratified it on 1991-04-19.
108 Art 6 of CEDAW
109 The Declaration was adopted by the UN General Assembly on 1959-11-20.

attained earlier".[110] Although the declaration does not establish a relationship between trafficking and forced prostitution, it does acknowledge that children may be subjected to various forms of exploitation. The declaration confers duties to state parties to prevent child exploitation, to protect and recover children in case where they are or have been exploited or abused, and to combat their illicit transfer.[111]

Various human rights are contravened at different points in the trafficking cycle. Some instances of trafficking breach the right to an adequate standard of living. Many human rights, such as the right to be free from slavery, exploitation and torture are breached in the actual process of trafficking. Other rights, such as the right of suspects to a fair trial are a response to trafficking. Human trafficking is regarded as a modern form of slavery, which frequently involves physical, psychological and sexual abuse. The psychological abuse aspect is linked to the use of traditional oath ceremony. It is connected to the superstitious beliefs of victims, which are imbued in their psychology as part of their culture. The traditional oath is used as a coercive technique and a push factor in trafficking. Most of the survivors establish that they were lured by the false dream of a new life abroad.[112] Traffickers have been using duplicitous approaches to influence victims into believing that the potential rewards are greater than the risks along the trip.[113] Traffickers usually do not discuss the risks at all, and if they do, these are discussed in a minimal manner.[114] Many victims are promised to be taken to school or given jobs, such as hairdressers, nannies, designers, restaurant workers or housekeepers, which is an enticing offer to vulnerable women and girls, many of whom are just school dropouts and struggle to survive by hawking petty items on the streets.[115] The bondage is used as a means of controlling and exploiting victims. Debt bondage is forbidden in human rights law, though the pledging of personal services as security for a debt, where the value of such services is not applied towards the liquidation of a debt, or its period or nature, is not delimited and defined. Recruitment through duplicity or false promises violate an individual's right to liberty and security, which are guaranteed under article 9 of the ICCPR.[116] This also, in many cases, involves women been deprived of their liberty to be treated with humanity and the right not to be subjected to cruel, inhuman or

110 Art 1.
111 Art 35 of the Convention on the Rights of the Child of 1989, which states that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form".
112 Elbagir and Leposo "Smuggled by Nigeria's Pushermen" *CNN* (2018-02 27).
113 Daman *CNN* (2018-03-21) 2.
114 Daman *CNN* (2018-03-21) 2.
115 Africa Faith and Justice Network (AFJN) "The Challenges of Human Trafficking in Nigeria" *AFJN* (2017-07-28) 2.
116 Art 9 of the ICCPR.

degrading treatment, both of which are guaranteed by articles 10 and 7 of the ICCPR.[117]

The free will of most of the trafficked victims participating in the traditional oath ceremony is infringed in three different stages. The first is when they make the decision to migrate from Nigeria. Secondly, where they make the choice to participate in the oath ceremony, and finally, while they are determining to abide by the oath or break the promise. The concept of free will is well analysed in the UDHR, which was the first document to address the concept of free will. Article 1 of the declaration provides that, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". The right to self-determination is safeguarded by a number of international instruments, including the CEDAW,[118] ICESCR[119] and CERD.[120]

The right to freedom of movement of victims is also largely infringed upon by the seizure of their documentation upon arrival in the destination country, with the understanding that if they did not comply with what is demanded of them, they will be threatened and beaten. It is also sad to note that victims of this traditional oath for trafficking purposes not only experience pressure and abuse of power from traffickers, but also from their own families. Nigeria, like many other African countries, conforms to a patriarchal system where males usually exercise authority over females.[121] Men heavily influence family directives. Men are the ones who most often make decisions for women and girls. Parents have a tendency to make decisions and coerce their daughters too.[122] Some of the victims interviewed alleged to pressure by their family members to abide by their oaths to avoid misfortune.[123]

The efficacy of the oath as a control mechanism in trafficking is tantamount to torture, as defined by international law UNCAT. Article 1(1) of the UNCAT defines torture as follows:

> [a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or

117 Art 10 and 7 of the ICCPR.
118 Art 2 of the CEDAW 1979.
119 Art 1 of the ICESCR of 1966.
120 Art 5 of the CERD.
121 Aiyedun (2016) 156.
122 Aiyedun (2016) 157.
123 Baarda "Human Trafficking for Sexual Exploitation from Nigeria into Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network" (2016) *European Journal of Criminology* 258.

> other person acting in an official capacity, it does not include pain or suffering arising only from, inherent or incidental to lawful sanctions.[124]

The definition of torture contains three collective elements, which are: (1) The intentional infliction of severe mental or physical suffering; (2) by a public official, who is directly or indirectly involved; (3) for a specific purpose. Although element 2 is not pertinent to the study at hand, as torture in trafficking is most likely not inflicted by a public official, the remainder of the definition remains highly relevant. The application of a traditional oath ceremony in trafficking subject victims to extreme physical and psychological torment, and the things which subsequently happen to them, as listed below, are also considered torture:

(i) Aggressive and often violent oath-taking ceremony;

(ii) Threat of death to oath-takers and their families during the ceremony;

(iii) Entrapment through excessive debt bondage and manipulation to believe there will be a dream life thereafter;

(iv) The shock of the deception and realizing the dream is really a nightmare and the awareness of being sold into slavery;

(v) Witnessing horrific violence, such as murder, rape, beatings, and other forms of death;

(vi) Repeated rape, physical abuse, and starvation; Threats from traffickers, madams, and family members to prevent escape or reports to authorities;

(vii) Intense feelings of humiliation, shame and guilt;

(viii) Isolation in a foreign country, unable to speak the language, confiscated documents and no way to earn a legitimate income;

(ix) Physical restriction of movement;

(x) Degradation to the level of passivity; and

(xi) Begging on the streets for survival.[125]

The proscription of torture and other forms of ill-treatment has a special prominence in the international protection afforded by human rights. It is encompassed in numerous international and regional treaties, and forms part of customary international law binding all states. Other international human rights instruments, including the UDHR, prohibit torture. Article 5 of the UDHR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[126]

Another fundamental human right, which is largely infringed upon by the application of the traditional oath ceremony, is the right to freedom of speech and expression. It is one of the human rights, which is protected by several key international human rights instruments,

124 Art 1(1) of the UNCAT.
125 Baarda (2016) European Journal of Criminology 259.
126 Art 5 of the UDHR.

including the ICCPR,[127] CERD,[128] and the UDHR.[129] The Government of Nigeria has also incorporated the right to free speech into their Constitution, which states that "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference".[130] The fundamental reason for making trafficked victims undergo the traditional oath ceremony is to force them to remain silent in an effort to prevent authorities from tracing the identities of the traffickers and to ensure that traffickers' orders are obeyed.

The gods are summoned to frighten the victims from speaking, and therefore prevent them from acting in the future.[131] While traditionally the oath was used to detect crimes, its purpose has now been transformed into an instrument whereby to commit crimes. Some women survivors of trafficking are at times subject to serious human rights violations while in the hands of foreign governments as well.[132] This is because many governments have policies, which prioritise the enforcement of immigration laws and other domestic offences, such as prostitution or begging.[133] They end up detaining, prosecuting and deporting victims of trafficked persons for offenses relating to their status.[134] Survivor victims experience isolation from foreign governments' support systems and are kept under constant control.[135] Some of them are subjected to police victimisation, which leads to additional vulnerabilities and human rights violations, which may eventually result in re-trafficking.[136]

Human rights laws also prohibit forced labour under the International Labour Organisation Forced Labour Convention of 1930 No. 29. Forced labour is defined under article 1 as, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [herself] voluntarily".[137] Forced labour is also prohibited under article 11 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990, which explicitly prohibits both slavery and forced labour.[138] Trafficking is included amongst the worst forms of child

127 Art 19(2).
128 Art 5(d) viii.
129 Art 19.
130 Art 39 of Constitution of the Federal Republic of Nigeria of 1999.
131 AFJN (2017-07-28).
132 European Support Asylum Office (ESAO) "EASO COI Meeting Report: Nigeria," EASO Practical Cooperation Meeting, Rome, (2017-06- 12-13) 2.
133 Europol "Joint Action to Tackle West African Human Trafficking Networks." Europol (2014-06-12) 2.
134 Europol (2014-06-12) 2.
135 Europol (2014-06-12) 3.
136 Europol (2014-06-12) 3.
137 Art 1 of The International Labour Organisation Forced Labour Convention of 1930.
138 Art 11 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.

labour, defined by the Worst Forms of Child Labour Convention No. 182 of 1999, which specifically deals with the abolition of these forms of child labour.[139] It is an international instrument, which primarily deals with child labour exploitation, such as child trafficking and the sale of children for sexual or other forms of exploitation. Other international instruments, which protect individuals against forced labour, include the CRC,[140] CEDAW,[141] and UDHR.[142] Other rights of trafficked victims guaranteed in CEDAW which are typically violated include the rights to freedom of movement,[143] to free choice of profession,[144] to equal remuneration,[145] and to choose a spouse and to marry.[146] Victims of trafficking are deprived of their right to liberty of movement and freedom to choose their employer and the kinds of work they wish to perform.

Additionally, the African region has joined international human rights efforts to combat human trafficking by adopting the African Charter on Human and Peoples' Rights (ACHPR) since 1981.[147] Though the ACHPR does not specifically refer to human trafficking, it is more directly relevant to human trafficking as it prohibits slavery and all acts which impair the right to liberty and security of a person. Article 5 provides that, "all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".[148] The ICHPR includes what is apposite to labour trafficking, the right to work under, "equitable and satisfactory" working conditions and the principle of equal pay for equal work.[149] The ACHPR also includes numerous human rights, which are naturally violated when a person is trafficked, such as the rights to equality, life, non-discrimination, liberty, privacy, integrity and security of the person, dignity and freedom of movement.[150]

Additionally, the African Union (AU) has adopted two instruments which make specific provision for the protection of women and children against slavery, which are: the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC) and the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003 (Maputo Protocol). Given the essentials of tradition in the structure of women's entitlement to enjoy their human rights in Africa, the Maputo Protocol

139 Ratified by Nigeria on the 2002-10-02.
140 Art 34.
141 Art 11.
142 Art 4.
143 Art 15(4).
144 Art 11(1). These rights are relevant to human trafficking, because they are often violated in labour trafficking.
145 See footnote 20.
146 Article 16(1)(a) and (b). These rights are often not adhered to in trafficking for the purposes of forced or child marriages.
147 Nigeria ratified the ACHPR in 1983.
148 Art 5 of the ACHPR.
149 Art 15.
150 These rights are under Art 2-6 and 12 of the ACHPR.

incorporates article 5(a) of CEDAW in its article 4(b), which specifies parties to the protocol should embark to:

> … [m]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[151]

The Maputo Protocol requires state parties to prohibit and condemn all forms of harmful practice, such as the use of traditional oath ceremony in trafficking, which negatively affects the human rights of women and which is in conflict with recognised international standards. Further, article 17 of the Protocol requires states to ensure the right of women to live in a positive cultural context.[152] The Maputo Protocol also places African cultural values into a filter under paragraph 2 of its Preamble, which states that: "Women shall enjoy, on the basis of equality with men, the same rights and respect for their dignity and contribute to the preservation of those African cultural values that are positive and are based on the principles of equality, dignity, justice, and democracy".[153] These words in the Preamble not only give some meaning to positive African values, but also state clearly that in invoking these values, care needs to be taken not to permit the kinds of culture, which will disrespect the dignity of women.

Likewise, the ACRWC confers obligation on state parties to prevent, "(a) the abduction, the sale of, or traffic of children for any purpose or in any form, by any person including parents or legal guardians of the child; (b) the use of children in all forms of begging".[154] Albeit that the difference between the trafficking and sale of children is not elucidated in the ACRWC, it does reinforce international human rights laws, and the implied obligation that the protection of fundamental rights, especially those affecting children, is an integral part of domestic anti-trafficking responses. The ACRWC reaffirms general fundamental human rights and includes specific obligations on child labour, a phenomenon that is often prevalent in human trafficking. It gives state parties a broad obligation to protect children from all forms of economic exploitation, including work, which is hazardous, or work that interferes with, "the child's physical, mental, spiritual, moral, or social development".[155] Under article 15(2) of the ACRWC it is added that minimum wages, appropriate working conditions and relevant provisions from International labour Organisation Conventions relating to children must be adhered to.[156] The ACRWC explicitly provides what is overlooked by the CRC, that

151 Art 4(b) of The Maputo Protocol.
152 Art 17 of The Maputo Protocol.
153 Paragraph 2 of the Preamble of The African Charter on Human and People's Rights on the Rights of Women in Africa of 2003.
154 Art 29 of the ACRWC.
155 Art 15(1) of the ACRWC.
156 Art 15(2) of the ACRWC.

restrictions on the economic exploitation of children apply to both formal and informal sectors of the economy. This is substantial because children are normally trafficked for forced labour into the informal and unregulated sector, such as sexual exploitation, where they are easily exploited because they are not protected by labour rules.

The African Union further adopted the Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially women and children in 2006. Both instruments reconfirm international conventions on human trafficking and encourage African states to adopt administrative, legislative and institutional measures to combat trafficking of human beings within the region. The Ouagadougou Action Plan encourages the invention and implementation of both domestic and regional action plans by states in Africa toward achieving extensive and harmonised interventions. [157]

6 Measures taken by Nigeria to combat the use of traditional oath in human trafficking

6 1 Legislative and policy measures

Though Nigeria has taken several legal measures in ensuring that human trafficking is ended, the number of successful convictions for human trafficking offences is very low.[158] The application of traditional oath ceremonies in trafficking ensnares victims and makes it incredibly difficult to detain, prosecute, and ultimately stop traffickers.[159] Another problem is the silence, which surrounds the rituals. While the traditional oath ceremonies are widely believed in and practiced, they are rarely spoken about publicly. People think that even talking about "juju" might lead to something bad happening to them.[160]Although the traditional oath has legal recognition and is used in the justice system, there is a need to subject it to a test to remove superstitious and harsh elements as it has turned out to be a major hindrance in the enforcement of human trafficking offence laws. It should be noted that customary law is recognised in Nigeria as part of its legal system, although it does not have constitutional recognition and protection.[161] The Constitution of Nigeria is silent about what is to happen in the event of conflict between customary laws and constitutional provisions, which guarantee human rights. A national Constitution is the law of the highest authority; therefore, it should be unambiguous in ensuring that tradition and customs do not infringe upon the rights of individuals. For instance, the

157 Ruby and Benjamin (2012)17.
158 Sawadogo (2012) 98.
159 Sawadogo (2012) 98.
160 Sawadogo (2012) 99.
161 The 1886 Charter of the Royal Niger Company provides that in the administration of justice, the customs and laws of the people in its territory must be respected and upheld.

Constitutions of Uganda and Ghana contain provisions, which protect women from harmful customary practices. Section 26(2) of Ghana's Constitution of 1992 provides that: "All customary practices which dehumanize or are injurious to the physical and mental wellbeing of a person are prohibited".[162] More absorbing is the Ugandan Constitution of 1995 in section 33(6), which establishes that: "Laws, cultures or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution."[163] However, the Nigerian High Court has jurisdiction under the Evidence Act to observe and enforce the observance of every customary rule of the people in the country to test and remove superstitious and harsh elements. The Act states that: "Provided that in case of any custom relied upon in any judicial proceeding, it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience".[164] The High Court needs to invoke the above provision to nullify the use of traditional oath in human trafficking.

6 2 International measures

Nigeria has launched various initiatives at an international level. It has signed and ratified many international, regional which are directly or indirectly related to trafficking as discussed above. Nonetheless, for any international treaty to be applicable in Nigeria it must be incorporated into its domestic law by the process of specific adoption. The Nigeria Constitution under section 12(a) provides that no treaty between Nigeria and any other country shall have the force of law, except to the extent to which the National Assembly has enacted any such treaty into law.[165] Therefore, all international treaties signed and ratified by Nigeria are only persuasive. This is to the effect that victims of human trafficking cannot rely on the provisions of international human rights, as discussed above, to enforce their rights in Nigerian courts except to the extent that those rights are provided for under the Constitution or other relevant domestic Nigerian laws. Nigeria must domesticate international human rights treaties relating to human trafficking, as it has already ratified these treaties, which should now be rendered enforceable internally. The incorporation of international treaties into domestic legislation is of paramount importance, because if the national court is left in a position where they can only consider ratified instruments, the rights of many trafficking victims will continue to be denied.

6 3 Establishment of institutional framework

Apart from legislative measures taken by Nigeria to compact human trafficking, the country also established The Inter-Ministerial Committee on Human Trafficking in 2001. The committee aims to bring together

162 S 26(2) of Constitution of Ghana, 1992.
163 S 33(6) of Ugandan Constitution, 1995
164 S 18(3) Nigeria Law of Evidence, 2011.
165 S 12(a) of The Constitution of the Federal Republic of Nigeria, 1999.

representatives of Federal Government Agencies and Ministries to combat trafficking of persons and form Nigeria's response to the phenomenon.[166] The committee includes the Immigration service, the police, the Federal Ministry of Justice, the Ministry of Justice, the Federal Ministry of Women Affairs, the National Planning Commission, the Customs Service, and the Office of the Secretary to the Government of the Federation.[167] However, the absence of legislative guidance and a lack of effective coordination, the presence of rivalry amongst members, along with competing demands of the agencies, are factors, which have placed the committee under critique.[168]

To address human trafficking issues, Nigeria established a National Agency for the Prohibition of Traffic in Persons and Other Related Matters (NAPTIP) in 2003.[169] The agency has wider mandates, including monitoring, investigation and prosecution of human trafficking. The law also confers jurisdiction to the agency to deal with the counselling and rehabilitation of the victims of trafficking, and also to deal with public enlightenment on matters pertaining to human trafficking.[170] It has established a National Referral Mechanism for Protection and Assistance to Trafficked Persons in Nigeria in 2013, which offers guiding principles for immigration officials, law enforcers and other service providers to advance protection and support trafficking victims.[171]

The NAPTIP is involved in monitoring cross-border movements, the investigation of human trafficking cases and the prosecution of human trafficking cases in the courts of law. NAPTIP has successfully conducted 282 convictions and prosecuted 337 persons between December 2004 and December 2017.[172] A total of 5,496 cases of human trafficking and other related matters have been reported to NAPTIP since its inception.[173] The agency collaborates with other agencies at regional and international levels, which ensure the eradication and prevention of human trafficking in the country and in bordering countries. The few successful prosecutions and convictions of traffickers described above indicate that there is still ineffectiveness in the criminal justice systems

166 Morka "National Rapporteurs on Trafficking in Persons and Equivalent Mechanisms in Addressing Trafficking in Person (NREMs): Institutional Framework – Nigeria's Perspective' *NAPTIP* 2014 7.
167 The work of the Committee is coordinated by the Office of the Special Assistant to the President on Human Trafficking and Child Labour.
168 Morka 2014 *NAPTIP* 18.
169 The agency was established by The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003.
170 S 9(3) and (4)(a) of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003.
171 United States Department of State: Office to Monitor and Combat Trafficking in Person "Trafficking in Persons Report – Nigeria" (2014) 17.
172 NAPTIP *Data-Analysis-Final Report 2017* (2017)14.
173 NAPTIP (2017)15.

and related institutions in combating human trafficking.[174] Reports show that some law enforcers harass rather than help the victims, particularly those engaged in prostitution. Hence, law enforcers must be able to recognise trafficking when they see it otherwise; they may ignore a case or take unsuitable measures.

7 Concluding remarks

The trafficking of women and children in Nigeria is a serious human rights infringement, which can only be curbed by the proper enforcement of national and international trafficking laws and the eradication of cultural traditions that are harmful to women and children. This is necessary to protect those who are vulnerable and being harmed by traditional belief practices. The inadequate implementation of these laws constitutes a major challenge in Nigeria. Traditions and culture should not be obstacles to the realisation of human rights, but rather a means of paving the way for individuals to obtain their rights. In this context, the right to take part in cultural activities and practices and in traditional life includes the right not to participate in traditions and customs, which infringe on human dignity and human rights. Nigeria needs to strengthen its laws and policies protecting women and children from harmful traditional beliefs, such as traditional oath.

Given the unique social dynamics of traditional oath ceremony, the enactment of comprehensive, stand-alone legislation to regulate its applicability is recommended. Additionally, it is important that the recommended legislation provides for punishment and remedies in instances where traditional oath ceremony practices and crimes are planned and committed across borders. To counter these phenomena, the principle of extraterritoriality in respect to traditional oaths must be applied. This would allow for the extradition of perpetrators for their harmful beliefs and for them to stand trial, and would eliminate diplomatic protocols, which may hinder a victim's access to assistance. The principle of extraterritoriality is found in various European legislations pertaining to harmful African practices, such as Female Genital Matriculation (FGM) and forced marriages. The most promising example in this regard is Spain, which under its Constitutional Act 3/ 2005, provides that FGM committed abroad is a crime.

The focus on the available international human rights laws to eradicate the use of a traditional oath in human trafficking may appear as being western pressure for change. This is because the focus on international

174 The 2014 Global Report on Trafficking in Persons of the UN Office on Drugs and Crime indicates that only four in 10 countries reported having 10 or more yearly convictions, with nearly 15 per cent having no convictions at all. According to the US Trafficking in Persons Report of 2014, the Sub-Saharan African region had only 574 human trafficking prosecutions and 341 convictions in 2013 (United States of America Department of State, 2014).

human rights is sometimes criticised as being heavy-handed and insensitive, and is often perceived as culturally imperialistic in most African countries. This paper argues that efforts to change the use of the traditional oath in human trafficking are most effective when they originate from within the culture, which practices them. In Africa, traditional and religious leaders have a huge influence on customs and practices and are therefore vital in the struggle to change society's attitudes. The government needs to empower and enable local leaders in advocating for correctly using traditional oath. This is likely to be an effective way of affecting change. It is a strong argument that, if traditional leaders support the abolition of the use of traditional oath ceremony for women and girls, then people in their communities are likely to do the same. The cooperation and understanding of policymakers, local community leaders and the people who have experienced or witnessed the hardships caused by traditional oaths within societies is also vitally required.

Positive traditional methods and practices must also be employed to alleviate the abuse of traditional oath ceremonies for a better understanding of rural social realities. For instance, traditional dances and rituals can be used to discourage the misuse of traditional oaths in human trafficking. Dialogue can be encouraged in different traditional systems, which comprise different cultures and religions to challenge negative aspects of the use of traditional oath ceremonies in human trafficking. The upholding of human rights must be conducted in such a way that communities do not feel that the integrity of their traditional practices and beliefs is being compromised. Traditional beliefs should adhere to the values of the right to human dignity. It is important to be culturally sensitive, but this does not mean that respect for culture warrants uncritical and insensitive adherence when cultural, traditional or religious practices are invoked. Traditional beliefs as a rationale for harmful practices to a vulnerable group should not to be accepted; rather, both society and the government should look for opportunities to counteract prejudice and its consequences. The assumption that cultural values are static and inalienable ignores the reality that they are in conflict with human rights and require urgent change.

A critical analysis of article 16 of the UN refugee convention in relation to victims of sexual violence in refugee camps in Africa

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SUMMARY

This article analysed article 16 of the United Nation convention relating to the status of refugees 1951, which provides free access to courts in the contracting states for all refugees, in relation to victims of sexual violence in refugee camps. However, it was found that with the current state of affairs in the domestic criminal justice system, a victim of crime has no legal standing to have direct access to a court for the enforcement of his or her rights. Instead, the crime is considered as against the state and not against the individual victims, and this has caused severe hardships for victims of sexual violence in refugee camps. Thus, for a victim to benefit maximally and enjoy the requisite free access to court, we argue that victims of sexual violence in a refugee camp should be accorded the *locus standi* and made a co-party to the prosecution of their perpetrators, as a paradigm shift from the current domestic and international criminal justice system that uses victims as a witness for the state prosecution, so that victims can assert their rights and plead for the required remedy and reparation that will ameliorate their plight. In order to achieve this, the authors are advocating for law reform of both the domestic and international criminal justice system to reflect victims' rights as co-prosecutor of their assailant.

1 Introduction

Refugees have been empowered under the Universal declaration of human rights (UDHR) to seek asylum in any state of their choice where it declares, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[1] In addition, UDHR also protects against the violation of the rights and dignity of all human beings.[2] Furthermore, UDHR upholds the tenets of equal opportunity before the law, devoid of "discrimination against equal protection before the law."[3]

1 Art 14(1) of the Universal Declaration of Human Rights 10 December 1948, 217 A (III).
2 Art 1 of the Universal Declaration of Human Rights.
3 Art 7 of the Universal Declaration of Human Rights.

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It also accords all humans a "right to recognition before the law"[4] and for "an effective remedy by a competent national court of law for acts violating the fundamental rights granted to an individual by the Constitution or by law."[5] Additionally, UDHR asserts that equal opportunity to a fair and public hearing before an autonomous and unbiased court, in the determination of his or her "rights and obligations",[6] should be made available to all humans, including refugees.

Based on the above provisions the legal protection and the enforcement of the rights of refugees by states were created through the Convention Relating to the Status of Refugees (UN refugee convention 1951).[7] It defines refugees, as persons, "who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his or her nationality and is unable to, or owing to such fear is unwilling to avail himself or herself of the protection of that country."[8] Moreover, the convention prohibits the "expulsion or return (refoulement)" of a refugee to their home countries, in terms of article 33(1)(2).[9] Thus refugees have a right to seek protection and the enforcement of their rights in a country of refuge.

Accordingly, refugees are hosted in various types of facilities, for this article the word "camps" will be utilised.[10] These camps have been denoted as places that breed lawlessness and crime.[11] In anticipation of the enforcement of the rights of refugees, article 16 of the UN refugee convention, extends access to a judicial institution in host states as follows:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States;

4 Art 6 of the Universal Declaration of Human Rights.
5 Art 8 of the Universal Declaration of Human Rights.
6 Art 10 of the Universal Declaration of Human Rights.
7 Art 1 of the Convention Relating to the Status of Refugees (1951) United Nations Treaty Series, Vol.189, p.137 (entered into force on 22 April 1954) art 1.
8 UN Refugee Convention 1951.
9 UN Refugee Convention 1951.
10 Here as camps, settlements, detention facilities, where ever refugees live whether on the streets, including urban refugees.
11 Allison, "Africa: Analysis: Kenya's Dadaab, the world's largest refugee camp, isn't going anywhere yet" Daily Maverick (2015) available at https://www.dailymaverick.co.za/article/2015-04-12-analysis-kenyas-dadaab-the-worlds-largest-refugee-camp-isnt-going-anywhere-yet/#.WPYyf4iGOM8 (accessed 2017-04-18); ANA "Biggest Somali refugee camps turned into terror breeding ground" SABC 2016 http://www.sabc.co.za/news/a/44fb4a004c85d445a480eef73ffe3ce9/Biggest-Somali-refugee-camps-turned-into-terror-breeding-ground-20162404 (accessed 2017-04-18); Opelka "Justifying OWS Philly rape? 'The rates of rape seem to be much lower than in Refugee Camps'" *Theblaze* 2011 available at http://www.theblazecom/news/2011/11/13/justifying-ows-philly-rape-the-rates-of-rape-seem-to-be-much-lower-than-in-refugee-camps/ (accessed 2017-04-18).

2. A refugee shall enjoy in the Contracting State in which he or she has his or her habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi;*
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he or she has his or her habitual residence the treatment granted to a national of the country of his or her habitual residence;[12]

Regardless of the above provisions, refugees have been known to suffer various kinds of violence, especially sexual violence in camps.[13] International Criminal Court (ICC) has described sexual violence,[14] as situations where:

> the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.[15]

The consequence of violence experienced by these refugees as victims,[16] of these heinous crimes may be physical, psychological, and other injustices. These may lead to homicide, serious injuries, unwanted or early pregnancies, sexually transmitted diseases (STDs)/infections (STIs) including infertility and infections with human immunodeficiency virus and acquired immune deficiency syndrome (HIV/AIDS), cervical cancer and venereal diseases.[17] Victims also suffer from psychological trauma, suicide, mental health problems,[18] and post-traumatic stress disorders (PTSD),[19] miscarriages if raped and pregnant, prolonged haemorrhage, vesico-vaginal and recto-vaginal fistulas, insomnia, nightmares, chest

12 UN Refugee Convention (1951).
13 The word camps here represent, camps, settlements, detention facilities, where ever refugees live Weather on the streets, including urban refugees.
14 Art 7(1)(g) - 6(1) of the ICC Elements of Crime "Crime against humanity of sexual violence" International Criminal Court (2011) available at http://www.icc–cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45 bf9de73d56/0/elementsofcrimeseng.pdf (accessed 2014- 07-31).
15 ICC Elements of Crime, art 7(1)(g) - 6(1).
16 In this article includes the individual that suffer the harm, their relatives and guardians.
17 United Nations High Commissioner for Refugees (UNHCR) "Sexual violence against refugees: guidelines on prevention and response" 8 March 1995 available at http://www.unhcr.org/3b9c c26c4.html (accessed 2017-01-14); Office of the United Nations High Commissioner for Refugees (OUNHCR) "Guidelines on the protection of refugee women," prepared by the Office of the United Nations High Commissioner for Refugees, Geneva (1991) para 94.
18 UNHCR (1995) 1.5; Ramji-Nogales 'Questioning Hierarchies of Ham: Women Forced Migration and International Criminal Law' 2011 Intentional Criminal Law Review, 820, Social Science Research Network Electronic Paper Collection: http://ssrn.com/abtract = 1753758 (accessed 2014-06-22).
19 UNHCR (1995); Ramji-Nogalis (2011) 821.

and back pains, painful menstruation, complications resulting from unsafe abortions and death.[20]

Refugees who are victims of sexual violence in refugee camps are also stigmatised, ostracised or even sanctioned by their families, which may worsen their physical and psychological injuries.[21] Some of these consequences outlive the victims, for instance, children born out of the act may be stigmatised, discriminated against or even suffer sexual assaults.[22]

Unfortunately, these victims may never have access to courts in countries of refuge to seek redress for this harm suffered. Since most refugee camps do not have court facilities for seeking redress and in camps with mobile court facilities, such as the Nakivale refugee settlement in Uganda,[23] the facility has been coined as inadequate and inaccessible to victims of sexual violence, because it serves only one refugee settlement in Uganda.[24] The latter implies that other refugees in Kyangwali, Adjumai, Kirandongo, Rwamwanga, Arua, Kyaka II and Oruchinga refugee settlements,[25] may never obtain justice. Besides, there are yet to be records of prosecuted cases in sexual violence by the mobile court.

In addition, the concept of access to courts which is a fundamental right, has been enshrined in most Constitutions of various nations, for instance, section 34 of the Constitution of the Republic of South African provides that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[26] Also, under the Constitution of the United Republic of Tanzania, this phrase is referred to in sections 13(6)(a) as a measure to ensure equality before the law and to a fair hearing.[27] In addition, the

20 Mabuwa, Seeking Protection: Addressing sexual and domestic violence in Tanzania's refugee camps, Human Right Watch (2000) 39; Vigaud-Walsm "Women and girls failed: The Burundi refugee response in Tanzania" Refugee international (2015) 1 http://www.refworld.org/docid/568cf1e64.html (accessed 2017-11-07).

21 Mabuwa 39; Vigaud-Walsm "Women and girls failed: The Burundi refugee response in Tanzania" Refugee international.

22 Mabuwa 39; Vigaud-Walsm "Women and girls failed: The Burundi refugee response in Tanzania" Refugee international.

23 UNHCR Uganda "SGBV Fact Sheet | Southwest Uganda | 2014" 2014 available at https://data2.unhcr.org/en/documents/download/48494 (accessed 2016-11-23); Powell "Activists: rape in Africa driven by inequality and weak prosecution" Voice of America (2013) available at http://learningenglish.voanews.com/a/south-africa-rape-uganda-refugee-camp-drcunhcr/1794666.html (accessed 2016-11-30).

24 UNHCR Uganda.

25 Action African Help International "Kyangwali Refugee Settlement" Action African Help Uganda Country Programme 2016 available at http://www.actionafricahelp.org/kyangwalirefugeesettlement (accessed 2016-11-22).

26 S 34 Constitution, see also The Constitution of the Republic of Ghana 1992 art 33; art 97 of the Constitution of the Arab Republic of Egypt of 2014.

27 The Constitution of the United Republic of Tanzania, 1977.

right to litigate in courts is considered as one of the indispensable civil rights of the citizen of a nation, of a necessity must be conferred on each citizen by states, and to other nationals similar to what is enjoyed by their people in this respect.[28]

The provision of article 16,[29] is general and ambiguous to all refugees who require court access with no definition of what access to court is. It is submitted that the concept of access to court was not conceptualised to capture the needs of refugees who are victims of crime, specifically those of female victims of sexual violence in refugee camps. This is because, in criminal proceedings, the state has the *locus standi* to prosecute the case, while the victims are used as witnesses. Consequently, victims of crime lack the legal standing to sue and this is a constraint on access to courts. However, the only channel they may have is to obtain formal authorisation that will empower them to hire the services of a private prosecutor, which is if they are wealthy enough to do so, to prosecute the case. Nevertheless, this does not give them the legal standing to pursue their rights, because the private prosecutor will still represent the interest of the public or state.

Thus, this article analyses article 16 of the UN Refugee Convention,[30] in relation to the victims of sexual violence in refugee camps. In examining this, the article discusses the theories of the rule of law as a foundation of access to courts, the basic principle of *locus standi,* as it relates to standing in the court and concludes with the proposition that victims of sexual violence in refugee camps should be conferred with legal standing, so that in criminal proceeding they can represent their interest.[31]

2 Theoretical foundation for access to courts

The doctrine of the rule of law without victim's access to courts signifies the catastrophe of democracy, thus this article will be built on the theories of the rule of law. The rule of law is the legal principle that asserts that law should govern a nation, as opposed to be governed by the arbitrary decisions of individual government officials. Primarily, it refers to the influence and authority of law within society, particularly as a constraint upon behaviour, including actions of government officials,[32]

28 *Chambers v Baltimore & O.R.R.,* 207 US 142, 148 (1907); *McKnett v St. Louis & S.F. Ry.*, 292 US 230, 233 (1934).
29 UN Refugee Convention 1951.
30 UN Refugee Convention 1951.
31 Note that victims of sexual violence are used as a test case for other victims of crimes, because of the invasive nature of the crime and the lifelong consequence on the victims.
32 Soanes and Stevenson "Rule of Law" in *Concise Oxford English Dictionary* (2006) 1258.

with the basic principle that "no person is above the law."[33] The Secretary-General of United Nations opines that:[34]

> The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[35]

Historically, the expression can be traced back to 16th century Britain and in the following century the Scottish theologian Samuel Rutherford, who used the phrase in his argument against the divine right of kings.[36] The rule of law, was further promoted in the 19th century by British jurist Dicey, who described the rule of law as,[37] the overall sovereignty or prevalence of regular law as conflicting with the influence of illogical power and discounts the reality of unpredictability, of right, or "even of wide discretionary authority on the part of the government ...".[38] Again, the rule of law signifies parity before the law or the equal subjugation of all classes of human beings to the regular law of the nation managed by the "courts ...".[39] Lastly, it signifies that "the ideologies of private law have with us been by the action of the courts and legislature so extended as to regulate the position of the crown and of its servants; thus, the Constitution is the result of the ordinary law of the land".[40]

Moreover, Dworkin holds that the theory of rule of law,[41] assumes that citizens have ethical rights and obligations towards each other and political rights against the government.[42] The contends that these moral and dogmatic rights be accepted in positive law, so that they can be

33 LexisNexis "What is the Rule of Law" 2017 available at https://www.lexisnexis.co.za/news/rule-of-law/What-is-the-rule-of-law (accessed 2019-01-11).

34 Secretary-General, United Nations "The rule of law and transitional justice in conflict and post-conflict Societies" Report of the Secretary-General S/2004/616 2004 http://daccess-dds-ny.un.org/doc/UNDOC/G EN/N04/395/29/PDF/N0439529.pdf? OpenElement (accessed 2016-01-11).

35 Secretary-General, United Nations "The rule of law and transitional justice in conflict and post-conflict Societies."

36 Rutherford, *Lex, rex: The law and the Prince, a Dispute for the just prerogative of king and People* Edinburgh, printed by A. Murray, Milne square, (1644) 237.

37 Dicey, Introduction *to the Study of the Law of the Constitution* (1961) 202; Principe "Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain" 2000 *Loyola of Los Angeles International and Comparative Law Review* 357.

38 Dicey 202; Principe 2000 *Loyola of Los Angeles International and Comparative Law Review* 357.

39 Dicey 202.

40 Dicey 202.

41 Dworkin "Political Judges and the Rule of Law" 1978 *Proceedings of the British Academy,* open Access archive of volumes 51-111, 259, 262.

42 Dworkin 1978 *Proceedings of the British Academy* 262.

enforced and demanded by individual citizens through the courts or other judicial institutions as far as this is feasible.[43] This conception of the rule of law by Dworkin is the paradigm of rule by a precise public conception of individual rights.[44]

As per Allan, the rule of law consists, mainly of a body of rudimentary philosophies and standards, which collectively offer some consistency and lucidity to "the legal order …".[45] Furthermore, it is a blend of ideals, potentials, and objectives that incorporate traditional thoughts about distinct freedom, natural justice and largely, thinking about the requirements of justice and fairness amongst the ruler and ruled.[46] There is no distinction between substantive and procedural fairness because both are "premised on respect for the dignity of the individual person …".[47] The inkling of the rule of law is also intimately connected with the fundamental belief of equality, which lies at the heart of our persuasions about justice and fairness. It underscores "an equal voice for all … citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law."[48]

From the doctrines stated above it is trite to argue that without the rule of law, there cannot be access to courts, since the rule of law promotes accountability for a crime against any section of human beings, which includes female refugees, through the subjection of states, individuals and corporate perpetrators to the law. The principles also lay emphasis on individual rights and provide the mechanisms for the enforcement of such rights. If these principles are incorporated into the running of a refugee camp, the current culture of impunity by the violators of female refugees will be curtailed. In addition, they serve as the foundation on which female refugees who are victims of sexual violence will gain access to court. The rule of law also promotes equal protection before the law; this implies that refugees should be accorded the protection against sexual violations as accorded to the females in host states.

43 Dworkin 1978 *Proceedings of the British Academy* 262.
44 Dworkin 1978 *Proceedings of the British Academy* 262.
45 Allan *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993) 21-22.
46 Allan 22.
47 Allan 22.
48 Allan 22.

3 Analysis of article 16 of the UN convention 1951

3 1 Article 16(1)

Of the UN Convention 1951,[49] provides that a refugee shall have free access to the courts of law on the territory of all Contracting States.[50] The question is what is free access to a court?

3 1 1 Free

The word "free" has numerous connotations depending on the context in which it is being employed. In English, it basically means, a person who is not or no longer in bondage, servitude or in subjection to another and has liberty as a member of a society or state;[51] alternatively, it symbolises an individual of a noble, honourable, gentle birth and breeding,[52] denotes the 'ability to act from one's own will or choice and not compelled or constrained and determining one's own action without outside motivation."[53]

Additionally, the word "free" also represents, "a lack of impediment, restrained, restriction in action, activity or movement; unhampered, unfettered, allowed or permitted to do something, unbiased, open-minded, clear of obstruction, not blocked, open, unobstructed, clear of something regarded as objectionable or an encumbrance."[54] Furthermore, the word "free" has been described by Black's law dictionary as having legal and political rights, enjoying political and civil liberty, not subjected to constraint or domination of another, enjoying personal freedom; emancipation, characterised by choice rather than by compulsion or constraint, unregulated and costing nothing."[55] Can it be held that these literal meanings of the word "free" as discussed in this section, are what the UN convention is conveying and asserting that it should be granted to these refugees? If the answer is in the affirmative, then this reveals that refugees should have access to courts in accordance with all the meanings of the word "free" as discussed in this section in the strictest sense.

However, this is a broad and general provision for all refugees and implies that there is no need to pay court process fees, whilst not meeting the needs of refugees who are victims of sexual violence in a host state. However, in relation to victims of a sexual violation, they do not have the

49 UN Refugee Convention 1951.
50 Allan 22.
51 Brown (ed.) "Free" in Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* (1993) 1022.
52 Brown 1022.
53 Brown 1022.
54 Brown 1022.
55 Garner "Free" in Garner *Black Laws Dictionary*, 8th Edition, Thompson West (2004) 688.

freedom to approach the court to enforce their rights as they are; they have a lengthy process before the case is taken to court by the state prosecutor. For instance, rape cases must have to be reported to the police in South Africa, per adventure, as the police do not believe their testimony; therefore, the case might not lead to prosecution. However, if their testimony is believed, then the victim is sent to the hospital for examination, the collection of evidence before the perpetrator is arrested, and the case is later handed over to the state prosecutor, who prosecutes the case, while the victim is the principal witness. Thus, this freedom is not practicable in cases of victims of sexual violence.

3 1 2 Access to court

Access to court has been defined in many circumstances; it could be physical or procedural.

3 1 2 1 Physical access

"Access to court" is a broad term and for clarity sake, the phrase will be divided into words and defined separately. Thus, the word "access" denotes "an opportunity or ability to enter, approach, pass to and communicate with, for instance, accessing the court.[56] In addition, access is described, as the right or opportunity to use or look at something or the method or possibility of getting near to a place or person.[57]

The word "court" is demarcated as a governmental institution consisting of one or more judges who sit to decide disputes and administer justice.[58] Likewise, Hughes describes a court as "… a permanently, organised body, with independent judicial powers delineated by law, meeting at a time and place fixed by law for the judicial public administration."[59] In addition, a court is defined as a "locale for legal proceeding."[60]

In summary we declare "access to court" to mean a right, opportunity or ability for a violated individual to approach, enter, pass to and from a demarcated governmental institution consisting of one or more sitting judges who decide disputes and administer justice over one grievance; or a right, opportunity or ability of a victim to, approach, enter, pass to and from an enduring, organised body of independent judicial powers delineated by law to meet at a particular time and place prescribed by law for the judicial public administration; or a right, opportunity or ability

56 Garner "Court" *in Black's Law Dictionary*, 8th edition Thomson West (2004) 14.
57 Cambridge University Press, Meaning of "access" in the English Dictionary, available at http://dictionary.Cambridge.org/dictionary/english/access (accessed 2017-04-03).
58 Garner "Court" in *Black's Law Dictionary* (2004) 378
59 Hughes *Federal Practice, Jurisdiction & procedure, civil and criminal with forms* Assisted by Thorpe GC. 7 (1931) 8; Garner 378.
60 Garner (2004) 374.

to communicate with, approach, enter, pass to a facility for legal proceeding.

3 1 2 2 Procedural access

Procedural process is a right, opportunity or ability for violated individuals to communicate with and participate in a legal proceeding that could enforce their rights and provide them with a remedy. Thus, in the European case of *Oerlemans v The Netherlands*,[61] the European Court of Human Rights,[62] describes access to court as giving an applicant an opportunity to challenge the lawfulness of an order.[63] In that case, the government of Netherlands created some areas of their land as protected locations, comprising the property belonging to the applicant.[64] The order required that certain agricultural activity required permission before it could be accepted. The European Court of Human Rights had to determine whether the applicant has a right and whether the right is of a civil character. The court agreed that there was a dispute because the applicants' rights to use their property were being restricted.[65]

In addition, the other issue the court had to resolve was whether the Netherland, gave the applicant the opportunity to challenge the lawfulness of the order pursuant to the European Convention in article 6(1),[66] which provides that: in deciding about civil rights and obligations or of any criminal charge against an accused the applicants must be granted the right to voice their opinions.[67] The court must consider that every person is eligible for an impartial and civic hearing within a realistic period by an autonomous and unbiased law court created by law.[68] Likewise, that the decision of the court must be declared overtly, without the media and public watching all or some part of the proceeding.[69] Furthermore, that in the interests of ethics, public order or national safety in an independent society, wherever the protection of youths or of private life of the parties to proceedings is required, or where the court is of the opinion that publicity would prejudice the interests of justice, thus the privacy of proceedings should be respected.[70]

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61 *Oerlemans v The Netherlands 15 EHRR 561 1991*.
62 Note that the cases cited in this article which are outside the jurisdiction of Africa, were utilised in the light of their germane principles with this article.
63 *Oerlemans v The Netherlands*.
64 *Oerlemans v The Netherlands*.
65 *Oerlemans v The Netherlands*.
66 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
67 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
68 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
69 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
70 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

The court further specified that under the Netherlands case law, where an administrative petition to a higher authority does not guarantee fair procedure, it is possible to have a recourse to the civil courts for a full review of the lawfulness of the administrative decision.[71] Similarly, in the case of *J.J. v The Netherlands,*[72] the right of access to courts was also violated in a taxation proceeding in the supreme court of Netherland.[73] In this case, the plaintiff was inept to reply to the advisory opinion of the Advocate General's appeal against fiscal penalty on grounds that he did not pay the court's registration fee, and it was held as an infringement of article 6(1),[74] of the European Convention for the Protection of Human Rights and Fundamental Freedoms. These aforementioned rights provide for fair hearing, which is tantamount to the violation of access to court.[75] Since article 50 declares that, "the expenditure on the court shall be borne by the Council of Europe." This implies that access to court includes a right to fair hearing in the instant case and the right to reply to an adversarial proceeding.

Likewise, another challenge of access to courts was in the case of *Golder v The United Kingdom,*[76] where a prisoner who craved to take a civil action for defamation against a prison guard, who had allegedly falsely accused him of instigating a prison riot had his letters to both a legal representative and the European Commission of Human Rights censored and withheld by the prison authorities.[77] However, the European Court of Human Rights pronounced that censoring and withholding the letters of the prisoner was a violation of both of his rights to communication under article 8 and his right of access to court under article 6(1).[78]

Furthermore, in the case of *Campbell and Fell v The United Kingdom,*[79] the European Court of Human Rights, in the same way, held that the absence of privileged consultation between an attorney and client amounted to meddling with the right of access to court and a contravention of article 6(1) of the Convention.[80] The accused were prisoners charged with the offence of participating in a protest, but they were prevented from hiring the services of a legal practitioner to defend

71 *Oerlemans v The Netherlands.*
72 *J v The Netherlands* (9/1997/793/994) 27 March 1998,
73 *J J v The Netherlands.*
74 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.
75 *J J v The Netherlands.*
76 *Golder v The United Kingdom,* Application No 4451/70, Judgement of 21 February 1975.
77 *Golder v The United Kingdom.*
78 European Convention for the Protection of Human Rights and Fundamental Freedoms.
79 *Campbell and Fell v The United Kingdom,* Application No 8342/95, Judgement of 28 June 1984.
80 European Convention for the Protection of Human Rights and Fundamental Freedoms.

them.[81] Even when, they were eventually granted access, the prisoners were made to consult their lawyer in the presence and hearing of a prison officer.[82]

This phrase "access to court" is ambiguous, because it did not state who could access the court and the subject matters that refugees can bring before the court of law. In addition, victims of sexual violations have no legal standing to institute a criminal proceeding against their assailant in a court directly in the current practice, for criminal proceedings in domestic courts. Instead, they must overcome all hurdles of other administrative and procedural bureaucracy, before a prosecutor can bring the case to court. In the event that they are not believed by the administrative organs, then they will be robbed of the opportunity to assert their rights, and accordingly, it is submitted that victims should be conferred a *locus standi* to be joined as co-prosecutor of their perpetrators, in the criminal proceeding against the assailant.

3 1 2 3 *Locus Standi*

For individuals to access a court physically or procedurally, they must possess a standing before a court of law.[83] This implies that access to court is not absolute to all human beings and it is a preliminary issue, which some courts usually address, without which the substantive case may not proceed. *Locus standi* also referred to as "standing to sue" or "title to sue"[84] had been described as "the right of an individual, "to have a court adjudicate a dispute taken before it and instituted by the individual or group.[85] In theory, the standing is in effect "procedural or adjectival, rather than substantive," because it has to do with physical access to the courts for the resolution of disputes and not with the legal rules and principles which regulate how disputes ought to be resolved.[86] However, in practice, they are intertwined.[87]

Furthermore, the issue of standing has been denoted to be strictly applicable in private law for instance in intermediary recipient disputes.[88] Nevertheless, in public law, it occurs in cases where secondary statutes or legal institutions are confronted either for acting *ultra vires* or for constitutional and excessive jurisdictional basis.[89] The issues of standing also surface in cases of the common law of public nuisance, actions where declarations and injunctions are needed, and in

81 *Campbell and Fell v The United Kingdom*
82 Campbell and Fell v The United Kingdom.
83 Legere "*Locus Standi* and the Public Interest: A Hotchpotch of Legal Principles" 2005 *Judicial Review* 128
84 Stein, "The theoretical foundation bases of *lucus standi*" in Stein LA (ed.) *Locus standi,* the law book company Sydney Melbourn Brisbane Perth (1979) 3.
85 Stein 3.
86 Baxter *Administrative Law* (1984) 647.
87 Baxter 644.
88 *Vandervell Trustie Ltd. v* White [1970] All E.R. 16 A at 31 (H.L.)
89 Stein 3.

situations where a person is authorised by law to take part in a decision made by way of trial, objections or appeals.[90]

However, for a person to possess *locus standi,* the person must have a legal interest in the relevant relief sought,[91] and the "capacity to sue."[92] This implies that the claim must be grounded on a lawfully enforceable right and the applicant is entitled to enforce that right. Moreover, for an initiator of a dispute to succeed, the applicant is required by the courts to pass a certain assessment to have a standing in a case. For instance, the instigator of a proceeding may be required to pass the "sufficient interest test" which entails that the claimant must demonstrate that he or she has an adequate interest both in fact and in law in relation to the suit.[93] Thus, victims of sexual violence, for instance, could be said to have sufficient interest, because they are the ones that directly suffered the harm, as a result of this harm the public has also indirectly suffered.

Furthermore, the originator of the proceeding may also be required to succeed with the "person aggrieved" test,[94] for instance an applicant who owns a land in a particular location who has been affected by the decision of the authorities is a person aggrieved, therefore has every right to institute an action against the orders of an authority.[95] This provision has been challenged in courts, for instance, in *Morbaine Ltd v (1) Secretary of State (2) Stoke on Trent City Council.*[96] The court held that a person who does not have an interest in land and is hoping to have an interest in the future is not a person aggrieved. The principle to be imbibed here is that of a person with interest in a matter. Thus, it is submitted that a victim of sexual violence is a person directly affected by the crime because the crime of sexual violence is directly against the victim. Therefore, a victim of sexual violation is a person aggrieved and should be joined to prosecute the assailant.

In addition, the other impediment, a litigant, has to get through in order to establish his or her standing before the court which is the "victim's" test. This is provided for under article 34 of the European Convention on Human Rights,[97] and the United Kingdom Human rights act that a victim of an unlawful act has a standing in legal proceedings.[98] In *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice*

90 Stein 3.
91 Loots "*Locus Standi* to claim relief in the public interest in matters involving the enforcement of Legislation" 1987 *SALJ* 131; *Attorney-General Federation v Attorney-General of the 36 States of Nigeria (2001)9 SCM 45 59.*
92 Beck "*Locus Standi* in *Judico or Ubi Ib Remedium*" 1983 *SALJ* 278 283.
93 Legere 2005 *Judicial review* 126.
94 S 288 of the Town and Country Planning Act 1990.
95 Legere 129.
96 *Morbaine Ltd v (1) Secretary of State (2) Stoke on Trent City Council* [2004] EWHC 1708 (Admin
97 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
98 Chapter 42, sec 7(1)(a) of the Human Rights Acts 1998.

of England and Wales ex p. Ralph Bulger,[99] the father of a murdered toddler Jammie Bulgar applied for the review of the lord chief justice decision on the fee fixed by the court. The court of appeal held that the father of the victim did not have an interest in the matter, thus had no standing.[100]

However, Rose LJ,[101] was of the view that if the family of a victim could contest the sentencing process, then the family of the defendant could also do so. This decision is unfair and contrary to the principles of human rights and it robs victims of their rights, because if the criminal justice which favours perpetrators and gives them the opportunity to plead their case and even appeal against the decision of a court, then why should victims be deprived of this favour? Therefore, it is submitted that the deprivation of a victim from asserting their rights against their assailant as co-prosecutor or appealing against the sentences is unfair, impartial and it is a contravention of the fundamental human rights of the victim. In addition, why should the criminal justice system give a fair hearing to a perpetrator, whereas the victims of crime receive the same fair hearing? Furthermore, the court held that in criminal cases there was no need for a third party to intervene to uphold the rule of law.[102] This aspect of the judgment is also ironical because the rule of law is meant to promote, equality, impartiality and the rights of an individual. Therefore, we submit that the rule of law without the promotion of the right of individuals that constitutes the public is a mirage. Going further, the option of asking Mr. Bulger to challenge the decision on the impact of his son's death on him is equally unfair, a waste of time and resources and it amounts to an infliction of a fresh injury on a scar plus emotional pain on him. This on its own is a further violation of his right to access the courts.

Therefore, it is argued that, if a victim can be conferred with the right to legal standing under the UK human rights act,[103] then a victim of sexual violence should be accorded a legal standing in a criminal proceeding as a co-prosecutor, so that she can enforce her rights as a paradigm shift from the usual criminal proceedings where victims are used as mere prosecution witness. The reasons are that the crime of sexual violence is directly against the victim and likewise as against the rule of law,[104] as a secondary victim, so victims of sexual violence should

99 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* ex p. Ralph Bulger [2001] EWHC Admin 119.

100 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales 119.*

101 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 21-22.

102 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 21-22.

103 A 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms; chapter 42, sec 7(1)(a) of the Human Rights Acts 1998

104 *R v (1) Secretary of State for the Home Department (2) Lord Chief Justice of England and Wales* 21-22.

be authorised to protect their individual rights during the criminal proceedings, while the state prosecutor should be allowed to defend the rule of law.

3 1 3 The territory of all contracting states

A "Contracting State" has been indicated as a state, which has consented to be bound by a treaty, whether the treaty has entered into force, or not;[105] while a "Party" denotes a state, which has consented to be bound by the treaty and for the reasons, the treaty was promulgated.[106] This provision has excluded refugees who are in a third state that is a non-contracting state.[107] This literally suggests that a refugee cannot enjoy the provision of article 16(1) if they are not located in countries that are not parties to the refugee convention. Thus, this will bring hardships for refugees in those nations. Consequently, it is submitted that where a refugee is located in a non-contracting state, the principle of customary international law should be invoked to bind that state.

With reference to paragraph (1) of article 16,[108] the jurisdiction for the enforcement of refugee rights is the court of host states or contracting states. The limiting factor here is that this article did not specify the subject matter to be arraigned before the court whether it is civil or criminal. However, it is easier for an individual to access the court, for the enforcement of their rights in civil cases, while victims of sexual violence who do not possess *locus standi* in a criminal proceeding cannot access the court directly.

3 2 Article 16(2)

Declares that "a refugee shall enjoy in the contracting state in which he or she has his or her habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*". It has been stated that paragraph 2 confers an obligation on a contracting state only in respect of refugees who have their habitual residence within its territory.[109]

3 2 1 Treatment as a national

This clearly reveals that the destiny of refugees concerning access to courts are tied to the way in which the nationals of the contracting states are treated. It indicates that if the citizens of a host state are denied access to court, then refugees will be treated likewise. This indicates that,

105 A 2(1)(f) of the Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23May1969https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (accessed 2016-09-25).
106 A 2(1)(g) of the Vienna Convention on the Law of Treaties 1969.
107 "Third State" means a State not a party to the treaty in A 2(1)(h) Vienna Convention on the Law of Treaties 1969.
108 UN Refugee Convention 1951.
109 UN Refugee Convention 1951.

if the nationals of contracting states have access to courts then refugees should be accorded with the same access.

3 2 2 Legal assistance

The current practice is that legal assistance also known as legal aid is made available to perpetrators who cannot afford to employ the services of a legal practitioner for their defence in criminal cases. This is usually provided by the government in the interest of fair hearing. However, there are yet to be documented criminal cases where a victim is given a legal assistance in criminal cases except for the preparation of the victim as a prosecution witness. Nevertheless, in the European Court of Human Rights in *Airey v Ireland*,[110] established that a denial to grant legal aid to an impoverished woman seeking a judicial separation from her abusive husband violated her right of access to court under article 6(1).[111]

The court also added that although access is exercised actively by the individual, access is equally important to the proper conduct of criminal cases given that, it provides protection against the determination of a criminal charge by a body not meeting the standards dictated by article 6.[112] Therefore, it is submitted that if the woman in the instant case is accorded access to court in order to prevent a crime, then it is logical to advance legal aid to her and to victims of sexual violence as a co-prosecutor of their perpetrator.

3 2 3 Cautio judicatum solvi

The second ambit of subsection 2 states that refugees should be exempted from *cautio judicatum solvi*. This is a cautionary fee of a certain amount of money required, at the discretion of a court to be deposited by a foreigner who is a party to suit, which is sufficient to cover the cost of litigation that he or she might be compelled to pay to the party peradventure he or she loses the case.[113] Grahl-Madsen explained that in certain countries, persons have only access to the courts as plaintiffs if they are nationals of that country or of another country with which there exists a reciprocity arrangement.[114] However, other countries may admit foreigners to their courts of law but request them, in the absence of reciprocity, to deposit an amount, which at the court's discretion is

110 *Airey v Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305*.

111 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

112 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

113 UN High Commissioner for Refugees (UNHCR) "Commentary of the Refugee Convention 1951 (articles 2-11, 13- 37)" 1997 available at: https://www.refworld.org/docid/4785ee9d2.html (accessed 2019-04-26); Weis (ed) The Refugee Convention 1951 (1995) 134.

114 Weis (ed) 131.

sufficient to cover the costs he or she will be compelled to pay the other party if he or she loses the case.[115]

This implies that it does not matter whether the home country of a refugee has a reciprocity agreement with the host state or not, they are exempted from depositing any amount to the court as security.

3 3 Article 16(3)

Article 16(3) advocates that a refugee shall be given equal access in the matters referred to in paragraph 2 in countries other than that in which he or she has his or her habitual residence and treatment granted to a national of the country of his or her habitual residence.[116] This implies that whatever benefits that accrue to the citizens of a host state, concerning access to court should be made applicable to refugees. This suggests that refugees in a host country are to enjoy the same rights and privileges concerning access to courts; this indicates that refugees will have better treatment than other aliens will in the same country. It can also be inferred from paragraph 1 that in countries where nationals have no free access to courts the refugees will, in this respect be treated even more favourably than nationals.[117] The rule that refugees should be treated as nationals of the country is mostly on the issue of their eligibility for legal assistance and exemption from *cautio judicatum solvi*.[118]

In respect of legal assistance, the article can only apply to such welfares, which are granted by the national authority, under a state-supported system.[119] It also symbolises that in countries where legal aid is solely granted by bar associations the provision may not be applicable.[120]

4 Conclusion

This paper analysed the article 16 of the UN refugee convention and its applicability to victims of sexual violence in refugee camps. It discusses the theory of the rule of law as the foundation of access to courts. It concluded, that article 16 of the UN Refugee Convention was not conceptualised to accommodate the victims of crime especially the victims of sexual violence in refugee camps. Since the current domestic criminal procedure for prosecuting crimes has no room for victims to

115 Weis (ed.) 134.
116 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".
117 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".
118 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".
119 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".
120 UNCHR "Commentary of the Refugee Convention 1951 (articles 2-11, 13-37)".

freely have access to courts either, physically or procedurally, because victims lack *locus standi* to freely access courts in criminal proceedings.

Instead, they are used as prosecution witnesses, because crime is treated as against the state and public, and not against the individuals who have suffered harm. This caused hardships for victims of sexual violence, because the prosecution of perpetrators serves the interest of the state and the public, thereby robbing the victims of their rights and remedy. Although the wealthy victims could obtain a fiat in order to employ the services of a private prosecutor, victims are used as witnesses and not as parties to the suit.

Thus, the concept and principles of *locus standi*, which apply to civil cases, were discussed and it is submitted that victims of sexual violence should be afforded a standing as a co-prosecutor of their offenders. This is based on the "victim's test" as discussed above, so that while the state represents and defend the rule of law, the refugee who is a victim of sexual violence in camps should be provided with legal aid that can enforce the right of the victim and plead for a remedy that will ameliorate the right of the victim. In order to achieve this, the authors are suggesting the reform of domestic and international criminal legal system to reflect, victims of crimes as co-prosecutor of their offenders.

Recent case law

Nondabula v Commissioner: SARS (2018 (3) SA 541 (ECM) (27 June 2017))

"Victory" for taxpayer after SARS fails to fulfil its duties

1 Introduction

The South African Revenue Service (SARS) is tasked with effectively and efficiently collecting taxes (s 3(a) of the South African Revenue Service Act 34 of 1997). In turn, these collected taxes are used by government to develop the economy of the country and regulate employment levels (Croome *Taxpayers' Rights* (2010) 3).

Section 92 of the Tax Administration Act 28 of 2011 (TAA) ensures that SARS collects the correct amount of tax by providing for the issuing of an additional assessment, if the assessment that was originally issued in relation to a specific tax period was not in accordance with the relevant tax provisions and was to the detriment of SARS or the *fiscus*. SARS may estimate this additional assessed amount based on information that is readily available to SARS (s 95(1) and 95(2) of the TAA). Whenever SARS issues an additional assessment, section 96(1) of the TAA provides that SARS must issue a notice of assessment in relation to assessed taxes. This notice must contain, *inter alia*, the date of the assessment, the assessed amount, and the period in terms whereof the assessment is issued, and when the assessed amount must be paid. Where SARS has estimated the amount of outstanding tax based on information it has at its disposal (s 95(2) of the TAA), the notice of assessment should also contain a statement indicating the grounds for the assessment (s 96(2)(a) of the TAA). This statement should make it possible for the taxpayer to establish the legal and factual basis for the assessment (*SARS Dispute Resolution Guide* (28 October 2014) 31).

In *Nondabula v Commissioner: SARS* 19 SATC 333 (*Nondabula*), the court had to consider whether SARS could proceed in fulfilling its task of collecting assessed taxes if it did not furnish a notice of assessment as required. This is an important aspect to consider as allegations pertaining to an illegal "rogue" investigation unit set up by SARS and the emerging public debate in this regard has brought the extent of SARS powers under scrutiny (see Sikhane Investigation report – conduct of Mr Johan Hendrikus van Loggerenberg South African Revenue Service (2014) 5-7; Sunday Times (2016-05-15) 1; Business Day Live (2015-03-02) in this

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regard). This case note reflects on whether the court came to a correct conclusion and the future implications thereof.

2 Facts and judgment

In the present matter before the Eastern Cape Local Division (Mthatha), the taxpayer, Nondabula, sought confirmation of a rule *nisi* that was granted to interdict SARS from using its power to appoint a third party to collect an outstanding tax debt. This outstanding tax debt emerged from an additional assessment, which was issued by SARS on 1 March 2016 (par 1, 4 & 14). This outstanding tax debt first came to the taxpayer's attention by way of a statement of account dated 4 April 2016 (par 5). The statement of account did not contain any indication of how the amount of outstanding tax had been determined (par 5), and it also did not contain a statement indicating the grounds as required in terms of section 96(2)(a) of the TAA (par 20).

The applicant lodged an objection relating to the assessed tax, where after SARS responded that the taxpayer could not request that penalties be waived and declare a dispute in the same objection (par 9). It therefore seems that the merits of the taxpayer's objection were not considered.

Subsequently, SARS forwarded a letter to the taxpayer demanding that the outstanding tax be settled within ten days (par 4). In response, the taxpayer requested SARS to reconsider the assessment and to note the objections which he had lodged (par 10). This request was to no avail, as SARS did not provide an indication of how the outstanding tax debt had been calculated, and continued to oppose the taxpayer's objections on technical grounds (par 10).

Thereafter, SARS issued another statement of account reflecting an outstanding tax debt, which was less than the tax debt initially indicated.

None of the correspondence addressed to the taxpayer by SARS provided any indication of how the amount had been calculated. Furthermore, the legal basis for the outstanding tax was not indicated (par 5 & 14).

The court observed that no interaction with a taxpayer is required either when an additional assessment in terms of section 92 of the TAA is issued or when an estimation is based on information readily available to SARS (par 21). However, the court held that section 96 sets out what information *must* be contained in the notice of assessment (par 21). SARS could not simply decide to deviate from the required information provided for in the section as SARS is expected to adhere to "its own legislation" (par 26).

The court considered SARS decision to issue a third party appointment notice in terms of section 179 of the TAA, despite not furnishing a notice of assessment, as unlawful and contrary to the rule of law (par 22).

Furthermore, the court held that SARS had failed to comply with the constitutional obligations that SARS, as an organ of state, has in terms of section 195 of the Constitution of the Republic of South Africa, 1996 (Constitution). Firstly, SARS had not acted in an accountable manner (s 195(1)(f) of the Constitution), as it had not complied with the relevant legislation. Secondly, SARS had not acted transparently, as it had failed to provide the public, in this case the taxpayer, with "timely, accessible and accurate information" (s 195(1)(g) of the Constitution; par 24).

Based on the foregoing, the court concluded that the conduct of SARS had been both unlawful and unconstitutional. Accordingly, the court confirmed the interdict prohibiting SARS from appointing a third party in terms of section 179(1) of the TAA. Also, SARS was ordered to pay costs in the matter.

3 Analysis of the judgment

3 1 General observations

In the preceding judgment of *SARS v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91 (12 June 2014) (par 11) the Supreme Court of Appeal remarked as follows:

> As best as can be discerned, Ms Victor's approach was that if she did not understand something she was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. Her approach was fallacious. ... In the case of income tax, it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.

This remark highlights the importance of the notice of assessment, namely to facilitate engagement with an informed taxpayer. Without such a notice the taxpayer would be prompted to request reasons for the assessment (rule 6 of the Rules promulgated under s 103 of the Tax Administration Act 28 of 2011 as contained in GN 550 in *Government Gazette* 37819 (11 July 2014)) and possibly proceed with dispute resolution. Early engagement between SARS and a taxpayer is beneficial, as the taxpayer would have the opportunity to show that the additional assessment was incorrect, without venturing into the often long and costly option of dispute resolution. Accordingly, the notice of assessment ensures that uncertainties are eliminated and only actual disagreements proceed to dispute resolution. Thus, the issuing of a notice of assessment is crucial in an effective tax administration system.

3 2 Peremptory wording

The importance of issuing a notice of assessment is demonstrated in section 96(1) of the TAA provides that SARS "must" issue this notice.

Consequently, SARS has not discretion regarding whether to furnish this notice or not. Unfortunately, the TAA does not stipulate the consequences if SARS fails to comply with this requirement. Botha (*Statutory Interpretation – An Introduction for Students* (2012175-176) remarks that any ensuing action, by a party who has failed to act in accordance with a peremptory wording, would be null and void.

Based on this, the court's decision to interdict SARS from proceeding with ensuing action, appointing a third party, is correct. However, the court did not only rely on the peremptory wording to reach its decision. It considered two aspects of the Constitution, namely the rule of law and the basic values and principles of public administration should be adhere to.

3 3 Rule of law and section 195(1) of the Constitution

One of the founding values of the Constitution contained in section 1(c) thereof is the supremacy of the rule of law. The rule of law, and, more specifically, the principle of legality, which forms part of the rule of law (*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) par 56 & 58), dictates that government must act in accordance with "pre-announced, clear and general rules" (*Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 5 BCLR 837 (CC) 842; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 6 BCLR 529 (CC) par 108; Bekink *Principles of South African Constitutional Law* (2012) 62. See, also: Dicey *Introduction to the Study of the Law of the Constitution* (1959) 193; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC) 1482; *Pharmaceutical Manufacturers Association of SA: in re ex parte President of the RSA* 2000 2 SA 674 (CC) par 19-20; Fritz *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service in the South African Constitutional Context* (LLD thesis 2017 UP) 37). Thus, SARS must act in accordance with legislative provisions such as section 96 of the TAA.

Moreover, this value demands that the conduct of government, in this instance SARS, may not be arbitrary (Fritz 38). Currie and De Waal (*The Bill of Rights Handbook* (2013) 540-547) state that "arbitrary" generally involves not following fair procedure, being irrational or having no good reason. It is submitted that SARS' conduct in *Nondabula* was arbitrary for two reasons. One, SARS did not follow fair procedure when it failed to provide the grounds for the additional assessment in a notice of assessment as required in terms of section 96(1) of the TAA. Two, SARS' conduct was irrational as it reduced the additional assessed amount over the course of time without any explanation. This creates the impression that the initial assessed amount was not on firm grounds, or perhaps groundless, which resulted in SARS unceremoniously reducing the amount.

In *President of the Republic of South Africa v South African Rugby Football Union* (CCT16/98) 1999 ZACC 11 (*SARFU*) the court pointed towards another element of the rule of law. Public administration, of which SARS forms part of (s 195(2) of the Constitution read with s 2 of the SARS Act 34 of 1997) "must act in good faith and must not misconstrue" its powers (*SARFU* par 148). The court in *Nondabula* (para 24) shared a similar sentiment when it declared that SARS contravened the rule of law by not complying with its duties in terms of section 195(1) of the Constitution when it failed to furnish the taxpayer with the required information.

The question arises why the court considered it necessary to highlight the unconstitutionality of SARS' conduct, whilst simply relying on the peremptory wording of section 96 would suffice. It is submitted that in the current discourse where the extent of SARS' powers and conduct play an important role, the court had to emphasise that although it is important for SARS to collect taxes this must be done within the parameters of the Constitution.

3 3 Confirming the interdict – no other satisfactory remedy

An interdict is seen as a drastic remedy (Devenish 432) and should be granted only when similar protection cannot be achieved by "any other ordinary remedy" (*Setlogelo v Setlogelo* 1914 AD 221 227).

For purposes of ascertaining whether there was another satisfactory remedy available to the taxpayer, two actions of SARS should be considered. Firstly, SARS issued an estimated additional assessment and failed to comply with the procedural requirements thereof as envisaged in section 96 of the TAA. Secondly, SARS appointed a third party in terms of section 179 of the TAA.

(a) Failure to comply with section 96 of the TAA

In principle, a taxpayer could force SARS to comply with legislative provisions, in this instance section 96 of the TAA, by way of a mandatory interdict against SARS, known as a *mandamus* (Dendy 1063; Hoexter *Administrative Law in South Africa* (2007) 495). Nonetheless, this relief would possible not have been granted as an interdict requires there to be no other satisfactory remedy. In this instance, the taxpayer could use provisions in the Promotion of Administrative Justice Act (PAJA) 3 of 2000 to ensure compliance.

The issuing of an assessment constitutes administrative action. This is relevant, as such act falls within the purview of PAJA, which was enacted to give effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair as envisaged in section 33 of the Constitution (preamble to the PAJA).

In terms of section 3(2)(b)(iii) of the PAJA, an administrator must give a person who is subject to an administrative action a clear statement of the administrative action. This requirement is echoed in section 96 of the TAA, specifically in relation to SARS and assessments.

Furthermore, sections 6(2)(b) and 6(2)(c) of PAJA identify a failure to comply with a procedure or condition in terms of an empowering provision and a procedurally unfair action as grounds for review in terms of section 8 of PAJA. In turn, section 8(1)(a)(ii) of PAJA stipulates that a court that reviews such a qualifying action may order the administrator – in this instance SARS – to act in a certain manner. In *Nondabula*, the court could have ordered SARS to furnish the taxpayer with the required details in relation to the additional assessment in order for him to grasp the legal and factual basis for the assessment.

It is clear that the taxpayer had a remedy at his disposal in relation to SARS' failure to comply with section 96 of the TAA. However, the interdict sought by the taxpayer in *Nondabula* relates to the subsequent action of SARS in appointing a third party in terms of section 179(1) of the TAA. Consequently, the fact that the taxpayer could have had SARS' non-compliance remedied, cannot result in the court refusing to confirm the final interdict based on other suitable remedies available as this matter has evolved beyond the failure to furnish a notice of assessment.

(b) Appointment of a third party

The decision to appoint a third party is considered an "administrative action" in terms of PAJA (*Contract Support Services (Pty) Ltd v SARS* [1998] 61 SATC 338 349). Consequently, such action also needs to be lawful, reasonable and procedurally fair as envisaged in section 33 of the Constitution and in PAJA. The action on the part of SARS is thus reviewable in terms of section 6(2)(e)(v) of PAJA, as it acted in bad faith by proceeding with enforcement of a tax debt while not yet having provided the taxpayer with the required information. This conduct cannot simply be attributed to possible inadequate training that should be excused. Surely, if a taxpayer requests certain information on numerous occasions, the SARS official(s) dealing with the matter, should seek guidance within SARS. Also, SARS is required to be accountable (s 195(1)(f) of the Constitution) and provide the public with accurate information in a timeous manner (s 195(1)(g) of the Constitution). Therefore, more is and must be expected from SARS.

Apart from a review in terms of PAJA, the taxpayer could also have taken the matter on review on the grounds that the conduct of SARS was contrary to the rule of law (see above). Hoexter (225) points out that a review based on the principle of legality, which forms part of the rule of law, corresponds with the grounds for review in terms of PAJA. However, as "PAJA is now the primary or default pathway to review" (Hoexter 114), it would have been more appropriate for the taxpayer to have

commenced review proceedings in terms of PAJA than based on the principle of legality.

From the above discussion regarding possible remedies available in this matter, it is clear that the taxpayer could have taken the conduct on the part of SARS on review based on several different grounds. However, if the taxpayer had opted for relief by taking the matter on review, SARS would have still been able to collect the assessed amount by way of a third-party appointment as section 164(1) of the TAA provides for the "pay now, argue later" rule. This means that even if an objection, appeal or review has been lodged in relation to a tax debt, SARS may proceed with enforcing the payment of this disputed tax debt. Accordingly, the court was correct in granting the final interdict in *Nondabula* as there were no other satisfactory relief available to the taxpayer.

3 4 Cost Order

Whilst the cost order granted by the court would absorb some of the costs incurred by the taxpayer, the taxpayer could still be liable for a substantial amount in legal costs. As the court did not specify what type of cost order had been granted, it is deemed to be on a party-and-party scale (Theophilopoulos, Van Heerden & Boraine *Fundamental Principles of Civil Procedure* (2015) 447). As such, SARS would only be liable to pay costs that were "necessarily and properly incurred, for the attainment of justice, or for defending of that party's rights" (*Lead Practice Manual: Legal Costs* (2016) 17), which would result in the taxpayer having to pay his attorney any other costs not covered in terms of the party-and-party scale. Accordingly, awarding a party-and-party cost order in this matter does not mean that the taxpayer would not be liable for any costs incurred as a result of SARS not complying with the explicit requirements set out in section 96 of the TAA.

The matter of *Reid v Royal Insurance Co Ltd* (1951 1 SA 713 (T)) (*Reid*) serves to indicate that, in some circumstances, a court may order a party to pay more than just the "necessary and properly incurred" costs. In *Reid*, the court held that the applicant had misunderstood the purpose of particulars of claim, which had caused a delay in proceeding with the matter (720). As a result, the court held that the plaintiff should not "suffer by having to pay out of his own pocket any portion of the costs to which it was subjected" (720) and awarded costs on the attorney-and-client scale. This means that the applicant had to pay all costs, which the plaintiff's attorney would have been able to justifiably recover from the plaintiff (Theophilopoulos 447).

In *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* (1990 2 SA 574 (T)), the court went even further by awarding a cost order for punitive reasons. *In casu*, the court stated that an order on an attorney-and-own-client scale, which was awarded in this matter, signified the court's utmost disapproval of the circumstances that had given rise to the action or the actions of the losing party (589). This cost award would thus

require the losing party to pay the costs as agreed upon by the winning party and its attorney (Theophilopoulos 447). However, the court in *Enslin v Gallo* (1984 1 PH F27 (D)), as referred to in *Cambridge Plan AG v Cambridge Diet (Pty) Ltd* (1990 3 All SA 836 (T) 862), recognised that the party against whom an attorney-and-own-client order is granted is not a party to the contract between the winning party and his or her attorney. This aspect must therefore be taken into consideration when a court exercises its discretion relating to a cost order, as the court has to ensure that its order is fair to both parties. (See *Fripp v Gibbon & Co* 1913 AD 354; *Vryenhoek v Powell* 1996 2 SA 621 (CC) 624B-C; *Naylor v Jansen* 2007 1 SA 16 (SCA) 23F-28F in this regard.)

Considering the different costs orders and relevant case law, it is apparent that whenever a taxpayer approaches a court, even if SARS is to blame, it will have a financial impact on the taxpayer, unless the taxpayer's legal representative is able to successfully argue for an attorney-and-own-client cost order. Although this may be true for other types of litigation, the extent of SARS' powers, *inter alia* the "pay now, argue later" rule and third party appointments, forces a taxpayer to approach a court as it cannot simply be ignored.

4 Conclusion

The case of *Nondabula* highlights the fact that the duty of SARS to collect taxes does not mean it can forsake its obligations imposed by legislation. SARS must act in accordance with the rule of law and has to adhere to the standard enshrined in section 195(1) of the Constitution. As such, the "pay now, argue later" rule can only apply if SARS has furnished a notice of assessment as required in terms of section 96(1) of the TAA. Thus, failure on the part of SARS to provide legal and factual basis for the assessment prevents SARS from using its array of enforcement powers. Although the taxpayer had to pay a cost to interdict SARS, the clarity gained for the benefit of future disputes with SARS is invaluable and a victory for taxpayers.

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Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa

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SUMMARY

Constitutionalism in sub-Saharan Africa evolved from imperial European laws, which were imposed on Africa's agrarian political economies through legal transplants. Being historical continuities of imperial laws, state laws have a rule-obsessed approach to law, with its attendant justice delivery problems. Significantly, colonial legal transplant in Africa was accompanied by radical socioeconomic changes, whose persistent patterns of power, philosophy, and conduct are referred to as coloniality of power. The staggering extent to which coloniality affects the normative behaviours of Africans demands a reassessment of the status of indigenous African laws. This paper argues that most indigenous laws have transformed into customary laws through people's adaptations to legal, economic, religious, and globalisation-fuelled changes in intersecting social fields. It uses content analyses of 26 African Constitutions to assess the extent to which customary laws are accommodated. Suggesting that these Constitutions are future common laws, the article offers the foundational values of indigenous laws as building blocks of constitutionalism and legal integration in the continent.

1 Introduction

Constitutionalism is the idea that governmental authority is conferred and defined by the people through a fundamental law known as the Constitution.[1] In the Global North, the Constitution reflects the customary laws of citizens, given that these laws had integrated with state laws through a long coexistence. However, this integrated legal system is not the case in sub-Saharan Africa, where mostly oral indigenous laws enjoyed normative monopoly just over a century ago.[2]

1 For discussion, see Chesterman "Imposed constitutions, imposed constitutionalism, and ownership" 2004 *Connecticut Law Review* 947; Holmes "Constitutions and constitutionalism" in Rosenfeld & Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (2012) 189-214.

2 'Indigenous laws' are also referred to as 'people's law, folk law, adat law, traditional law' and 'autochthonous law.' See generally Allot & Woodman (eds) *People's Law and state law: The Bellagio papers* (1985) 24.

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Here, European laws with industrial backgrounds forcefully displaced indigenous laws with agrarian backgrounds and entrenched themselves as the dominant legal order. Significantly, state laws abolished, modified, and rigidly regulated the application of indigenous laws.[3] By so doing, it coercively changed the normative behaviours of Africans, thereby birthing what we regard today as customary law. However, the creation of customary law occurred in the context of dissonance between indigenous laws and state laws. Nowhere is this dissonance more evident than in African Constitutions, which, as prime products of imposed European laws, are the normative faces of state laws. We shall argue that the creation of customary law resulted from people's normative adaptations to the socioeconomic changes brought by colonial rule, of which the most influential is state laws. We shall demonstrate how these socioeconomic changes were backed by legislation, stamped by the courts, and enforced by law enforcement agents. Notably, all these processes of change were embedded in the phenomenon of legal transplant.[4] Accordingly, to illumine our proposal for rethinking the interface of customary law and African Constitutions, we need to explain the significance of legal transplant for the interaction of laws in sub-Saharan Africa.

Legal transplant, defined here as the movement of rules and legal institutions from one state to another, may be classified into voluntary, coercive, and imposed types. It is imposed when the laws and judicial systems of a foreign state are forced on another state through conquest, colonialism, and some might add, neo-colonialism.[5] Being a product of conquest, imposed legal transplant is unmindful of differences between the socio-political environments of the transplanting and recipient states. Accordingly, it had two consequences for African constitutionalism.

Firstly, it disregarded the free will of African peoples, who were on the receiving end of European laws and legal systems. Many early Constitutions in Africa were drafted by elites, who were either influenced by colonialists, or acquired political power through questionable ways that need not detain us here.[6] Secondly, the invidious ways European laws displaced African legal orders resemble what Siems described as "malicious legal transplants."[7] Rather than being an isolated event, colonial legal transplant in Africa was a comprehensive, self-replicating phenomenon, which was accompanied by radical socioeconomic changes that irrevocably affected the education, philosophy, religion, work, food, and dressing of Africans. In short, it created patterns of

3 Morse & Woodman *Indigenous law and the state* (1988) 8.
4 Watson *Legal transplants: An approach to comparative law* (1993) 1.
5 Owen "The foreign imposition of domestic institutions" 2002 *International organization* 375-409.
6 Even South Africa's serenaded constitution had little input from the masses. For debate, see Sparks *Tomorrow is another country: The inside story of South Africa's negotiated settlement* (1995) 63.
7 Siems "Malicious legal transplants" 2018 *Legal Studies* 105.

power, philosophy, and conduct, whose persistence has been aptly described as the coloniality of power.[8]

Given the staggering normative effects of coloniality and the historical continuities of state laws in Africa, the relevance and status of indigenous laws must be reassessed. So, to what extent do African Constitutions incorporate customary laws that emerge(d) from people's adaptations of indigenous laws to socioeconomic changes? In the context of constitutionalism with imperial roots, this article argues that coloniality characterises the legal systems of sub-Saharan Africa, specifically the emergence and forms of Constitutions. Colonial rule not only transformed indigenous laws into customary laws endowed with the rule-minded character of imperial law, it also contributed to the second-class status of customary laws in African Constitutions. In furtherance of our argument, we used content analyses of 26 African Constitutions to assess the extent to which they accommodate customary laws. The main elements for assessing this accommodation are constitutional acknowledgements of the right to culture, communal life, equality of women and men, and matrimonial property. Others are provisions defining customary law, mandating courts to apply customary law, and affirming the socioeconomic changes that drive the dynamism of customary law. These elements stand at the intersection of colonial continuities and discontinuities in indigenous African laws. Also, they are useful for policy makers interested in the integration of state laws with customary laws.

Following this introduction, section II of this article explains how colonial rule created and reinvented most of what we regard today as customary laws. In so doing, we distinguish between indigenous laws and customary laws. While indigenous laws are remnants of the precolonial norms which people observe in their ancient forms, customary laws are adaptations of indigenous norms to socioeconomic changes. Given that colonial rule was coercive, the normative alterations it brought are imposed changes, thereby necessitating a differentiation between pre-colonial norms and post-colonial norms. Section III uses content analysis of African constitutions to explain how the constitutional statuses of indigenous laws display scant sensitivity to people's normative adaptations to socioeconomic changes. Thereafter, it demonstrates how the inferior legal status of indigenous laws impacts on justice delivery, especially for marginalised groups such as women. Section IV concludes with proposals.

8 Quijano "Coloniality of power and Eurocentrism in Latin America" 2000 *International Sociology* 215-232; Mignolo "Epistemic disobedience, independent thought and de-colonial freedom" 2009 *Theory, Culture and Society* 1-23.

2 Colonial creation of customary law

Do contemporary African customary laws substantively reflect their precolonial forms? The answer is negative because law is a product of its historical environment. The reality of the African environment is that customary laws emerge(d) from people's adaptations of mostly oral indigenous laws to economic, legal, political, cultural, and religious changes in intersecting social fields.[9] In turn, these socioeconomic changes embody the confluence of European imperial interests with the preservationist and opportunistic interests of their subject chiefs, elders, and merchants. We refer to these individuals as African elites. As Roberts noted, "customary law is now widely regarded as a collaborative project shaped primarily by male colonial officials fearful of their fragile control over newly colonized societies and by elderly African males equally fearful about the challenges to their authority."[10] We will discuss the interests embedded in this collaborative project in turn.

2 1 Imperial interests

The interests of European colonisers in Africa are well documented.[11] The most important is economic exploitation, which was achieved with the aid of territorial, political, normative, and even religious subjugation of African communities.[12] Being intrinsically exploitative, colonial rule was implemented with rule-obsessed or legal positivist law, referred to here as imperial law.[13] To understand the significance of imperial law, one needs to appreciate the modern roots of legal transplant.

Taking classical antiquity as a historical reference point, the most significant use of legal transplants in modern times may be attributed to the Roman Empire.[14] As the most enduring empire in recorded history, the Romans imposed their laws on Northern Europe, Scandinavia, the

9 Diala "The concept of living customary law: A critique" 2017 *J of Legal Pluralism and Unofficial Law* 143-165.

10 Roberts "Colonialism and Customary Law in Africa: A Response to Leslye Obiora" 1993 *Legal Studies Forum* 253.

11 See, for example, Rodney *How Europe underdeveloped Africa* (1971); Njoh "The impact of colonial heritage on development in Sub-Saharan Africa" 2000 *Social Indicators Research* 161-178.

12 For an illuminating discussion of colonialism and religion in Africa, see Nunn "Religious conversion in colonial Africa" 2010 *American Economic Review* 147-52.

13 Legal positivism perceives law from the lens of verifiable social facts rather than morality or values. See Austin (1832) *The province of jurisprudence determined* (Rumble ed) (1995) 157.

14 In simple terms, classical antiquity denotes the epoch between the 8th century BC and the 6th century AD, a period in which the Greco-Roman world (great civilizations of ancient Greece and ancient Rome) flourished around the Mediterranean Sea.

Middle East, and North Africa,[15] using the rule of legal change.[16] This rule was founded on a positivist view of law – that is the idea of law as a command enforceable by force if necessary. As we know, this idea of law ignores law's "interactional" character, as well as its "power differentials."[17]

Previously, moral values and communal needs had dominated ideas of laws in many of the tribes that came under Roman rule. Rome's imperial law made it easy for their generals to form and administer nation-states under centralised leaderships founded on cooperative governance between the conquered tribes and their Roman overlords. Moreover, it was the most effective way to ensure that the conquered peoples accepted the new Sheriff in town. Unfortunately, rather than normative change to emerge from below in response to people's adaptation to social changes, imperial law imposed change from above. By divorcing values (morality) from law and giving normative change a rule-obsessed character, imperial law arguably sowed the seeds for the destructive series of battles known as the Thirty Years War. These battles eventually birthed the Peace of Westphalia,[18] which, as widely acknowledged, laid the foundations of state sovereignty, from which modern Western legal systems emerged. As Halpérin stated, normative behaviour all over Europe embraced the disturbing reality "of a new statute abrogating an old one" without the need for change to initiate from people subject to the new statute.[19] Like a bad habit, this disturbing reality accompanied British, French, Belgian, Portuguese, Italian, and German conquests of Africa. It coloured their understanding of African indigenous laws, as presented to them by the natives.

Significantly, imperial law was accompanied by revolutionary changes such as wage labour, urbanisation, new religion, education, food, dressing, forms of property, and individualistic worldview. These changes radically altered the social organisation of African communities, with considerable impact on their indigenous laws. One of the most known impacts of these alterations is the diminished status of women.[20] Another is state ownership of all land.[21] As agriculture became commercialised, women became excluded from production policies, lost

15 For an overview of the Roman Empire, see Sherman *Roman law in the modern world volume 2* (1922).

16 Benton & Straumann "Acquiring empire by law: From Roman doctrine to early modern European practice" 2010 *Law and History Review* 1-38.

17 Kidder "Toward an integrated theory of imposed law" In Burman & Harrell-Bond (eds) *The Imposition of Law* (1979) 291.

18 Bring "The Westphalian Peace Tradition in International Law: From *Jus ad Bellum to Jus contra Bellum*" 2000 *International Law Studies* 58.

19 Halpérin "The concept of law: A Western transplant?" 2009 *Theoretical Inquiries in Law* 333.

20 Korieh "The invisible farmer? Women, gender, and colonial agricultural policy in the Igbo region of Nigeria, c. 1913-1954" 2001 *African Economic History* 124.

21 Meek "A note on Crown land in the colonies" 1946 *J of Comparative Legislation and International Law* 87-91.

arable lands to big firms, and ultimately, lost their economic power base.[22] In fact, in southern Africa, colonialists went as far as creating enforced settlements to which they confined Africans to land only deemed adequate for survival. By so doing, they rearranged means of livelihood, created new patterns of wealth, and invented social statuses, whose devastating effects on equality and wealth remain today.

Naturally, imperial law and its accompanying socioeconomic changes forced adjustments in normative behaviour. As shown below, these adjustments manifested in the manners Africans presented indigenous laws to Europeans.

2 2 Native interests

To understand how the kinship, tribal, economic, and political interests of Africans and European colonialists created customary laws, one must appreciate the nature of law. Generally, law is a product of human needs and aspirations, which emerges in a social context characterised by dynamism – that is an ability to respond to changing needs and situations.[23] Indigenous laws are no different. Most of them emerged in agrarian settings in which families lived in close-knit units for purposes of defence and agricultural activities.[24] In these communal settings, rights were mostly complementary and relational rather than absolute and hierarchical. The absence of absolutism in the exercise of rights was due to the overriding nature of family or communal interest in social relations. In a typical precolonial social setting, for instance, women played rights-related roles by cooking for the family, selling/bartering farm produce, and mediating in disputes.[25] Indeed, we are persuaded by scholarly views that pre-colonial gender relations evolved in non-patriarchal environments.[26] Phenomena evidencing this argument include gender neutral names, attires, patterns of comportment, and even ritual ceremonies such as the Nrachi custom in southern Nigeria.[27] The point here is that the close-knit, communal rights oriented nature of precolonial society is incompatible with the rule-based, hierarchical, and individualistic image with which European colonisers perceived African indigenous laws. For example, rights to land were rights of use, not alienation;[28] the family head's powers over property inheritance were trustee-like, not dictatorial;[29] and women exercised matrimonial

22 Boserup, Tan & Toulmin *Woman's role in economic development* (2013) 36.
23 Obiora "Reconsidering African customary law" 1993 *Legal Studies Forum* 217-252.
24 Barton *et al Law in radically different cultures* (1983) 41-42.
25 See, for example, Nzegwu *Family matters: feminist concepts in African philosophy of culture* (2006) 188-190.
26 Sudarkasa "The status of women in indigenous African societies" 1986 *Feminist Studies* 101.
27 Nrachi custom helps a man raise a male child through his daughter by keeping her unmarried in his house.
28 Elias *The nature of African customary law* (1956) 159.
29 Mbatha "Reforming the customary law of succession" 2002 *SAJHR* 259-286.

property rights embedded within their influential roles in the family and larger community as priestesses, mothers, wives, sisters, aunts, mothers-in-law, and grandmothers. Following colonial rule, however, the communal, dynamic, and process-oriented nature of indigenous laws changed.

2 3 How indigenous laws changed

It would be abnormal if the Africans who first encountered European colonisers were not perturbed over the motives of these strangers with different skin colours and seemingly magical objects like guns and mirrors. For purposes of protecting their families and properties, these Africans would have almost exclusively been men, not women. So, right from the start, the face of public governance was altered. As Chanock showed, Africans could have exploited the situation by presenting versions of customs that enhanced their social powers, or even manufactured powers they did not exercise in their communities.[30] They would certainly have made mistakes in presenting their laws, since formidable language barriers existed between them and the new overlords. In most parts of Africa, these language barriers were overcome with the aid of natives who acted as interpreters, many of whom had poor mastery of English language after receiving crash courses in colonial schools. Other interpreters were former slaves from neighbouring communities, whose abilities to speak local dialects were poor.

Furthermore, many presentations of indigenous laws occurred in the context of disputes. Several factors such as interpreters' abilities, relationships with litigants, pecuniary interests, and political considerations influenced the presentation of customs. We can illustrate this argument with two typical examples involving inheritance and marital property rights.[31] The parties here are an elderly family head who considered himself a defender of cultural and religious values, a court interpreter who recently converted to Christianity, and a European District Officer (Native Commissioner) who somehow managed to avoid asking rule-based questions even though he had no ethnographic research background:[32]

"*Inheritance dialogue*

District Officer: Ask the chief to explain inheritance rights in his community.

Court interpreter: Master [District Officer] says you should tell him who inherits the property of a dead man in your community. He doesn't want long stories. Just tell us who inherits.

30 Chanock "Neither customary nor legal: African customary law in an era of family law reform" 1989 *International Journal of Law and Family* 72-88.

31 This dialogue is constructed from one of the authors' interviews of elders, traditional leaders, and customary court judges in southern Nigeria between 2014 and 2015, as well as "Icheoku", a 1980s Nigerian television comedy.

32 The identity of the community involved in the dispute is redacted.

Family Head: In my community of XYZ, the land of fierce rivers, long valleys, and beautiful women, the oldest male son inherits the property of a deceased man. This is the custom of our people since time immemorial. Everyone in the village knows this. I don't know why Chungu (defendant) is using alien ideas to claim something that does not belong to him. Our custom is very clear on inheritance. In fact, the gods will punish anyone who denies it –

Court interpreter: [*Cuts in mockingly*] I told you Master doesn't want to hear long stories. In any case, there are no gods. There is only one God, the father of Jesus Christ our Saviour.

Family Head: I am sorry if I annoyed the white man. Please tell him only the eldest male son inherits the property of a dead man."

In the above dialogue involving the rule of male primogeniture, we draw attention to how the family head was given no opportunity to express African peoples' "love of intricate and eloquent rhetoric."[33] Being so restricted, he could not explain that the first son inherits family property because the close-knit structure of social life demanded an authority figure to protect the family's interests. Similarly, he did not explain the two-fold purpose of this rule: (1) to enable the first son to, literally, step into the shoes of the deceased as the family head. (2) to require the heir to administer the estate in a trustee-like manner – that is for the benefit of all who were dependent on the deceased person, especially wives, unmarried daughters, and younger male children.[34]

We turn now to dialogue number two, which involves a family head anxious to assert a patriarchal view of indigenous laws and a court clerk/ interpreter, who, as a former slave, was almost despised in the jurisdiction in which he worked.

"*Matrimonial property dialogue*

District Officer: Ask the chief to explain matrimonial property rights in his community.

Court interpreter: Master says you should tell him whether women inherit property when they separate from their husbands.

Family Head: Women do not separate from their husbands in our community, so how can they inherit property?

Court interpreter: No, that is not what I asked! When a man sends a woman back to her father forever, does she have claims to marital property?

Family Head: [*Contemptuously*] If you know our people (community) well, you wouldn't ask that question. But I don't blame you because you are not from here –

Court interpreter: [*Cuts in sharply*] Never mind me! Just answer the question!

33 Fallers "Customary law in the new African states" 1962 *Law and Contemporary Problems* 607.

34 South African Law Commission Report on Harmonisation of the Common Law and the Indigenous Law 1999 (Project 90).

> **Family Head**: Such a thing is rare, as our fathers did not divorce their wives. Our women used to be well behaved until the white man's education started filling their ears with nonsense … Anyway, if a man sends a woman with nasty character back to her husband, she has no right to the man's property because everything she owns belongs to the family in which she married. In fact, since the man is the head of the family, it means the woman belongs to the man.
>
> **Court interpreter**: Master, the witness says a divorcing woman has no matrimonial property rights because she belongs to her husband."[35]

In the above dialogue, the family head's degradation of the legal status of women is partly honest and partly obfuscating. Even though he was not asked specifically, nothing prevented him from acknowledging that women have limited marital property rights. He could have done this by explaining the social context of the family. He could have stated the rights of divorcing women to refund of bride wealth and collection of the marriage gifts they received from their own family, which were usually cooking utensils and items of adornment.[36] In the agrarian settings in which matrimonial property rights emerged, these were the only conceivable properties women could own in a personal capacity, since other properties such as fishing, hunting, and farming tools were communal.

From the foregoing peek at how Africans presented indigenous laws to early European administrators, we see how the confluence of varying interests affected indigenous laws. These interests, we argue, coupled with the influence of socioeconomic forces, created contemporary African customary laws. This argument requires a distinction between indigenous laws and customary law, to which we now turn.

2 4 Indigenous law versus customary law

Ordinarily, customary law connotes the image of "custom" – that is an immemorial practice with historical continuity. However, the foregoing discussion has shown that "customary law in Africa is not what it used to be."[37] As we hinted in section I, indigenous laws are oral precolonial norms which people observe in their ancient forms, while customary laws are adaptations of precolonial norms to socioeconomic changes. This argument resonates with Starr and Collier's description of customary law as "the outcome of historical struggles between native elites and their colonial or postcolonial overlords."[38] Before theoretically

35 For similar account of matrimonial property, see Diala "A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states" 2018 *AHRLJ* 103-104.

36 Obi *et al The customary law manual* (1977) s 321 & s 322.

37 Zenker & Hoehne "Processing the paradox: When the state has to deal with customary law" in Zenker & Hoehne (eds) *The state and the paradox of customary law in Africa* (2018) 1.

38 Starr & Collier "Introduction: Dialogues in legal anthropology" in Starr & Collier (eds) *History and power in the study of law: New directions in legal anthropology* (1989) 9.

expanding this argument, we will illustrate it with two commonly recognisable examples.

Our first example is the male primogeniture rule.[39] Supposing Sechaba, a wealthy businessman, died intestate, leaving three male children and two female children. If his entire estate is inherited by Mark, his eldest son, the applicable custom of inheritance here is classical male primogeniture. This is because the estate was divided in strict accordance with an ancient norm that emerged in response to the agrarian nature of precolonial society. However, supposing the estate is shared among all the children, even if inequitably. In this second scenario, a deviation from classical male primogeniture is evident. This deviation constitutes customary law, since it emerged from an adaptation of an indigenous norm to influences or changes such as acculturation, constitutional equality, new (religious/global) notions of fairness, family income patterns, urbanisation, and individualism. As evident in the popular *Bhe* case,[40] urbanisation, and individualism are increasingly common – that is the reality that some modern heirs are selfish, live in cities far from ancestral homes, and lack adequate time to administer the estate of deceased persons for the benefit of their dependants.

Our second example of the distinction between indigenous laws and customary laws is custody rights over children. Prior to colonial rule, women had limited custody rights over children who were past weaning age.[41] This is largely because most African societies are patrilineal. However, in the communal social settings in which this custom emerged, divorce was rare, since marriage was a near-indissoluble alliance between families, one in whose success the entire community invested their peace and reconciliation energies.[42] On the rare occasions divorce occurred, it was difficult for the interests of children to be negatively affected because the close-knit nature of the (extended) family acted as a safety check against children's maltreatment. This safety check resonates with the best interest of the child principle found in state laws. Accordingly, when the rate of divorce spiked and began causing hardships to women and children, it was easy for the indigenous law of child custody to adapt. Recognising the realities of urbanisation, acculturation, equality rights, independent income, and similar socioeconomic elements, traditional communities began to accord divorcing women custody rights over their children.[43] We regard this adaptation as customary law because it is forced by radical

39 The following example is inspired and borrowed from Diala 2017 *J of Legal Pluralism and Unofficial Law* 153.

40 *Bhe and Others v Magistrate Khayelitsha and Others*; *Shibi v Sithole*; *SAHRC v President RSA* 2005 1 BCLR 1 (CC).

41 Newman *Women of the world: Sub-Saharan Africa* (1984) 110.

42 Uchendu *The Igbo of Southeast Nigeria* (1965) 50.

43 Himonga *Family and succession laws in Zambia: developments since independence* (1995) 16-32; Diala "The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria" 2018 *AHRLJ* 706-731.

socioeconomic changes, of which bills of rights and children's laws are prominent.

Other examples of indigenous laws transmuting to customary laws abound in land registration,[44] adoption of children by women,[45] succession to traditional leadership,[46] disposal of parental consent in marriage,[47] and monetisation of bride wealth payment.[48] We proceed to a brief distinction between indigenous laws and customary laws.

2 5 What is customary about African customary law?

This is an interesting question; one which scholars are yet to satisfactorily answer. Is African customary law 'customary' because it is an unchanged remnant of the precolonial past or because it is a label for describing all forms of non-state laws to which Africans attach a sense of obligation? The latter response is more persuasive, since there is no historical continuity in African customary laws. Sanders observed that "today's autonomic customary law is not the same as the customary law of the pre-colonial past."[49] In agreement, we argue that the 'customariness' of customary laws is traceable to two intertwined elements.

The first is an amplified sense of obligation to people's indigenous practices, while the second is the confluence of interests between African elites and the postcolonial state, which inherited its capitalist hegemony. Regarding the second element, the process-oriented character of indigenous laws proved to be a double-edged sword. On the one hand, it made indigenous laws very receptive to change. On the other hand, it made it easy for African elites to exploit indigenous laws' flexibility to present distorted versions of customs to European authorities. Since the imperial and pecuniary interests of these two parties were incompatible with the dynamism of indigenous norms, they were compelled to give these norms rule-based features.[50] Accordingly, they replaced the sense of obligation that guided indigenous laws with a sense of coercion. Along with acceptance, the sense of obligation became displaced with fear – the fear of the white man's courts and soldiers.[51]

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44 Nwauche "Legal pluralism and access to land in Nigeria" in Mostert & Bennett (eds) *Pluralism and development: Studies in access to property in Africa* (2012) 70.

45 *K v M and Others* (671/2013) 2014 ZALMPHC 5.

46 *Shilubana and Others v Nwamitwa* 2008 9 BCLR 914 (CC); 2009 2 SA 66 (CC).

47 Section 3(a) of the Recognition of Customary Marriages Act 1998.

48 Grosz-Ngaté "Monetization of bridewealth and the abandonment of "kin roads" to marriage in Sana, Mali" 1988 *American Ethnologist* 501-514.

49 Sanders "How customary is African customary law" 1987 *Comparative and International LJ of SA* 409.

50 For analysis of the political economy of customary law in post colonies, see Ghai, Luckham & Snyder *The political economy of law: A third world reader* (1985) 1.

51 Spiers "The use of the Dum Dum bullet in colonial warfare" 1975 *J of Imperial and Commonwealth History* 3-14.

To legitimise this new element of coercion, indigenous laws were endowed with historical antiquity,[52] shrouded with a preservationist shadow, and brought under the suffocating shade of sanctions, whose alien nature is evidenced by the rarity of prisons in precolonial Africa.[53] An example of the artificial antiquity of indigenous law is the Nigerian Evidence Act and customary court laws, which invariably define customary law as "a rule or body of customary rules … fortified by established usage." Ultimately, rule-obsession or legal positivism invaded indigenous laws, muted their propensity to change, obscured their foundational values, and championed their "customariness." We know how this was done throughout the continent: customs were codified, trapped in judicial precedents, and interpreted in the courts with European lens of legal certainty. So, to return to the question: what is customary about African customary law?

The answer is practically nothing. Almost all aspects of customary laws are different from their precolonial forms and usages. As Snyder summed it, "the foundations of customary law in Africa lie partly in the development of capitalism and its expansion from Europe during the colonial era."[54] In ending our distinction of indigenous laws from customary laws, one thing must be stressed. Law – of whatever type – is not immutable. Precolonial indigenous laws would have changed with or without the influence of colonial rule.[55] Our argument is that colonial rule hastened the pace of change in a manner so revolutionary that many precolonial norms lost their indigenous flavour. The comprehensive socioeconomic changes that occurred in African social fields in the areas of religion, education, commerce, leisure, and means of livelihoods, among others, disrupted the natural pace of normative changes. The consequences are so pervasive that they qualify as imposed changes. In this sense, state laws are the most powerful socioeconomic changes, constitutions are the poster pages of state laws, while customary laws are products of these changes. In what follows, we analyse the extent to which African constitutions recognise customary laws, thereby setting the stage for rethinking the interface between indigenous laws and constitutionalism.

3 Constitutional recognition of customary law

As shown in section II, socioeconomic changes underlie the intersection of historical discontinuities in indigenous African laws. The most visible

52 During fieldwork in Somaliland and Nigeria, it was common for informants to invoke the tradition of their ancestors to explain women's subordination in customs of male primogeniture and matrimonial property rights.

53 Novak "Capital punishment in precolonial Africa: The authenticity challenge" 2018 *J of Legal Pluralism and Unofficial Law* 76; Lewin "Crime and punishment in Africa" 1940 *Howard J of Criminal Justice* 245-247.

54 Snyder "Customary law and the economy" 1984 *Journal of African Law* 34.

55 Obiora "Reconsidering African customary law" 1993 *Legal Studies Forum* 217-252.

aspects of these changes concern gender equality, dignity, succession, and property rights. They are very visible because they radically altered the close-knit structure of precolonial society, thereby changing people's attitudes and hastening the transformation of indigenous laws to customary laws. Specifically, the transformed aspects of indigenous laws concern group/family production of wealth, emphasis on communal interests over individualism, the basic nature of property, the process-oriented character of norms, and the reconciliatory nature of dispute resolution. Accordingly, this section analyses the ways in which African constitutions acknowledge the transformation of indigenous laws to customary laws. These acknowledgements are the ways constitutions define customary law, mandate courts to apply customary law, and affirm socioeconomic changes that affect traditional society and drive the dynamism of customary law. We also examine provisions on the right to culture, communal life, equality of women and men, and matrimonial property, since these provisions reveal colonial-induced discontinuities in indigenous African laws.

Of the 26 constitutions surveyed, we highlight 13 only because they are on extreme ends of customary law recognition. In no order, these are South Africa, Nigeria, Cameroon, Gabon, Ghana, Kenya, Uganda, Tanzania, Rwanda, Zambia, Zimbabwe, and Mozambique. Our analysis is arranged thematically.

3 1 Culture, traditional institutions, and communal life

As the preceding discussion shows, communal life and traditional institutions in contemporary Africa are vastly different from what they were in precolonial times. Constitutions should help people to cope with radical changes in social life, specifically the dissonance between modernity and customs with agrarian origins. They can do this by affirming people's right to culture and traditional institutions, and subjecting these rights to human dignity and non-discrimination. By so doing, people's adaptations of indigenous laws to socioeconomic changes will find support in the highest law of the land. In this context, Kenya, South Africa, Uganda, Mozambique, and Zimbabwe have the most prominent provisions on the right to indigenous culture and communal life. We offer snippets of these provisions below.

The Kenya Constitution of 2010 establishes a National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts. Article 11(1) "recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation." Furthermore, article 56 mandates the state to take "affirmative action programmes designed to ensure that minorities and marginalised groups develop their cultural values, languages and practices." Article 159(2)(c) makes unparalleled provisions for "courts and tribunals [to] be guided by principles of alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms." In marked departure from

colonial era land laws, article 63 guarantees that "community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest."

In a similar manner as Kenya, Mozambique strongly supports indigenous institutions. For example, article 118 of its Constitution provides: "The State shall recognise and esteem traditional authority that is legitimate according to the people and to customary law ... The State shall define the relationship between traditional authority and other institutions and the part that traditional authority should play in the economic, social and cultural affairs of the country ..."[56] This requirement to "define the relationship between traditional authority and other institutions" is a rare effort to legislatively clarify legal pluralism in Mozambique. Only South Africa comes close in clarifying legal pluralism by mandating the courts to "apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[57] As we show below, this clarification is useful for asserting gender-related rights, as it enables women to confront the patriarchal reinforcements that accompanied the transformation of indigenous laws into customary law.

3 2 Gender equality

South Africa, Zambia, Zimbabwe, and Mozambique have firm customary law-related gender provisions. Indeed, South Africa, Zambia, and Zimbabwe went as far as establishing gender equality commissions. Intended or not, the manner these states emphasise the equality of spouses recognises how group production of wealth and women's independent income have diminished and increased respectively. For example, section 26 of the Zimbabwean Constitution of 2013 mandates the state to "take appropriate measures to ensure that (c) there is equality of rights and obligations of spouses during marriage and at its dissolution." Article 122 of the Constitution of Mozambique requires the state to "promote, support and value the development of women, and [to] encourage their growing role in society, in all spheres of political, economic, social and cultural life of the country."

Other states like Kenya, Ghana, and Uganda also protect gender equality in varying degrees.[58] The Ghanaian Constitution of 1992 not only ensures women's right to property, it is also the only surveyed constitution that unequivocally affirms joint matrimonial property. Notably, section 22(3)(a) and (b) provides that "spouses shall have equal access to property jointly acquired during marriage," and "assets, which are jointly acquired during marriage shall be distributed equitably

56 Constitution of the Republic of Mozambique of 2004 34.

57 See s 211(3) of the Constitution of South Africa Act 108 of 1996. To a lesser extent, Kenya and Uganda also attempt to clarify their legal pluralism.

58 See article 27 of the Kenyan Constitution of 2010 and art 32 (2) of the Ugandan Constitution of 1995, which recognises that women are a marginalised group in need of protection.

between the spouses upon dissolution of the marriage." This remarkable recognition may be due to the matrilineal nature of some Ghanaian societies.

3 3 Dynamism of indigenous law

African states do not seem to grasp fully the hardships that result from applying indigenous norms in industrial conditions different from the agrarian settings in which these norms emerged. Dissonance between the origins of indigenous norms and their application in modern conditions invokes the dynamism of indigenous law – that is its ability to respond to the hardships which women suffer in inheritance and matrimonial property issues. As shown above, only Ghana, Kenya, South Africa, Zambia, Zimbabwe, and to a lesser extent, Uganda, strongly affirm gender equality within the context of this dynamism.[59] Of these states, Ghana stands head and shoulders above the others, since it seems particularly conscious of women's loss of their economic powerhouse status following the industrialisation and land appropriation policies of British colonialism. For example, section 36(6)(7) of the Ghanaian Constitution mandates the state to "take all necessary steps … to ensure the full integration of women into the mainstream of the economic development of Ghana" and "guarantee" their ownership of property and right of inheritance.[60] Section 39 mandates the state to adapt "customary and cultural values" to "the growing needs of the society," while section 270 grants traditional institutions a role in customary law's development.

South Africa prefers to tackle the dynamism of indigenous laws through the courts. Section 39(2) of its constitution provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights." Zambia and Zimbabwe give this promotion function to chiefs. Their role in Zambia is, among others, to "initiate, discuss and make recommendations to the National Assembly regarding socio-economic development" and "advise the Government on traditional and customary matters."[61] In Zimbabwe, their role includes the preservation of culture, facilitation of development, and resolution of "disputes amongst people in their communities in accordance with customary law."[62]

From the surveys, there is increasing recognition of customary law in constitutions adopted in the last twenty years. Also, recent constitutions, including constitutional amendments, seem to emulate the Constitution of South Africa. For example, Kenya and Zimbabwe heavily copied the

59 S 33 of the Constitution of Uganda of 1995 has elaborate provisions for protecting the rights of women.
60 *See* also s 27(3) and s 36(6).
61 See art 165 and art 169 of the Zambian Constitution of 2016.
62 S 282 of the Zimbabwean Constitution of 2013.

duty imposed on the courts to interpret indigenous law in accordance with the Bill of Rights.

Conversely, the constitutions of Cameroon, Gabon, Nigeria, Rwanda, and Tanzania have the least recognition of customary law. They do not define its relationship with state laws, contain no matrimonial property rights, and have insignificant or no provisions on the right to culture, traditional institutions, and the status of chiefs, monarchs, and elders. Although article 201 of the Rwandan Constitution of 2003 appears to recognise that indigenous law transforms to customary law, it paints a condescending image of this transformation. It states: "Unwritten customary law remains applicable as long as it has not been replaced by written laws, is not inconsistent with the Constitution, laws and regulations, and does not violate human rights, prejudice public order or offend public decency and morals." Article 201's emphasis on orality demonstrates the influence of codification on the transformation of indigenous laws into customary law. Codification brings coercion, legal certainty, and judicial precedents. Unfortunately, these features of imperial law are incompatible with the dynamism of indigenous laws. As we show shortly, they make it difficult for people to assert changing social conditions.

3 4 Implications of customary law's status

The inferior constitutional status of customary law has negative impacts on justice delivery, especially regarding the rights of marginalised groups such as women, female children, and younger males. We demonstrate this argument with matrimonial property rights under customary law. As stated, women's marital property rights in the precolonial era flowed from the close-knit nature of social life, in which family income was jointly derived from farming, hunting, and fishing. This is no longer the case. For a start, the nature of family property has changed from huts, sleeping mats, farm implements, and fishing nets to sophisticated cars, refrigerators, televisions, and modern buildings. Similarly, the communal structure of the extended family is giving way to migrant labour and nuclear families with individualistic mannerisms. Furthermore, income is now earned independently, with women contributing directly to the acquisition of new forms of property. With this type of changed social settings, it is inhumane to continue with the indigenous law of matrimonial property, which subsumes a married woman's property rights in her husband.[63] In the absence of a supportive legislative framework, divorcing women's only recourse is judicial creativity or activism. However, given the disproportionate gender balance in African judiciaries and the legal positivist training of judges, litigation does not offer much hope for meeting the justice needs

63 For discussion, see Moore & Himonga "Protection of women's marital property rights at the end of a customary marriage: A view from inside and outside the courts" (2015) CSSR Working Paper 350; Diala 2018 *AHRLJ* 706-731.

of divorcing women. This is where the constitution's role becomes crucial.

4 Concluding proposals

We propose that African constitutions should spearhead the integration of customary law with state law by adopting the foundational values of indigenous laws as constitutional principles. These easily ascertainable values include humaneness, family continuity,[64] preservation of the ancestral home,[65] the duty of care owed to family members by the family head,[66] and the non-individual nature of marriage.[67] Change-wise, South Africa's Constitutional Court has noted that the foundational values of indigenous laws are more stable than indigenous laws because they motivate the ways people adapt their behaviour to socioeconomic changes.[68] Our proposal presents these foundational values as a basis for the evolution of a common law in African countries.[69] As far back as 1960, Allot observed that "customary laws in modern Africa are growing more alike."[70] His observation mirrors our argument that the colonial experience created contemporary customary law by forcing people to adapt indigenous laws to socioeconomic changes. We have already given codifications, restatements, judicial precedents, and repugnancy clauses as examples of how customary law was created. Indeed, the modus of this creation reflects experiences in territories that experienced Roman law. In these places, the common law tradition itself is the product of "a dynamic and essentially customary system."[71] For example, legal integration founded on customary law was successfully implemented in Pacific Island nations such as Papua New Guinea, Solomon Islands,

64 Van Niekerk "Succession, living indigenous law and Ubuntu in the Constitutional Court" 2005 *Obiter* 474-487.

65 Fombad "Gender equality in African customary law: Has the male Ultimogeniture rule any future in Botswana?" 2014 *J of Modern African Studies* 478.

66 Mbatha 2002 *SAJHR* 259-286.

67 Radcliffe-Brown & Forde *African Systems of Kinship and Marriage* (1950) 1.

68 Cousins "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa" in *Land, power & custom: controversies generated by South Africa's Communal Land Rights Act* (ed Claassens & Cousins) (2008) 25.

69 For a somewhat similar idea, see Ndima "The resurrection of the indigenous values system in post-apartheid African law: South Africa's constitutional and legislative framework revisited" 2014 *SAPL* 311 [urging "for the development of a sound theory of African law's re-indigenisation which would anchor the system firmly to both African values and the Bill of Rights as envisioned by the Constitution"].

70 Allott *Essays in African law: With special reference to the law of Ghana* (1960) 63.

71 Aleck "Beyond recognition: contemporary jurisprudence in the Pacific islands and the common law tradition" 1991 *Queensland University of Technology LJ* 141-143.

Vanuatu, and Western Samoa.[72] Following their independence, these nations placed customary law on a higher or equivalent status with the imposed colonial law by making it their primary source of law.[73] Their efforts reflected their desire to move their legal systems away from the imposed common law tradition and establish it on "the customs, values and traditions of the people."[74] As a commentator explained it, the ultimate goal was "to bring about the development of 'a new, culturally sensitive ... jurisprudence which blend[s] customary law and institutions with modern Western law and institutions in an appropriate mix."[75] In this context, it makes sense to use the foundational values of indigenous laws as constitutional principles.[76] After all, scholars such as Fuller and Webber asserted that "all law is customary", or at the very least, the primary form of law was customary.[77]

In conclusion, it is probably impossible to exhaust the impact of coloniality on African indigenous laws. As Fitzpatrick stated, "existing social relations were taken, reconstituted in terms of its imperatives and then, as it were, given back to the people as their own. In this, history was denied, and tradition created instead."[78] Since Africans cannot turn back the hands of their legal clock, they may as well embrace change in a manner that achieves justice for marginalised groups.

72 See, for example, Weisbrot "The post-independence development of Papua New Guinea's legal institutions" 1987 *Melanesian LJ* 45-46; Powles "The common law as a source of law in the South Pacific: experiences in Western Polynesia" 1988 *University of Hawaii LR* 105.

73 See, for example, the Underlying Law Act 13 of 2000 of Papua New Guinea, the Laws of Kiribati Act of 1989, the Laws of Tuvalu Act of 1987, and the Customs and Adopted Laws Act 1971 of Nauru.

74 Goldring *The Constitution of Papua New Guinea* (1978) 150.

75 Aleck 1991 *Queensland University of Technology LJ* 139, citing Weisbrot 1988 *Melanesian LJ* 2.

76 These principles can start their journey from constitutional preambles and work themselves into bills of rights.

77 Fuller "Human interaction and the law" 1969 *American Journal of Jurisprudence*; Webber "The grammar of customary law" 2009 *McGill Law Journal* 579-582.

78 Fitzpatrick "Is it simple to be a Marxist in legal anthropology?" 1985 *Modern Law Review* 479.

"Dumping" and the Competition Act of South Africa

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SUMMARY

The Competition Commission and the International Trade Administration Commission have concluded a Memorandum of Agreement to address matters of concurrent jurisdiction. However, the Memorandum of Agreement does not specify these areas of concurrent jurisdiction. Consequently, this paper seeks to assess the legal implications of this agreement with a specific focus on the correlation between "prohibited practices" under the Competition Act 89 of 1998 and "dumping" in the manner contemplated by the International Trade Administration Act 71 of 2002.

1 Introduction

"Dumping" refers to the introduction of a product into the market of another country at a price that is lower than their normal value. The World Trade Organization (WTO) has a fully-fledged legislative scheme to address dumping. This is achieved through the nexus of the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). There are two forms of "dumping": the first is "international price discrimination", which occurs through "price discrimination by the investigated producer between the domestic and export markets".[1] The second form is "cost dumping", which occurs when an exporter sells products in an importing country at below the cost of production.[2] To give effect to South Africa's obligations on "dumping", South Africa has promulgated the International Trade Administration Act 71 of 2002 (ITAA); the Customs and Excise Act 91 of 1964; the Board on Tariffs and Trade Act 107 of 1986 and the International Trade Administration Commission Regulations on Anti-Dumping in South Africa (GN 3197 in *GG* 25684 of 14 November 2003 (Anti-Dumping Regulations). It follows from the definition of "dumping",

1 World Trade Organization Panel Report, *United States-Definitive Anti-dumping and countervailing duties on certain duties from China* WT/DS379/R, adopted 25 March 2011, par 14.69; Bhala *Modern GATT Law: A Treatise on the Law and Political Economy of the General Agreement on Tariffs and Trade and other World Trade Organisation Agreements* (2013) 705.

2 Bhala 705.

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that a foreign firm can only commit this infraction. This dumping is penalized through the imposition of an anti-dumping duty.[3]

However, "international price discrimination" and "cost dumping" are also prohibited under the banner of "prohibited practices" in the Competition Act 89 of 1998 (the Act). In this regard, section 9 of the Act regulates "prohibited price discrimination" by "dominant firms". Similarly, it is regarded as a "prohibited practice" to engage in "predatory pricing" or "cost dumping", which is in essence, the selling of goods below their "cost of production".[4] In this way, the Act prohibits "international price discrimination" and "cost dumping" by foreign and domestic "dominant firms". Thus, a foreign "dominant firm", which has engaged in prohibited price discrimination or cost dumping, will have simultaneously violated the Act and the anti-dumping law of South Africa. This may mean that a foreign producer may face the unpalatable prospect of both an administrative penalty imposed by the Competition Tribunal and an anti-dumping duty from the International Trade Administration Commission (ITAC). This would constitute a "double remedy". The government of South Africa would in essence, be penalizing the same injury twice. This means that there is an overlap between the jurisdictions of ITAC and the Competition Commission. In a bid to address matters of concurrent jurisdiction and the possibility of a "double remedy", the Competition Commission and ITAC have concluded a Memorandum of Agreement. Consequently, this paper seeks to evaluate whether this Memorandum of Agreement addresses this "double remedy". This evaluation will be conducted through a detailed analysis of the relevant legislative scheme and case law.

To this end, this paper is divided into three parts: the first part of the paper establishes the conceptual overlap between competition law and anti-dumping law in South Africa; the second part evaluates the legal implications of the Memorandum of Agreement on the concurrent regulation of "prohibited price discrimination" and "cost dumping" and the final part of the paper offers a conclusion.

2 The overlap between "dumping" and "prohibited practices"

2 1 "Dumping" in South African law

South Africa is a founding member of the WTO and party to the Agreement Establishing the World Trade Organization 1994.[5] The

3 S 56 of the Customs and Excise Act 91 of 1964.

4 S 8(d)(iv) of the Competition Act 89 of 1998 (hereafter, the Act); for a discussion on "prohibited practices", see Munyai "Claims for damages arising from conduct prohibited under the Competition Act, 1998" 2017 *De Jure* 18-35.

5 *Association of Meat Importers v ITAC* (769, 770,771/12) 2013 ZASCA 108 par 10; *Progress Office Machines v SARS* 2007 SCA 118 (RSA) par 5.

Agreement Establishing the World Trade Organization 1994 consists of several agreements including the GATT and the Anti-Dumping Agreement, which regulate the practice of "dumping".[6] South African acceded to the GATT and its accession was promulgated in the *Government Gazette*.[7] Parliament endorsed the GATT in the Geneva General Agreement on Tariffs and Trade Act 29 of 1948.[8] Thus, South Africa's international obligations on "dumping" are borne out of the GATT and the Anti-Dumping Agreement.[9] These obligations are complied with through domestic legislation, which consists of the ITAA, Customs and Excise Act, the Board on Tariffs and Trade Act and the Anti-Dumping Regulations.[10]

In this regard, "dumping" is defined as the introduction of goods into the market of another country at an export price that is less than the normal value of those goods.[11] However, the GATT does not prohibit "dumping"; rather, the GATT "condemns" dumping.[12] This "condemnation" is expressed in the form of an "anti-dumping duty".[13] The purpose of the "anti-dumping duty" is to "off-set or prevent dumping".[14] This anti-dumping duty is calculated based on the "anti-dumping margin", which is the amount by which the normal value of a product exceeds its export price.[15]

To this end, there are two types of "dumping". The first form is "international price discrimination", which is the sale of goods in the

6 *Association of Meat Importers v ITAC supra*, par 10; *Progress Office Machines v SARS supra*, par 5.

7 *Progress Office Machines v SARS supr*a, par 5; GN 2421 of 18 November 1947.

8 *Progress Office Machines v SARS supra*, par 5.

9 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) par 2; *Progress Office Machines v SARS supra*, par 5; for a discussion of these judgments on this issue, see Vinti "A Spring without Water: The Conundrum of Anti-dumping Duties in South African Law" 2016 *PELJ* 19; Ndlovu "South Africa and the World Trade Organization Anti-dumping Agreement Nineteen Years into Democracy" 2013 *SAPL* 296; Brink "*Progress Office Machines v South African Revenue Services* [2007] SCA 118 (RSA)" 2008 *De Jure* 645; Satardien "South Africa's International Trade Laws and its "Guillotine" Clause" 2010 *Manchester Journal of International Economic Law* 54; Sucker "Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'?" 2013 *Constitutional Court Review* 417-434.

10 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd supra*, par 2.

11 S 1 of International Trade Administration Act 71 of 2002 (hereafter, ITAA) read with art 2(1) of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereafter, Anti-Dumping Agreement) and art VI.1 of the General Agreement on Tariffs and Trade 1994 (hereafter, GATT).

12 Art VI.1 of the GATT; Bhala 730.

13 Art VI.2 of the GATT.

14 Art VI.2 of the GATT.

15 S 12(1) of the International Trade Administration Commission Regulations on Anti-Dumping in South Africa GN 3197 in *GG* 25684 dated 14 November 2003 (hereafter, Anti-Dumping Regulations); art VI.2 of the GATT.

market of another country at a price that is below that of the same goods in the ordinary course of trade in the exporter's domestic market.[16] In this regard, it has been held that "dumping" refers to "price discrimination" by the investigated producer between the domestic and export markets.[17] Thus, increased price discrimination leads to a higher margin of dumping.[18] The South African regulatory framework on "dumping" also regulates "price discrimination" which is defined as the situation whereby the goods imported into the domestic market are sold at prices that are less than in the exporting country.[19] It is clear then, that "dumping" in the form of "international price discrimination", is regulated by South African law in line with its obligations under the GATT and the Anti-Dumping Agreement.

The second form is "cost dumping", which is the sale of goods in an export market at prices that are less than their "cost of production".[20] The GATT and the Anti-Dumping Agreement regulate "cost dumping" in the instance that the margin of dumping of a product cannot be determined according to a proper comparison of the "normal value" and "export price".[21] This occurs when there are no sales of the same product in the ordinary course of trade in the domestic market of the exporting country or when, as a consequence of the specific market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not allow a proper comparison, the margin of dumping will be determined according to the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[22] This is called the "Constructed Normal Value".[23] Similarly, in South Africa, "cost dumping" is also regulated by the ITAA.

16 Art VI.1 of the GATT; Osode "An assessment of the WTO: Consistency of the procedural aspects of South African anti-dumping law and practice" 2003 *Penn State International Law Review* 19; Bhala 705.

17 World Trade Organization Panel Report, *United States-Definitive Anti-dumping and countervailing duties on certain duties from China supra*, par 14.69; Bhala 705; Matsushita "Basic Principles of the WTO and the Role of Competition Policy" 2004 *Washington University Global Studies Law Review* 371; Brink "Anti-Dumping in South Africa" (2012) 21 available at http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf (accessed 2019-04-02); International Trade Administration Commission "Trade Remedies" available at http://www.itac.org.za/pages/services/trade-remedies (accessed 2019-04-02).

18 World Trade Organization, *United States-Definitive Anti-dumping and Countervailing Duties on Certain Products supra*, par 568.

19 S 1 of the ITAA; *Farm Frites International v International Trade Administration Commission* (unreported) case number 32263/14 of 20 May 2014 par 3.

20 Osode 2003 *Penn State International Law Review* 19; Bhala 705.

21 S 32(2)(b)(ii) of the ITAA, "export price" in essence, is defined as the "price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale" whereas "normal value" in essence, defined as the "comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin".

22 Art 2(2) of the Anti-Dumping Agreement read with art VI.1 (b) of the GATT.

23 Bhala 723.

According to the ITAA, the determination of the "normal value" of goods may in certain instances, refer to the "constructed cost of production" of the goods in the country of origin when they are to be sold in the domestic market, plus a logical incorporation for selling, general and administrative costs and for profit.[24] It is clear then, that the determination of the margin of dumping using the "cost of production" is only used as an exception.[25] This explains why "dumping" is seen as "generally" referring to "international price discrimination". Regardless, it is clear that South African law prohibits "international price discrimination" and "cost dumping" or "predatory pricing". This means that the South African law on dumping prohibits both forms of "dumping".

2 2 "Prohibited Practices" under the Act

One of the objects of the Act is to prevent anti-competitive trade practices.[26] The Act does this by prohibiting certain conduct that it deems a "prohibited practice". A "prohibited practice" is defined as a practice prohibited under Chapter 2 of this Act. One of the "prohibited practices" under Chapter 2 of the Act is "prohibited price discrimination". According to section 9 of the Act, a "dominant firm" can only commit "prohibited price discrimination". In simple terms, a "firm" includes "a person, partnership or trust".[27] The term "includes" means that the Act leaves the door open for other legal entities to qualify as a "firm". It must be noted now, that the Act does not distinguish between domestic and foreign firms. In fact, one of the objects of the Act is to acknowledge the role of foreign competition in South Africa.[28]

In turn, a firm is regarded as a "dominant firm" in a market, if it has acquired at least 45% of that market or it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or it has less than 35% of that market, but has market power.[29] In this regard, "market power" refers to the power of a firm to influence prices, to impede competition or to behave to a considerable extent, independently of its competitors, customers or suppliers.[30] Having established that a "dominant firm", which can be a domestic or foreign firm, can only commit "prohibited price discrimination" the Act then outlines the requirements for one's conduct to qualify as "prohibited price discrimination".

24 S 32(2)(b)(ii)(aa) of the Act read with ss 8.9, 8.10 and 8.11 of the Anti-Dumping Regulations.
25 S 8 of the Anti-Dumping Regulations read with s 32(b)(ii) and s 32(6) ITAA, read with s 10 of the Anti-Dumping Regulations.
26 Preamble to the Act.
27 S 1 of the Act.
28 S 2(d) of the Act.
29 S 7 of the Act.
30 S 1 of the Act.

According to section 9 of the Act, there are three requirements for "prohibited price discrimination": first, it must be the conduct of a dominant firm as the seller of goods and services, which is likely to have the impact of materially preventing or reducing the competition,[31] or in the alternative, where the conduct of a dominant firm will prevent the ability to participate effectively, of small and medium enterprises controlled or owned by historically disadvantaged persons;[32] second, it must be connected to the sale in equivalent transactions, of goods and services of like quality and grade to different buyers and third, if it involves discriminating between those buyers in terms of *inter alia*, the purchase price for the goods or services; any discount, allowance or rebate allowed in relation to the supply of goods or services.[33] These requirements are cumulative and thus an allegation of "prohibited price discrimination" must comply with these three requirements.[34] It must be noted that it will now also be "prohibited price discrimination" for a dominant firm to prevent the selling of goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to evade the operation of section 9(1)(a)(ii) of the Act.[35] As already stated, section 9(1)(a)(ii) of the Act regulates the conduct of a dominant firm that is preventing the ability to participate effectively, of small and medium enterprises controlled or owned by historically disadvantaged persons.

However, there are exceptions to the rule on "prohibited price discrimination". According to section 9(2) of the Act, conduct which would be otherwise deemed "prohibited price discrimination" would nevertheless be lawful if it permits only "reasonable" accommodation for differentiation on cost or likely cost of manufacture, distribution, sale or promotion; second, the Act does not see it as "prohibited price discrimination" if the "differential treatment" consists of acts in "good faith" to mirror a price or advantage that is offered by a competitor and third, it is not "prohibited price discrimination" if the "different treatment" is a response to changing circumstances that are affecting the sale of the goods or services including *inter alia*: any action in response to the actual or impending decay of perishable goods and a sale for the purpose of insolvency proceedings.[36] These exceptions give meaning to the term "prohibited price discrimination", which immediately implies that there are instances where "price discrimination" is lawful and thus, not "prohibited".

31 S 9(1)(a) of the Act.
32 S 6(b) of the Competition Amendment Act 18 of 2018, which has been assented to, by the President but will come into effect once it is proclaimed.
33 S 9(1)(c) of the Act; see Neuhoff *A Practical Guide to the South African Competition Act* (2006) 134-143; Mankga "When is price discrimination prohibited as anti-competitive?" 2007 *Juta's Business Law* 96-97.
34 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 2006 3 SA 400 (CAC) 15.
35 S 6(c) of the Competition Amendment Act 18 of 2018.
36 S 9(2) of the Act; see *Sasol Oil (Pty) Ltd v Nationwide Poles CC supra*, 15.

Another "prohibited practice" under Chapter 2 of the Act is "cost dumping" or "predatory pricing". According to the Act, it is prohibited for a dominant firm to sell products "below their marginal or average variable cost".[37] "Marginal costs" refers to the price that is imposed for a product that is less than the cost of producing the last unit of it.[38] In other words, "marginal cost" refers to the increase to total cost because of producing an additional unit of output.[39] However, the term "average variable cost" is not defined in the Act. The yet to be promulgated amendment to the Act defines "average variable cost" as the total of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product.[40] The resort to "average variable cost" is based on the submission that "marginal costs" are difficult to ascertain.[41] Thus, it has been held that the Act stipulates that there are two tests, which may be used to establish the existence of predatory pricing, namely a cost standard of marginal costs and of average variable cost.[42]

In this regard, the Competition Amendment Act adds that it is prohibited for a dominant firm to sell goods at "predatory prices".[43] "Predatory pricing" is defined as the selling of goods or services below the firm's average avoidable cost or average variable cost.[44] "Average avoidable cost" means the total of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm halted producing a specific amount of additional output, divided by the quantity of the additional output.[45] It has been held that "average avoidable cost" is an alternative principle that encapsulates the cost the firm could have avoided by not embarking on a predatory strategy.[46] The significant difference with "average variable cost", is that the "average avoidable cost" incorporates the factor of fixed costs, known as product specific fixed costs, thus making the fixed/variable conundrum more acceptable.[47] In simple terms, the *Competition Amendment Act* adds the standard of "average avoidable cost" in the determination of the "cost of production". The inclusion of these traditional economic standards is significant because the failure of a dominant firm to cover its average avoidable cost or average variable cost implies that the dominant firm is deliberately losing profits in the interim, and therefore, may be engaged

37 S 8 (d)(iv) of the Act.
38 *Competition Commission v Media 24 (Pty) Ltd* 2016 2 CPLR 968 (CT) par 78.
39 Neuhoff 123.
40 S 1(a) of the Competition Amendment Act 18 of 2018.
41 *Competition Commission v Media 24 (Pty) Ltd supra*, par 79.
42 *Media 24 Proprietary Limited v Competition Commission of South Africa* 2018 4 SA 278 (CAC) par 45; see s 8(d)(iv) of the Act.
43 S 5 of the Competition Amendment Act 18 of 2018.
44 S 1(i) of the Competition Amendment Act 18 of 2018.
45 S 1(a) of the Competition Amendment Act 18 of 2018.
46 *Competition Commission v Media 24 (Pty) Ltd supra*, par 84.
47 *Competition Commission v Media 24 (Pty) Ltd supra*, par 84.

in "exclusionary" conduct.[48] It is clear then, that "marginal cost", "average avoidable cost" and "average variable cost", are methods used to determine the "costs of production". None of these methods is perfect and the courts have to be practical and choose the test, which may be better suited to resolve the dispute.[49] It must be noted that section 8(1)(d) is not the only provision in the Act that regulates predatory pricing.[50] Overall, there is no question that the Act prohibits the selling of goods below their "cost of production". This is the essence of "cost dumping". Consequently, there is no doubt that the Act prohibits "international price discrimination" and "predatory pricing" or "cost dumping". This means that the Act prohibits both forms of "dumping", which are deemed "prohibited practices" under the Act.

If a foreign dominant firm is found to have committed the act of "prohibited price discrimination" or "predatory pricing/cost dumping", then the Competition Tribunal can impose a variety of orders including an administrative penalty.[51] This "administrative penalty" or "fine" may not be more than 10 per cent of the firm's annual turnover in South Africa and its exports from the Republic during the firm's preceding financial year.[52] However, the administrative penalty can be more than 10 percent but not more than 25 percent of the offending firm's annual turnover in the Republic and its exports from the Republic during the firm is preceding financial year, if such firm is a repeat offender of the "prohibited practice" provisions.[53] This "fine" or "administrative penalty" should be paid into the National Revenue Fund.[54]

It is then conceivable that a foreign dominant firm could be investigated for "international price discrimination" or "cost dumping" by both the ITAC and the Competition Commission. This could result in the concurrent imposition of an anti-dumping duty and an administrative penalty.[55] To this end, Vinti,[56] has postulated that the concurrent

48 Memorandum on the Objects of the Competition Amendment Bill, 2018 par 3.3.4; for further discussion on "exclusionary conduct", see Munyai "The lack of an appropriate causation framework in competition law proceedings under the Competition Act, 1998" 2017 *Obiter* 486-489.

49 *Competition Commission v Media 24 (Pty) Ltd supra*, par 96.

50 *Nationwide Airlines (Pty) Ltd v SAA (Pty) Ltd* 1999–2000 CPLR 230 (CT) 10; *Competition Commission v Media 24 (Pty) Ltd supra*, par 100; see s 8(c) of the Act.

51 S 58 read with s 59(1)(b) of the Act.

52 S 59(2) of the Act.

53 S 33(c) of the Competition Amendment Act 18 of 2018.

54 S 59(4) of the Act.

55 Ss 58 and 59 of the Act; s 32(3) of the ITAA read with s 52 of the Anti-Dumping Regulations and ss 55 and 56(1) of the Customs and Excise Act 91 of 1964.

56 Vinti "A Critical Analysis of the Frozen Potato Chips Saga Between the Southern African Customs Union and Belgium and the Netherlands" 2017 *Speculum Juris* 156-157; art VI.5 of the GATT; World Trade Organization Panel Report, *United States Definitive Anti-Dumping and Countervailing Duties on Certain Products from China supra*, par 14.171 and footnote 1083; *Wheatland Tube Co. v United States* 495 F.3d 1355 (Fed. Cir. 2007) 10-17.

imposition of anti-dumping and safeguard duties, could in certain instances, constitutes a "double remedy" that is prohibited by the GATT. According to Vinti,[57] this concurrent imposition of these duties is a "double remedy" because it corrects the same injury twice. On the back of this hypothesis, it is my view that the concurrent imposition of an administrative fine and an anti-dumping duty as penalties for prohibited price discrimination or cost dumping against a foreign dominant firm, would also result in a "double remedy". The Competition Commission and ITAC have recognised the potential "double remedy" conundrum by concluding a Memorandum of Agreement (MOA).

3 Assessment of the legal implications of the MOA

The MOA seeks to facilitate cooperation and harmony between the Competition Commission and ITAC on matters of concurrent interest to give effect to their respective enabling legislation.[58] This MOA has a sound legal basis. According to section 21(1)(h) of the Act, the Competition Commission has the authority to negotiate agreements with any regulatory body to organise and align the exercise of jurisdiction over competition issues within the relevant industry or sector, and to ensure the proper implementation of the provisions of this Act. In tandem with this provision, section 82(1) of the Act provides that a regulatory body which has the power in respect of conduct regulated in terms of Chapter 2 or 3 within a particular sector, to negotiate agreements with the Competition Commission, as contemplated in section 21(1)(h) and in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement. Thus, the Act empowers the Competition Commission and the ITAC to negotiate the MOA on matters that fall under Chapter 2 of the Act, which includes "prohibited price discrimination" and "cost dumping".

Furthermore, the Act provides that to the extent that this Act applies to an industry, which is subject to the authority of another regulatory body, which body has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be read as conferring concurrent jurisdiction in respect of that conduct.[59] This concurrent jurisdiction as exercised in terms of this Act and any other legislation, must be regulated, to the extent possible, in line with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).[60] This means that the Competition Commission and ITAC, as regulatory

57 Vinti 2017 *Speculum Juris* 156-157.

58 Memorandum of Agreement Between the Competition Commission of South Africa and the International Trade Administration Commission of South Africa 2015 (hereafter, MOA) par 2 available at http://www.compcom.co.za/wp-content/uploads/2016/05/MoU-between-the-Competition-Commission-and-ITAC.pdf (accessed 2018-12-09).

59 S 3(1A)(a) of the Act.

60 S 3(1A)(b) of the Act.

authorities that regulate the anti-competitive conduct of foreign firms, are bestowed with concurrent jurisdiction over matters such as "prohibited price discrimination" and "cost dumping", which are regulated by Chapter 2 of the Act and this jurisdiction must be implemented according to the MOA.

In the MOA, the Competition Commission and ITAC agree *inter alia*, to provide comment and advice on complaints and applications.[61] This requires the parties to the "extent feasible": to make representations to each other; to refer complaints/applications falling within the jurisdiction of the other within a rational time after considering of such and to advice and receive advice from each other on matters of mutual interest.[62] More specifically, the MOA permits the submission of representations to each other on matters that have international trade law or competition law "considerations".[63] In this way, the MOA must be commended for promoting cooperative government as required by the Constitution and facilitating the sharing of valuable information and insights between government officials who share mutual expertise.[64] However, this obligation to "refer" a matter is restricted by the proviso that this must be to the "extent feasible".[65] This implies that ITAC and the Competition Commission have the discretion to transfer a matter to each other only if it is possible. Unfortunately, there are no precise guidelines on how this determination will be made. This leaves the offending firm unaware of which body will investigate them and which penalty they should expect. This also means that the offending firm will not know which law is applicable to the matter. In short, the MOA breeds uncertainty.

In the same breath, while the MOA purports to prevent the occurrence of the "double remedy", it does not actually do so. This is because the MOA does not stipulate that ITAC and the Competition Commission must always "refer" a matter to each other. Rather the MOA gives ITAC and the Competition Commission, the discretion to decide when to refer a matter because they must do so only if it is possible to do so.[66] However, in instances whereby ITAC or Competition Commission are not aware of the "concurrent" considerations, these two investigative bodies would neither "refer" nor make any "representations" to each other in this regard. This would be problematic in several respects. First, this could mean that a foreign dominant firm could be liable to parallel investigations and a penalty from both investigative bodies. This could lead to a "double remedy" because it would penalize the same injury twice. Second, this invariably means that the offending foreign firm would have to defend parallel investigations. This unnecessarily encumbers the foreign firm and imposes a huge financial burden. Third, concurrent investigations, regardless of their duration, would waste

61 MOA par 3.2.
62 MOA par 5.
63 MOA par 5.1.
64 Chapter 3 of the Constitution of the Republic of South Africa, 1996.
65 MOA par 5.
66 MOA par 5.2.

government resources and promote inefficiency. Fourth, the concurrent jurisdiction could actually facilitate "forum shopping" by aggrieved parties in the South African market. In essence, "forum shopping" would permit an aggrieved domestic firm to choose an adjudicatory body that it deems favourable to its case.[67]

However, the problem with forum shopping in this regard could be in the penalties that are imposed depending on whether the matter is addressed through either the Act or the Anti-dumping law of South Africa. On the one hand, the Act could require the imposition of a penalty up to 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm is preceding financial year.[68] This means that the administrative penalty is capped at 10%, which implies that the penalty could be less than the 10% threshold. However, this is not a purely mathematical process because the Act provides that the calculation of the administrative penalty must afford due consideration to factors such as the conduct of the respondent, the market circumstances in which the contravention took place and the extent to which the respondent has cooperated with the Competition Commission and the Competition Tribunal.[69] This multi-faceted approach must be commended in that it allows for a variation of the penalty if the offender has cooperated with the Competition Commission. However, because the calculation of the administrative penalty is a discretionary process that is guided by an imprecise threshold i.e. the 10% cap, and non-mathematical factors such as "conduct" and "cooperation", it means that the offending foreign dominant firm would be unable to establish or predict the amount of the administrative penalty for prohibited conduct. This is in contrast to the anti-dumping margin, which is calculated according to the injury suffered, taking into consideration, adjustments that have been made for comparative purposes.[70] Thus, the anti-dumping duty is more susceptible to precise determination whereas the administrative penalty is difficult to predict because it accords substantial discretion on the amount of the penalty. It follows that the aggrieved domestic firm could pursue the unpredictable avenue of the Act, instead of the ITAA, when it has a dispute with a foreign firm.

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67 Whytock "The Evolving Forum Shopping System" 2011 *Cornell Law Review* 485; Clermont and Eisenberg "Exorcising the Evil of Forum-Shopping" 1994-1995 *Cornell Law Review* 1507-1535; Maloy "Forum Shopping – What's Wrong with That" 2005 *Quinnipiac Law Review* 28; for a contrary view on "forum shopping", see Bookman "The Unsung Virtues of Global Forum Shopping" 2017 *Notre Dame Law Review* 579-636.

68 S 59(2) of the Act; s 33(c) of the Competition Amendment Act 18 of 2018, which provides that the administrative penalty may exceed 10% but not exceed 25 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's previous financial year if the conduct is in essence, a repeat by the same firm of conduct previously established by the Competition Tribunal to be a "prohibited practice".

69 S 59(3) of the Act.

70 S 1 of the Anti-Dumping Regulations, on definition of "margin of dumping" read with s 11 of the Anti-Dumping Regulations, which lists "adjustments" such as taxation and levels of trade.

Overall, it is my view that since the Competition Commission and the ITAC had already done the difficult task of identifying the potential concurrent jurisdiction, it is disappointing that they have not completed the process of explicitly specifying the areas of concurrent competence. Consequently, it is my view that the MOA should be amended or that a provision be inserted into either the ITAA or the Act, which specifies that either investigative body will be charged with the investigation and imposition of a penalty/duty on a specific matter of concurrent competence. This would provide the necessary legal certainty that is required. Consequently, it my suggestion that the ambit of the Act must be narrowed to only regulate "prohibited price discrimination" and "predatory pricing" by domestic producers. The foreign dominant firms are already liable to the "prohibited price discrimination" and "cost dumping" regulation under the banner of anti-dumping law through the ITAA, Customs and Excise Act and the Anti-Dumping regulations. In simple terms, the Act's prohibition on price discrimination and cost dumping, as far as it relates to foreign firms, is superfluous. This submission is analogically based on the contention that anti-dumping laws are "redundant" if a country already has competition law legislation that addresses "prohibited price discrimination" and "cost dumping".[71] The converse is true that competition law legislation that regulates "prohibited price discrimination" and "predatory pricing" is "redundant" in respect of foreign firms, if there are anti-dumping laws that regulate prohibited price discrimination and cost dumping.

To the contrary, other commentators argue that there is no problem with this concurrent regulation of "prohibited price discrimination" and "cost dumping" because this situation offers "alternatives" to aggrieved parties.[72] This submission is unsustainable. Apart from the fact that concurrent investigations could promote "forum shopping", the concurrent regulation of "prohibited price discrimination" and "cost dumping" by foreign dominant firms through competition law legislation and anti-dumping legislation, contravenes the national treatment clause of Article III of the GATT.[73] That is to say, anti-dumping law does not apply to domestic firms i.e. a domestic company committing prohibited price discrimination or cost dumping only in the domestic market would only contravene competition law, but not the anti-dumping law.[74] This then means that the concurrent regulation of "prohibited price discrimination" and "cost dumping" by foreign dominant firms in South African law, contravenes Article III of the GATT.[75] Article III of the GATT

71 Bhala 710; Cooper "The Antidumping Act. Tariff or Antitrust Law?" 1965 *Yale Law Journal* 723; Coudert "The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy" 1965 *Columbia Law Review* 189-231.
72 Bhala 710.
73 Bhala 710.
74 Bhala 710.
75 Bhala 710; see World Trade Organization Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II,* WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, adopted 1 November 1996, 16.

provides that the goods of the territory of any contracting party imported into the commerce of any other contracting party must not be liable, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those imposed, directly or indirectly, to like domestic products.[76] The import of Article III of the GATT is that the contracting parties must ensure "equality of competitive conditions for imported products in relation to domestic products".[77] In this way, the drafters of the GATT sought to accord the same treatment to imported products as that afforded to like domestic products once they enter the domestic market.[78] Consequently, the MOA and the Act, by providing for concurrent regulation of "prohibited price discrimination" and "cost dumping" by a foreign firm, may impede the "equality of competitive conditions for imported products in relation to domestic products", which contravenes the national treatment clause in Article III of the GATT. It follows then that the MOA could be regarded as a protectionist measure, which violates the import of Article III of the GATT.[79]

A preferable approach would be that which is employed by the environmental legislation in South Africa. Faced with a fragmented approach that resulted in environmental harm by mining corporations, the government of South Africa decided to create an integrated system through an agreement between the departments of mineral resources, environmental affairs and water and sanitation. This MOA resulted in the creation of the One Environmental System (OES), which was incorporated into the National Environmental Management Act 107 of 1998 (NEMA), the framework legislation.[80] The OES seeks to align the laws and policies of the portfolios of environmental affairs, mineral resources and water and sanitation. This has resulted in a legal framework that clearly specifies the powers of each relevant government department on matters of concurrent jurisdiction.[81] Despite its challenges, the OES leaves no room for conjecture.[82] It is then suggested that either the ITAA or the Act, be amended in the same manner as the NEMA to ensure legal certainty.

76 Art III.2 of the GATT.
77 World Trade Organization Appellate Body Report, *Japan* – Taxes on Alcoholic Beverages *II supra*, 16.
78 World Trade Organization Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II supra*, 16.
79 See World Trade Organization Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II supra*, 16.
80 S 50A(2) of National Environmental Management Act; s 38A(1) of the Mineral and Petroleum of Resources and Development Act 28 of 2002; National Environmental Management Amendment Act 62 of 2008; National Environmental Laws Amendment Act 25 of 2014; Environmental Impact Assessment Regulations and Listing Notices, 2014; National Appeal Regulations, 2014; National Exemption Regulations, 2014.
81 S 50A of the National Environmental Management Act.
82 Vinti "The power to declare a prohibition or restriction on prospecting or mining to protect the environment: a critical assessment of s 49 of the Mineral and Petroleum Resources Development Act 28 of 2002 and s 24(2A) of the National Environmental Management Act 107 of 1998" 2018 *Journal of Energy & Natural Resources Law* 16.

4 Conclusion

The Act and the anti-dumping legislation regulate "prohibited price discrimination" and "cost dumping" by a foreign dominant firm. This means that there is an overlap between these two sets of legislation and in the functions of ITAC and the Competition Commission. This could result in the concurrent imposition of an administrative penalty and an anti-dumping duty on a foreign dominant firm. To address this conundrum, the ITAC and the Competition Commission have concluded an MOA. This paper then sought to assess the efficacy of this MOA. On this score, this paper finds that the MOA breeds uncertainty, as it does not actually address the matters of concurrent jurisdiction. This is because the ITAC and the Competition Commission have the discretion to refer or to make representations to each other on matters of concurrent considerations, if it possible to do so. However, the MOA does not actually specify the matters of concurrent jurisdiction. In this paper, I suggested matters of concurrent jurisdiction between the Act and anti-dumping law in South Africa; it is possible that there are other matters of concurrent "consideration", which the MOA should have explicitly specified.

Unfortunately, in the event that the ITAC and the Competition Commission are unaware that a specific matter is a concurrent "consideration", then it is possible that parallel investigations and the concurrent imposition of an anti-dumping duty and an administrative penalty, could occur. It is my view that this would be tantamount to a "double remedy" because it addresses the same injury twice. This would discourage foreign investment. In the same breath, the institution of parallel investigations would waste crucial government resources and promote "forum shopping".

Even more significant, the concurrent regulation of "prohibited price discrimination" and "cost dumping" by a foreign dominant firm, contravenes the national treatment clause of Article III of the GATT. It is thus my view that the MOA could be seen as a protectionist measure that violates the objects of the GATT. Consequently, it is my recommendation that the MOA could be amended to expressly specify the matters of concurrent jurisdiction and to specify which investigative body has authority in each matter. It is then my view that the MOA could be amended in the same manner as the OES, which offers a clear and pragmatic demarcation of matters of concurrent jurisdiction between the relevant government departments.

Dividends *in specie*: the granting of services or the right of use of assets

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SUMMARY

Dividends *in specie* are not defined by the Income Tax Act, which could result in uncertainty whether the granting of services or the right of use of assets to shareholders would be included in the ambit thereof. The uncertainty could result in the opportunity for dividends tax to be avoided and could also result in applicable deductions, claimed by the declaring company, not being recouped for tax purposes. This article investigated whether the granting of services or the right of use of assets to shareholders would constitute dividends *in specie* for purposes of the Income Tax Act by considering the South African perspective as well as guidance based on international practices. The article submits that a broad interpretation of the meaning of "dividend" and "*in specie*" in the Income Tax Act supports the granting of services or the right of use of assets as constituting dividends *in specie*. Furthermore, the context of the provisions contained in the Income Tax Act considered in this article, does not indicate findings contrary to the broad interpretation of the meaning of "dividend" and "*in specie*". The guidance obtained from investigating international practices of selected countries also indicated that the granting of services or the right of use of assets constitute dividends or shareholder benefits on which shareholders are taxed. This article concludes that the granting of services or the right of use of assets would constitute dividends *in specie* and that the specific guidance on the valuation of such benefits in terms of the Seventh Schedule to the Income Tax Act, could possibly be extended to the application in the context of dividends tax.

1 Introduction

A dividend *in specie* has been described as any dividend other than in the form of cash,[1] and considered viable if declaring company is facing liquidity problems or the distribution of an asset instead of cash would make economic sense.[2] Common forms of known dividends *in specie*

1 Stiglingh, Koekemoer, Van Heerden, Wilcocks, De Swardt & Van der Zwan *Silke: South African income tax* (2018) 664.

2 Investopedia 2018 *In specie* available at https://www.investopedia.com/terms/i/in_specie.asp (accessed 2018-01-31).

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include property, stock, scrip, and liquidating dividends.[3] Companies could, however, also distribute other forms of property to their shareholders, including perks and benefits associated with their shareholding, which give them the right to such property, as well as discounts in respect of services.[4] Dividends tax is levied in respect of dividends declared and paid by a company as defined in terms of section 1 of the Income Tax Act 58 of 1962 (hereafter referred to as the ITA) and section 64E(2) regulates the tax treatment for distributions other than *in specie* distributions and asset *in specie* distributions. Two types of dividends – cash and dividends *in specie* – are accordingly regulated by the ITA and are treated differently for purposes of dividends tax in terms of their valuation, timing, and liability for the payment of the dividends tax.

The fact that dividends *in specie* contemplated in section 64F of the ITA are not defined by the ITA gives rise to uncertainty as to what could possibly fall within its ambit. Ambiguity could also arise by the fact that the ITA refers to other terms which could also be conceived as dividends *in specie*, being "distribution *in specie,*"[5] or "asset *in specie*".[6] Current guidance issued by the SARS in respect of dividends tax only distinguishes between financial instruments, movable or immovable property, and deemed dividends in respect of low-interest loans to certain shareholders.[7] No current guidance is provided in respect of the granting of services or right of use of assets as dividends *in specie*. Under the dividends tax regime, reliance is placed on the wide definition of "dividend" to prevent avoidance of dividends tax, whereas, specific examples of deemed dividends were provided under the STC regime in order to prevent avoidance of dividends tax by structuring distributions in a manner other than a dividend.[8] A company could therefore grant services or the right of use of assets to shareholders instead of a cash dividend under the dividends tax regime, in which case uncertainty could arise regarding whether or not these would constitute dividends *in specie*. The lack of guidance under the dividends tax regime could consequently result in incorrect interpretation and application in respect of dividends *in specie*. Uncertainty regarding aspects such as how the revenue authorities will treat a certain transaction, or how and by when the legislator will introduce new legislation, or amend existing legislation, may have a profound impact on the economy of a country.[9] One of the canons of a good tax system is also that the tax system should contain

3 Accounting Tools 2018 *Types of dividends in specie* available at http://www.accountingtools.com/types-of-dividends (accessed 2018-01-31).
4 The Share Centre 2018 *Shareholder perks* available at https://www.share.com/find-investments/shares/shareholder-perks/ (accessed 2018-01-31).
5 Para 75 of the Eighth Schedule.
6 S 10B(2)(d) and S 64EA.
7 SARS *Comprehensive guide to dividends tax (Issue 2)* (2017) 62.
8 Mazansky "South Africa: New rules for tax on dividends (domestic and foreign) and other company distributions" 2012 *Bulletin for International Taxation* 172.
9 Stiglingh *et al supra* n 1 at 6.

elements of certainty.[10] Attempting to investigate guidance to resolve uncertainty in interpretation could therefore contribute to the certainty of tax interpretation.

Apart from the preceding uncertainty, a practical tax issue in respect of the non-recoupment of deductions claimed by the declaring company is also conceived if services or the right of use of assets is granted to a shareholder. In the case of a distribution of an allowance asset, tax deductions or capital allowances for the company in respect of the asset distributed will be recouped in terms of section 8(4)(k) of the ITA on distribution of the asset as a dividend *in specie*. However, if a service or the right of use of an asset is granted as a dividend *in specie*, the declaring company could still claim deductions without any recoupment in terms of section 8(4)(k) or section 8(4)(a) on subsequent granting to the shareholder if no asset was distributed or amounts recouped. A deduction could thus be claimed on services or the right of use of an asset distributed to beneficial owners for something that in fact constitutes a dividend *in specie*. If services or the right of use of assets provided are not regarded as a "dividend" a natural person beneficial owners could benefit as no dividends tax is payable. Due to consecutive increases in the applicable tax rates of natural persons, the incentive for electing a distribution that does not constitute a dividend also increases. As shareholders could opt for the granting of services or the right of use of assets if not classified as a dividend, these methods could be applied to avoid dividends taxes and could also result in a non-recoupment of deductions claimed by the declaring company.

The objective of this article is to investigate whether the granting of services or the right of use of assets constitutes dividends *in specie*. This objective stems from a lack of specific guidance in respect of dividends *in specie* and the practical tax issue in respect of non-recoupment of deductions if a service or right of use is granted as dividends *in specie*. From a South African perspective an investigation into the purpose of the Seventh Schedule is also conducted for possible guidance on whether or not the intention of the legislator was to include granting of services or the right of use of assets within the ambit of a dividend *in specie*. The investigation into whether the granting of services or the right of use of assets constitutes dividends *in specie* could also benefit from consideration of international practices. The Secondary Tax on Companies (STC) regime was replaced with the dividends tax regime in order to align the tax on dividends with international practices as STC was unfamiliar to foreign investors.[11] International experience is also considered an important aspect as it could offer lessons learned from those experiences.[12] Based on the international practice of selected

10 Smith 1776 *Wealth of nations*.

11 Roeleveld "The road to dividend withholding tax in South African income tax law" 2015 *Income tax in South Africa: The first 100 years (1914 – 2014)* 120.

12 Arendse & Stack "Investigating a new wealth tax in South Africa: Lessons from international experience" 2018 *JEF* 1.

countries, guidance can be considered on whether or not the granting of services or the right of use of assets could constitute dividends for ITA purposes.

2 South African perspective

The South African perspective is investigated by considering the meaning of "dividend" and "*in specie*". For terms not defined in the ITA due consideration of interpretation approaches of fiscal legislation is warranted.[13] The two main approaches that have been adopted by the South African courts are the literal approach and the purposive approach to interpretation.[14] The literal approach is characterised by the strict and literal rule of interpretation of legislation by following the letter of the law, unless the legislation provides a specific definition thereof. According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.[15] In instances of uncertainty, ambiguity, or absurdity in the language used in legislation, the courts have departed from the strict literal approach and instead have sought to establish the so-called "intention of the legislature" referred to as the purposive approach, which takes into consideration the words used in legislation, viewed in their context, in order to interpret the purpose for which the provision was enacted.[16] With the modern purposive approach to interpretation of documents from the outset considering the context and the language together, with neither predominating over the other.[17] The purposive approach to interpretation therefore insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.[18] When applying the purposive approach specific wording, together with the context in which it is used, should be used to interpret the legislation.[19] If the ordinary meaning of a word therefore accords with the intention of the provision, further consideration is generally not required.[20] The South African courts have also set guidelines that must be considered in order to apply the purposive approach recommending consideration of the precise wording of the provision, the context, and an overview of tax history of the provision when determining the purpose of the

13 Stiglingh *et al supra* n 1 at 18.
14 De Koker & Williams *Silke on South African income tax* (2017) para 25.1A-25.1D available at http://www.mylexisnexis.co.za (accessed 2018-02-28).
15 *Coopers & Lybrand v Bryant* (1995) 3 SA 761 (A) 767.
16 De Koker & Williams *supra* n 14 at para 25.1C.
17 *Natal Municipal Joint Pension Fund v Endumeni* (2012) 4 SA 593 (SCA) 16.
18 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 315.
19 De Koker & Williams *supra* n 14 at para 25.1D.
20 Goldswain "Hanged by a comma, groping in the dark and holy cows: Fingerprinting the judicial aids used in the interpretation of fiscal statutes" 2012 *Southern African Business Review* 37.

provision.[21] The set guidelines is now applied in investigating the definition of "dividend" and meaning of dividend *"in specie"* in sections which follows.

2 1 Definition of "dividend"

The definition of a "dividend" underwent many amendments since 2007 to arrive at the definition as currently contained in the ITA. The current definition of "dividend" was introduced with effect from 1 January 2011 in anticipation of the dividends tax regime to be introduced. In 2008, company law in South Africa underwent a major transformation with the enactment of the new Companies Act,[22] (the "Companies Act") which modernised company law in line with international and economic trends. An important change from the previous Companies Act,[23] which had an effect on dividends, was the introduction of the solvency and liquidity test in place of the old capital maintenance rule. Provisions in the ITA directly or indirectly depend on company law definitions and principles,[24] and as result amendments in the ITA was necessary to align the ITA with these definitions and principles as per company law. The Companies Act introduced the capital maintenance rules to ensure that shareholders would not withdraw company funds to the detriment of corporate creditors as issued share capital could not be return to shareholders and must be maintained to act as security for corporate creditors.[25] The new rule, which replaced the capital maintenance rules, requires solvency and liquidity test in terms of which the directors of companies had to ensure that before a dividend is declared, the company satisfied the solvency (assets must be more than liabilities) and liquidity (have enough cash to settle short-term obligations) test before and after the distribution. The previous definition of a "dividend" in terms of the ITA incorporated the capital maintenance requirements in terms of the previous Companies Act and had to be amended with the introduction of the new Companies Act. The amended "dividend" definition removed reference to all elements of profits and reserves and regards any amount transferred or applied as a dividend, unless those dividends come from contributed tax capital.[26] The new definition of "dividend" is also not concerned with the presence or absence of profits.[27] Consequently, directors are able to pay out whatever they believed fit – provided the company met the solvency and liquidity requirements,[28] without being

21 Goldswain *supra* n 20 at 37.
22 Companies Act 71 of 2008.
23 Companies Act 61 of 1973.
24 National Treasury *Explanatory memorandum on the taxation laws amendment bill 2010* (2010) 37.
25 Van der Merwe "Reconsidering distributions: A critical analysis of the regulation of distributions to shareholders in the Companies Act of 2008" (2015) 11.
26 National Treasury *supra* n 24 at 37-38.
27 National Treasury *supra* n 24 at 24.
28 Edward Nathan Sonnenbergs Inc. "What constitutes a dividend" 2008 *Integritax*.

concerned with the presence or absence of profits. With a change in wording generally reflecting a change in intention,[29] the amended "dividend" definition could be indicative of a broad interpretation being intended by the legislator. The amended "dividend" is defined in section 1(1) of the ITA as:

- an amount
- to be transferred or applied
- by a company that is a resident
- for the benefit of or on behalf of any person and in respect of any share in that company
- by way of a distribution made by the company.[30]

For the granting of a service or the right of use of an asset to be included, it would first have to constitute an "amount". The word "amount" is used in the definition of "gross income" as defined in section 1 of the ITA and has been judicially considered in a number of cases and held to include not only money but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which had a money value.[31] If the term "amount" is given a broad meaning incorporeal property such as rights would also be included. In *Cactus Investments (Pty) Ltd v CIR,*[32] the court held that in order to comprise an "amount", rights of a non-capital nature must be "capable of being valued in money". Similarly, in *CIR v People's Stores (Walvis Bay) (Pty) Ltd,*[33] the court held that in order to be included in gross income, an amount must be of such a nature that a monetary value can be attached thereto. In *C:SARS v Brummeria Renaissance (Pty) Ltd & Others,*[34] it was held that it did not follow that if a receipt or accrual cannot be turned into money, it had no monetary value. The "turn into money" test was merely one of the tests for determining whether an accrual had monetary value. The court confirmed that the test was objective, and not subjective. In considering the context, the same broad meaning ascribed to the word "amount" must be given in the context of the definition of "dividend" in section 1(1) of the ITA.[35] The granting of a service or the right of use of an asset would therefore constitute an "amount".

The amount should then be "transferred" or "applied" by a company that is a resident. The ordinary meaning of "transfer" is to convey or make over (title, right, or property) by deed or legal process and the ordinary meaning of "apply" to connect (something abstract) with (a person or thing) as its attribute or cause; to refer, ascribe, attribute.[36] The

29 De Koker & Williams *supra* n 14 at para 25.7I.
30 S 1(1) definition of "dividend" in Income Tax Act 58 of 1962.
31 *WH Lategan v CIR* 2 SATC 16 (1926) 19.
32 *Cactus Investments (Pty) Ltd v CIR* 61 SATC 43.
33 *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 52 SATC 9.
34 *C:SARS v Brummeria Renaissance (Pty) Ltd & Others* 69 SATC 205.
35 SARS *supra* n 7 at 24.
36 Oxford English Dictionary (2018).

granting of services or the right of use of assets would adhere to this element of the definition as long as legal ownership of the right to the use of assets or services is transferred to the shareholder or is put to purpose or used by the shareholder. The meaning of "company that is a resident" is not submitted as contentious for purposes of this article. Furthermore, it would also be accepted that the granting of a service or the right of use of an asset would be in respect of a shares therefore not considered as specific focus for this article.

The final consideration is by way of a "distribution" made by the company. No definition of "distribution" is contained in the ITA, however, a common law dividend is provided by the SARS,[37] as an example of a distribution. Distribute means to apportion, appropriate, allocate or apply towards,[38] and as no longer dependent on profits will be a dividend if the company from a company law or accounting point of view is entitled to make the distribution to shareholders.[39] The definition of "distribution" contained in the Companies Act is therefore considered for guidance on the meaning thereof. In terms of the Companies Act, a "distribution" includes the transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares of that company in the form of a dividend. The South African Companies Act and that of New Zealand have also been found to have similarities.[40] The phrase "to or for" the benefit of one or more shareholder is also used in the definition of "distribution" as contained in the New Zealand Companies Act. When applying the interpretation by the New Zealand courts,[41] in this regards any instance where a distribution causes wealth to flow from the company to the shareholder would be classified as a "distribution" in terms of the Companies Act. If the Companies Act's interpretation is applied to that used in the definition of "dividend" in the ITA, it would necessitate that any transfer of wealth from the company to the beneficial owner in respect of the beneficial owner's shareholding would be considered a dividend for tax purposes. On this premise the granting of services or the right of use of assets, wealth is transferred to the shareholder in respect of shareholding. The beneficial owner receives a benefit, either in the form of services or the use of company assets. The company, on the other hand, experiences a negative impact on its net value either due to costs associated with performing the services or allowing the beneficial owner to use company assets, or in the form of lost income (opportunity costs). The granting of a service or the right of use of an asset to a shareholder in respect of the shareholder's

37 SARS *supra* n 7 at 27.
38 *CIR v Legal and General Assurance Society Ltd* 1963 (3) SA 876 (A), 25 SATC 303, at 315.
39 Jutastat *RS 23 Dividend* (2018) Tax: Juta's Practice Collection Online (accessed 2019-04-26).
40 Jooste "Issues relating to the regulation of "distributions" by the 2008 Companies Act: Notes" 2009 *South African Law Journal* 635.
41 *Re DML Resources Ltd (In Liquidation)* (2004) 3 NZLR 490 (HC) at 505.

shareholding could thus be considered a distribution for Companies Act purposes and by inference a dividend for ITA purposes.

Based on the above the definition of "dividend" does not contradict the interpretation that the intention of the legislator is to include other benefits within the ambit of the definition of "dividend" and is consistent with the modern purposive approach to interpret legislation. Considering the context of "dividend" as defined based on an overview of tax history of the provision also does not contradict the broad meaning submitted in terms of the wording and context. Owing to the fact that dividends *"in specie"* are treated differently for purposes of dividends tax in terms of their valuation, timing, and liability for the payment of the dividends tax consideration is also given to meaning of *"in specie"*.

2 2 Meaning of dividend *"in specie"*

The ordinary meaning of "*in specie*" is "in its actual form" or "in kind".[42] The SARS also describes "*in specie*" as a distribution to shareholders in a form other than cash.[43] The granting of services or the right of use of assets would be in the form other than cash and accordingly be regarded as dividends *"in specie"*.

The ITA,[44] however, also refers to different terms which could also be conceived as dividends *in specie*, being "distribution *in specie*" or "asset *in specie*". The granting of services or the right of use of assets has been argued as a "distribution,"[45] consequently submitted as a distribution *in specie*. The main terms in the definition of "asset" in paragraph 1 of the Eighth Schedule are "property" and "a right" to such property. SARS describes "property" as anything that can be disposed of and turned into money.[46] "A right" would include both personal rights (enforceable against a specific person).[47] Granting of services is not submitted as an "asset" as such services are immediately consumed or utilised by the shareholder resulting in the personal rights obtained being exercised immediately. Granting the right of use of assets could result in an "asset" if the shareholder obtains right of use for a defined future period.

Based on the preceding the granting of services or the right of use of assets are submitted as dividends in *specie* contemplated in sections 10B(2)(d) and 64EA of the ITA. Guidance based on the Seventh Schedule and international practices are subsequently considered for further guidance in support of the submission that the granting of services or the right of use of assets are dividends in *specie*.

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42 *Collins Dictionary* (2018).
43 SARS *What is a dividend in specie?* (2018) available at http://www.sars.gov.za/FAQs/Pages/833.aspx (accessed 2018-01-31).
44 S 10B(2)(d), s 64EA and para 75 of the Eighth Schedule
45 Based on arguments submitted under 2.1 of this article.
46 SARS *Comprehensive Guide to Capital Gains Tax (Issue 5)* (2015) 39.
47 SARS *supra* n 45 at 532.

2 3 Guidance based on the Seventh Schedule

Benefits provided to employees by an employer are taxed in terms of the Seventh Schedule to the ITA. These benefits are taxed as a result of the employment relationship that exists between the employer and the employee. An investigation into the purpose of the Seventh Schedule is conducted in order to understand the reason for the implementation of the schedule, as well as whether it could provide guidance on whether or not the intention of the legislator could be to include granting of services or the right of use of assets within the ambit of a dividend *in specie*.

Fringe benefits provided by employers, such as housing and housing assistance schemes, travel allowances, and rental of movable and immovable property, became taxable in 1985,[48] and such inclusion broadened the tax base. The broadening of the tax base could be a useful tool for redistribution to the poorest by taxing the rich and a broad base also encourages lower tax rates which in turn will reduce tax evasion.[49] These benefits were also often partially exempt from tax in order to compensate for the high marginal rate of tax during the period of the Margo Commission. Fringe benefits such as housing and holiday accommodation, company cars, and travel allowances became fully taxable in order to rectify a loophole that created a loss to the fiscus.[50] Furthermore, anti-avoidance provisions were also introduced between 1997 and 1999 to prevent the abuse of company car schemes, travel allowances, and residential accommodation for employees.[51] These reforms gradually started to decrease opportunities for tax avoidance in order to protect the tax base and to reduce loss to the fiscus. In the 2010 budget speech, the Minister of Finance, Pravin Gordhan, emphasised that the government would tighten fringe benefit rules to reduce tax avoidance and tax structuring.[52] One of the main reasons for the implementation and further reforms to employees' tax in respect of fringe benefits, other than to broaden the tax base, was to combat special tax structures used to avoid tax.

The granting of services or the right of use of assets to shareholders as a dividend *in specie* could potentially not be taxed unless they fall within the ambit of the definition of a dividend as contained in section 1(1) of the ITA. These types of distributions would also not fall within the definition of a taxable benefit as defined in the Seventh Schedule to the ITA if no employment relationship exists. Thus, a potential structure

48 National Treasury *Explanatory memorandum on the Income Tax Bill 1985* (1985) 3.
49 Ahmad & Stern "Taxation for developing countries" in Chenery and Srinivasan *Handbook of development economics* (1989) 1065.
50 Katz Commission *Interim report of the Commission of Inquiry into certain aspects of the tax structure of South Africa* (1996) 33-34.
51 Nyamongo & Schoeman "Tax reform and the progressivity of personal income tax in South Africa" 2007 *South African Journal of Economics* 480.
52 National Treasury *Budget speech by the Minister of Finance, 22 February 2010* (2010) 15.

exists for avoiding tax. Based on these findings, the intention of the legislator could be to include the granting of services or the right of use of assets to shareholders within the ambit of the definition of a dividend as contained in section 1(1) of the ITA. The taxing of fringe benefits was due to the benefits being granted in lieu of remuneration as structures to avoid tax. The same applies to the structuring of a distribution in a manner other than a dividend in order to avoid dividends tax, which in essence would be a distribution in lieu of cash or an asset that would have been taxed. The definition of "dividend" in section 1(1) of the ITA is interpreted broadly to prevent avoidance of dividends tax by structuring distributions in a manner other than dividends.[53] Based on these findings, the benefits included in the ambit of "taxable benefits" in section 2 of the Seventh Schedule to the ITA could indicate what the legislator intended to fall within the ambit of dividends *in specie* for ITA purposes, which includes free or cheap services and the right of use of assets such as residential accommodation and motor vehicles.

The Seventh Schedule also contains specific guidance on the valuation of right of use of assets granted as fringe benefits. Paragraph 6 contains provisions for determining the cash equivalent of the right of use of any asset, other than residential accommodation or a motor vehicle. The value of the private or domestic use of such asset shall be either the rental amount paid by the employer if such asset is leased by the employer, or the value shall be determined as 15% per annum on the lesser of the cost or market value of the asset at the date of commencement of the period of use.[54] If the asset is owned by the company before distribution, the value for dividends tax purposes could be calculated as 15% per annum of the market value at the date of distribution apportioned for the months used within a year of assessment. The taxable benefit specific to the right of use of a motor vehicle based on the "determined value" in relation to the motor vehicle.[55] The general rule is that the value of private use is 3.5% of the "determined value" per month that the right of use was granted. Where the employer acquired the vehicle subject to a maintenance plan, the percentage is reduced to 3.25%. If, however, the vehicle was acquired by the employer under an operating lease, the value of private use is determined to be the actual cost to the employer plus any fuel cost incurred. The provisions to determine the cash equivalent taxable benefit for the private use of residential accommodation stipulates that the value placed on the taxable benefit will be the "rental value" less any consideration paid by the employee to the employer.[56] The "rental value" is determined by way of a formula; however, if the full ownership of the property is not vested in the employer, the "rental value" is the lower of the value per the formula or the expenditure

53 Mazansky "South Africa: New rules for tax on dividends (domestic and foreign) and other company distributions" 2012 *Bulletin for International Taxation* 172.
54 Para 6(2) of the Seventh Schedule to the Income Tax Act 58 of 1962.
55 Para 7(1) of the Seventh Schedule to the Income Tax Act 58 of 1962.
56 Para 9(2) of the Seventh Schedule to the Income Tax Act 58 of 1962.

incurred by the employer. The formula for the "rental value" is based on the remuneration proxy of an employee at 17%, 18%, or 19% per annum and apportioned for the number of months the benefit is granted for during the year. The formula for determining the cash equivalent value of the right of use of residential accommodation will not be an appropriate way to determine the market value in context of dividend tax as the basis of the formula is a remuneration proxy as these fringe benefits are received in respect of employment, while for dividends tax the benefit is received due to shareholding.

Furthermore, the Seventh Schedule also contains specific guidance on the valuation of services granted as fringe benefits. Paragraph 10 contains provisions for determining the cash equivalent of services provided by employers to employees.[57] The cash equivalent value of a taxable benefit derived from the rendering of a service to any employee shall be in the case of a travel facility granted by an employer, who is engaged in the business of conveying passengers by sea or air, the lowest fare payable by a passenger utilising such a facility less any consideration given by the employee, and in any other case the cost of such services to the employer in rendering such services or having such services rendered less any consideration given by the employee in respect of such services.[58] Multiple circumstances are provided for where no value is placed on services provided by employers to employees, which include services used mainly for the purposes of the employer's business or for the improved performance of an employee's duties at work. Applying the guidance obtained from paragraph 10 to the distribution of services for dividends tax purposes, the value of travel services rendered would be the lowest fare payable by a passenger should an entity whose business is the conveying of passengers distribute such services to a shareholder, or in the case of any other services the cost to the entity in rendering such services or having such services rendered. For the purposes of section 64E the distribution of an asset *in specie* is deemed to be at market value and thus the market value of such services received by the shareholder would be a better option for the value of the deemed dividend.[59] Thus the value would be the market-related selling price of such services and not only the cost for the entity in the case of services rendered by the entity. The cost of having services rendered would most likely be the market-related cost.

The aforementioned cash values in terms of the Seventh Schedule have been extended for application to another tax apart from normal tax, being Value-Added Tax.[60] This article argues that the specific guidance on the valuation of services or right of use of assets in terms of the Seventh Schedule could also be extended to the application in the context of dividends tax. The international practice of selected countries is

57 Para 10 of the Seventh Schedule to the Income Tax Act 58 of 1962.
58 Para 10(1) of the Seventh Schedule to the Income Tax Act 58 of 1962.
59 S 64E(3) of the Income Tax Act 58 of 1962.
60 S 10(13) of the Value-Added Tax Act 89 of 1991.

further considered for international guidance on the tax of granting of services and the right of use of assets to shareholders.

3 Guidance based on international practices

The South African tax legislation has gone through many phases of tax reform; one of which started after the year 2000, which saw the adaptation of the tax system to conform to international tax law.[61] Specifically, with regard to the taxing of distributions to shareholders, the STC regime was replaced with the dividends tax regime in order to align it with international practices.[62] Investigating the tax implications of distributions by entities to shareholders in the context of international practices could provide guidance whether the granting of services or the right of use of assets could constitute dividends for ITA purposes. International practices could also provide guidance on the dividends tax treatment of the granting of services or the right of use of assets for purposes of dividends tax in the South African context. The countries and their respective taxation legislation used for this investigation are Canada, the UK, Australia, and the USA. The first three countries and South Africa are part of the Commonwealth, with the Commonwealth countries' legislation having common influences as these countries were once territories of the British Empire.[63] Notwithstanding the fact that the USA does not form part of the Commonwealth countries, the inclusion of the USA as a country for investigation is considered as it provides practical guidance from a government that has paid attention to the granting of services and the right of use of company assets to shareholders.[64] Canada, the UK, Australia and the USA were also four of the five countries included in the international comparison by National Treasury in revising the base for taxable distributions.[65] It is recognised that transferring insights in respect of taxes between different countries could be a problematic endeavour as tax systems could differ significantly between countries. International experience could, however, still be considered as an important aspect as it could offer lessons learned from those experiences.[66] The aim of this article is to consider international practices as a supplementary argument to the primary investigation performed in terms of the ITA in South Africa.

61 Nyamongo & Schoeman "Tax reform and the progressivity of personal income tax in South Africa" 2007 *South African Journal of Economics* 480.
62 Roeleveld *supra* n 11 at 120.
63 Commonwealth *Member countries* (2018) available from http://the commonwealth.org/ member-countries (accessed 2018-06-30).
64 Kohla Dividend income from personal use of business assets 1974 *American Bar Association Journal* 1431.
65 National Treasury *Dividends versus return of capital: Revising the base for taxable distributions* (2008) 12-13.
66 Arendse & Stack "Investigating a new wealth tax in South Africa: Lessons from international experience" 2018 *JEF* 1.

3 1 Canada

Taxable dividend distributions made by companies to shareholders are included in the taxable income of the shareholder in terms of the *Canadian Income Tax Act* reads as follows:

> "In computing the income of a taxpayer for a taxation year, there shall be included the total of the following amounts:
>
> (a) the amount, if any, by which
>
> (i) the total of all amounts, other than eligible dividends and amounts described in paragraph (c), (d) or (e), received by the taxpayer in the taxation year from corporations resident in Canada as, on account of, in lieu of payment of or in satisfaction of, taxable dividends."[67]

The term "taxable dividend" is defined in the *Canadian Income Tax Act R.S.C. of 1985* under section 89 is defined as a dividend other than certain exempt dividends that are listed in subsection (a) and (b) of the definition of a taxable dividend.[68] This provides no insight into what would constitute a dividend other than the common law cash dividend. The *Canadian Income Tax Act*, however, contains section 15, which specifically deals with benefits conferred on shareholders. Section 15(1) states that if, at any time, a benefit is conferred by a corporation on a shareholder of the corporation or on a future shareholder of the corporation, the amount or value of the benefit is to be included in computing the income of the shareholder, unless the benefit is deemed to be a dividend in terms of section 84. Section 84 deems the decrease of paid-up capital, distributions on winding-up, and the redemption of shares as dividends. Specific subsections exist for the forgiveness of debt,[69] provision of shareholder debt,[70] and automobile benefits.[71] The value of the automobile benefit conferred on the shareholder is determined based on the provisions for taxable amounts to be included from employment. In terms of section 15(1.3), the value of all property and services conferred specifically includes all taxes paid for such property or services or should have been paid had the individual not been exempt from any such taxes. Section 15(2), relating to shareholder debt, is not applicable to non-residents, ordinary lending practices, when the loan is repaid within one year, and when the debt is provided to an employee in respect of employment.

Based on the above, section 15 has a broad scope in terms of what would be considered a benefit conferred on a shareholder.[72] Even

67 S 82(1) of the Canadian Income Tax Act R.S.C. of 1985.
68 S 89 of the Canadian Income Tax Act R.S.C. of 1985.
69 S 15(1.2) of the Canadian Income Tax Act R.S.C. of 1985.
70 S 15(2) of the Canadian Income Tax Act R.S.C. of 1985.
71 S 15(5) of the Canadian Income Tax Act R.S.C. of 1985.
72 Mitchell "The 'dark path': subsection 15(1) of the Income Tax Act" 2012 *Collins Barrow: Tax Alert* 4 available at https://www.collinsbarrow.com/uploads/docs/newsletter/national/archive/Tax%20Alert%20-%20Winter%202012.pdf (accessed 2018-06-30).

though the *Canadian Income Tax Act* has a number of provisions to prevent shareholders from extracting wealth from a corporation without incurring a tax liability, section 15(1) provides a general provision to include benefits not covered by other provisions in the taxable income of a shareholder in the year the benefit is conferred.[73] Thus, if shareholders extract wealth from a corporation other than through employment remuneration or investment income (common cash dividends and interest), all of which will be taxed under the provisions of section 15(1) which will include the value of the wealth extraction in the taxable income of the shareholder. Mitchell,[74] identifies three important definitions that are relevant to the concept of a shareholder benefit, which are "shareholder", "benefit", and "value". A shareholder is defined as a person who is entitled to a dividend. The word "benefit" is not defined in the *Canadian Income Tax Act*, and a broad interpretation has been applied, which results in a broad range of transactions being regarded as taxable benefits interpreted to include, among others, the following:

- Personal use of corporate assets (e.g. real estate, aircraft, horses);
- Corporate payment of personal expenses;
- Gifts to shareholders' relatives;
- Inadequate consideration of sale of corporate assets; and
- Travel reward points.[75]

The "value" of the benefit is considered by the Canadian Revenue Authority to be the fair market value of that benefit.[76] In *Youngman v The Queen,*[77] it was held that in circumstances where the fair market value rent for the property is not appropriate or cannot be determined, the amount or value of the benefit will generally be determined by multiplying a normal rate of return with the greater of the cost or fair market value of the property. This will be the case when, for example, an asset is built specifically for the shareholder, as not merely the right to use the asset is conferred but also the right to use an asset built specifically for the shareholder. The Canadian courts have thus held that in circumstances where the fair market value rent is not appropriate, the value of the benefit would be the income the corporation would have earned had the capital been productively employed. Shareholder benefits that trigger section 15 will be taxed at the individual's marginal rate of tax due to the value of the benefit being included in the taxable income of the individual receiving the benefit. The amount is also not deductible by the corporation.[78] Section 15(1) will not apply to bona fide business

73 Canadian Income Tax Act R.S.C. of 1985.
74 Mitchell 2012 *Collins Barrow: Tax Alert* 5.
75 Mitchell 2012 *Collins Barrow: Tax Alert* 5.
76 Mitchell *supra* n 75 at 5.
77 *Youngman v The Queen*, 90 DTC 6322, (1990) 2 C.T.C. 10.
78 Hennessey "Another reason to avoid shareholder benefits" 2016 *CTF* 1 available at https://www.ctf.ca/ctfweb/EN/ Newsletters/Canadian_Tax_ Focus/2016/1/160103.aspx (accessed 2018-04-30).

transactions or if the benefit arose due to employment and not due to shareholding.

In the South African context, the definition of a dividend also refers to any amount for the benefit of any person that is transferred or applied. It is submitted that based on the taxing of shareholder benefits by the *Canadian Income Tax Act*, it should also be included in the South African context due to the use of "benefit" in the dividend definition. Guidance from the *Canadian Income Tax Act* indicates that the granting of services and the right of use of assets would be included within the ambit of the dividend definition in the ITA. A broad interpretation is applied to the word "benefit" in the *Canadian Income Tax Act* and academics have interpreted "benefit" to include the personal use of corporate assets. It is submitted that this same broad interpretation should be applied in the South African context. Section 15(1) of the *Canadian Income Tax Act* provides for all other cases where wealth is extracted from a corporation other than through remuneration or investment income. South Africa does not contain such a general provision and it is submitted that the dividend definition contained in the ITA has a broad interpretation in order to also include wealth extraction from a corporation other than through remuneration or investment income.

Guidance obtained from the Canadian courts on how to determine the fair market value of the benefit indicates that it would be the fair market value rent for that benefit. In cases where the fair market value rent is not appropriate or cannot be determined, the value of the benefit is the income the corporation would have earned had the capital been productively employed. These principles could be applied in the South African context to value the granting of services or the right of use of asset for dividends tax purposes.

3 2 United Kingdom (UK)

Taxing provisions for dividends and company distributions are contained in sections 382 to 401 of the *Income Tax (Trading and Other Income) Act of 2005*.[79] Within these sections, reference is made to dividends and other distributions. No definition of "distribution" is contained within the *Income Tax (Trading and Other Income) Act of 2005*, and the definition of "distribution" for purposes of this act is contained within the *Corporation Tax Act of 2010*.[80] Section 1000(1) of the *Corporation Tax Act of 2010* defines the meaning of "distribution" and includes any dividend or any other distribution out of the assets of the company. Also included are any securities issued by the company or any interest or other distribution out of the assets of the company, whether in cash or not. Section 1000(2) of

79 UK Income Tax (Trading and Other Income) Act of 2005.

80 Her Majesty's Revenue and Customs (HMRC) 2015 *Corporation tax, income tax and capital gains tax: Company distributions* available at https://www.gov.uk/government/publications/corporation-tax-income-tax-and-capital-gains-tax-company-distributions/corporation-tax-income-tax-and-capital-gains-tax-company-distributions (accessed 2018-06-30).

the *Corporation Tax Act of 2010* also includes in the definition of "distribution" any amount treated as a distribution in terms of section 1064.[81]

Section 1064 regards certain expenses of close corporations as distributions and applies to expenses incurred by a close corporation on behalf of any participator in the close corporation. A participator is defined as "a person having a share or interest in the capital or income of the company". Section 1064(2) states that:

> "where a close company incurs expense in or in connection with the provision for any participator of living or other accommodation, of entertainment, of domestic or other services, or of other benefits or facilities of whatever nature, the company shall be treated as making a distribution to the participator of an amount equal to so much of that expense as is not made good to the company by the participator".[82]

When comparing this to the dividend definition in the ITA of South Africa, the words "applied" and "on behalf of" are also used, which would include expenses paid by a company on behalf of a person in respect of a share. Guidance from the UK would indicate that in the South African context, any expenses paid for on behalf of a person in respect of a share would be interpreted as being included in the ambit of a dividend. The granting of services and the right of use of assets would thus fall within the ambit of a dividend if the company pays for the granting of services or the right of use of assets on behalf of a person in respect of a share. As the ITA provisions in South Africa also include distributions on behalf of any person in respect of any share, no further guidance is obtained from the UK practice.

3 3 Australia

Australian taxation legislation is contained in different acts. The most relevant for purposes of this discussion are the *Income Tax Assessment Act of 1936*, the *Taxation Administration Act of 1953*, and the *Income Tax Assessment Act of 1997*. The main sections in the Australian *Income Tax Assessment Act of 1936* that contain provisions for the taxing of dividends are section 44 for resident shareholders and section 128B for withholding tax on non-resident shareholders. In terms of section 44(1), dividends are paid to shareholders by the company from profits derived from any source.[83] Section 44(1A) states that for purposes of the *Income Tax Assessment Act of 1936*, in terms of dividends paid out of an amount other than profits, the dividends are deemed paid out of profits.[84] Section 44 also refers to dividends being in the form of money or other property. The definition of "property" can be found in section 343 of this Act, which states that property includes money. This provides no

81 UK Income Tax (Trading and Other Income) Act of 2005.
82 S 1064(2) of the UK Income Tax (Trading and Other Income) Act of 2005.
83 S 44(1) of the Australian Income Tax Assessment Act of 1936.
84 S 44(1) of the Australian Income Tax Assessment Act of 1936.

guidance in terms of what would be considered property distributed for purposes of dividends tax. The definition of a dividend found in section 995.1 of the *Income Tax Assessment Act of 1997* states that "dividend" has the meaning given by section 6(1) of the *Income Tax Assessment Act of 1936*. A dividend would therefore include any distribution made by a company to any of its shareholders, whether in money or other property.[85] No particular guidance is obtained from these sections on what would constitute "other property".

Further guidance is sought from the provisions that regulate distributions to non-resident shareholders. The *Taxation Administration Act of 1953* regulates the withholding arrangements for dividends to non-residents, which are found in divisions 12 and 14 of this Act. Division 14: Non-cash benefits and accruing gains, for which amounts must be paid to the commissioner, has the objective of placing entities that provide non-cash benefits, and entities that receive them, in a position similar to their position under division 12. Division 14 thus treats the benefit as if a payment of money had been made instead of a non-cash benefit being provided and included in division 12 are the withholding tax provisions for dividends paid to non-residents.[86] Thus, if an entity provides non-cash benefits to non-residents, it will be treated in the same manner as if it had been a cash dividend. Division 14 prevents entities from avoiding their obligation to withhold tax on distributions by providing non-cash benefits as an alternative. Subdivision 14-10 states that if an entity receives a dividend in the form of a non-cash benefit, tax must be withheld and paid over to the commissioner. The meaning of "entity" is found in section 960-100 of the *Income Tax Assessment Act of 1997*, which includes individuals and corporates. The specific inclusion of division 14 in the *Taxation Administration Act of 1953* indicates that the legislator's intention was that the meaning of "other property" as contained in the definition of "dividend" would include non-cash benefits.[87] The *Income Tax Assessment Act of 1997* defines non-cash benefits in terms of section 995.1 as "property or services in any form except money".

Further guidance on the meaning of non-cash benefits is obtained from the provisions that regulate non-cash business benefits, which are found in section 21A of the *Income Tax Assessment Act of 1936*. Section 21A states that for the purpose of the act, if a non-cash business benefit is not convertible to cash, it is deemed as if it were convertible to cash, and any restrictions or prevention of converting the benefit to cash will be disregarded when valuing the benefit.[88] The benefit shall be brought into account at its arm's-length value reduced by any contribution paid by the recipient for the benefit. Arm's-length value is defined in section 21A(5) as:

85 S 6(1)(a) of the Australian Income Tax Assessment Act of 1997.
86 Australian Taxation Administration Act of 1953.
87 Division 14 of the Australian Taxation Administration Act of 1953.
88 S 21A(1) of the Australian Income Tax Assessment Act of 1936.

> "the amount that the recipient could reasonably be expected to have been required to pay to obtain the benefit from the provider under a transaction where the parties to the transaction are dealing with each other at arm's length in relation to the transaction".[89]

In terms of section 21A, non-cash business benefits are non-cash benefits provided in respect of a business relationship and include property and services. Services are further defined in the *Income Tax Assessment Act of 1936* as "any benefit, right (including the right in relation to, and an interest in, real or personal property), privilege or facility and, without limiting the generality of the foregoing, includes a right, benefit, privilege, service or facility that is, or is to be, provided" in respect of a business relationship.[90] The meaning of a "non-cash benefit" in the provisions for dividends tax is ascribed to the term "other property" due to the reference to non-cash benefits in the administration of the withholding tax on dividends. Thus, for purposes of the Australian tax system, a "dividend" would include, among others, the granting of services or the right of use of assets. When considering the timing of when such a benefit is obtained and tax should be levied, Taxation Ruling 96/6,[91] states that the facts of each case must be considered, but guidance is given that this would most likely be when there are no more steps required in order to become entitled to the benefit.

The definition of "dividend" in the ITA of South Africa refers to any "amount" being transferred or applied, with "amount" including not only cash but all forms of property. Applying the guidance from the Australian Income Tax acts' regulation of distributions indicates that property includes non-cash benefits, which in turn include services and rights. The granting of services or the right of use of assets could thus constitute dividends *in specie*. Guidance on valuing the benefit indicates that the arm's-length value is the most appropriate value, similar to the market value, to be placed on dividends *in specie* in section 64E(3) of the ITA of South Africa.

3 4 United States of America (USA)

Provisions regulating distributions by corporations are found in sections 301 to 318 of the *Title 26 Internal Revenue Code (IRC) of the US Code*.[92] "Dividend" is defined under section 316(a) as "any distribution of property made by a corporation to its shareholders". "Property" is defined under section 317(a) as "money, securities, and any other property except that such term does not include stock in the corporation

89 S 21A(5) of the Australian Income Tax Assessment Act of 1936.
90 S 21A(5) of the Australian Income Tax Assessment Act of 1936.
91 Commonwealth of Australia 1996 *Taxation Ruling 96/6* available at https://www.ato.gov.au/law/view/document?DocID = TXR/TR966/NAT/ATO/00001&PiT = 99991231235958 (accessed 2018-06-30).
92 Legal Information Institute (undated) *Title 26 of the Internal Revenue code and federal regulations* available at https://www.law.cornell.edu/uscode/text/26 (accessed 2018-06-30).

making the distribution (or rights to acquire such stock)".[93] The value attributable to a dividend of property is the amount of money received if received in cash, otherwise the fair market value if other property is received.[94]

The *Code of Federal Regulations (CFR)* is a codification of general and permanent rules and regulations published in the Federal Register by agencies of the federal government of the USA. Agencies such as the Internal Revenue Service (IRS) promulgate regulations and rules specific to their subject area, which are divided into 50 broad subject areas that are updated on a regular basis. *CFR Title 26* contains the regulations and rules published for internal revenue in section 1.301-1(j) which states, in part, that if property is transferred by a corporation to a shareholder who is not a corporation, for an amount that is less than its fair market value in a sale or exchange, such a shareholder shall be treated as having received a distribution to which section 301 of the *IRC Code* applies.[95] In such a case, the amount of the distribution shall be the difference between the amount paid by the shareholder for the property and its fair market value. The provision of services and the use of corporate-owned property have been held to be "property" for purposes of section 301.[96] Furthermore, it was also held by the US courts that the distribution of corporate earnings to or for the benefit of shareholders may constitute a dividend to the shareholder, notwithstanding that the formalities of a dividend declaration are not observed, not recorded in the accounting records of the entity, or even if some of the shareholders do not participate in the benefit distributed.[97]

Guidance from *Title 26 IRC* dividends sections indicates that property also constitutes dividends, and property in turn includes services and the use of corporate-owned property. This interpretation could be of assistance in interpreting what could be included in the ambit of "amount" for ITA purposes as "amount" includes property. Based on this guidance, the granting of services or the right of use of assets could be interpreted as being included in the ambit of the definition of "dividend".

4 Conclusion

The broad interpretation of the meaning of "dividend" and "*in specie*" in the ITA supports the granting of services or the right of use of assets as constituting dividends *in specie*. Furthermore, the context of the provisions contained in the ITA considered in this article does not indicate findings contrary to the broad interpretation of the meaning of "dividend" and "*in specie*" in the ITA. The definition of "dividend" has

93 S 317(a) of Title 26 Internal Revenue Code (IRC) of the US Code.
94 S 301(b)(1).
95 Title 26 Internal Revenue Code (IRC) of the US Code.
96 *Ireland v United States* 621 F.2d 731, 735 (5th Cir. 1980).
97 *Paramount-Richards Theatres v Commissioner* 153 F.2d 602, 604 (5th Cir. 1946).

been amended as result of amendments to the Companies Act and the removal of the profits as requirement in both Acts could be indicative of a broad interpretation being intended by legislator. The use of "any amount" in the dividend definition furthermore supports a broad interpretation in respect of which this article submits that the granting of services or right of use of assets should also be included within this broad interpretation. Ambiguity could result from the fact that the ITA refers to other terms which could also be conceived as dividends *in specie*, being "distribution *in specie*",[98] or "asset *in specie*",[99] and in this regards further guidance from government could assist in clarifying whether these terms should bear the same meaning as other references to dividends *in specie*.

An investigation into the purpose of the Seventh Schedule indicated that the aim of the introduction of the Seventh Schedule was to eliminate loopholes as employees structured their remuneration packages to avoid income tax by including non-taxable fringe benefits. In the context of dividends tax, this article posits that the granting of services or the right of use of assets in respect of shareholding could also be employed to avoid dividends tax implications if uncertainty regarding classification as dividends *in specie* is not clarified. The Seventh Schedule also provides specific guidance on valuing services, the right of use of motor vehicles, residential property, and other assets granted as benefits from a South African perspective. This article posits that the provision for valuing fringe benefits in terms of the Seventh Schedule could also be considered in valuing such benefits granted to shareholders for dividends tax purposes.

The findings from investigating international practices indicated that the granting of services or the right of use of assets constitutes dividends in Australia, the UK, and the USA, while in Canada these are taxed as shareholder benefits included in the shareholders' taxable income. Canadian legislation includes provisions for tax benefits received by shareholders, which specifically include provisions for taxing the use of a motor vehicle for private purposes by a shareholder. The value of the motor vehicle benefit conferred on the shareholder is determined based on the provisions for taxable amounts to be included from employment. From the Canadian context, a link is made between dividends tax and employees' tax for determining the value of the motor vehicle benefit. This could indicate that from a South African perspective, guidance can be obtained for the value to be attributed for tax purposes to the granting of services or the right of use of assets from the Seventh Schedule. Canadian academics have interpreted "shareholder benefits" broadly and have included the right of use of various corporate assets and gifts to shareholders or their relatives. The British legislation deems certain expenses paid by an entity on behalf of a shareholder as a distribution for dividends tax purposes. The Australian legislation deems non-cash

98 Para 75 of the Eighth Schedule
99 S 10B(2)(d) and Section 64EA

benefits (a right, benefit, privilege, service, or facility) received by a shareholder to be treated the same as if it were received in cash. This is because it is submitted that the legislator's intention is that the meaning of "other property" as contained in the definition of "dividend" would include non-cash benefits. In the USA, distributions of other property, such as services and the private use of corporate assets, referred to as constructive dividends, have received much attention from the IRS, yet no official provisions or policies for determining the value of the deemed dividends exist.[100] Dividends include the distribution of property and the US courts have held that property includes the provision of services and the use of corporate-owned property. Based on international practices, the granting of a service or the right of use of an asset to a shareholder will be taxed as dividends. International guidance was also obtained on how to value the right of the benefit received by the shareholder, taking into consideration the specific facts of each case.

Although a taxpayer has the right to arrange affairs in such a manner as to obtain the most favourable tax position,[101] any disguised transaction surrounding a transaction will be ignored and the commercial sense of the transaction will be examined in order to ascertain its real substance and purpose.[102] When applied in the context of dividends, it would mean that if the true purpose of a benefit granted to a shareholder was to extract wealth in lieu of cash dividends from an entity, then the substance of the transaction is a dividend and accordingly should be considered for dividends tax purposes. From a South African perspective reliance on the broad "dividend" definition resulted in a lack of specific guidance in respect of dividends *in specie* and the practical tax issue in respect of non-recoupment of deductions if a service or right of use is granted as dividends *in specie* as highlighted by this article. Due to the fact that dividends and dividends *in specie* are treated differently for purposes of dividends tax in terms of their valuation, timing, and liability for the payment of the dividends tax further specific guidance from government could be warranted.

100 Kohla *supra* n 57 at 1431.
101 *Erf 3183/1 Ladysmith (Pty) Ltd and Another v CIR* (1996 A) 58 SATC 229.
102 *C:SARS v NWK Ltd* (2011) 73 SATC 55.

Is it a competent child's prerogative to refuse medical treatment?

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SUMMARY

The purpose of this article is to analyse the legal position pertaining to the refusal of medical treatment by a competent child as an expression of his or her rights to physical integrity and autonomy guaranteed in the Constitution of the Republic of South Africa, 1996. The article also examines how the Children's Act gives effect to the child's right to refuse medical treatment in order to determine whether it demonstrates respect for a child's rights to bodily integrity and autonomy. Thereafter the question whether the refusal of a competent child should be overridden with specific reference to the child's best interests is addressed.

1 Introduction

All persons, including children, have the right to bodily integrity (including the ability to make autonomous decisions regarding one's own body) which in the simplest of terms means that a person has the right to decide what happens to his or her body. In a health care context, this right necessitates a right to give or withhold informed consent,[1] before any procedure is undertaken or another process affecting one's body begins.[2]

For purpose of medical treatment,[3] children are considered to have the capacity to consent if they comply with two requirements namely (1) age and (2) maturity and understanding.[4] When children reach the age of 12 and provided they are of sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the medical treatment they are deemed to be competent to consent to

1 With reference to *Castell v De Greef* 1994 4 SA 408 (C), Mojapelo J found in *Christian Lawyers Association v Minister of Health* 2004 4 All SA 31 (T) that the rationale behind the requirement of informed consent in medical procedures was to give effect to the patient's fundamental right to self-determination (autonomy), which is protected by amongst others s 12(2) (the right to bodily and psychological integrity, including the right to security in and control over the body) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

2 Nienaber & Bailey "The right to physical integrity and informed refusal: Just how far does a patient's right to refuse medical treatment go?" 2016 *SAJBL* 74.

3 For the purposes of this article, medical treatment means a non-invasive intervention usually in the form of a drug.

4 Mahery in Boezaart (ed) *Child law in South Africa* (2017) 263-264.

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medical treatment.[5] Requiring children to be mature and to possess the capacity to understand the consequences of the treatment reinforces the application of the common law-doctrine of informed consent,[6] in all health care settings.[7]

The position of the refusal of medical treatment, including life-saving treatment, by children has not been set out with clarity in the Children's Act.[8] The existence of the right of children to refuse medical treatment has been inferred from the wording of section 129(2) of the Children's Act. This section, as indicated above, sanctions the right of a child to consent to medical treatment and considering that refusal is the converse of consent,[9] section 129(2) must surely sanction the right of a child to refuse medical treatment as well.[10] Therefore, drawing on section 129(2) of the Children's Act a child is competent to refuse medical treatment if he or she is 12 years or older and of sufficient maturity to understand the risks and consequences of refusing medical treatment.

If the child is legally competent to refuse medical treatment the refusal to medical treatment, including life-saving treatment should be respected. However the informed refusal of a child can be overridden by the court,[11] or the minister.[12] No distinction is made between a competent and an incompetent child in deciding whether or not to override the child's decision to refuse medical treatment. The question posed by this article is whether the refusal by a competent child should be overridden?

The purpose of this article is to analyse the legal position pertaining to the refusal of medical treatment by a competent child as an expression of his or her rights to physical integrity and autonomy guaranteed in the

5 S 129 Children's Act 38 of 2005.

6 At common law the courts have held that for an informed consent to medical treatment the patient must: (i) have knowledge of the nature and extent of the harm or risk involved; (ii) have an appreciation and understanding of the nature of the harm or risk; (iii) have consented to the harm or assumed the risk and have provided a consent that is comprehensive and that extents to the entire transaction, including its consequences. See *Castell v De Greef* supra and *Christian Lawyers Association v Minister of Health* supra.

7 Mahery 264.

8 38 of 2005.

9 Lemmens "End-of-life decisions and minors: Do minors have the right to refuse life preserving medical treatment? A comparative study" 2009 *Medicine and Law* 479.

10 McQuoid Mason "Can children aged 12 years or more refuse lifesaving treatment without consent or assistance from anyone else?" 2014 *SAMJ* 467. See also Chetty *An examination of the rights of the child to refuse medical treatment: A South African perspective* (LLM theses 2016 UKZN) 2; Mahery 272.

11 See s 29(9) of the Children's Act. The High court or children's court can consent where anyone who may consent (that includes a child that complies with s 129(2)) refuses to consent.

12 See s 29(8) of the Children's Act. The minister may consent to medical treatment of a child if the child unreasonably refuses to give consent.

Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution"). I will also briefly look at how the Children's Act gives effect to the child's right to refuse medical treatment to determine whether it demonstrates respect for a child's rights to bodily integrity and autonomy. Thereafter I will address the question whether the refusal of a competent child should be overridden with specific reference to the child's best interests.

2 The Constitution

2 1 The rights in the Bill of Rights relating to children

> "Constitutional rights do not mature and come into being magically only when one attains the [S]tate-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[13]

According to section 7(1) of the Constitution, both adults and children alike are bearers of rights.[14] Since children are viewed as the most vulnerable members of South Africa's society, section 28 has been included to provide particular protection and rights for children. While the rights in section 28 apply exclusively to children, this does not bar children from the enjoyment, protection and application of other human rights found within the Bill of rights.[15]

Many of the rights which are found in section 28 are, in fact, mere repetition of the rights found in the other sections and can therefore be classed as background rights to the specific rights of children.[16] An important observation, however, is that while not all rights are repeated in section 28, they nevertheless remain important for children. These rights include the right to equality,[17] dignity,[18] bodily and psychological integrity,[19] and the right to individual autonomy.[20] It is the last mentioned two rights which are of particular importance to the topic of this article which require detailed discussion.

13 Du Plessis, Van der Walt & Govindjee "The constitutional rights of children to bodily integrity and autonomy" 2014 *Obiter* 2.
14 S 7(1) states "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."
15 Skelton & Proudlock in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 1-7; Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 2.
16 Kruger "The protection of children's rights in the South African Constitution: reflections on the first decade" 2007 *THRHR* 241; Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 2.
17 S 9 of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").
18 S 10 of the Constitution.
19 S 12(2) of the Constitution.

2 2 Children's rights to bodily integrity

As bearers of rights, children have the right to bodily integrity which is found under the protection of so-called "umbrella right" of freedom and security of the person in section 12 of the Constitution. The right to bodily integrity specifically comprises:[21]

> "[The right] (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

The right to bodily integrity amounts essentially to a "right to be left alone",[22] in other words a right to make decisions concerning one's body without undue interference by others.[23] Section 12(2)(b) refers to the right to security in and control over the body. The right to security in the body prevents unwanted invasion of bodily integrity by the state and others, as would arise in the situation where a patient is forced to undergo treatment; whereas the right to control over the body amounts to the ability to make autonomous decisions regarding one's own body.[24] The wording of section 12(2)(b) assumes that individuals are capable of taking decisions that are, at the very least, in their own interests. Linked to this, it is often argued that interference and intervention in the lives of others must, in general, be minimised. This implies that, while a person may experience and express genuine concern for the well-being of another, the choices made by the other person, with respect to issues relating to bodily integrity, must ultimately be respected.[25]

In a health care context, the right to bodily integrity protects individuals from being subjected to any form of medical treatment that is against their wishes, and from any imposition of treatment that is a product of a third party's perception of being in the best interests of the

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20 Despite not being found within a particular section of the Constitution it is arguable that the right is constructed from the rights to freedom and security, to privacy, to dignity, freedom of religion, freedom of expression and freedom of association read together. See Bekink & Brand in Davel (ed) *Introduction to child law in South Africa* (2000) 169-178; Kruger 2007 *THRHR* 241; Kruger "Traces of *Gillick* in South African jurisprudence: Two variations on a theme" 2005 *Codicillus* 11; Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 3, 5.

21 S 12(2) of the Constitution.

22 Nienaber & Bailey 2016 *SAJBL* 74; Currie & De Waal *The Bill of Rights Handbook* (2005) 287.

23 Nienaber & Bailey 2016 *SAJBL* 74.

24 Nienaber & Bailey 2016 *SAJBL* 74; Currie & De Waal 287.

25 Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 4; Bishop & Woolman in Woolman & Bishop (eds) *Constitutional law of South Africa* (2008) 40-85. As Sachs and O'Regan JJ noted in *S v Jordaan* 2002 6 SA 642 (CC), [the body is not] something to be commodified. Our Constitution requires that it be respected." (par 74).

patient concerned.[26] This right necessitates a right to give or withhold informed consent before any procedure is undertaken or another process affecting one's body begins.[27] Patients, who wish to refuse medical treatment, including life-saving treatment, are free to make this decision. In doing so, they are deciding what happens to their own bodies. These patients are merely exercising their right to refuse medical treatment as permitted by the right to bodily integrity.[28]

2 3 Children's right to autonomy

The quintessence of the right to bodily integrity is the contentious right to autonomy or self-determination.[29] This refers to the right that a person has to decide what they want to be done with their body, without anybody else deciding such matters for them.[30]

Support for a child's right to autonomy can be found in the work of several authors. Freeman, for example proposes four categories of rights for children, of which the third and fourth categories respectively validate a child's right to autonomy. The right to be treated as an adult is the third of Freeman's categories and proposes that the rights and liberties afforded to adults should also be extended to children.[31] Based on the research of developmental psychologists, Freeman argues that the age-related restrictions placed on children should be constantly reviewed, alternatively that the legal capacity of children to make decisions should be determined on a case-by case basis, given that maturity levels differ amongst children, irrespective of their age.[32] Freeman's fourth category of children's rights is rights against parents. It is this component of the right, which would, for example, allow for claims of independence from parental control before the age of majority is attained.[33] These rights against parents would also, for example sanction a child's decision-making powers in matters such as consent to medical treatment and termination of pregnancy. Findings of research done by developmental psychologists regarding the intellectual, social and moral development of children also indicate that a child reaches adult decision-making

26 Biggs *Euthanasia, Death with Dignity and the Law* (2001) 95.
27 Nienaber & Bailey 2016 *SAJBL* 74; Carstens & Pearmain *Foundational principles of South African medical law* (2007) 30.
28 This right is supplemented in the National Health act, particularly in s 6 dealing with informed refusal. A discussion of s 6(d) follows in paragraph 3 hereunder.
29 Despite not being found within a particular section of the Constitution it is arguable that the right to autonomy is constructed from the rights to freedom and security, to privacy, to dignity, freedom of religion, freedom of expression and freedom of association read together. Furthermore in *NM v Smith* 2007 5 SA 250 (CC) par 145-146 O'Regan J suggested autonomy as a constitutional value that underlies human dignity, freedom and privacy. See Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 3, 5.
30 Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 5.
31 See Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 5; Freeman *The rights and wrongs of children* (1983) 22-23.
32 See Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 5; Freeman 46.
33 See Du Plessis, Van der Walt & Govindjee 2014 *Obiter* 5; Freeman 48.

capacities around mid-adolescence.[34] It is clear that the right to autonomy ensures that children enjoy a level of independence from their parent.

Autonomy has also been recognised as a constitutional value that underlies freedom, human dignity and privacy.[35] As a constitutional value, it has been defined by the courts as "the ability to regulate one's own affairs, even to one's own detriment".[36] Implicit in this juridical definition is the acknowledgement of autonomy as a developmental phenomenon. This is inferred by the term "ability" implying that autonomy is an evolving capacity that is, *acquired* in the process of human development. According to the provisions of the United Nations Convention on the Rights of a Child, 1989 (hereafter "UNCRC") and the African Charter on the Rights and Welfare of the Child, 1990, (hereafter "ACRWC") a child has autonomy rights.[37] The Children's Act first defines a child as a *person* below the age of 18 years and further specifies in section 129 which children can fully exercise autonomy rights in the setting of consent to medical treatment.

As the right to bodily integrity including the ability to make autonomous decisions regarding one's own body is enshrined in the Constitution medical practitioners have a general legal obligation to respect this right of patients. It is submitted that children should be authorized to refuse medical treatment and to enforce this decision especially in terms of the right to bodily integrity. This submission has been made for two reasons. The first reason is that children are equally entitled to the right to bodily integrity. It is therefore submitted that they may exercise this right to effectively refuse medical treatment if they are competent to exercise the autonomy that they have been automatically afforded by the right to bodily integrity. The second reason is that in order to give effect to the right to bodily integrity, it is obvious that children must be competent to make autonomous decisions and once competence has been confirmed, the refusal must be respected and enforced regardless of the consequences.[38]

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34 Kruger 2005 *Codicillus* 6; Buchner-Eveleigh "Section 71 of the National Health Act: Call for review of the consent requirement to child participation in health research" 2015 *De Jure* 284. See also Zuch (et al) 2012 *BMC International Health and Human Rights* 4; Freeman "Taking children's rights more seriously" 1992 *International Journal of Law and the Family* 59, 67.

35 See *NM V Smith* 2007 5 SA 250 (CC) par 145-146.

36 Jordaan "Autonomy as an element of human dignity in South African case law" 2009 *Journal Philosophy, Science and Law* 6.

37 Ganya, Kling & Moodley "Autonomy of the child in the South African context: Is a 12 year old of sufficient maturity to consent to medical treatment" 2016 *BMC Medical Ethics* 17: 66. Also available at https://doi.org/10.1186/s12910-016-0150-0.

38 Hill "Constituting children's bodily integrity" 2014 *Duke Law Journal* 1297; Chetty 47.

3 Children's Act

The promulgation of the Children's Act sought to supplement and give effect to the rights that children already enjoy in terms of the Constitution.[39] The provisions of the Children's Act aim further to provide children with the care, protection and safeguards that will ensure that their constitutional rights are being fulfilled, while their overall well-being is being promoted and strived for concurrently.[40] The Act governs a wide range of interests and rights that children are entitled to. Section 129 of the Act specifies which children can fully exercise autonomy rights in the setting of consent to medical treatment.

Section 129 provides that a child over the age of 12 years who is of sufficient maturity and who has the mental capacity to understand the benefits, risks and social and other implications of the treatment may consent to medical treatment on their own. Two requirements must be complied with before a child can consent on his or her own. These two requirements determine a child's competency for purpose of consenting to medical treatment. These requirements are (1) age,[41] and (2) maturity and understanding. The position of the refusal of medical treatment by children has not been set out with clarity in the Act. The existence of the right of children to refuse medical treatment has been inferred by section 129(2) of the Children's Act. This section, as stated above,[42] sanctions the right of a child to consent to medical treatment and considering that refusal is the converse of consent, section 129 (2) of the Children's Act must surely sanction the right of a child to refuse medical treatment as well. Therefore, drawing on section 129(2) of the Children's Act, a child is competent to refuse medical treatment if he or she fulfils the age (12 years or older) and maturity and understanding requirements.

The second requirement namely maturity and understanding requires further discussion. Maturity is the ability to comprehend, understand and assess the implications of a particular matter.[43] More importantly, maturity is the ability to understand the nature of medical treatment, the consequences (emotional, psychological etc.) and associated risks that follow of consenting (or not) to it. Therefore a determination of competence also depends on the abilities of a child.[44] In order to satisfy the medical professional or court, as the case may be, the child must demonstrate his or her ability to understand. Although there is no provision in the Act specifying how the child's ability ought to be

39 The aims of the Children's Act are set out in the long title.
40 Du Plessis, Van der Walt & Govindjee 214 *Obiter* 7.
41 The age is 12 years. The legislature elected to adopt a fixed age approach possibly in the interests of greater legal certainty for those involved in providing medical treatment in all its forms. See Sloth-Nielson in Davel & Skelton (eds) *Commentary on the Children's Act* (2007) 7-31.
42 Par 1.
43 Committee on the Rights of the Child, General Comment 12, para 30.
44 Trowse "Refusal of Medical Treatment – A Child's Prerogative?' 2010 *Queensland University of technology Law and Justice Journal* (*QUTLJJ*) 207.

assessed questions will be asked and discussions held with the child in order to establish whether or not the child's level of understanding is sufficient. An ability to understand the treatment alone is insufficient. The child must be able to understand the consequences and associated risks of accepting the treatment and the dangers of not accepting treatment.[45] This extends beyond an ability to understand physical aspects of the treatment. It extends to other related circumstances surrounding the treatment. An ability to understand social, emotional and psychological issues must be demonstrated.[46] It follows that treatment of a more complicated nature would involve a series of highly comprehensive discussions, almost to the point of interrogation, in order to establish whether or not the child can satisfy the second requirement of competence.[47] In order to understand the child's ability to understand, it is likely that, in the course of these extensive discussions, the child actually becomes highly apprised of the treatment, its effects on the child and on others. Through this physical process, the child's ability to understand becomes an actual understanding - how else can ability be measured?[48]

Requiring the child to be sufficiently mature and to possess the capacity to understand the nature, consequences and risks of the treatment reinforces the application of the common law doctrine of informed consent in all health care settings. This doctrine rests on 3 legs namely knowledge,[49] appreciation,[50] and consent.[51] Where a child decides to give or withhold informed consent knowledge and understanding in a child must be proved and therefore demonstrated by the child. Discourse must occur to prove competence and this will involve discussions, questions and answers. If the treatment is serious, the discussions are likely to be rigorous and onerous.[52] To avoid the ramifications of a wrong decision it is obvious that the person making the determination of competency will ensure that the child is well informed and knowledgeable and therefore very capable of making a decision.

Once competence has been established, it is submitted that it affords the child the decision-making competence of an adult. If it does not afford adult competence on a child, it raises the implication that there are two levels of competence – "adult competence" and "child competence" – the latter being a lesser level/form of competence and one can then ask

45 Trowse 2010 *QUTLJJ* 206.
46 Trowse 2010 *QUTLJJ* 206
47 Trowse 2010 QUTLJJ 207.
48 Trowse 2010 *QUTLJJ* 207.
49 Knowledge means that the patient who consents must have full knowledge of the nature and extent of the harm or risk involved.
50 Appreciation implies that the person must understand or comprehend the nature and extent of the harm or risk.
51 Consent means that the patient must in fact subjectively consent to the harm or risk, and his or her consent must be comprehensive, in that it must extend to the "entire transaction', including its consequences. See Mahery 264.
52 Trowse 2010 *QUTLJJ* 211.

whether there would be any need to assess the competence of a child at all.[53] Thus once competence has been established the child's refusal should be respected, regardless of the consequences. The child can thus exercise his or her right to bodily integrity (including autonomy) by refusing medical treatment just as an adult.

However, the Act states that the best interests of the child are of paramount importance in every matter concerning the child. Satisfying the requirements of age and maturity and understanding appear not to suffice, although a legal requirement,[54] as a decision made by a child who does satisfy these principles may be overridden by the court if it is found that the proposed medical treatment is in the child's best interests.[55] The refusal may also be overridden by the Minister of Home Affairs if the child unreasonably refuses medical treatment.[56] When deciding the reasonableness or otherwise of the child's refusal, the minister should judge it against the best interests of the child standard.[57] If the court or the minister is of the opinion that it is in the best interest of the competent child to override his or her refusal the competent child is then compelled/forced to undergo medical treatment.

- The question that arises is whether it is in the best interest of a competent child to override his or her refusal to medical treatment, in particular life-saving treatment. No South African court has pronounced on this difficult issue yet. In order to develop South African law it is also necessary to critically look at foreign cases which have ruled on the refusal of treatment.[58]

4 Is it in the best interests of a competent child to override his or her informed refusal to medical treatment, including life-saving treatment?

South Africa holds the best interests of children in high esteem and the seriousness with which it regards such interests are reflected in various statutory provisions.[59] The Constitution makes it a vital right for all children and a responsibility to be fulfilled that "a child's best interests are of paramount importance in every matter concerning the child'.[60]

53 Trowse 2010 *QUTLJJ* 204.
54 Lemmens 2009 *Medicine and Law* 493.
55 S 129(9).
56 S 129(8).
57 McQuoid Mason 2014 *SAMJ* 468; Mahery *Children's health service rights and the issue of consent* (LLM dissertation 2007 UWC) 73.
58 S 39 of the Constitution stipulates that foreign law must be considered in order to develop South African law regarding a child's refusal of medical.
59 Moyo "Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child" 2012 *AHRLJ* 143.
60 S 28(2) of the Constitution.

This provision has influenced the drafters of the Children's Act to include the paramountcy of these interests in the Act. Therefore, section 9 of the Children's Act was drafted to confirm that the best interests of the child shall be the primary consideration in all actions concerning the child undertaken by any person or authority. This section has been supplemented by section 7 of the Children's Act which lists several factors that must be considered when determining what would be in the best interests of children. Of particular applicability to medical treatment are the consideration of the child's age, maturity, and stage of development,[61] and the child's emotional and physical security and his or her emotional, intellectual, cultural and social development, together with any disability or chronic illness from which the child may suffer.[62] Another factor that is of possible relevance to the consideration of what would be in the best interests of the child with regard to medical treatment, is the protection of children from any psychological or physical harm that may arise from subjecting the child to degradation or harmful behaviour.[63]

International and regional human rights conventions such as the UCRC and the ACRWC are comprehensive instruments, which further confirm the importance of promoting the best interests of children. The UCRC orders that: [64]

> "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*'"

These provisions are reaffirmed by the ACRWC, which stipulates that the standard of the best interest of the child be of paramount importance, and must be applied in all actions concerning the care, protection and well-being of a child.[65]

The above provisions guarantee that the best interests of the child will be given due consideration and will be the basis upon which all matters concerning the child will be decided. However, what is in the best interests of a competent child with regard to refusal of medical treatment remains unclear. Decisions which claim to be made in the best interests of children, such as overriding refusals of medical treatment by competent children, do not reflect the wishes of competent children and they are therefore forced to undergo medical treatment.[66] To override the refusal by a competent child is to allow a third party's view to

61 S 7(1)(g)(i).
62 S 7(1)(h)-(j).
63 S 7(1)(l).
64 Art 4(1).
65 Art 3(1).
66 Moyo 2012 *AHRLJ* 144. Parents believe that it is in the best interests of their children to receive medical treatment; while children who refuse medical treatment clearly hold the view that it is in their best interests not to undergo the medical treatment.

determine the child's best interest rather than the competent individual whose health is at stake.

Satisfying the requirements of age and maturity and understanding appear not to suffice, although a legal requirement, as a decision made by a child who does satisfy these requirements can be overridden if the court is of the opinion that the treatment is in the best interests of the child.[67] It seems as if the lengthy assessment of competence becomes a meaningless exercise to the point where competence merely becomes one among many factors that the court considers when determining what would be in the best interests of the child.[68] It is submitted that this is an incorrect application of the law as competence is the ground upon which children are judged in order to determine whether they are capable of making autonomous decisions concerning their health.[69] Once competence has been established, it should not be marginalized as if it holds no value for the sake of an objective notion held by courts of what is in the best interests of the child. This has, unfortunately, been the common occurrence in several English cases where the courts stated that it could override the refusals to medical treatment by competent children where it is in their best interests to do so. These cases illustrate the courts' reluctance to regard the decisions to refuse medical treatment by competent children as determinative in cases where the refusal would result in the death or severe permanent injury to the children.[70] In *Re W (A Minor),*[71] the Court of Appeal overrode a competent child's refusal to medical treatment because it would have resulted in the child's death. The court conceded that it couldn't lightly override the decisions made by a competent child with respect to medical treatment; however, the court had followed this statement by adding that it could do so if it were in the best interests of the child. Lord Donaldson noted it would generally be in the child's best interests to follow his or her wishes, except in circumstances where the child refuses medical treatment in circumstances, which would probably result in death or severe permanent injury to the child.[72]

The case of *Re M (Child: Refusal of Medical Treatment),*[73] differs from the case of *Re W* in that the child concerned was found not to be competent; however, the court stated that the outcome of this case would

67 Trowse 2010 *QUTLJJ* 192.
68 Elliston in McLean (ed) *Contemporary Issues in Law, Medicine and Ethics* (1996) 39.
69 This submission is supported by Canadian cases where the consensus is that children can consent or refuse medical treatment if they are mature and understand the nature of the treatment and the consequences of not receiving that treatment. See Burden-Osmond 2002 *Defence Counsel Journal*. Available at http://www.allbusiness.com/legal/contracts-agreements/1067823-1.html (assessed 2017-03-12); Mahery 74.
70 Trowse 2010 *QUTLJJ* 199.
71 1992 4 All ER 627. This case is the only case where the court actually overrode the decision of a child found by the court to be competent.
72 At 643.
73 2000 52 BMLR 124.

have been the same had the child been found to be competent as it had the power to override the decision of a child, whether or not the child was competent.[74] The court reasoned that the welfare of the child was the paramount consideration and if the decision made by the child negatively impacted this welfare, the court was obliged to intervene. The court placed emphasis on decisions, which result in the death of the child and stated that "whatever the risk may be in overriding the child's decision, it has to be matched against … the certainty of death [if she did not receive the treatment]".[75]

In the case of *Re W*, the court made a finding of competence and nonetheless, had overruled the decision made by a competent child. It is however important to note that although the child was found to be competent, it was noted by Lord Donaldson that one of the symptoms of the illness is a desire by the sufferer to be in control and refusal of treatment is an obvious way of demonstrating this.[76] Whilst the finding of competence was not overridden, these words place some doubt on W's ability to honestly evaluate her situation. It is clear that her refusal of treatment could have been based on something other than an ability to understand fully the proposed treatment.[77] In the case of *Re M* the court had found that the child was not competent and accordingly, overruled the decision. It is submitted, that courts should only override decisions by children who do not exhibit complete competence as it is in their best interests to disallow a decision that is made by children who do not have the competence to make such decision. Such children must be protected from making incompetent decisions.

The court in *Re W* conceded that it is in the child's best interest to abide by the decision of the child unless there is a danger to the child's health or survival, in which case best interests point to survival.[78] This is irrespective of whether the child is competent or not. The issue of best interests raises two important questions in the context of a competent child. The first issue is whether a competent child should lose the right to determine what is in his or her best interests because the decision the child makes may risk loss of life or permanent injury. It is important to remember that these decisions are of very personal nature. Medical choices would vary from person to person and views in some cases are likely to be adamant. It appears as if a competent child loses this choice by virtue of being under the age of majority. Court decisions, with similar set of facts, may also not be uniform because there is no right or wrong answer to which form of treatment is in the child's best interests. The subjective views of the decision maker may prevail.[79] Physical aspects alone further not necessarily judge best interests. Emotional and

74 At 126.
75 At 128.
76 At 631.
77 Trowse 2010 *QUTLJJ* 199.
78 Trowse 2010 *QUTLJJ* 197.
79 Trowse 2010 QUTLJJ 209.

psychological ramifications felt only by the child must be considered and should be respected.[80]

In certain circumstances, the child's best interests are a fine line, which no one except the child requiring the treatment can really understand. Only the competent patient really knows and understands what is in his or her best interests. Only the competent patient should consent or refuse treatment. A competent child is a competent patient, even if he or she is not an adult. The competent child knows his or her best interests and may have very good reasons for acting outside that which a third party considers his or her best interests.[81]

It has been held in Canada,[82] that the best interests of a competent child were best served by abiding by the child's decision to only accept treatment, which did not require blood transfusion. This was despite medical evidence that the child's refusal to accept blood could be fatal. The court found overwhelming evidence that the child was sufficient mature.

The second issue is whether a competent child should be able to make a decision with respect to medical treatment, which is not in his or her best interests. In other words, if a competent child's decision appears irrational or unreasonable to the objective observers, should the decision be respected as it would be if made by an adult. What is seen as irrational to one person may be common sense to another. Once a person attains the age of majority and legally enjoys adult status, competence is presumed and if not rebutted, decisions made by such individuals are respected. The courts will uphold the decisions of adults (if threats to public health etc. have been ruled out),[83] irrespective of the detrimental or fatal consequences which follow a refusal of medical treatment.[84] This has been endorsed in *Re T (adult: refusal of medical treatment)*,[85] where Lord Donaldson had recognised that every adult has the *prima facie* right and capacity to decide whether to accept or refuse medical treatment, regardless of whether the latter may risk permanent injury to health or result in premature death. He further acknowledged that issues surrounding whether or not the reasons for the refusal were rational, irrational, unknown or possibly non-existent were redundant.

If it is accepted that once competence of a child has been established it affords the child the same decision-making competence of an adult (as there is only one level of competence) then the decision of a competent

80 Trowse 2010 *QUTLJJ* 211.
81 Trowse 2010 *QUTLJJ* 209.
82 *Region 2 Hospital Corp v Walker* 1994 NBR 2) LEXIS 1127. See also Trowse 2010 *QUTLJJ* 209.
83 See Nienaber & Bailey 2016 *SAJBL* 74-77.
84 Elliston 41.
85 1992 4 All ER 649.

child must be respected even if the decision carries with it the risk of death or serious damage to health.[86] To some (or all) it may appear irrational. However, competence prevails over best interests. Irrational decisions, while heavily scrutinised in terms of competence (like an adult) should be respected.[87] It is for this reason that section 129(8) of the Children's Act which confers power on the Minister to consent to the medical treatment that has been unreasonably refused by children cannot stand as far as it applies to competent children.

The best interests of the patient are not measured with the purpose of preserving the health and the life of the patient at all costs.[88] This position is supported by our law in terms of section 6(d) of the National Health Act,[89] which permits competent individuals to refuse health services. The application of this section does not extend to competent adults alone, but to competent children as well.[90] A child will be able to refuse medical treatment and have such refusal respected provided that the implications, risks and obligations of the refusal of medical treatment have been explained to the child and in return, have been understood and accepted by them.[91] In addition the child must meet the requirements of age and maturity and understanding.

The best interests of competent children are best served by allowing them to exercise their autonomy by making informed decisions, such as refusal to medical treatment. It is irrational and arbitrary that the competent refusals of adults are respected and upheld, but the competent refusals of children are not. After all, they both have one quality in common and that is competence which ultimately distinguishes between individuals who may make autonomous decisions and those who may not due to their lack of competence. To overrule the refusal of a competent child and compel him or her to undergo medical treatment will violate his or her right to be treated in accordance with his or her best interests and would likewise violate his or her constitutional rights to bodily integrity and autonomy.

4 Conclusion

The right to bodily integrity and autonomy is pivotal in any health related context and should not be lightly disregarded. The right of children to possess and fulfil their rights on the same platform as adults is implied by section 7 (1) of the Constitution.[92] In a health care context this means that a child's refusal to medical treatment should be respected and not

86 See also Trowse 2010 *QUTLJJ* 210.
87 Trowse 2010 *QUTLJJ* 210.
88 Elliston 41.
89 61 of 2003.
90 Mahery 272.
91 McQuoid Mason "The National Health Act and refusal of consent to health services by children" 2006 *SAMJ* 531.
92 Chetty 87.

overridden provided that they are competent. Competent children are well informed and, potentially have a better understanding of the proposed treatment than an adult in the same position. It is submitted that if a child has capacity to refuse medical treatment, he should be treated as an adult, and the decisions respected because it is made by the child in the child's interests. It may not be the best interests from the perspective of the objective bystander, but, if the child is competent, who has the right or ability to query what is in that child's best interests?

Furthermore, if a decision is irrational it should be respected provided competence is found. With competence comes the right to autonomy. There is one level of competence, and if it is achieved, whether by a child or an adult autonomy prevails, regardless of whether the decision is, objectively, in that person's best interests.

A constitutional analysis of an Islamic will within the South African context

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SUMMARY

Muslims have been living in South Africa for over 300 years. These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. This paper investigates the constitutionality of an Islamic will left behind by a testator that has the effect of a son inheriting double the share of a daughter. The right to freedom of testation and the right to equality are first looked at by way of introduction. The constitutionality of the Islamic will is then be looked at. The paper concludes with an analysis of the findings and makes concluding remarks.

1 Introduction

Muslims have been living in South Africa for over 300 years.[1] These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African government giving effect to Islamic law.[2] South African Muslims are able to make use of existing South African law provisions in order to apply

1 The first recorded Muslim arrived in South Africa in 1654. Mahida *History of Muslims in South Africa: A Chronology* (1993) 1.

2 This situation has led to much difficulty for South African Muslims. The most recent example in this regard was where a South African Muslim widow, who was married to her deceased husband (testator) in terms of Islamic law only, challenged the constitutionality of s 2 C(1) of the Wills Act 7 of 1953, as it did not recognise her marriage as a valid marriage for purposes of the section. The section was found to be unconstitutional. See *Moosa v Harnaker* 2017 6 SA 425 (WCC) 39 – and *Moosa v Minister of Correctional Services* 2018 5 SA 13 (CC) 21. See also Abduroaf "An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the *Moosa NO and Others v Harnaker and Others* Judgment" 2019 Electronic Journal of Islamic and Middle Eastern Law, for a discussion on this issue. This case illustrates that there is a dire need to enact legislation that governs Islamic law within the South African context. It should be noted that the Western Cape Division of the High Court recently held that the State has failed in its constitutional obligation to enact legislation that recognises marriages concluded in terms of Islamic law. See *Women's Legal Centre Trust v President of the Republic of South Africa, Faro v Bignham, Esau v Esau* (22481/2014, 4466/2013, 13877/2015) 2018 6 SA 598 (WCC) 252.

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certain Islamic laws within the South African context.[3] An example of this would be where a testator or testatrix makes use of the South African common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise.[4] A clause in his or her will would state that an Islamic law expert or Islamic institution should draft an Islamic distribution certificate listing his or her beneficiaries and their shares in terms of the Islamic law of succession.[5] A matter concerning a will of this nature (referred to hereafter as an Islamic will) was heard in the Western Cape Division of the High Court in *Moosa v Harnaker* during 2017.[6] The Islamic Distribution Certificate in this case was issued by the Muslim Judicial Council (SA). The certificate stated that each son should inherit 28/208 whereas each daughter should inherit 14/208. It can clearly be seen that the son inherits double the share of the daughter. This is required in terms of Islamic law.[7] It could be argued that the Islamic law of succession unfairly discriminates against the daughter. It should be noted that unfair discrimination is prohibited in terms of South African law.[8] It is interesting to note that the issue concerning discrimination against the daughter was not raised in *Moosa v Harnaker*. This paper investigates the constitutionality of an Islamic will left behind by a testator (X) that has the effect of a son (Y) inheriting double the share of a daughter (Z). The right to freedom of testation and the right to equality are first looked at by way of introduction. The constitutionality of Islamic will is then looked at. The paper concludes with an analysis of the findings and concluding remarks.

3 See Abduroaf 2019 Electronic Journal of Islamic and Middle Eastern Law, for an example of how this is done in terms of the law of succession.

4 South African law recognises the common law principle of freedom of testation. See Jamneck "Freedom of testation" in Juanita & Rautenbach *The Law of Succession in South Africa* (2009) 115 for a discussion on this issue.

5 The Muslim Judicial Council (SA) based in the Western Cape offers the service of drafting Islamic Distribution Certificates as required in terms of Islamic wills. See MJC SA "Distribution Certificates (Estates)" *https://mjc.org.za/2016/06/14/distribution-certificates-estates/* (accessed 2019-05-13).

6 See *Moosa v Harnaker supra* – and *Moosa v Minister of Correctional Services supra*.

7 See Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 11 where it states "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females …".

8 See s 9 of the Constitution of the Republic of South Africa, 1996 where it states that "(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."

2 Freedom of testation versus the right to equality

Section 25(1) of the Constitution guarantees a person the right to own private property.[9] A person may dispose of the property during his or her lifetime or after he or she has died (in terms of an Islamic will). The right to dispose of property in terms of a will was noted by the Supreme Court of Appeal in *In re: BOE Trust*.[10] It was argued in this case that section 25(1) of the Constitution guarantees the right to freedom of testation.[11] The court held that freedom of testation is linked to the constitutionally guaranteed right to human dignity.[12] It also held that a court must give effect to the wishes of a testator or testatrix unless it is prevented from doing so in terms of law.[13] It could be argued that the wish of X, at the time of drafting his will, was that the Islamic law of succession should apply.

The Constitution and legislation that flows therefrom prohibits unfair discrimination. Section 1 of the Constitution states that our democratic State is founded on a number of values that include the achievement of equality.[14] It also includes the advancement of human rights and freedoms. Section 8(2) of the Constitution states that the provisions found in the Bill of Rights are binding on natural persons.[15] It could therefore be applicable to a Muslim testator or testatrix when he or she drafts an Islamic will. It could be argued that the fact that Y inherits double the share of Z is an example of unfair discrimination.

The right to equality is guaranteed in terms of section 9 of the Constitution. Section 9(4) of the Constitution states that a "person" may not unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in terms of section 9(3) of the Constitution which include "race, gender, sex, pregnancy, marital status, ethnic or

9 See s 25(1) of the Constitution.
10 *In Re BOE Trust Ltd* 2013 3 SA 236 (SCA) 26.
11 See De Waal & Schoeman-Malan *Law of Succession* (2015) 4.
12 *In Re BOE Trust Ltd supra* 27.
13 *King v De Jager* 2017 4 All SA 57 (WCC) 55.
14 See s 1 of the Constitution where it states that "[t]he Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."
15 See s 2 of the Constitution where it states that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[16] It could be argued that Z is partially disinherited based on her sex.[17] This type of discrimination is specifically prohibited in terms of section 9(3) of the Constitution.[18]

Section 39(1)(b) of the Constitution states that international law must be considered when interpreting the Bill of Rights.[19] The South African government ratified international and regional human rights instruments that prohibit discrimination. These instruments are looked at in order to see what obligations the South African government has to fulfil regarding the elimination of discriminatory practices.[20] The South African government ratified the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 15 December 1995.[21] Article 16(1) of CEDAW obliges States Parties to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations …" Article 16(1)(h) of CEDAW states that States Parties are to ensure equal rights between men and women concerning the acquisition of property.[22] The fact that Y inherits double the share of Z would be problematic as far as this provision is concerned. The South African government subsequently ratified the African Charter on Human and Peoples' Rights (ACHPR) on 9 July 1996.[23] Article 18(3) of the ACHPR states that "[t]he State shall

16 See s 9(3)-(4) of the Constitution where it states that "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

17 The term partial disinheritance is used in this chapter to refer to a situation where a female inherits less favourably than her male counterpart. An example of this would be where a daughter inherits less favourably than a son in the event where they inherit as intestate beneficiaries.

18 See s 9 of the Constitution.

19 See s 39(1)(b) of the Constitution where it states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum – …(b) must consider international law …"

20 See s 39(1) of the Constitution where it states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

21 See CEDAW, 1989 United Nations General Assembly Resolution 34/180 (1979). Signed by South African Government on 29 January 1993 and ratified by the South African Government on 15 December 1995.

22 See art 16(1)(h) of CEDAW, 1979 United Nations General Assembly Resolution 34/180 (1979).

23 See ACHR. The Charter was ratified by the South African Government on 9 July 1996. The South African Government deposited the instrument of ratification on 9 July 1996. See African Commission on Human and People's Rights "Ratification Table: African Charter on Human and Peoples' Rights" *http://www.achpr.org/instruments/achpr/ratification/* (accessed 2017-12-25).

ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman ..." It could be argued that "every discrimination" includes discrimination against Z. The South African government later ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African WR Protocol) on 17 December 2004. Article 21(2) of the African WR Protocol states, that both women and men shall have the right to inherit from the property of their parents in equitable shares.[24] It is quite interesting that the wording in the article refers to equitable shares and not equal shares.[25] The South African government has also enacted legislation in order to prevent unfair discrimination.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) was enacted in accordance with section 9(4) of the Constitution.[26] This is also in line with CEDAW, ACHPR, and the African WR Protocol. Section 8(c) of PEPUDA prohibits "unfair" discrimination based on a "system" that "prevents" women from inheriting family property.[27] It could be argued that the Islamic will drafted by X is based on a system, as the clause in the will states that the estate must be distributed in accordance with the "Islamic law of intestate succession" when he dies. The situation would be different if a testator or testatrix bequeaths 2/3 of his or her estate in favour of his or her son and 1/3 of his estate in favour of his or her daughter.[28] In this case no reference would be made to the "Islamic law of intestate succession" even though the consequences would be the same. It would be difficult, if not impossible, to prove that the will is based on a "system" of discrimination. It should be noted that section 8(c) of PEPUDA prohibits unfair discrimination that "prevents" women from inheriting family property.[29] The unequal distribution of shares in terms of the

24 See African WR Protocol. The South African Government ratified the African WR Protocol on 17 December 2004 and deposited the instrument of ratification on 14 January 2005. See African Commission on Human and People's Rights "Ratification Table: African Charter on Human and Peoples' Rights" *http://www.achpr.org/instruments/achpr/ratification/* (accessed 2017-12-25).

25 It should be noted that equity refers to the quality of being fair; fairness, impartiality, and even-handed dealing, whereas equality refers to the quality of being equal in quantity, amount and value. See Herrera LM "Equity, Equality and Equivalence – A contribution in search for conceptual definitions and a comparative methodology" 13 2007 *Revista Española de Educación Comparada* 322. It could be argued that a son inheriting more favourably than a daughter would be equitable if he has more financial responsibilities than her.

26 See PEPUDA. See also s 9(4) of the Constitution where it states that "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

27 See s 8(c) of PEPUDA where is states that "… no person may unfairly discriminate against any person on the ground of gender, including … (c) the system of preventing women from inheriting family property…"

28 See s 8(c) of PEPUDA.

29 See s 8(c) of PEPUDA.

Islamic law of succession does not prevent Z from inheriting property from X's estate. Z is, however, partially disinherited as she inherits half the share of Y. An example of a "system" where females are "prevented" from inheriting family property is found in the rule of male primogeniture. The rule of male primogeniture was found to be unconstitutional in *Bhe v Magistrate Khayelitsha* "to the extent that it excludes or hinders women and extra-marital children from inheriting property."[30] This was based on a system found in customary law.

Section 8(3)(a) of the Constitution states that a court must develop the common law if it does not give effect to a right found in the Bill of Rights.[31] It must do so to the extent that legislation does not give effect thereto. Section 8(3)(b) of the Constitution states that a court may develop the common law to limit a right.[32] The common law principle of freedom of testation can technically be developed based on these constitutional provisions in order to prevent the enforceability of discriminatory provisions found in wills.[33] The development of the common law is subject to section 36(1) of the Constitution which states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …"[34] No challenges have (to date) been made regarding the constitutionality of the Islamic will, based on section 8 of the Constitution.

30 See *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) 36.

31 See s 8 of the Constitution where it states that "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right…"

32 See s 8 of the Constitution where it states that "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) … a court – (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

33 See 8(3) of the Constitution where it states that "[w]hen applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1)."

34 See s 36(1) of the Constitution where it states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

3 The constitutionality of an Islamic will

This section investigates whether Z can successfully challenge the constitutionality of her partial disinheritance. It could be argued that the discrimination against Z is not unfair as she has less financial obligations in comparison to Y, in terms of Islamic law.[35] This could be seen as discrimination based on her sex because of her gender. It should be noted that X applied his constitutional right to freedom of testation by executing an Islamic will.[36] The right to freedom of testation is, however, not absolute. The South African Constitution also includes the right to freedom of religion. The right to practice ones religion is also one of the fundamental rights entrenched in the Constitution.[37] It could be argued that this would include the right of X to draft an Islamic will. The question now remains as to whether the provision in the Islamic will that has the effect of Y inheriting double the share of Z would pass constitutional muster. It will be accepted for purposes of this enquiry that Y inherits double the share of Z based on sex because of gender.

The first question that is needed to be answered is whether the Constitution applies to the provision in the Islamic will. Section 8(2) of the Constitution states that "[a] provision of the Bill of Rights binds a natural … person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[38] This provision clearly states that a private person may not infringe the constitutional rights of another private person.[39] Upon this confirmation, three enquiries must be done. The first enquiry is to look at whether the Bill of Rights is capable of being applied to the provision in the Islamic will that partially disinherits a daughter.[40] It could be argued by Z that she is being discriminated against based on her sex because of her gender role and that her constitutional right to equality as found in section 9 of the Constitution is being infringed upon. The Bill of Rights would therefore be applicable to this scenario as it is capable of being applied. The second enquiry is to look at whether the provision found in the Islamic will violates the equality provisions found in section 9 the Constitution. Section 9(4) of the Constitution states that "[n]o person may unfairly discriminate directly or indirectly against anyone on

35 See Khan *The Noble Qur'an* where it states that "[l]et the rich man spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. Allah will grant after hardship, ease."
36 See s 25(1) of the Constitution.
37 Currie & De Waal *The Bill of Rights Handbook* (2013) 316-317.
38 See s 8(2) of the Constitution where it states that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."
39 Rautenbach and Malherbe *Constitutional Law* (2012) 295.
40 See Rautenbach and Malherbe 297.

one or more grounds in terms of subsection (3)."[41] Section 9(3) of the Constitution includes both sex and gender as listed grounds.[42] Section 9(5) of the Constitution states that "[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[43] The conclusion that must be reached in this regard is that the provision in the Islamic will would be presumed to be unfair discrimination unless it can be established that it is fair. Section 8(3) of the Constitution states that "when applying a provision of the Bill of Rights to a natural … person in terms of subsection (2), a court … (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1)."[44] The third enquiry is to look at whether the Islamic will meets the requirements of section 36(1) of the Constitution which deals with limitations to rights. Section 36(1) of the Constitution states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application …"[45] The Islamic will was executed based on the principle of freedom of testation which is established in terms of the common law. The principle of freedom of testation is also general in its application as all South Africans have the right to execute wills, based on this principle. Section 36(1) of the Constitution further states that unfair discrimination would be justified if it is deemed "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors." These factors include "(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) [whether there are] less restrictive means to achieve the purpose",[46] in question. The following points should be noted before continuing with the section 36 enquiry. A distinction must be made between a testamentary disposition that applies in the public sphere and a testamentary disposition that applies in the private sphere.[47] Provisions in wills that apply in the public sphere were heard in a number of cases in South African courts with regard to testamentary provisions in public charitable trusts.[48] The relief sought in those cases was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular beneficiaries.[49] This is quite different to the consequences that flow from the Islamic will where Y inherits double the share of Z. Changing the consequences of the Islamic will would mean taking benefits away from Y and giving it to Z. This would render the principle of freedom of testation as guaranteed in the

41 See s 9(4) of the Constitution.
42 See s 9(3) of the Constitution.
43 See s 9(5) of the Constitution.
44 See s 8(3) of the Constitution.
45 See s 36(1) of the Constitution.
46 See s 36(1) of the Constitution. See also Currie & De Waal 216.
47 *Harper v Crawford* 2017 4 All SA 30 (WCC) 22.
48 See *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) – *Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 6 SA 518 (SCA) – *Ex Parte BOE Trust Ltd* 2013 3 SA 236 (SCA).
49 *Harper v Crawford supra* 22.

Bill of Rights to be meaningless.[50] It would also mean that the court would have the final say as to who the beneficiaries of X would be. This could lead to situations where a court would be second-guessing the testator or testatrix without having any knowledge as to why the testator or testatrix executed the private will in the way he or she did.[51] It should be noted that no person has a fundamental "right" to inherit as a testate beneficiary in terms of South African law. The exclusion of a person as a testate beneficiary does not encroach upon or take away existing rights of a person.[52] If Z were to succeed in her challenge, it would take away the existing right of Y to inherit his more favourable share.[53] There would be a number of difficult choices that a court would have to make if the daughter succeeds in her challenge. Should the court re-write the Islamic will of X in order to increase the share of Z? Should Z inherit the same share as Y even though Y is entitled to inherit a more favourable share in terms of the Islamic will? Should the will of X (Islamic Will) be declared invalid? Should the estate of X now be distributed in terms of the South African law of intestate succession and not the Islamic law? Does this mean that persons who were excluded in terms of Islamic law can now also challenge the Islamic will?[54] These are but a few of the difficult decisions that would have to be made.

When one looks at the nature of the rights in question it is noted that two of the three values stated in section 36 were engaged when X executed the will in terms of the right to freedom of testation. The listed rights are human dignity and freedom. X also engaged his right to freedom of religion that is entrenched in section 15(1) of the Constitution.[55] The right to equality is, however, broadly stated and should at times give way to competing rights.[56] When one looks at the importance of the limitation in question, it can be seen that X exercised the constitutional right to practice religion based on the right to freedom of testation in terms of religious principles. If Z is successful in her application, then it would mean that the right to freedom of testation would be deemed meaningless.[57] When one looks at the nature and extent of the limitation in question it is noted that the discriminatory provisions apply in terms of a private will as well as in the private sphere. It affects only Y and Z. It does also not apply to an unknown amount of people. It is "one thing to say that the Constitution with its values and rights reaches everywhere, but quite another to expect the courts to make rulings and orders regarding people's private lives and personal preference."[58] It is quite clear that the purpose behind the limitation of

50 See De Waal & Schoeman-Malan 5-6.
51 *King NO v De Jager supra* 61.
52 See De Waal & Schoeman-Malan 5-6.
53 *King v De Jager supra* 63.
54 See De Waal & Schoeman-Malan 6.
55 See s 15(1) of the Constitution.
56 *King v De Jager supra* 73.
57 See *King v De Jager supra* 74.
58 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* 2016 2 SA 1 (CC) 79.

the right to equality of Z is in order to give effect to a number of constitutionally entrenched rights that apply to X. It would be quite difficult to conceive a less restrictive means in order to achieve the same purpose. Based on the above, it would seem quite unlikely that Z would succeed in her quest to challenge the constitutionality of the Islamic will based on discriminatory grounds.

4 Conclusion

This paper has investigated the constitutionality of an Islamic will. The findings have shown that the Islamic will is subject to constitutional challenge. The investigation has shown that the right to freedom of religion, the right to freedom of testation, and the constitutional right to own property would more likely than not trump the right to equality of a beneficiary who is discriminated against based on her sex because of her gender. The findings have also shown the constitutionality of an Islamic will has (to date) not been tested by South African courts. If, for some reason, the Islamic will is found to be unconstitutional, I would recommend that the consequences of Islamic law of succession be incorporated into the will of the testator or testatrix without any reference to Islamic law. It would then be highly unlikely or even impossible to challenge the will as there would be no strong basis for the challenge.

Payday: Business as usual or a new dawn rising for persons with disabilities in the workplace

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SUMMARY

The article examines and clarify the legal obligations of labour market (as part of mainstream society) to effectively promote and protect the right to employment for persons with disabilities in South Africa. In this regard the article contextualises the understanding of disability within an international and national context by outlining the legal obligations of employers under the Convention on the Rights of Persons with Disabilities (CRPD), the South African national legal framework and policy directives pertaining to the right to employment of persons with disabilities. The article submits that the success of realising the right to employment and work of persons with disabilities will only be measured through the implementation of international obligations, the national legal framework and policy directives. In order to measure the progress in realising the right to work of persons with disabilities, the importance of collecting and maintaining disability data as statistical evidence is highlighted.

1 Introduction

Multiple barriers hinder persons with disabilities to obtain employment and enjoyment of full and effective participation in the labour market on an equal basis with others. In the South Africa context and generally reflective of the trend worldwide, persons with disability experience high levels of unemployment and often remain in low status jobs.[1] This stark reality is the result of the interplay between a number of factors,[2] such

1 *National Development Plan 2030 Our future – make it work* (2012) 382; Eide and Loeb "Data and statistics on disability in developing countries" 2005 *Disability Knowledge and Research Programme* 8; Report of the South African Human Rights Commission (SAHRC) *National Hearing on Unfair Discrimination in the Workplace* (8 March 2016 and 25 April 2016) launched 23 November 2017 50 & 51.

2 Report of the South African Human Rights Commission (SAHRC) *National Hearing on Unfair Discrimination in the Workplace* (2017) 47 and SAHRC *Promoting the Right to Work of Persons with Disabilities: Toolkit for the Private Sector* (2015) 8.

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as access to education and other forms of training and skills development, reasonable accommodation measures in the workplace, lack of accessibility to infrastructure, information and technology, lack of effective enjoyment of the right to legal capacity, as well as attitudinal barriers in the South African society.[3] Whilst it is true that unemployment remains a fundamental problem across the board,[4] unemployment disproportionately affects the majority of persons with disabilities.[5]

It is against this backdrop that this article seeks to examine and clarify the legal obligations of the labour market as part of mainstream society to effectively promote and protect the right to employment for persons with disabilities in South Africa. The first part of the article contextualises the understanding of disability within an international and national context. The second part of the article outlines the legal obligations of employers under the Convention on the Rights of Persons with Disabilities (CRPD), the national legal framework and policy directives pertaining to the right to employment of persons with disabilities. The discussion fosters an understanding of the right to employment of persons with disabilities in general and more particular to ensure that labour market have a clear understanding of the nature of their legal obligations. Finally, the article submits that the success of realising the right to employment and work of persons with disabilities will be measured through the implementation of international obligations, the national legal framework and policy directives. Progress with the implementation can only be measured through monitoring and evaluation processes. In this regard, the article highlights the importance of collecting and maintaining disability data as statistical evidence to measure progress in realising the right to work and employment.

2 Contextualising the understanding of disability

During the course of the past thirty years, views on disability have gradually shifted emphasis from a medical model to a social model of disability (and the more recent human rights model of disability).[6] This shift is of extreme significance when one considers the fact that the medical model and social model of disability represent two opposite

3 SAHRC (2015) 8.

4 According to Statistics South Africa there was a decline of 48 000 jobs (0,5%) to 9 644 000 in South Africa in the formal non-agricultural sector in the first quarter of 2017 alone available at http://www.statssa.gov.za/?p=10136 (accessed 2017-07-04).

5 According to *Quarterly Labour Force* (4) 2016 Statistics South Africa the number of persons with disabilities who are not economically active in South Africa stood at 1 611 000 in 2016.

6 Degener "A Human Rights Model of Disability" in Blanck and Flynn (eds) *The Routledge Handbook of Disability Law and Human Rights* (2017) 47.

approaches to disability.[7] The shift also relates to activities at the international level where the United Nations has developed a comprehensive human rights system subsequent to the Second World War.[8] A greater international awareness of human rights and human needs has also given rise to this shift in how persons with disabilities are viewed. In response to this growing awareness and the international community's realisation that continued denial of human rights and discrimination, exclusion and dehumanisation of persons with disabilities was no longer acceptable,[9] the United Nation's General Assembly, to this end, adopted the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.[10]

The social model of disability,[11] recognises that disability is caused by the way in which society's physical and social environment is organised,[12] which significantly contributed and paved the way to having disability fully recognised as a human rights issue, as opposed to the medical model that presumes that a person is disabled by his physical impairment, requiring an individualised medical solution and dependence on the non-disabled.[13]

Unfortunately approaches and attitudes towards, as well as perceptions about persons with disabilities in the workplace, still reflect the out-dated medical model of disability.[14] This is evident in the interpretation(s) of disability and unfair labour practices against persons

7 Grobbelaar-du Plessis and Van Reenen "Introduction to aspects of disability law in Africa" in Grobbelaar-du Plessis and Van Reenen *Aspects of disability law in Africa* (2011) xxiii.

8 Malan "'n Kritiese evaluering van menseregte as eietydse globale politieke-juridiese verskynsel" 2003 (43) 1 & 2 *Tydskrif vir Geesteswetenskappe* 94; Strydom and Grewers "Defining epochs" *International Law* (2016) 4.

9 United Nations *From Exclusion to Equality – Realizing the rights of persons with disabilities*: *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) foreword iii.

10 A/RES/61/106 adopted by the General Assembly on 13 December 2006 and opened for signature on 30 March 2007.

11 The *social model of disability* holds that disability is not primarily due to some or other condition inherent in the particular person, but to the manner in which the physical and social environment within which such person must operate has been arranged. In essence society must be rearranged to accommodate everybody - including persons with disabilities – on an equal footing. Disability viewed against the backdrop of the social model of disability is an evolving concept, and results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. See Grobbelaar-du Plessis and Van Reenen (2010) xxv.

12 SAHRC (2017) 47.

13 Degener "Disability in a Human Rights Context" 2016 *Laws* 5(3) 35.

14 The *medical model of disability* holds that disability is primarily viewed as a health and welfare issue. The emphasis was placed on the physical or psychological nature of the impairment and the dependence of the person with a disability on the non-disabled. The view that disability was a health and welfare issue gave rise to an attitude amongst members of society that

with disabilities in practice.[15] According to the 2017 South African Human Rights Commission's (SAHRC) report on the *National Hearing on Unfair Discrimination in the Workplace*, social attitudes and stigmatisation of persons with disabilities remain prevalent in modern-day South Africa.[16] It is for this reason that both public and private sector employers should take note of existing social attitudes and stigmatisation geared towards achieving and maintaining very specific physical characteristics of people. Portraying persons with disabilities as sick, weak or incapable of caring for themselves tends to marginalise persons with disabilities as non-productive and unequal members of the South African society.[17]

Both the public and private sector employers should take note of the differences between the models of disability and view persons with disabilities against the backdrop of the social model and the more recent human rights model of disability.[18] Degener argues that the human rights model of disability goes beyond the social model of disability and acts as a tool to implement the obligations imposed by the CRPD.[19]

3 International legal framework: Obligations imposed by article 27 of the CRPD

The CRPD has domestic constitutional significance for South Africa.[20] Public and private sector employers should take note of the understanding of disability and the obligations imposed by the CRPD, since the duties imposed on both sectors, [21] stem from international obligations (amongst others the CRPD), the Constitution of the Republic of South Africa, 1996 (the Constitution) and South African labour laws.[22]

persons with disabilities (and their families) were separate from mainstream communal activities, including the labour market. Their dependency on state assistance disempowered these people and undermined their self-confidence and capacity to interact on an equal level with colleagues in the working environment, and elsewhere with other members of society. See Grobbelaar-du Plessis and Van Reenen (2010) xxiii – xxiv; Integrated National Disability Strategy White Paper Office of the Deputy President, November 1997, available at http://www.gov.za/sites/www.gov.za/files/disability_2.pdf (2017-02-04); SAHRC (2017) 50.

15 SAHRC (2017) 49 - 51.

16 SAHRC (2017) 50.

17 SAHRC (2017) 50.

18 Degener "Disability in a Human Rights Context" 2016 *Laws* 5(3) 35.

19 Degener in Blanck and Flynn (2017) 47.

20 See n 10 above. South Africa signed and ratified the CRPD on the 30th of November 2007.

21 Art 27(1)(e); (g) and (h) of the CRPD.

22 See para 4 2.

The right to work is a fundamental right, recognised in several international legal instruments, such as the ILO Conventions.[23] Article 27 of the CRPD, one of the most detailed and significant articles of the CRPD, restates the right to work from a disability perspective. This provision of the CRPD sets the basis for building a society in which persons with disabilities are free from marginalisation and stigma and hence, free of discrimination in employment. This means that persons with disabilities in South Africa are part of society and included in community life as socio-economically active citizens.

Article 27 directs the public sector, in collaboration with the private sector, to undertake a large variety of measures to ensure the promotion of the rights to work and earn a living: to choose a job;[24] not to be treated unfairly when employed;[25] to receive equal pay for equal work done just like everyone else;[26] to benefit from equal opportunities and safe and healthy working conditions just like everyone else;[27] to be able to complain and to join labour and trade unions and not be harassed;[28] to provide them with career counselling, vocational trainings and career opportunities;[29] to promote self-employment and business opportunities;[30] to have the possibility to be hired both in the public and in the private sector;[31] to ensure that reasonable changes are made in the workplace environment, that is, fulfil the reasonable accommodation principle according to their personal needs;[32] and to promote vocational and professional rehabilitation programmes to support their return to work.[33] South Africa, as a state party to the CRPD, is bound to these obligations and has to ensure that the right to employment and work of persons with disabilities are protected, promoted and fulfilled.

It is important to note that the provisions on work and employment in article 27 of the CRPD protect persons with disabilities in all stages of employment.[34] The South African government should therefore - when formulating policies and programmes – provide for, and include protection for those seeking employment, those advancing in

23 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
24 Art 27(1) of the CRPD.
25 Art 27(1)(a) of the CRPD.
26 Art 27(1)(b) of the CRPD.
27 Art 27(1)(b) of the CRPD.
28 Art 27(1)(c) of the CRPD.
29 Art 27(1)(d) and (e) of the CRPD.
30 Art 27(1)(f) of the CRPD.
31 Art 27(1)(g) and (h) of the CRPD.
32 Art 27(1)(i) of the CRPD.
33 Art 27(1)(k) of the CRPD.
34 Art 27 of the CRPD.

employment, and those who acquire a disability during employment and who wish to retain their jobs.

4 South Africa's progress in implementation of article 27 of the CRPD

All legally binding international human rights treaties, including the CRPD, have monitoring mechanisms to foster accountability by state parties, and to ensure that they fulfil their commitments and obligations.[35] According to article 35 of the CRPD, a state party must submit a comprehensive report on measures taken to give effect to its obligations and on the progress made in that regard, within two years after the entry into force of the CRPD.[36] South Africa submitted its initial state party report to the CRPD's Committee towards the end of 2014,[37] and expects consideration of the report towards the end of 2018.

The CRPD requires government to "take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise".[38] This includes providing for reasonable accommodation measures,[39] and to promote policies and programmes, including affirmative action,[40] that encourage employers to recruit persons with disabilities.[41] To enable governments to formulate and implement these policies and programmes, article 31 of the CPRD provides for governments to undertake the collecting of appropriate information, including statistical and research data.[42]

Statistics regarding persons with disabilities,[43] provide the basis for measuring progress in realising the rights to work and employment. Progress captured through statistics and data has to be reported in both

35 United Nations "From Exclusion to Equality – Realizing the rights of persons with disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol" (2007) 25.
36 The CRPD entered into force on May 3, 2008.
37 Committee on the Rights of Persons with Disabilities, consideration of reports submitted by States parties under article 35 of the Convention "Initial reports of State parties due in 2009 South Africa" CRPD/C/ZAF/1 23 November 2015 (Initial country report); South Africa *South Africa Baseline Country Report: UN Convention on the Rights of Persons with Disabilities* 2013.
38 Art 4(1)(a) & (e) of the CRPD.
39 Art 27(1)(i) of the CRPD.
40 Art 27(1)(h) of the CRPD.
41 United Nations *From Exclusion to Equality – Realizing the rights of persons with disabilities*: *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007) 87.
42 See para 4 1.
43 Schneider *The social life of questions: Exploring respondents' understanding and interpretation of disability measures* (PHD dissertation 2012 University of Witwatersrand) 1.

the comprehensive initial state party report[44] and subsequent reports,[45] in order to measure the progress made in realising the right to work. It is for this reason that the CRPD recognising the importance to collect and maintain data on disability to enable formulation of policies that will facilitate implementation and monitoring of state parties compliance with the Convention.[46]

4 1 Prevalence of disability in South Africa

South Africa has recognised the importance of statistics when measuring progress in current and future policies interventions to ensure that its people have equal access to education, employment and basic services.[47] The South African census reports of 1996, 2001 and 2011 provided information for government to monitor and enhance national priorities and public debate in resolving unemployment faced by amongst other persons with disabilities in South Africa.[48]

In the last census of 2011, a report was drawn out by Statistics South Africa (StatsSA),[49] which provided statistical evidence relating to the prevalence of disability and characteristics of persons with disabilities at both individual and household levels.[50] The 2011 census was different from the 1996 and 2001 census reports in that, the method applied in the 2011 census included questions on disability that were used to improve and enhance disability specific statistics.[51] The questions of the 2011 census were formulated from the Washington Group (WG) short set of questions.[52] The WG method focused on degree of difficulty in a

44 Art 31(1) of the CRPD.
45 Art 31(2) of the CRPD.
46 Art 31 of the CRPD determines that states parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.
47 Statistics South Africa (as mandated in the Statistics Act 6 of 1999) has conducted three censuses (in 1996, 2001 and 2011) as well as various annual household-based surveys. "Census 2011: Profile of persons with disabilities in South Africa" 2011 *Statistics South Africa* is available at http://www.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf.
48 Department of Social Development *White Paper on the Rights of Persons with Disabilities (WPRPD)* (2015) 109; National Planning Commission in the Presidency's *Our future – make it work. National Development Plan: Vision 2030* (March 2012) 368.
49 State agency responsible for the collection, production and dissemination of official and other statistics, including conducting of population census, and for co-ordination among producers of statistics.
50 Statistics South Africa *Census 2011: Profile of persons with disabilities in South Africa* (2011).
51 Schneider 69.
52 Schneider 69; The WG short set of questions is a method based on activity limitations and restrictions in social participation, with the aim of producing prevalence measures that are internationally comparable.

specific function domain and the disability index.[53]

The 2011 census report indicated that persons with disabilities constituted 7,5% of the total population of South Africa.[54] Black South Africans had the highest proportion of persons with disabilities (7,8%), followed by white South Africans (6,5%).[55] However, no variations were observed among the coloured, Indian or Asian population groups. The data furthermore showed that disability is more prevalent among females than males (8,3% and 6,5% respectively).[56] Provincial variations showed that the Free State and the Northern Cape provinces had the highest proportion of persons with disabilities (11%), followed by North West and Eastern Cape (10% and 9,6% respectively). The Western Cape and Gauteng provinces showed the lowest percentage of persons with disabilities (5%).[57] This means that disability is more prevalent in rural provinces, suggesting a link to poverty and lack of access to adequate transportation, healthcare and other essential services.[58]

Statistics have further shown that there is a correlation between the degree of severity of the impairment, and the degree of economic participation in South Africa. More severe impairments are being associated with a decrease in labour market participation and employment.[59] This means that employment levels were recorded to be the highest among persons with less severe impairments, and lowest among persons with severe impairments across all provinces and sectors.[60] The severity of impairment therefore greatly affects the economic outcomes pertaining to employment in South Africa.

Different population groups are also affected differently. According to the 2011 census, the profile of persons with mild and severe disabilities shows how the latter are disadvantaged, particularly amongst the black and coloured population groups, compared to other population groups.[61] The 2011 census further recorded that the white population group have the highest proportions of employed persons with disabilities, while the black population group had the lowest proportions across all impairments and degrees of difficulty experienced.[62]

The initial state party report of South Africa (initial country report) noted the interrelatedness of disability, employment and poverty, which

53 The domains are seeing, hearing, mobility (lower body – walking or climbing stairs), cognition (remembering and concentrating), self-care (washing and dressing) and communication in one's usual language.
54 Statistic South Africa (2011) 60.
55 Statistic South Africa (2011) 60.
56 Statistic South Africa (2011) 60.
57 Statistic South Africa (2011) 57.
58 SAHRC (2017) 48.
59 Statistics South Africa (2011) 116 and Department of Social Development (2015) 25.
60 Statistics South Africa (2011) 121.
61 Statistics South Africa (2011) 60; Department of Social Development (2015) 25.
62 Statistic South Africa (2011) 60.

was articulated in South Africa's National Development Plan (NDP).[63] The NDP states that disability and poverty operate in a vicious circle and that persons with disabilities face multiple discriminatory barriers. The NDP directs that persons with disabilities must have enhanced access to quality education and employment. [64] The initial country report recognises that efforts to ensure relevant and accessible skills development programmes for persons with disabilities, coupled with equal opportunities for their productive and gainful employment, has to be prioritised.[65]

In order to fulfil the NDP's directive to enhance access to quality education for persons with disabilities and employment in the labour market, accurate and available information regarding the nature and prevalence of disability is required. However, the initial country report recognises the lack of adequate, reliable and relevant information on the nature and prevalence of disability.[66] Government further recognises that the disaggregation of disability-related statistics and data, including the reliability of such data across all government institutions remains problematic.[67] In order to address government's obligation to collect appropriate statistical and research data,[68] the initial report confirms that corrective measures had been taken to mainstream disability into government's various research and evaluation projects.[69]

The SAHRC found in their 2017 report on unfair discrimination in the workplace that there is a low labour marked absorption of persons with disabilities across all sectors in South Africa.[70] The report indicated that only 1,2% of persons with disabilities participated in the labour market.[71] This figure decreased over the last financial year, suggesting that a number of persons with disabilities left the labour market.[72] However, the SAHRC report suggests that the availability of accurate data on disabilities is limited.[73] This prevents proper assessment of the progress made in realising the rights of persons with disabilities.[74]

Given this background government embarked upon reporting on the progress made and measures taken in implementing the right to work and employment. However, it is important to note that consistent measures should be in place to record the persistent challenges in

63 National Planning Commission in the Presidency's (2012) 52.
64 Initial country report CRPD/C/ZAF/1 para 6.
65 Initial country report para 6.
66 Initial country report para 6.
67 Initial country report CRPD/C/ZAF/1 para AA 394.
68 Art 31 of the CRPD.
69 Initial country report CRPD/C/ZAF/1 para AA 395.
70 SAHRC (2017) 50; South Africa *South Africa Baseline Country Report* (2013) 56.
71 South Africa *South Africa Baseline Country Report* (2013) 56.
72 SAHRC (2017) 50.
73 Initial country report CRPD/C/ZAF/1 para 1 and 23; SAHRC (2017) 48.
74 Art 31 of the CRPD.

realisation of the right to work and employment[75] through collecting and maintaining disability data. This will enable government to evaluate progress made in realising their rights and to formulate and implement policies that give effect to the obligations imposed by the CRPD.[76]

4 2 Constitutional framework

In reporting on the progress and measures taken in implementing the CRPD, the initial country report refer to the Constitution, which ensures an environment conducive to full and equal participation of men, women and children with disabilities in society, including equal access to opportunities, accessibility and protection of the inherent dignity of the person.[77]

The initial report in particular refer to the Bill of Rights in the Constitution,[78] as the cornerstone of democracy,[79] which binds all government institutions and the courts,[80] in order to protect *all* people in South Africa.[81] The Bill of Rights, therefore, *inter alia* protects the right to dignity of persons with disabilities,[82] their right to equality,[83] and their right to bodily and psychological integrity.[84] Every person with a disability further has a right to privacy,[85] to freedom of expression,[86] association,[87] movement and residence,[88] as well as a right to choose a trade, occupation or profession freely.[89] Persons with disabilities further have a right to fair labour practices,[90] health care,[91] education,[92] and access to courts.[93] However, these rights and others may be limited in

75 Art 27 of the CRPD.
76 Art 21 of the CRPD.
77 Initial country report CRPD/C/ZAF/1 para 288.
78 Initial country report CRPD/C/ZAF/1 Implementation of the general principles and obligations para 27.
79 S 7(1) of the Constitution.
80 S 8(1) of the Constitution.
81 S 8(2) - (3) of the Constitution determine that the Constitution is binding and applicable to natural persons including persons with disabilities. The word "everyone" used in a number of provisions includes citizens and non-citizens, and is sufficiently comprehensive to include persons with disabilities. See Grobbelaar-du Plessis and Van Eck "Protection of disabled employees in South Africa: An analysis of the Constitution and Labour Legislation" in Grobbelaar-du Plessis and Van Reenen (eds) *Aspects of disability law in Africa* (2011) 237; Currie & De Waal *The Bill of Rights Handbook* (2014) 34-35; and *Mohammed v President of the Republic of South Africa* 2001 3 SA 893 (CC).
82 S 10 of the Constitution.
83 S 9 of the Constitution.
84 S 12(1) of the Constitution.
85 S 14 of the Constitution.
86 S 16 of the Constitution.
87 S 18 of the Constitution.
88 S 21 of the Constitution.
89 S 22 of the Constitution.
90 S 23 of the Constitution.
91 S 27 of the Constitution.
92 S 29 of the Constitution.
93 S 34 of the Constitution.

terms of section 36 of the Constitution,[94] to the extent that such limitation is reasonable and justifiable in an open and democratic society.

The Constitution, and more specifically the right to equality,[95] and the right to fair labour practices,[96] contained in the Bill of Rights, could potentially affect labour law in three ways. Firstly, the rights contained in the Bill of Rights could be applied to test the validity of labour legislation aimed at compliance with fundamental rights. Secondly, they could be employed to interpret existing labour legislation, which has been promulgated in compliance with the fundamental rights contained in the Bill of Rights. In this regard when interpreting the legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law, to any alternative interpretation that is inconsistent with international law.[97] Finally, the rights could be used as a tool to develop the common law in those instances where compliance with any particular human right is not at stake.[98]

In terms of section 9(1) "everyone" – including workers and/or employees with a disability – are equal before the law and have the right to equal protection and equal benefit of the law. Section 9(2) further provides that equality include the full and equal enjoyment of *all rights* and *freedoms*. This means that a worker or an employee with a disability has equal right to work, to be economically active and to be part of mainstream society. The section further provides that legislative (such as equality,[99] and labour legislation),[100] and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken in order to promote and achieve equality.[101] The national legislature introduced specific measures in the Employment Equity Act (EEA),[102] to protect persons with disabilities, in particular, as a designated group for purposes of equal treatment and affirmative action.[103]

Furthermore, section 9(3) provides that *the state* may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds including disability. Of importance to the private sector

94 S 36 of the Constitution, the limitation clause.
95 S 9 of the Constitution.
96 S 23(1) of the Constitution.
97 S 233 of the Constitution.
98 Grobbelaar-du Plessis and Van Eck (2011) 238; and Van Niekerk *et al* 34; *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC) confirmed *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) in this regard.
99 Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA) Act 4 of 2000.
100 Employment Equity Act (EEA) Act 55 of 1998.
101 Van Jaarsveld and Van Eck *Kompendium van Arbeidsreg* (2006) 137.
102 Act 55 of 1998.
103 See the discussion of the Employment Equity Act 55 of 1998 (EEA) and affirmative action.

are the provisions of section 9(4), which determine that *no person* may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 9(3). This section, therefore, also prohibits any other person, including private individuals and institutions such as employers from the private sector, from discriminating unfairly against workers with disabilities on one or more of the listed grounds. Section 9(4) requires that "national legislation must be enacted to prevent or prohibit unfair discrimination". For this purpose, legislation enacted by the national legislature includes the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),[104] and the EEA.[105] Of importance to labour market is section 9(5) of the Constitution, which provides that discrimination on one or more of the grounds listed in subsection 9(3) is unfair unless it is established that the discrimination is fair. In terms of this provision, discrimination based on disability in the workplace is unfair, unless it has been established that such discrimination is fair because of, for instance, valid inherent requirements for the work concerned.

Labour market has to take cognisance of unfair discrimination as the Constitutional Court, in *Harksen v Lane*,[106] has set out the factors that have to be taken into account in determining whether discrimination is unfair or not.[107] *Harksen* also formulated the stages in which an enquiry into alleged unequal treatment and unfair discrimination must proceed.[108] However, in both *Harksen,*[109] and *Prinsloo v Van der Linde*,[110] the determining factor, which rendered the discrimination unfair, was the impact it had on the person against whom the discrimination was inflicted.[111] It follows that labour market should guard against unfair discrimination and should implement safeguards against unfair discrimination of employees or persons with disabilities.

104 Act 4 of 2000.
105 See the discussion of the EEA in para 4 3 1.
106 1998 1 SA 300 (CC) para 52.
107 The same factors were taken into account in *WH Bosch v The Minister of Safety and Security & Minister of Public Works* Case no. 25/2005 9, where persons with disabilities had no access to the first floor of the police station where they had to apply for firearm licences. The factors laid down in *Harksen* played an important role when the equality courts had to determine whether there was unfair discrimination.
108 *Harksen v Lane* 1998 1 SA 300 (CC) para 53, which was confirmed in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 17. See Grobbelaar-du Plessis and Van Eck (2011) 242 – 246; Carpenter "Equality and non-discrimination in the new South African constitutional order: the early cases – part 1" (2001) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 409; "Equality and non-discrimination in the new South African constitutional order: important trilogy of decisions – part 2" (2001) *THRHR* 619; "Equality and non-discrimination in the new South African constitutional order: the sage continues – part 3" (2002) *THRHR* 37; "Equality and non-discrimination in the new South African constitutional order: update – part 4" (2002) *THRHR* 177.
109 1998 1 SA 300 para 51.
110 1997 6 BCLR 759 (CC) para 32.
111 Grobbelaar-du Plessis and Van Eck (2011) 246.

Section 23(1) of the Constitution guarantees everyone's right to fair labour practices. From this provision, it is clear that every employee, employer, or other organisation or institution involved in labour relations has the right to fair labour practices in terms of the Constitution.[112] It is understood that employees with disability are also entitled to protection in terms of this provision.[113]

However, it is not appropriate for an aggrieved employee with disability to approach the courts based on an infringement of a constitutional principle if subsequent legislation has already given effect to the relevant human right.[114] The constitutional provisions of section 9 and 23(1) do however play a significant role whenever enabling legislation – giving effect to a human right, such as the right to work of an employee with a disability – is being interpreted, and when the common law has to be developed in absence of existing legislative provisions that give effect to constitutional principles.[115] To this end, the Constitutional provisions regarding interpretation,[116] and application of international law,[117] must also be considered.

The initial country report highlights the subsequent enabling legislation that gave effect to the right to work and employment.[118] The enabling legislation that established reasonable accommodation mechanisms and targets for the economic empowerment of persons with disabilities are:[119] the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA);[120] the Labour Relations Act (LRA);[121] the Employment Equity Act (EEA);[122] together with the Code of Good Practice in the Employment of People with Disabilities and its accompanying Technical Assistance Guidelines on the Employment of Persons with Disabilities providing further guidelines for employers;[123]

112 *Idem* 238; 246 and 254 and Van Jaarsveld and Van Eck (2006) 137.

113 *NEHAWU v University of Cape Town* 2003 *ILJ* 95 (CC) by 110H – 111A: "[t]he concept of fair labour practice is incapable of precise definition … [It should be] given content by legislation and thereafter be left to gather meaning … from the decisions of specialist courts and tribunals. … In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provisions of the 1956 LRA [Labour Relations Act] as well as the codification of unfair labour practice in the LRA."

114 See para 4 2.

115 Grobbelaar-du Plessis and Van Eck (2011) 246.

116 S 39(1)(b) of the Constitution.

117 S 233 of the Constitution.

118 S 9 and s 23(1) of the Constitution.

119 Initial country report CRPD/C/ZAF/1 para 288.

120 Act 4 of 2000.

121 Act 66 of 1995.

122 Act 55 of 1998.

123 The Code of Good Practice was published in terms of s 54 of the EEA in *GG* 23702 of 19 August 2002. In 2004 the Department of Labour issued additional guidelines in the "Technical Assistance Guidelines on the Employment of People with Disabilities" that must be read in conjunction

and the Broad- Based Black Economic Empowerment Act.[124]

The following section examines the labour legislative measures that give effect to the obligations imposed in article 27 of the CRPD.

4 3 Implementation of article 27 of the CRPD through legislative measures

4 3 1 The Employment Equity Act 55 of 1998 (EEA)

Although the EEA is not a disability-specific piece of legislation, specific emphasis is placed on equity and the right to equal protection and benefit of the law, of *inter alia*, persons with disabilities. The EEA strives towards the attainment of two goals, namely, to prohibit unfair discrimination and to promote the implementation of affirmative action measures to eradicate inequalities that were institutionalised by previous political policies.[125]

The first goal of the EEA,[126] broadly coincides with the principles of formal equality as enshrined in section 9(1), (3) and (4) of the Constitution and obligations imposed by articles 4 (general obligations),[127] 5 (equality and non-discrimination),[128] and 27(1)(a),[129] of the CRPD. Barriers such as ignorance, fear and stereotyping have resulted in unfair discrimination of employees or workers with disabilities. In this regard, section 6(1) of the EEA prohibits unfair discrimination in the workplace, which applies to all workers or employees, job applicants, irrespective of the size of the employer's

with the EEA and the Code of Good Practice. These guidelines were revised in June 2017 and are practical in nature, and based on the prohibition of unfair discrimination and affirmative action measures. See para 4 3 1 2 in this regard.

124 Act 53 of 2003.

125 S 2(b) of the EEA.

126 Chapter II of the EEA.

127 The general obligations imposed by article 4 of the CRPD determines that States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake (a) to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention; (c) to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes; (d) to refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention; (e) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise; (f) to undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.

undertaking.[130] It provides that everyone, including a worker or an employee with disabilities, is equal before the law and that unfair discrimination on a list of grounds, including disability is, proscribed.[131]

However, unfair discrimination towards persons with disabilities is perpetuated in many ways. The most significant of these are unfounded assumptions about the abilities and performance of persons with disabilities; an inaccessible workplace, including the manner in which jobs are advertised which might exclude or limit access to the advertisement; selection tests that can further discriminate unfairly against persons or potential workers with disabilities; and arrangements regarding interviews which might exclude or limit the opportunity of persons with disabilities to prove themselves for employment.[132] It implies that employment and employment opportunities should be accessible to persons with disabilities and that they should be accommodated in accessing such employment opportunities as well as work environments.[133] Safeguards against unfair discrimination should be implemented throughout the full cycle of employment – from recruitment to promotions and termination - of persons with disabilities as provided for in the obligations imposed by article 27 of the CRPD.

128 Article 5 of the CRPD on equality and non-discrimination provides for (1) States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law; (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds; (3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

129 Article 27(1)(a) of the CRPD determine that States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: (a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.

130 S 4(1) of the EEA provides that Chapter II applies to "all employees and employers" and also covers any "employment policy or practice" which includes "recruitment procedures, advertising and selection criteria".

131 S 6(1) of the EEA prohibits unfair discrimination in the workplace. It states that "[n]o person may *un*fairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

132 Initial country report CRPD/C/ZAF/1 para 289 and the foreword to the Code of Good Practice to the EEA. In this regard see para 4 3 1 1.

133 Art 9 and 27 of the CRPD and United Nations *Handbook for Parliamentarians on* CRPD (2007) 79 – 80.

The initial country report recognises that society in general, unless directly affected by disability, remains largely ignorant of the rights of persons with disabilities. To this end, the report specifically highlights the ignorance of society to implement reasonable accommodation measures required to give effect to the rights protected in the CRPD.[134] The aim of reasonable accommodation is to enable persons with disabilities to equally perform the essential functions of the work. Reasonable accommodation may require modifications or alterations to the way a job is normally performed and should make it possible for a suitably qualified person with a disability to perform the work on an equal basis with others.[135] However, the type of reasonable accommodation required would depend on the type of work and its essential functions, the work environment and the specific impairment of the person.

Reasonable accommodation, as defined in article 2 of the CRPD, is the necessary and appropriate modification and adjustment where needed, that does not impose a disproportionate or undue burden, to ensure to persons with disabilities the enjoyment or exercise of their rights on an equal basis with others. The adjustments in the context of work and employment should not impose a disproportionate or undue burden on the employer, but should rather ensure that persons with disabilities enjoy or exercise their right to work on an equal basis with others.[136] However, it is important to note that the failure to reasonably accommodate persons with disabilities in the workplace will amount to discrimination based on disability, within the meaning of article 2 and 5(3) of the CRPD.

Section 1 of the EEA similarly defines reasonable accommodation,[137] as "any modification or adjustment to a job or to the working environment that will enable a person from a designated group,[138] to have reasonable access to or participate or advance in employment". Employers are required to adopt the most cost-effective means that are consistent with effectively removing the barriers to perform the job. This means that the employer need not accommodate a qualified applicant or an employee with a disability if in doing so an unjustifiable hardship will be imposed on the business of the employer. According to the Code of Good Practice, an unjustifiable hardship on the business of the employer means an action that requires significant or considerable difficulty or expense.[139]

134 Initial country report CRPD/C/ZAF/1 para 59.
135 Art 2 of the CRPD.
136 Art 1 of the CRPD.
137 Part 6 of the Code of Good Practice of the EEA requires employers to make "reasonable accommodation" for people with disabilities in particular.
138 S 1 of the EEA determines that designated groups that must enjoy the benefit of affirmative action are black people, women and persons with disabilities.
139 Part 6.11 and 6.13 of the revised draft Code of Good Practice.

The obligation to reasonably accommodate persons with disability may arise when an applicant or employee voluntary discloses a disability-related accommodation need, or when such a need is self-evident to the employer.[140] The employer should consult the employee and, where reasonable and practical consult technical experts for advice on how to adequately address the need and to provide an appropriate solution. Reasonable accommodation does not only mean that obstacles and, or barriers be eliminated at the workplace, but it also requires positive measures to be taken in order to adapt policies, practices and the working environment in order to promote accessibility in the workplace.[141] Through positive measures taken by employers, the broader constitutional promise of substantive equality and affirmative action, contained in section 9(2) of the Constitution can be fulfilled.

This is also the second goal of the EEA contained in chapter III of the legislation, which places an obligation on "designated employers" to implement affirmative action measures in respect of persons from "designated groups".[142] Persons with disabilities,[143] as part of the designated group must enjoy the benefits of affirmative action policies and practices. The reason why designated employers are duty-bound to favour persons with disabilities when making appointments and considering promotions, is a positive response towards addressing unemployment, low salaries and stereotyping (as seen from the prevalence on disability in South Africa above),[144] facing the majority of persons with disabilities.[145]

140 Currie and De Waal *The Bill of Rights Handbook* (2014) 235.

141 Part 6 of the revised draft Code of Good Practice. The Code provides examples of reasonable accommodation. This could entail the adaptation of computer hard- and software, the provision of training and evaluation material, and amendments to work time and leave. Ngwena "Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue" 2004 *Journal for Juridical Science* 179.

142 S 1 and s 13 of the EEA. Designated employers are defined as municipalities, organs of state, employers with 50 or more employees and employers with less than 50 employees but with a total annual turnover higher than that of a small business in terms of the EEA.

143 S 1 of the EEA. Black persons are further defined as "a generic term, which means Africans, Coloured and Indians".

144 Para 4 1 above.

145 Grobbelaar-du Plessis and Van Eck (2011) 248 and 252. The report of the SAHRC "Towards a Barrier-free Society: A Report on Accessibility and Built Environment" 2002 available at https://www.westerncape.gov.za/text/2004/11/towards_barrier_free_society.pdf 22 (accessed 2015-02-02) mentioned that "as a result, people with disabilities experience high unemployment levels and, if they are employed, often remain in low status jobs and earn lower than average remuneration. In terms of the Act, all legal entities that employ more that 50 people must submit Employment Equity Plans to the Department of Labour, showing how many people with disabilities are employees and what positions they hold".

Designated employers do not have a choice as to implementation of affirmative action measures.[146] Such employers must, in consultation with their employees, devise an affirmative action plan and, depending on the size of the undertaking, must annually or biannually report to the Department of Labour on their progress in pursuance of their affirmative action plans.[147] The plan must contain details regarding "preferential treatment and numerical goals" aimed at attaining equitable representation at the workplace.[148] The EEA does not set quotas, but the designated employers,[149] must formulate their own goals in their affirmative action plans and strive to attain these goals. The initial country report refers to the self-determined targets of designated employers for, amongst others, employment of persons with disabilities and reasonable accommodation measures that will be undertaken, and the slow progress reported to date.[150]

The slow progress reported in the initial country report is of particular concern in the light of the concerted efforts of Parliament (to enact enabling legislation such as the EEA), the Public Service Commission as part of their administrative responsibilities, as well as efforts by the Department of Public Service Administration and the Department of Women, Children and People with Disabilities to strengthen, support and attainment of set targets for employment of persons with disabilities.[151]

Legislation such as the EEA and policies play a vital role in overcoming marginalisation, segregation and discrimination against persons with disabilities in the workplace. In the South Africa context and generally reflective of the trend worldwide, a significant barrier to the employment of persons with disabilities is the absence of internal policies targeted at recruiting and employing persons with disabilities.[152] In the implementation of such a plan an employer may, for example, favour persons with disabilities above other more suitable candidates who do not have a disability in an attempt to reach goals in respect of

146 S 13(1) of the EEA provides that "[e]very designated employer *must*, in order to achieve employment equity, implement affirmative action measures" [our emphasis].

147 S 13(2) of the EEA describes the duties on designated employers. S 21 provides that employers with more than 150 employees must submit reports annually and employees with less than 150 employees must report every second year.

148 S 15(2) of the EEA.

149 Employers employing more that 50 people.

150 Initial country report CRPD/C/ZAF/1 para 290. The public sector, as designated employer set its employment equity target for 2005 at 2% of the total work force, but had to extend this target annually due to the slow progress being made.

151 Initial country report CRPD/C/ZAF/1 para 292.

152 Braddock and Bachelder "Glass Ceiling and Persons With Disabilities David Braddock" http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1115&context=key_workplace (accessed on 2015-01-28); and Gida and Ortlepp "Employment of People with Disabilities: Implications for Human resource management practices" (2007) *Acta Commercii* 135-150.

representativeness.[153] Further, chapter II of the EEA, which relates to formal equality, expressly provides that the implementation of affirmative action measures that coincide with the goals of the EAA does not constitute unfair discrimination against other candidates.[154]

According to the initial country report the initiatives to address disability-equity policies and programmes in the public sector included the:[155] JobACCESS Strategic Framework for the Recruitment, together with an accredited training course in disability management based on the JobACCESS Strategic Framework; Employment and Retention of Persons with Disabilities in the Public Service (2009); Handbook on Reasonable Accommodation for People with Disabilities in the Public Service (2007); targeted recruitment strategy to establish a database for persons with disabilities, intending to widen the pool for recruitment of persons with disabilities; and a draft policy on Reasonable Accommodation and Assistive Devices in the Public Service.

In respect of the development, implementation and refinement of disability-equity policies and programmes in the workplace, labour market should take note of the Code of Good Practice, established in terms of section 54(1)(a) of the EEA.[156]

4 3 1 1 Code of Good Practice in the Employment of People with Disabilities (Code of Good Practice)

The Code of Good Practice published in August 2002,[157] is based on the constitutional principle that no one may unfairly discriminate against a person on the grounds of disability.[158] In order to align itself with the obligations imposed by the CRPD, the Department of Labour published the revised Code of Good Practice on the Employment of Persons with

153 In *Department of Correctional Services v Van Vuuren* 1999 20 *ILJ* 2297 (LAC) the Labour Appeal Court considered the following set of facts: Ms Van Vuuren, a white female, was "strongly recommended" for a position by an interviewing panel whereas four other candidates were merely "recommended". The employer decided to appoint a black person who was only "recommended" based on an affirmative action policy that had been implemented. The employer admitted that the black candidate was appointed only because of his race. Having found that the employer had not deviated from the collectively agreed upon affirmative action policy, the Court held that the decision to appoint the black man was just and fair. It held that the decision was "dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants".

154 S 6(2) of the EEA; and Grobbelaar-du Plessis and Van Eck (2011) 248 and 253.

155 Initial country report CRPD/C/ZAF/1 para 293.

156 Code of Good Practice was published in terms of s 54 of the EEA in *GG* 23702 of 19 August 2002, and revised in 2005 and Grobbelaar-du Plessis and Van (2011) 248.

157 Code of Good Practice (as revised); Grobbelaar-du Plessis and Van (2011) 248.

158 Legal Framework and Guiding Principles of the Code of Good Practice.

Disabilities in November 2015.[159] The revised Code of Good Practice, is aligned with article 2 of the CRPD,[160] and defines discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[161] The foreword to the revised Code of Good Practice highlights that discrimination towards persons with disabilities is a socially-construed action and can be avoided by ensuring better knowledge, understanding and awareness about disabilities and the challenges encountered by persons with disabilities. The revised Code of Good Practice further acknowledges that discrimination based on disability includes all forms of discrimination, including denial of reasonable accommodation.[162]

In order to achieve their full inclusion, both socially and economically, an accessible, barrier-free physical and social environment is necessary. This means that the Code of Good Practice is not only part of the broader equality agenda for persons with disabilities, but also to South Africa's international obligations,[163] to have persons with disabilities' rights recognised in the labour market.[164] This is of particular importance to the labour market since South Africa's society has to recognise and accept that persons or workers with disability are part of society and human diversity. Employers, employees, trade unions and organisations with expertise on disability, including Disabled People's Organisations (DPOs), should use the Code to develop, implement and refine disability equity policies and programmes to suit the needs of the workplaces.[165]

4 3 1 2 Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)

In June 2017, the Department of Labour published its revised Technical Assistance Guidelines on the Employment of People with Disabilities (TAG).[166] TAG is intended to complement the revised Code of Good Practice of 2015, and to assist with the practical implementation of

159 The revised Code of Good Practice on the Employment of Persons with Disabilities was published in terms of Section 54(2) of the EEA of 1998 (as amended), on advice of the Commission for Employment Equity for public comment, in *GG* 39383 of 9 November 2015.

160 Art 2 of the CRPD.

161 Part 5.1 of the revised Code of Good Practice. According to article 1 of the CRPD a persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

162 Part 6 of the revised Code of Good Practice.

163 Art 27 of the CRPD.

164 Foreword to the Code of Good Practice.

165 Minister of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities (TAG)* (2017).

166 Foreword to (and purpose) of the TAG by the Minister of Labour in June 2017.

aspects of the EEA relating to the employment of persons with disabilities in the workplace. TAG therefore builds on the Code of Good Practice to set out practical guidelines and examples for employers, employees and trade unions on how to promote equality, diversity and fair treatment in employment through the elimination of unfair discrimination.[167]

It is important to note that the revised TAG aligns itself with the CRPD and aims to guide, educate and inform employers, employees and trade unions to understand their rights and obligations, to promote and encourage equal opportunities and fair treatment of Persons with Disabilities.[168] TAG safeguards against unfair discrimination throughout the full cycle of employment,[169] – from recruitment to promotions and termination – as provided for in the CRPD.[170]

The EEA, as well as the revised Code of Good Practice and revised TAG, places specific emphasis on equity and the right to equal protection and benefit of the law of persons with disabilities. Not only does this fulfil the constitutional promise of substantive equality in employment, and the prohibition of unfair discrimination for every person with a disability, but it also aligns itself with the obligations imposed by the CRPD. Persons with disabilities are further protected from unfair labour practices in the Labour Relations Act of 1995, which is briefly discussed hereunder.

4 3 2 Labour Relations Act 66 of 1995 (LRA)

It is important to note that the primary goal of the LRA is to give effect to the constitutional obligations contained in section 23(1) of the Constitution, which section 1(a) of LRA confirms.[171] The constitutional right to fair labour practices is wide and non-specific enough to include persons or workers with disabilities. However, the constitutional right to fair labour practices should not be confused with the definition of "unfair labour practice" as contained in the LRA. The definition of "unfair labour practices" contained in the LRA only covers specific practices perpetrated by employer.[172] For purposes of this article, the focus falls on the protection the LRA affords to employees with a disability in respect of unfair labour practices perpetrated against them, and unfair dismissal on grounds of incapacity due to injury and illness.[173]

167 Foreword to (and purpose) of the TAG.
168 Foreword to (and purpose) of the TAG.
169 The revised TAG addresses reasonable accommodation measures; recruitment and selection; medical and psychological testing; placement; training and career advancement; retaining; termination of employment; workers' compensation; confidentiality and disclosure of disability; employee benefits; employment equity planning; education and awareness; monitoring and evaluation.
170 Art 3; 4; 5; 8; 9; 12 and 27 of the CRPD.
171 The section states that it is the purpose of the LRA to give effect to the fundamental rights contained in the Constitution and the obligations incurred by the state as a member of the International Labour Organisation (ILO).
172 Chapter VIII of the LRA and Grobbelaar-du Plessis and Van Eck (2011) 254.
173 S 185 of LRA.

4 3 2 1 Persons with disabilities are protected against unfair labour practices

In terms of section 186(2) of the LRA, the term "unfair labour practice" means any unfair act or omission that arises between an employer and an employee relating to the unfair conduct of the employer in the "promotion, demotion, probation … or training of an employee or relating to the provision of benefits". The definition also covers the "unfair suspension" or "other unfair disciplinary action short of dismissal" of an employee, including employees with a disability.[174] This means that a worker or employee with a disability also has the option of referring a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) based on, for example, non-promotion, demotion or the unfair provision of benefits should it relate to an employee's disability.[175]

4 3 2 2 Persons with disabilities are protected against unfair dismissal

Section 186(1) of the LRA describes a number of occurrences covered by the term "dismissal" including the termination of a contract of employment by an employer: with or without notice;[176] the non-appointment of employees on fixed term contracts after such an expectation has been created by the employer;[177] the refusal of an employer to allow an employee to resume employment after taking maternity leave;[178] and the termination of the contract by an employee because the employer made continued employment intolerable.[179] Before a dismissal can be deemed fair, two main requirements are set by the LRA. A dismissal is deemed to be fair if the employer succeeds in proving that there was a fair reason for dismissal (also referred to as substantive fairness), and that the dismissal was effected in accordance with a fair procedure.[180] Of importance for the labour market is the fact that certain categories of dismissal are classified as being "automatically unfair dismissal".[181] Amongst others, it is automatically unfair should an employee be dismissed (with or without notice) on grounds of the

174 Also included in the definition is any "occupational detriment" in contravention of the Protected Disclosures Act 26 of 2000. The Act is also referred to as the "whistle blower's act".
175 S 10 of the EEA and Grobbelaar-du Plessis & Van Eck (2011) 255.
176 S 186(1)(a) of the LRA.
177 S 186(1)(b) of the LRA.
178 S 186(1)(c) of the LRA.
179 S 186(1)(d) of the LRA.
180 S 188 of the LRA and Grobbelaar-du Plessis and Van Eck (2011) 255-256.
181 S 187(1)(f) of the LRA includes a list of grounds upon which an employee may not be dismissed. The other grounds include, but are not limited to, race, age, gender, sex, political opinion etc. Grobbelaar-du Plessis and Van Eck (2011) 256.
182 However, the LRA adds an important *qualification* to this protection in so far as it specifically states that the dismissal of an employee on a ground such as disability may be fair if it is based on the inherent requirements of a particular job Sec 187(2)(a) of the LRA; J Grogan *Workplace law* (2005) 147;

person's "disability".[182] A number of disabilities can be encountered at the workplace.[183] They include, for example, physical disability due to illness and injury; mental incapacity due to stress, illness or trauma;[184] and chronic illnesses that result in continuous absence from work. Should an employee with a disability be subjected to an automatically unfair dismissal, he or she is entitled to lodge a claim for reinstatement or a compensation order up to a maximum of 24 months' remuneration calculated from the day of the dismissal.[185]

It is important for the labour market to note that both the EEA and the LRA protect employees or workers with disabilities against unfair discrimination when they apply for work, when they qualify for promotion in terms of the provisions of the EEA, and against unfair dismissal in terms of the LRA.[186] Furthermore, schedule 8 of the LRA contains a Code of Good Practice: Dismissal,[187] which provides guidelines regarding substantive fairness and the different procedures that apply to dismissal on different grounds.[188] It is important to note that, if these steps are not followed, the dismissal of a person with a disability will not only be unfair, but will also automatically constitute unfair dismissal. The dismissal of an employee with a disability who was not incapacitated at the time of the dismissal is regarded as one of the worst forms of discrimination possible.[189]

However, the initial country report recognises that despite enactment of the legislation discussed in paragraph 4 3, insufficient progress has been made in translating the legislative measures into economic independence for persons with disabilities.[190] Reasons for the slow

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Schmahmann v Concept Communication Natal (Pty) Ltd 1997 *ILJ* 1333 (LC); and *Archer v United Association of SA* 2005 *ILJ* 790 (CCMA). Also see Grobbelaar-du Plessis and Van Eck (2011) 256.

183 Grobbelaar-du Plessis and Van Eck (2011) 256, and *Van Jaarsveld and Van Eck supra* n 112.

184 *Spero v Elvey International (Pty) Ltd* 1995) 16 *ILJ* 1210 (IC); and *Automobile Association of SA v Govender* DA23/99) [2000] ZALAC 19 (20 September 2000).

185 Sec 194(3) of the LRA. Grobbelaar-du Plessis and Van Eck (2011) 256; Van Jaarsveld & Van Eck (2006) 168 - 169; *Van Niekerk v Minister of Labour* 1996 *ILJ* 525 (K); *Walters v Transitional Local Council of Port Elizabeth* 2000 *ILJ* 2723; and *POPCRU v SA Police Service* 2003 *ILJ* 254.

186 Van Jaarsveld and Van Eck (2006) 168.

187 Amended by Act 42 of 1996 and by Act 12 of 2002.

188 *Standard Bank Ltd v CCMA & Others* [2008] 4 BLLR 357; In terms of the Code, employers should follow a four-staged enquiry before dismissing an employee on grounds of disability. Firstly, the question is whether the employee with a disability is unable to perform his or her work. Secondly, if the answer to this question is in the affirmative, the next question is to what extent the employee with a disability is unable to do his or her work? Thirdly, the employer must consider whether the employee (with a disability) working conditions can be adapted, and lastly, if this is impossible, whether there is any alternative work which the employee/ worker with a disability could be required to do.

189 Grobbelaar-du Plessis and Van Eck (2011) 256-259.

190 Initial country report CRPD/C/ZAF/ para 289.

progress recorded in the initial country report were ascribed to the lack of access to the built environment and public transport, the interrelatedness between poverty and disability, as well as the persistent attitudinal and communication barriers.[191] This means that future initiatives in the realisation of the right to employment and work should involve a more holistic approach to accelerate inclusion and integration of persons with disabilities in the workplace.

4 4 Policy directives: The White Paper on the Rights of Persons with Disabilities (WPRPD)

The Department of Social Development reiterated in their White Paper on the Rights of Persons with Disabilities (WPRPD), [192] that the primary responsibility for disability equity lies with national, provincial and local governments and other sectors of society. [193] The policy directives in the WPRPD, approved by Cabinet in December 2015, task duty-bearers with the responsibility of eradicating persistent systemic discrimination and exclusion that persons with disabilities experience on a daily basis. [194]

The WPRPD is aligned with the disability-inclusive Sustainable Development Goals (SDGs),[195] which was adopted by the General Assembly of the United Nations in September 2015. The WPRPD further aims to integrate the obligations of the CRPD with the national legislative framework and the NDP,[196] by translating the CRPD into a tangible workable and practical tool for the South African context on the protection, promotion and realisation of the rights of persons with disabilities by both the public and the private sector. [197] This must be achieved through the development of targeted interventions that remove barriers in society,[198] calling on all stakeholders to take responsibility for ensuring that the policy directives are implemented.[199]

191 Ibid and para 2 of the discussion.
192 Department of Social Development *White Paper on the Rights of Persons with Disabilities (WPRPD)* (2015), approved by Cabinet on 9 December 2015.
193 Overview of the WPRPD (2015).
194 Overview of the WPRPD (2015).
195 Transforming our world: the 2030 Agenda for Sustainable Development (SDGs) resolution A/Res/70/1 adopted by the United Nations General Assembly on 25 September 2015. The SDGs is also known as the Global Goals. They are an universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity. The goals build on the success of the Millennium Development Goals, while including new areas such as climate change, economic inequities, innovations, sustainable consumption, and peace and justice, amongst other priorities.
196 National Planning Commission in the Presidency's *Our future – make it work. National Development Plan: Vision 2030 (NPD)* (2012).
197 *National Development Plan: Vision 2030* (2012) 38.
198 *National Development Plan: Vision 2030* (2012) 38.
199 Department of Social Development (2015) foreword.

The policy directives of the WPRPD are intended to accelerate transformation and redress with regard to full inclusion, integration and equality for persons with disabilities.[200] For this purpose the WPRPD identify strategic pillars for realising the rights of persons with disabilities.[201] Policy directives regarding the right to work and employment of persons with disabilities are addressed under the strategic fifth pillar of the WPRPD that deals with reducing economic vulnerability and releasing human capital.[202] In this regard, the WPRPD instructs employers to take on the responsibility for providing reasonable workplace accommodation,[203] according to the concepts of barrier-free access and universal design.[204] In order to achieve this, the WPRPD calls on employers to build and/or renovate the workplace. These proposed accommodation measures might place a disproportionate or undue burden on the employer in order to address barrier-free access and universal design. However, the WPRPD does not give guidance to employers or give policy directives on how to achieve reasonable accommodation in the workplace in these circumstances. This means employers need to consult the EEA's revised Code of Good Practice and TAG regarding the practical implementation on aspects of reasonable accommodation measures in the workplace.[205]

However, according to the WPRPD the EEA has not resulted in significant improvement of the employment status of persons with disabilities.[206] The WPRPD refers to the Commission on Employment Equity, which reported minimal year-on-year improvements, and targets set well below the national disability prevalence by both the public and private sectors.[207] To this end, the WPRPD provides that disability related economic affirmative action targets in the workplace should be cognisant of disability population demographics.[208] The targets must

200 Department of Social Development (2015) foreword.
201 Department of Social Development (2015) 48 – 123. The strategic pillars are: removing barriers to access and participation; protecting the rights of persons at risk of compounded marginalization; supporting sustainable integrated community life; promoting and supporting the empowerment of children, women, youth and persons with disabilities; reducing economic vulnerability and releasing human capital; strengthening the representative voice of persons with disabilities; building a disability equitable state machinery; promoting International Co-operation; and monitoring and evaluation.
202 Department of Social Development (2015) 90 – 99.
203 Department of Social Development (2015) 34.
204 Universal design is the design of products, environments, programmes and services to be usable by all persons to the greatest extent possible without the need for adaptation or specialised design. Assistive devices and technologies for particular groups of persons with disabilities where these are needed, must also respond to the principles of universal design. Universal design is therefore the most important tool to achieve universal access.
205 See paras 4 3 1 1 and 4 3 1 2.
206 Department of Social Development (2015) 94.
207 Department of Social Development (2015) 95.
208 See para 4 1 on prevalence of disability in South Africa.

take population demographics, as well as redress requirements into account to facilitate equity in employment and work by the year 2030.[209] The WPRPD proposes targets of 50% of all affirmative action opportunities targeting persons with disabilities, and 7% of affirmative action opportunities targeting women empowerment.[210] A further policy directive determine that employees with disabilities must have access to affordable vocational rehabilitation, skills development, job retention and return-to-work programmes after onset of disability.[211] The WPRPD further provides that persons with disabilities must have access to integrated socio-economic development programmes such as social assistance, rehabilitation and habilitation, skills development, and entrepreneurial and employment support programmes. These development programmes must also serve as a national employment services database, which can be utilised by job seekers to link persons with disabilities with employment opportunities.[212]

Success of the WPRPD will be measured through the implementation of its policy directives. To this end, the WPRPD provides for monitoring and evaluation of its policy directive in its strategic ninth pillar.[213] The directives regarding the monitoring process will involve amongst other the collecting, analysing and reporting data on activities, outcomes and impacts that supports effective management of implementation of the WPRPD. Policy directives regarding evaluations of progress made in implementing the WPRPD will assess amongst others; relevance, efficiency, effectiveness, impact and sustainability, which will provide credible and useful information to management and staff, as well as policy makers on accelerating the implementation of the WPRPD.

It is envisaged that the policy directives contained in the WPRPD will be escalated into legislation to complete the domestication of the CRPD. This has to be done through a comprehensive review of existing legislation and gap analysis in order to propose specific legal reform measures to strengthen accountability and recourse for persons with disabilities.[214]

5 Conclusion

The South African Government acknowledged in their initial country report that although awareness raising of the rights of persons with disabilities in general, and in particular the CRPD after ratification in 2007 featured high on the national agenda, weaknesses in co-ordination, implementation, monitoring and evaluation have largely detracted from

209 Department of Social Development (2015) 95.
210 Department of Social Development (2015) 98.
211 Department of Social Development (2015) 96.
212 Department of Social Development (2015) 96.
213 Department of Social Development (2015) 116.
214 Overview of the WPRPD (2015).

its effectiveness and impact.[215] The initial country report also recognised that despite the enactment of the legislation discussed in paragraph 4 3 above, insufficient progress has been made in translating the legislative measures into economic independence of persons with disabilities.[216] This is also evident from the situational analysis on the prevalence of disability in paragraph 4 1 above and the low labour market absorption of persons with disabilities in South Africa. The SAHRC's report of 2017,[217] further suggests that the availability of accurate data on disability is limited, and prevents proper assessment of the progress made in realising the rights of persons with disabilities. Statistics regarding persons with disabilities,[218] should provide a basis for measuring progress in realising the rights to work and employment.

Progress captured through statistics and data should be reported in both the comprehensive initial state party report,[219] and subsequent reports,[220] to the CRPD Committee in order to measure the progress made in realising the right to work. It is for this reason that the CRPD recognises, and the South African government should notice, the importance to collect and maintain data on disability to enable formulation of policies that will facilitate implementation and monitoring of state parties compliance with the CRPD.[221]

The recording of progress made through statistical evidence is also important in the evaluation of labour market's huge challenge to employ and reasonably accommodate persons with disabilities throughout their full cycle of employment. Labour market should also seek strategic partnerships with the disability sector, the Department of Labour and Department of Social Development for assistance and guidance in respect of implementation of their article 27 of the CRPD and national legislative obligations. In this regard, the Department of Labour revised the EEA's Code of Good Practice in 2015,[222] and TAG in 2017,[223] to align itself with the obligations imposed by the CRPD. Cabinet further approved the Department of Social Development's WPRPD towards the end of 2015, which aims to integrate the obligations of the CRPD with the national legislative framework and the NDP.[224]

215 Initial country report CRPD/C/ZAF/1 para 57.
216 Initial country report CRPD/C/ZAF/ para 289.
217 See para 4 1.
218 Schneider *The social life of questions: Exploring respondents' understanding and interpretation of disability measures* (PHD dissertation 2012 University of Witwatersrand) 1.
219 Art 31(1) of the CRPD.
220 Art 31(2) of the CRPD
221 Art 31 of the CRPD determines that states parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.
222 See para 4 3 1 1.
223 See para 4 3 1 2.
224 See para 4 4.

Monitoring and evaluation of the progress of implementation of the policy directives and targets to promote, protect and advance employment of persons of disabilities are imperative in the realisation of the right to work and employment. This could only be achieved if consistent measures are in place to record the persistent challenges of persons with disabilities through collecting disability data and tracking of statistical trends in the workplace.[225] Persons with disabilities should be involved in this process through participatory data collection that reflects their challenges and reasonable accommodation needs in the workplace.[226] Employers should ensure that there is evidence that persons with disabilities are considered and integrated in the workplace through data recorded and reflected in existing performance monitoring frameworks.[227] The information collected from labour market should be disaggregated and used to assist government with their assessment of progress of implementation of policy directives.

Monitoring and evaluation processes on the employment of persons with disabilities should significantly improve the current employment and retention rate of persons with disabilities in South Africa. Progress can only be measured through the analysis of disability statistical evidence of the progressive realisation of the right to work and employment. In absence of such efforts, a new dawn in realising the right to work will remain an impossible reality for the majority of persons with disabilities in South Africa.

225 Department of Social Development (2015) 117.
226 Department of Social Development (2015) 117.
227 Department of Social Development (2015) 117 and para 4 3 1.

The analysis of child marriage and third-party consent in the case of *Rebeca Z. Gyumi v Attorney General* Miscellaneous Civil Case no 5 of 2016 Tanzania High Court at Dar es Salaam

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SUMMARY

The Tanzanian High court handed down the remarkable judgment in *Rebeca Z. Gyumi v Attorney General* Miscellaneous Civil Case No 5 of 2016 HC Dar es Salaam on July 8, 2016. The court considered whether sections 13 and 17 of the Act violate the right to equality, the right to expression and receipt of information as provided for under Articles 12, 13, 18 and 21 of the Constitution of the United Republic of Tanzania 1977 (hereinafter referred to as the Constitution). The court therefore ordered the government to review the law in accordance with its obligations under international human rights law, with a view to setting the age of marriage at 18, with the full consent of the girl, and without exceptions. However, the Tanzanian government filed an appeal against this High court judgment on September 2017. In the light of the foregoing, this study analyses the above judicial decision, highlights the areas where the ruling makes a significant jurisprudential contribution and examine the impact of third-party consent to child marriage and early marriage on human dignity.

1 Background

On July 8, 2016, the Tanzanian High Court delivered a judgment concerning sections 13 and 17 of the Tanzania Marriage Act CAP R.E. 2002 (hereinafter referred to as the Act), which provides a different age for the marriage of girls and boys. The Act permits a girl child under the age of 18 to marry with the consent of a third party such as a parent or guardian. Section 13(1) of the Act specifically deals with the minimum age of marriage and sets the minimum age at 18 for boys and 15 for girls with parental consent to marry.[1] It also permits girls to marry at the age of 14 with the court's permission. While, section 17 of the Act permits girls from 15 years to get married with the consent of their parent or guardian.[2]

1 S13 (1) of the of the Tanzania Marriage Act CAP R.E. 2002.
2 S 17 of the of the Tanzania Marriage Act CAP R.E. 2002.

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This precedent-setting case was petitioned by Rebeca Gyumi, who is the director and founder of the *msichana* initiative, a non-governmental organisation that advocates for the rights of women and young girls. The petitioner sought two orders from the court, one that the court declare the provisions of sections 13 and 17 of the Act null and void, as far as they relate to the girl child. Furthermore, to expunge them from the statute and thereafter declare 18 as the age of competence, making both girls and boys eligible to enter into marriage without any exceptions. Two, the petitioner prayed to the court to consider 18 to be the minimum age of marriage for both boys and girls until the government amends the law.

The respondent was the Attorney General, acting on behalf of the government of Tanzania, who, upon being served with the petition, filed a reply and maintained that the provisions of sections 13 and 17 of the Act do not infringe a child's fundamental rights.

Acknowledging that the relief sought constituted a reasonable and effective means of enforcing the fundamental rights of the girl child subjected to early marriage, the court called for the hearing of the petition on 3 March 2016.[3] The petition was heard by way of written submissions and the case was presided over by three judges, namely Shabani Ally Lila J., Sekieti Suleiman Said Kiiyo J. and Ama-Isario Ataulwa Munisi J. This article aims to show that above everything else this affirmative judgment contributed to the legal certainty of women and children's rights, and specifically of the protection from discriminating and harmful traditional practices. More specifically, it goes a long way to clarifying the effect of sections 13 and 17 of the Act on human dignity, and the importance of Tanzania honouring its international obligations.

2 Petitioner's submission to the Court

The petitioner, through her counsel, Mr Jebra Kambole, filed an application under the provisions of articles 26(1)(2) and 30(3) of the Constitution,[4] sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2002 and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014.[5] Article 26(1) of the Constitution states that all people have a duty to observe and abide by the Constitution and the laws of the land, while article 26(2) guarantees every person the right to take legal action to protect the Constitution and the laws of the land. Article 30(3) of the Constitution gives room for any person to seek redress in the High Courts for the

3 Para 9.

4 Art 26(1) (2) and 30(3) of the Constitution of United Republic of Tanzania, 1977.

5 Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 Made under S 15 The Basic Rights and Duties Enforcement Act Cap 3 R.E. 2002.

infringement of basic rights, freedoms and duties guaranteed by the Constitution.[6]

Sections 4 and 5 of the Basic Rights and Duties Enforcement Act and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014, provide for the procedure for redressing basic rights and duties guaranteed under provisions 12 to 29 of the Constitution.[7] The petitioner through the above laws challenged the constitutionality of the provisions of sections 13 and 17 of the Law of Marriage Act. The petitioner raised four issues, which were all adopted by the court as discussed below.

2 1 Unconstitutionality of sections 13 and 17 of Marriage Act

The first issue raised by counsel of the petitioner was that the provisions of sections 13 and 17 of the Act contravene the right to equality as provided for under articles 12, 13 and 18 of the Constitution.[8] Article 18 of the Constitution provides for the right to freedom of expression, while article 12 of the Constitution guarantees the right to equality for all human beings and article 13 guarantees equality before the law, specifically sub-articles (1) and (2) which stipulate that:

> (1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.
>
> (2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.[9]

The petitioner strongly contended that the provisions, at issue in the Act, infringe the right to equality because they allow a girl aged 15 to enter into marriage at an age when she cannot make decisions for herself. His argument relied on the definition of the child adopted by various Tanzanian domestic laws, such as section 4 of the Law of the Child Act, 21 of 2010, section 4 of the Employment and Labour Relations Act, No 6 of 2004, and even the Law of Marriage Act itself. The cited laws defined a child as a person under the age of 18.[10] In this regard, the petitioner asked how the Act could retain provisions that allow a person, which it had already defined as a child to enter into marriage.

It was further argued that children are vulnerable and thus deserve protection from enormous commitments and undertakings reserved for adults due to their age. Counsel added that apart from serious matrimonial obligations and responsibilities, child marriages attract complex health hazards, which are incompatible with the best interests

6 Art 30 (3) of the Constitution of United Republic of Tanzania, 1977.
7 Art12 to 29 of the Constitution of United Republic of Tanzania, 1977.
8 Para 1(a).
9 Art 13(1) and (2) of the Constitution of United Republic of Tanzania, 1977.
10 Para 9.

of a girl child.[11] He added that, since various laws confirm that a person under the age of 18 is a child, it is logical to conclude that such a person does not have the capacity or competence to enter into a lawful marriage contract, which ironically has turned out to be the justification for consent as a requirement.[12] He went on to say that the provisions of section 13(2) of The Law of Marriage Act,[13] which require leave from the court for the marriage of a person aged 14, can be "arbitrarily interpreted" and deny children the right to education, which is a "cornerstone of the freedom of expression" guaranteed in the Constitution.[14]

2 2 Discrimination on the minimum legal age of marriage for boys and girls under section 13(1) of the Marriage Act

The second issue raised by the petitioner is that the provisions of section 13(1) of the Act, which allow a female to get married at the age of 14 and a male to get married at the age of 18 and above are discriminatory. Resulting in infringing the right to equality as protected by articles 12 and 13 of the Constitution.[15] The petitioner criticised the two provisions, arguing that they are discriminatory as they differentiate between boys and girls with regard to the eligible age for marriage.[16] It was further argued that the law that treats people differently under similar circumstances is discriminatory.[17]

The petitioner invited the court to look at international and regional instruments that support the fight against discrimination, which he insisted are in accordance with the constitutional intention to preserve and uphold human dignity intended to eliminate discrimination, which Tanzania has signed and ratified.[18] To that end, the petitioner cited among others the Universal Declaration of Human Rights of 1945 (UDHR), article 26 of the International Covenant on Civil and Political Rights of 1966 (ICCPR), article 2 of the Convention on the Elimination of All Forms of Discrimination against women of 1979 (CEDAW), articles (1) and (2) of the Convention on the Rights of the Child of 1986 (CRC), article 3 of The African Charter on the Rights and Welfare of the Child of 2001 (ACRWC), article (2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women of 2003 (Maputo Protocol).[19] The provisions in the above-cited instruments require member states to adopt legislation that advocates for equality and total elimination of all forms of discrimination.

11 Para 10.
12 Para 11.
13 Cap 29 R.E. 2002.
14 Cap 29 R.E. 2002.
15 Para 2(b).
16 Para 12.
17 Para 12.
18 Para 12.
19 Para 13.

2 3 A 15-year-old girl child can be married with the consent of the parent, guardian or court under section 17 of the Act

On the third issue, the petitioner criticised the provisions of section 17, which allow a child aged 15 to marry with the consent of the parent, guardian or court if the parent's consent is withheld unreasonably or that it is impracticable to obtain. Counsel for the petitioner submitted that, despite the explicit requirement of the parent or guardian's consent provided for under the above-mentioned section. Before a girl child can enter into marriage, the same provision waives this requirement when the parent or guardian is unavailable, which implies that this child's marriage infringes the law.[20] Therefore, he argued that these provisions are unconstitutional as they infringe Article 12 of the Constitution that guarantees the right to equality and the dignity of human beings.[21]

He further contended that such infringement constitutes a serious abrogation because the girl child is not free to choose her life partner without seeking the consent of the parent or guardian.[22] In this respect, counsel argued, it would have made more sense if the law did not allow a girl child to get married until she attain the majority age of 18 when she would be legally able to make her own decisions, similar to her male counterpart.[23] He emphasised that all human beings are equal and that someone cannot decide on behalf of another, thereby contravening the above-mentioned constitutional right to equality and dignity of a person, and the right not to be discriminated against. Furthermore, it was submitted that there is discrimination between girls with parents/guardian and those without parents/guardian, in that those with parents/guardian will get consent, while those without parents/guardian are treated differently. The petitioner proposed that the best remedy for this anomaly is to do away with the requirement for consent and declare the eligible age for marriage to be 18, which is in line with the right to freedom enshrined in article 21(2) of the Constitution, which stipulates that:

> "Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation."[24]

20 Para 9.
21 Para 9.
22 Para 10.
23 Para 10.
24 Art 21(2) of the Constitution of the Constitution of United Republic of Tanzania, 1977.

2 4 14-year-old child marriage through leave of the court under section 13(2) of the Marriage Act.

With regard to the last issues, the petitioner submitted that the provisions of section 13(2) of the Act, which requires leave of the court for the marriage of a person aged 14, is too vague. This because it can be arbitrarily interpreted to mean that children are denied the right to education, which is a cornerstone of freedom of expression as provided for by article 18 of the Constitution. Furthermore, the petitioner's counsel invited the court to be persuaded by the decision of the Constitutional Court of Zimbabwe, which deliberated on a similar matter in the case of *Loveness Mudzuru & Ruvimbo Tsopoddz v Minister of Justice Legal & Parliamentary Affairs and Others*, Constitutional Application No. 79 of 2014 (unreported).[25] In this case, the court declared unconstitutional the provisions of the Zimbabwe Marriage Act, which are *mutatis mutandis* with sections 13 and 17 of the Act.[26]

The petitioner invited the court to adopt a liberal interpretation of the impugned sections to give the intended effect and ensure the enjoyment of the guaranteed rights provided therein. The petitioner's counsel advised the court that the interpretation should mainly consider whether a right not to be discriminated against and the right to education and equality before the law are realised by the application of sections 13 and 17 of the Act.[27] To support the argument, counsel cited the case of *Kukutian Ole Pumbun and Another v Attorney General and Another (1993) TLR 159, DPP v Daudi Pete* (1993) TLR 22, and *Julius Ishengoma Francis Ndyanabo V Attorney General,* Civil case No 64 of 2001, or [2001] 2EA 485 (CAT).[28] The petitioner maintained further that the constitutional rights of young girls continued to be infringed by the submission of evidence in newspapers issued on the same day as his submissions in court,[29] which reported the arrest of a 70-year-old man who married a 14-year-old girl.[30] In that context the petitioner unequivocally submitted that the pinpointed discrimination imposes more harm on girls than boys and therefore does not meet the proportionality test, which was applied in the case of *Kukutia ole Pumbun and Another v Attorney General and Another* (1993) TLR 159 by the Court of Appeal.[31]

3 Respondent's submission to the court

The respondent, who is the Attorney General acting on behalf of the government of Tanzania in arguing the case strongly, resisted the claim

25 Para 14.
26 Para 23.
27 Law of Marriage Act CAP R.E. 2002.
28 Para 23.
29 Mwananchi Newspaper (2016-03-20) 3.
30 Para 24.
31 Para 24.

that the provisions infringe children's fundamental rights.[32] The Attorney General, represented by the Senior Principal State Attorney, responded to the petitioner's four issues cumulatively, as shown below.

3 1 Advancing the argument on the unconstitutionality of sections 13 and 17 of the Act

Council for the respondent began her submission by expounding the importance of the provisions of the Act. She contended that the provisions of the Law of Marriage Act in 1971 were the Government's response to sentiments aired by the public through the White Paper No. 1 of 1969.[33] Therefore, the provisions of the Act reflected the will of the people at that time. She added that the Act was a compromise to address and accommodate the differences existing in traditional, customary and religious values of divergent communities pertaining to marriage and related issues. Counsel submitted that the minimum age of marriage was among the issues causing protracted debate by the passing of the Act. In that regard, she emphasised that the Act has a firm foundation.[34] Responding to whether the provisions of sections 13 and 17 of the Act contravene the provisions of articles 12(4)(5) and 18 of the Constitution, the respondent contended that it is apparent from the stated religious and cultural beliefs that the issue being challenged is a delicate one, and not an easy fix.[35] The respondent referred to section 11 of the Judicature and Application of Laws, Act, Cap 358 R.E. 2002, and the Local Customary Law (Declaration) Order, GN 279 which provide for the application of customary law, which she thought was irrelevant in determining the constitutionality of sections 13 and 17. She argued that these provisions allow each ethnic group to make decisions based on its customary norms, traditions and religious values.[36]

3 2 Advancing the argument on the discriminatory nature of sections 13 and 17 of the Act

Addressing the contention that the provisions of sections 13 and 17 of the Act are unconstitutional on grounds of discrimination, the respondent ironically resisted the contention, based on section 13(2) & (3) of the Act, which referred to the requirement of the court's leave before a girl could conclude a marriage. The respondent insisted that this requirement is sufficient protection.[37] She went on to argue that, in any event, since subsection (3) refers to "persons" and not only the girl child, there is no discrimination, because boys could also seek the court's leave if they wish to marry at an age below 18 as long as they are older than

32 Para 14.
33 Para 14.
34 Para 15.
35 Para 15.
36 Para 15.
37 Para 16.

14, and there are special circumstances necessitating the contracting of the intended marriage.[38]

The respondent considered baseless the petitioner's apprehension that the uncontrolled discretion conferred by section 13(2) in granting leave may be interpreted arbitrarily. In this context, the respondent argued that statutes define the court's powers, and therefore it is unjustifiable to presume that the court will abuse its power without any facts to substantiate the allegation.[39] The respondent added that courts have been designated to be the final authority for dispensing justice by article 107A(1) of the Constitution and they are to act with impartiality. In this regard, the respondent submitted that there is every reason to believe that courts administered by competent professionals will consider the principle of the "best interests of the child" while adjudicating on all matters pertaining to children. However, the respondent condemned this argument saying that if this point is taken at face value, it will label the judiciary as an incompetent institution that does not understand its mandate, which cannot be justified.[40] With regard to article 13(5) of the Constitution, she concluded that age is not one of the considerations for gauging discrimination, and so the petitioner's argument that article 13 has been infringed has no merit.[41]

The respondent criticised the way in which the petitioner interpreted the contested provisions of the Act. She maintained that the two provisions should be read together with the rest of the provisions to get the intended meaning. Her argument relied on the principle set out in the case of *Christopher Mtikila v The Attorney General,* Misc. Civil Case No. 10 of 2005 (unreported) where the court of appeal explained how to interpret statutes.[42] She submitted that, to appreciate the import and context of the provisions of section 17, they should be read together with the preceding sections of the Act. The respondent also alerted the court to the danger of removing provisions of the law or some of them without adequate justification while the government is making an effort to remedy these incongruities.[43]

3 3 Advancing the argument on section 13(2) of the Act on denying girls under 18 the right to education

Again, the respondent considered ill-founded the petitioner's argument that the provision of the Act denies girls the right to education, hence infringing the right to freedom of expression guaranteed in article 18 of the Constitution.[44] The respondent considered this argument "too vague

38 Para 16.
39 Para 18.
40 Para 18.
41 Para 22.
42 Para 20.
43 Para 20.
44 Para 17.

and susceptible to being interpreted arbitrarily".[45] It was the respondent's submission that parents have a duty to ensure that their children from 7 years old are enrolled to attend and finish primary school, which is compulsory. In this context, she maintained that it is not expected of a parent to give consent to the marriage of a child before he or she finishes his or her compulsory primary education, which by that time they might then have attained the majority age and be capable of making their own decisions.[46]

On top of that, the respondent opposed the petitioner's claim that the right of a girl child to receive information and the right to freedom of expression are infringed by the failure to be educated. She contended that the allegation is very serious if there is no evidence to support it. She added that it is not essential for a person to attend a conventional school to be able to enjoy the right to receiving information or the right to freedom of expression. The respondent contended that, in any event, some boys and girls in societies have chosen not to attend school and yet are enjoying their right to freedom of expression and receiving information without any limitations, and so she repudiated the allegation.

3 4 Advancing the argument on the relevant regional and international instruments cited

In advancing the argument on the application of regional and international instruments cited by the petitioner, the respondent agreed that some of these instruments, with a few exceptions, advocate for the position of the petitioner. In that regard, the respondent cited the South African Development Community (SADC) Protocol on Gender and Development of 2008 as an example, which provides that marriage laws should ensure that no persons under 18 should marry unless otherwise specified by law, which takes into account the interests and welfare of the child involved.[47]

In contradiction to what was advanced above, the respondent without availing any material evidence, notified the court that the Law of Marriage Act has been debated lately and the government has already instructed the Law Reform Commission of Tanzania to revisit the disputed provisions with a view of addressing apparent and future apprehensions.[48] In this regard, she submitted that the stated facts confirm that government is dealing with the problem, and so she considered it a suitable way to deal with issues of a traditional and religious nature. In her prayers, the respondent not only requested the court to dismiss the entire petition with costs, but also to have regard for the efforts the government has made to remedy the situation. In this

45 Para 17.
46 Para 12.
47 Para 22.
48 Para 23.

context, she prayed that the court give government time to conclude the work it has started of rectifying the anomalies complained about by the petitioner, and not to grant the petition. The respondent cemented her prayers by referring to article 30 (5) of the Constitution and section 13 (2) of the Basic Rights and Duties Enforcement Act Cap 3 RE 2002, which put limitations on the enforcement and preservation of basic rights and duties in the following words:

> "[W]here in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in articles 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses."[49]

4 The High Court's judgment on the unconstitutionality of a girl child's marriage and third-party consent.

The High Court considered whether the provisions of sections 13 and 17 of the Act contravene the rights to equality, freedom of expression and receiving information as provided for under articles 12, 13, 18 and 21 of the Constitution as the main issue to be determined. Therefore, it directed itself to analyse whether the provisions of sections 13 and 17 treat girls and boys differently as far as the eligible age of marriage is concerned. The court then determined whether a girl aged under 18 is capable of being subject to complex matrimonial and conjugal obligations. It then determined whether the requirement for obtaining parents/guardian consent for a girl aged under 18 affects her undesirably. Thereafter, the court immediately disagreed with the respondent's contention that the judicial process is not appropriate for addressing the issue raised by the petitioner due to the good intentions of the impugned provisions. This led to the question as to whether there is a positive correlation between the imputed provisions of the Act and cultural and religious beliefs. The court adjudicated on these issues by considering the developments that have been taking place since 1971 when the imputed law was enacted, based on relevant international, regional and national laws.

49 S 13(2) of the Basic Rights and Duties Enforcement Act Cap 3 RE 2002.

4 1 Gender discrimination on the legal eligible age of marriage

After its examination of discrimination on the legal eligible age of marriage between a girl and a boy and a closer reading of the provisions of sections 13 and 17, the court agreed with the petition that it treats girls and boys differently as far as the eligible age for marriage is concerned. The provisions provide as follows:

> "[S]ection 13(1) No person shall marry who, being male, has not attained the apparent age of eighteen years or, being female, has not attained the apparent age of fifteen years. (2) Notwithstanding the provisions of subsection (7), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or of them is, below the ages prescribed in subsection (1) if: (a) each party has attained the age of fourteen years; and (b) the court is satisfied that there are special circumstances which make the proposed marriage desirable. (3) A person who has not attained the apparent age of eighteen years or fifteen years, as the case may be, and in respect of whom the leave of the court has not been obtained under subsection (2), shall be said to be below the minimum age of marriage. Section 17(7) A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent: (a) of her father; or (b) if her father is dead, of her mother; or (c) if both her father and mother are dead, of the person who is her guardian, but in any other case, or if all those persons are dead, shall not require consent."

The court stated that provisions of section 13(1) certainly permit girls to enter into marriage at 15 or even 14, while for boys it is between 18 and 14. The court failed to find any meaningful rationale for the requirement of a parent's or the court's consent before persons under the age of 14 could enter into marriage as provided for by section 17. The court agreed with the petitioner that the provisions of section 13(1) blatantly give boys preferential treatment with respect to the eligible age of marriage, in that for them the eligible age is 18 while for girls it is 15. To that end the court maintained that the provisions that treat persons in a similar situation differently are discriminatory, hence offending the principle of equality as enshrined in articles 12(1) and 13(1) and (2) of the Constitution, which guarantee the right to equality.

4 2 Is a girl child under 18 capable of being subject to the matrimonial contract?

The court went on to articulate what appears to have been a missing link in lawmakers' reasoning, which is the eligibility of a girl child to enter into marriage. In this regard, the court took notice of the definition of a child provided in numerous laws, including sections of the Marriage Act itself, the Child Act and the Labour Relations Act, which the court concurred with the petitioner that indeed the impugned provisions permit persons defined as children to enter into marriage. For this reason, the court recognised the need for the same Marriage Act to provide for the requirement of the parent's or court's consent to be obtained so that the

desired marriage could be effected. The court pinpointed that the Marriage Act contradicts itself by explicitly stating in section 13(1) that 15 is a girl's eligible age for marriage, thereby allowing a girl child to marry at 15, under section 17, and requiring her before doing so to obtain the consent of her parent, guardian or the court. In that context, the court inferred that the Act itself had reservations about the capacity of a child aged under 18 to make her own decision to enter into marriage.

4 3 Does parental/guardian consent for the marriage of a girl aged under 18 affect her?

As to whether the requirement to obtain the consent of a parent or guardian for a girl aged under 18 to be married undesirably impacts a girl child, the court ruled that a girl aged under 18 is a child in all respects, and agreed that it is not desirous to subject her to complex matrimonial and conjugal obligations. The court went further to consider the serious health risks that an under 18-year-old girl is exposed to if married at such an early age. The court reached this conclusion after analysing the petitioner's reports attached to his written submission, and was persuaded by the Zimbabwean judgment in *Loveless Mdzulu's case*. The court agreed with the petitioner's argument that girls under 18 are not free because if they want to get married, they have to seek leave of the court and so they are not free to make their own decisions, thereby infringing their constitutional rights. The court established that certainly the right to equality is negated when there is differential treatment.

Furthermore, the court referred to article 6 of the Maputo Protocol, which encourages state parties to ensure that there is equality between men and women and they are regarded as equal partners in marriage. The article stipulates clearly under sub-article (b) that state parties should take appropriate legislative measures that guarantee free will and the full consent of both parties. Sub-section (b) of the same article provides that 18 should be the minimum age of marriage for women. Therefore the court accords with the petitioner that, having ratified this regional instrument, it is high time that Tanzania takes appropriate legislative measures to ensure that the rights guaranteed under article 21(2) of the Constitution are realised by all. Article 21(2) states that: *"every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation."*

In addition, the court made reference to the provisions of the Sexual Offences Special Provision Act of 1998 (SOSPA) and wondered in what way after its enactment a court of law could be moved under sections 13(2) or 17(2) of the Marriage Act and grant leave for a girl under 18 to enter into marriage. SOSPA amended section 130 (2) (e) of the Penal Code and made the offence of rape as having sexual intercourse with a girl aged under 18 with or "without her consent unless the woman who is 15 or over is his wife and is not separated from the man." The High Court stressed that if the judiciary applied sections 13(2) and 17(2) and

granted leave for a girl to be married while under 14, this would constitute the newly created offence of statutory rape.

The court emphasised that SOSPA came into force 15 years ago, and is therefore not expected to be valid for applications still being filed in a court of law seeking leave to conduct marriages. Similarly, it does not anticipate it being a criminal offence if the defence of an accused person is that the child victim is his wife. It was the court in reasoning that a male seeking leave to marry a child will be committing the offence of rape, and the parent or guardian-giving consent will be committing the offence of procuring prohibited sexual intercourse as set out by SOSPA. The court concluded that the legislative development bought in by SOPSA and the Law of the Child Act in 2010 implies that the government passively concedes to the petitioner's claims. The court's standpoint was that all legislative developments should reflect worldwide public outcry about ensuring that the welfare and protection of the girl child is enhanced and the dignity and integrity of women is safeguarded.

4 4 Early marriage in relation to Tanzania's customary and religious beliefs

The court turned to what could be seen as the crux of this case, namely the culture and religious beliefs that support girls' early marriages. In this regard, the court rightly rejected the respondent's argument that due to the good intentions of the impugned provisions, the judicial process is not appropriate for addressing the issue, because it is associated with the cultural and religious beliefs of society. The court rejected this argument for two reasons, firstly, because the Judicature and Application of Laws Act Cap 358 RE 2002, which supported her argument on this issue, prohibits the application of customary and Islamic law to the Law of Marriage Act. Section 11(4) of this Act stipulates clearly that, *"notwithstanding the provisions of this Act, the rules of customary law and the rules of Islamic law shall not apply with regard to any matter provided for in the Law of Marriage Act."* From the above clear wording of the law, the court unequivocally found that it is not valid to associate sections 13 and 17 of the Marriage Act with the values embedded in customary and religious law.

Secondly, the court referred to some of the international and regional instruments, which Tanzania ratified 13 years ago, particularly article 27 of the African Charter on the Welfare of the Child, of 1990, and adjudicated that customary practices affecting children adversely, cannot be considered to be good. Article 27 of that Charter requires state parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. Having arrived at this decision, the court was also persuaded by the Zimbabwean case of *Loveless Mdzulu*, where the provision having an impact similar to the one in dispute was considered to have *social and health impacts on* children, and was declared unconstitutional.

4 5 Impact of child marriage on the right to education and freedom of expression

The court agreed with the respondent that there are no material facts to substantiate the allegation that child marriage affects the right to education, which ultimately invades the right to freedom of expression and the right to receive information. The court found no evidence of the pleaded facts, which suggested that lack of education essentially leads to the lack of freedom of expression and an impediment to the right to receive information. However, the court took note of section 35(1) of the Education Act that provides for compulsory primary education and compels parents to make sure that their children attend school until they finish. In this regard, it declared that the level of education has no direct link with the freedom of expression or the right to receive information, and so article 18 of the Constitution has not been infringed.

The court therefore concluded that sections 13 and 17 of the Law of Marriage Act no longer serve any useful purpose and declared them invalid. Government was given one year to correct this matter and ensure that marriages take place when a girl is 18 years and gives full consent to the marriage.

5 General Comments

Apart from the clear instructions on the legal position regarding the minimum legal age of marriage, this judgment has contributed to the country's effort of advocating for legal reforms to ensure that existing domestic laws and policies are human rights sensitive, conforming to international human rights standards as embedded in human rights instruments ratified by Tanzania. The United Kingdom colonial authority to sustain the colonial system enacted most of the domestic legislation, which is currently in operation in Tanzania.[50] This was done without careful consideration of the rights or welfare of the inhabitants and especially those of vulnerable groups such as girls.[51] These laws were enacted before the principle of human rights was incorporated into Tanzania's Constitution.[52] Since Tanzania's Bill of Rights became justifiable on 1st March 1988, after the expiry of the suspension period, the courts in Tanzania have positively resorted to applying human rights standards enunciated in the International Bill of Rights and other international and regional conventions, in interpreting the Bill of

50 Kabudi "The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms" 1991 *Verfassung und Recht in Übersee* 275.

51 Legal and Human Rights Centre (LHRC) *Tanzania Human Rights Report 2013* 2014 *LHRC* 57.

52 Msuya "Harmful cultural and traditional practices: a roadblock in the implementation of the convention on the elimination of discrimination against women and the Maputo protocol on women's rights in Tanzania" (PhD Thesis-UKZN 2017) 93.

Rights.[53] In addition to that, efforts have been made to ensure that new laws, which have been enacted since then, reflect the principle of equality.[54]

Further, this judgment presents a commendable example of how courts can make effective use of international law and treaties in their reasoning. The explicit reference to numerous international human rights instruments by the court in this case has provided a better basis on which to arrive at decisions. The court's use of international human rights instruments, and in particular the African Charter on the Welfare of the Child, is encouraged in the development of children's jurisprudence.[55] The judgment sets an important standard for other state parties to the African Charter on the Welfare of the Child. The High Court explicit reference to numerous international instruments, accords import to treaty national obligations, which were voluntarily undertaken. However, the international instruments themselves often do not provide much aid, in interpreting the provisions of the Bill of Rights couched in similar terms. Hence, in this case the court went beyond by taking note of how similar provisions have been interpreted in foreign jurisdictions by referring to the Zimbabwean case of *Mudzuru*. The gist of this is that fundamental rights are not only developed at the international level, but also domestically through jurisprudence and countries' respective Bills of Rights.

The case is also very significant on the elimination of discrimination against women. While some forms of discrimination against women and girls are diminishing, gender inequality continues to hold women back and deprives them of basic rights and opportunities.[56] Gender equality is essential for the achievement of human rights for all. Empowering women require addressing structural issues such as unfair social norms and attitudes as well as developing progressive legal frameworks that promote equality between women and men.[57] In majority legal traditions, many laws continue to institutionalise second-class status for women and girls with regard to personal rights such as marital, parental, inheritance and property rights. These forms of discrimination against

53 Kabudi 1991 *Verfassung und Recht in Übersee* 274.

54 For example Art 21 and 66(1) of Tanzania's Constitution which were amended to make sure that there are special parliamentary seats for women representatives; S 7 and 33 of the Employment and Labour Relations Act No 6 of 2004.

55 Skelton "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments" 2009 *African Human Rights Law Journal* 482: Sloth-Nielsen & Hove "*Mudzuru* & *Another v The Minister of Justice, Legal and Parliamentary Affairs* & *2 Others*: A review" 2015 *African Human Rights Law Journal* 554-568.

56 Burgess "The Uneven Geography of Participation at the Global Level: Ethiopian Women Activists at the Global Periphery" 2011 *Globalizations* 167.

57 Meron "Enhancing the Effectiveness of the Prohibition of Discrimination Against Women" 1990 *American Journal of International Law* 216.

women are incompatible with women's empowerment.[58] Forcing a young girl into marriage generally means she will be separated from her family and friends and transferred to her husband like a piece of property. In an instant, she will be expected to become a woman who looks after the house and family, rather than play and study like the child she is.[59] Child brides are often made to leave school, are more likely to experience domestic violence, and are at higher risk of dying from pregnancy and childbirth complications.[60] Young girls who are married off are more likely to have children while still physically immature.[61] They are psychologically unprepared and unequipped to become mothers, which means they tend to have more health problems during pregnancy and childbirth due to inadequate health care and their babies have a reduced chance for survival.[62] It is reported that 31% of girls in Tanzania are married before their 18th birthday and 5% are married before the age of 15.[63] According to the United Nations Children's Fund (UNICEF), Tanzania has the 11th highest absolute number of child brides in the world.[64] Tanzania is one of 20 countries, which has committed to ending child marriage by the end of 2020 under the Ministerial Commitment on comprehensive sexuality education and sexual and reproductive health services for adolescents and young people in Eastern and Southern Africa.[65]

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58 UN Committee on the Elimination of Discrimination against Women "Impeding Tanzanian efforts to implement women's convention were male domination, physical violence, emotional abuse, women's anti-discrimination committee told" 2008 https://reliefweb.int/report/united-republic-tanzania/impeding-tanzanian-efforts-implement-womens-convention-were-male (accessed 2019-03-22).

59 UNFPA "Marrying too young ends child marriage in Tanzania" UNFPA Child Marriage Fact Sheet (2014) http://tanzania.unfpa.org/sites/esaro/files/resourcepdf/Child%20Marriagge%20fact%20sheet%20English%202014_0.pdf. (accessed 2019-03-22).

60 ACHPR- ACERWC "Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending Child Marriage" 2017 *ACHPR- ACERWC* 8. http://www.achpr.org/files/news/2018/01/d321/jointgc acerwc_achpr_ending_child_marriage_eng.pdf. (accessed 2019-04-22).

61 Adrathy T "Legal contradictions influence early marriage in Tanzania" *We Write For Rights* (2013-02-24). Available at https://wewriteforrights.wordpress.com/2013/08/24/legal-contradictions-influence-early-marriage-in-tanzania/ (accessed 2019-04-12).

62 General recommendation/general comment No. 31 of the UN Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices" 2014. https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGC%2f31%2fCRC%2fC%2fGC%2f18&Lang=en. (accessed 2019-04-12).

63 Girlsnotbrides "Tanzania: What's the child marriage rate? How big of an issue is child marriage?" 2018 *Girlsnotbrides* https://www.girlsnotbrides.org/child-marriage/tanzania/ (accessed 2019-04-22).

64 Unicef "Child marriage Data" 2018 *Unicef* 4. Available at https://data.unicef.org/topic/childprotection/ child-marriage/. (accessed 2019-04-16).

65 Unicef "Child marriage Data" 2018. *Unicef*. https://data.unicef.org/topic/child-protection/child-marriage/ (accessed 2019-04-12).

Although the court has set a milestone in adjudicating on the recognition of women's rights in this case, it did not address the aspect of infringement of human dignity raised by the petitioner, which is central to the practice of child marriage and attitudes towards the sexuality of young girls. These customs and religious practices that support girls' early marriage degrade human dignity. For instance, child marriages are associated with the payment of dowries, which largely violate the dignity of the girl child by treating her as the means of securing some material or non-material assets. Her body and sexuality are regarded as property that families can exchange for economic gain or honour or both. The desire to maintain a girl's virginity before marriage is a powerful motivation for getting her married early, which denies her the right to receive comprehensive information and education on her sexuality, and restricting her freedom to make decisions regarding sexual relationships.[66] The practice of child marriage therefore sustains the violation of a host of other human rights of the girl child, such as the right to sexual and reproductive health, information and education on sexuality.[67] It is highly significant that human dignity appears before both equality and freedom because essentially, human rights law must serve the purpose of effectively protecting the human dignity of members of any society. Human dignity is therefore a universal human duty, a universal human responsibility. Achieving a life of dignity for all, must involve ensuring a safe, free and happy life for all girls.

Many stakeholders were optimistic that this clear and well-reasoned judgment of the court would be appreciated and give the government and its advisors a better understanding of the need to eliminate harmful and discriminatory provisions that have been discussed.[68] However, they may be disappointed, because an appeal by the government is pending in the court of appeal, challenging this decision. This portrays the unwillingness of the government to acknowledge and safeguard women's rights and interests at all levels.[69] The court gave an analysis of the various provisions of international human rights instruments that Tanzania has signed and ratified, which are inconsistent with the disputed provisions. Therefore, it is widely felt that Tanzania has failed to

66 Children's Dignity Forum-FORWARD "Voices of Child Brides and Child Mothers in Tanzania: A PEER Report on Child Marriage" 2014. *Children's Dignity Forum-FORWARD* http://www.forwarduk.org.uk/wp-content/uploads/2014/12/Voices-of-Child-Brides-in-Tanzania.pdf (accessed 2019-04-16).

67 Human Rights Watch "Tanzania: Child marriage harms girls" 2014 *Human Rights Watcht* https://www.hrw.org/news/2014/10/29/tanzania-child-marriage-harms-girls (accessed 2019-04-19).

68 Girlsnotbrides 2018 2: AllAfrica "Tanzania: Child Marriage - a Nasty Bump in the Road for Girls" 2018-06-18. https://allafrica.com/stories/201810210053.html: Rueckert "At Least 80 Girls Were Saved from Child Marriage in Tanzania, Government Reports" *Global Citizen* (2017-12-27) 2: Ministry of Health, Community Development, Gender, Elderly and Children (MHCDGEC) "Child marriage in Tanzania at a Glance" *MHCDGEC* (2017-03 02) file:///C:/Users/msuyan/Downloads/Child-Marriage-Study.pdf. (accessed 2019-04-19).

69 Girlsnotbrides 2018 2.

fully comply with international obligations imposed upon her.[70] Although Tanzania has passed many new laws with regard to the development of a modern economy, using modern technology and development practices that suit a modern democracy, it seems to be reluctant to accept change in the area of women's rights.[71] Nevertheless, the decision of the government to lodge an appeal against this decision of the court will serve as an avenue to obtain a precedent judgment from a final court of record.

Other African countries have managed to overcome this harmful and discriminatory culture of early marriage and adhere to international instruments by amending not only their legislation, but also their Constitutions to specifically stipulate the legal age of marriage. These countries include Uganda, whose Constitution affirms that a man and a woman are entitled to marry only if they are each aged 18 and over, and are entitled at that age to equal rights on entering marriage, during the marriage, and at its dissolution.[72] Similarly, the Namibian Constitution provides as follows:

> "[M]en and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution."[73]

Under the Namibia Married Persons Equality Act 1996, which amends the 1961 Marriage Act, the minimum legal age of marriage is 18 years.[74] Zimbabwe is also among the African countries that stipulates the 18 years legal age of marriage in its Constitution.[75] Other African countries that used to have discriminatory statutes on the legal age of marriage like Tanzania have already changed their laws. These countries include Algeria, which changed the minimum age of marriage from 18 for women and standardised it to 19 for both men and women in February 2005.[76] In other countries such as Lesotho, Libya and Rwanda, the minimum age of marriage is over 18 for both girls and boys.[77] In line with these standards, 32 African countries have set the minimum age of

70 Sueid "Child Marriage in Tanzania: National and International Legal Perspectives" 2017 *Zanzibar Year Book* 325.
71 Msuya "Harmful cultural and traditional practices: a roadblock in the implementation of the Convention on The Elimination of Discrimination Against Women And the Maputo Protocol on women's rights in Tanzania" (PhD Thesis-UKZN 2017).
72 Article 32 of the Constitution of the Republic of Uganda of 1995, The African Child Policy Forum (ACPF) "Minimum age of marriage in Africa" 2017 *ACPF* 14. https://www.Girlsnot brides.org/wp-content/uploads/ 2013/ 04/ Minimum-age-of-marriage-in-Africa-March-2013.pdf.
73 Art 14 (1) and (2) of the Constitution of the Republic of Namibia of 1998.
74 The African Child Policy Forum 2017 *ACPF* 10.
75 The African Child Policy Forum 2017 *ACPF* 15.
76 Art 7 of the Algeria Family Code of 2005.
77 The African Child Policy Forum 2017 *ACPF* 7.

marriage at 18 for both girls and boys.[78] South Africa, through the South African Law Reform Commission, proposed criminalising both forced and child marriages as a result of, among others, harmful cultural practices.[79] The section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 (RCMA) of South Africa prescribes the marriageable age to be 18 years for both girls and boys. However, the RCMA, read with the Marriage Act allows persons below the age of 18 to get married provided they have the necessary consent.[80]

6 Conclusion

The landmark ruling in this case will remain remarkable on the advancements of women's rights and children's rights as child marriage is not only a catalyst for improving development outcomes, but also a strategic entry point for addressing gender equality. By addressing an issue that affects the long term of women's lives, there is a huge potential to have a catalytic effect on achieving gender inequality worldwide. It is critically important to recognise that early marriages are linked to the continuous violation of girls and women's fundamental rights such as education, health, equality and non-discrimination as well as to live in free from violence and exploitation, including slavery and servitude. As we are zealous waiting for the determination of the appeal of this case, this study maintains that the minimum age for marriage should unequivocally be 18 years of age, for an international legal reason, a domestic legal reason and a social reason. The international legal reason is that Tanzania by increasing the minimum age to 18 for girls would be respecting the international instruments that it has ratified. Several treaty-monitoring bodies of various international human rights have issued statements encouraging governments to increase the age of marriage to 18 for both boys and girls. These bodies include the Committee on Economic, Social and Cultural Rights,[81] The Committee

78 The African Child Policy Forum "Minimum Age of Marriage in Africa" (2013) Minimum-age-of-marriage-in-Africa-March-2013.pdf: Odala "How important is minimum age of marriage legislation to end child marriage in Africa?" 2013. *The African Child Policy Forum* 2. https://www.girls notbrides.org/wp-content/ uploads/2013/06/ACPF -Importance-of-min-age-of-marriage-legislation-May-2013.pdf. (accessed 2019-04-19).

79 See The South African Law Reform Commission (SALRC) Revised Discussion Paper 138 Project 138 The Practice of Ukuthwala 2015. http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf. (accessed 2019-04-19).

80 S 25 and 26 of South Africa Marriage Act No. 25 of 1961: Mwambene "Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi" 2018. *African Human Rights Law Journal* 540. http://dx.doi.org/10.17159/1996-2096/2018/v18n2a5.

81 See the Concluding Observations of the Committee on Economic, Social and Cultural Rights, on Mexico (E/C.12/MEX/CO/4); the Concluding Observations of the Committee on the Rights of the Child on Georgia (CRC/C/15/Add.124), South Africa (CRC/C/15/ Add.122) and Costa Rica (CRC/C/CRl/CO/4).

on the Elimination of Discrimination against Women,[82] and the Human Rights Committee.[83] This statement has been resonating in the researches done by several special rapporteurs and representatives in their research.[84] Ending child marriage by 2030 one of the targets contained in the new Sustainable Development Goals adopted by world leaders at a United Nations summit in 2015, which Tanzania participated.[85]

The domestic law reason of changing the minimum age for marriage to18 years is that it will resolve the existing startling contradiction in domestic legislations such as the Law of the Child Act, which define the age of majority as 18.[86] Also, The Law of Contract Act, which requires one to have attained the age of majority of 18 years in order to contract an agreement and consider any agreement contracted by an individual below this age void.[87] Marriage is also an agreement, although is considered to be a contract with far reaching obligations than normal commercial contracts,[88] therefore this would imply that a marriage contract in which one of the parties is a girl below the age of 18 is void. Likewise the Penal Code criminalise and considers having sexual intercourse with a girl aged under 18 with or without her consent rape, unless the woman who is 15 or over is his wife and not separated.[89] Sections 13(2) and 17(2) which allows a girl to be married while under 14 by leave of the court is contradicting the above section of the Penal Code and at the same time constitute the newly created offence of statutory rape.

The social reasons of amending the legal age of marriage to 18 is that child marriages are prejudicial to the physical, psychological, emotional and economic well-being of half of the country's population, which is

82 Committee on the Elimination of Discrimination against Women, General Recommendation No. 21 (1994) on equality in marriage and family relations, Para 36.

83 Concluding Observations of the Human Rights Council on Uruguay (CCPR/C/URY/CO/5), Kuwait (CCPR/C/KWT/CO/2), Yemen (CCPR/CO/75/YEM), United Republic of Tanzania (CCPR/C/TZA/CO/4/Add.1), Islamic Republic of Iran (CCPR/C/IRN/CO/3).

84 In 2012 the Committees on the Rights of the Child and on the Elimination of Discrimination against Women, together with the Special Representative of the Secretary-general on Violence against Children, the Working Group on the Issue of Discrimination against Women in Law and Practice, together with four other special procedures mandate holders, issued a joint statement calling on States to increase the age of marriage to 18 years for both girls and boys without exception. See United Nations General Assembly, Human Rights Council. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, A/HRC/26/22, 2 April 2014, para. 13.

85 Mis "Law alone cannot end child marriage in Tanzania: activist" *Reuters* (2016-11-03) 2.

86 S 4(1) of Law of the Child Act No 21 of 2009.

87 S 11 (1) and (2) of The Law of Contract Act CAP 345 R.E 2002.

88 Sueid 2017 *Zanzibar Year Book* 338.

89 S 130(2)(e) of Tanzania Penal Code CAP16 R.E 2002.

women.[90] Girls who are allowed to stay with their families and stay in school are able to more fully engage in society, to become financially independent, to care for their families themselves and ultimately to work towards ending poverty. Girls who are married off at a young age are being denied the freedom to make informed decisions later in life. Changing the law alone cannot ultimately end child marriage, they need to be complemented with strategies to change mind-sets of the general community and try to trigger the shift of customs and traditions. As the issue of child marriage is deep-rooted in a male-dominated, patriarchal system where a girl child is not really treated as an equal person. Overall, it is hoped that the Tanzania court of appeal will follow the lead of the Zimbabwean Constitutional Court in *Mudzuru's* case by rejecting arguments defending child marriages based on custom, culture and belief in clear contravention of human rights commitments.[91]

90 Sueid 2017 *Zanzibar Year Book* 358.

91 Sloth-Nielsen & Hove "*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*: A review" 2015 *African Human Rights Law Journal* 567.

Children seeking justice: safeguarding the rights of child offenders in South African criminal courts

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SUMMARY

This contribution makes an argument for the use of witness tools as prescribed in section 170A of the Criminal Procedure Act 51 of 1977 in criminal cases involving child offenders if they choose an active defense. The argument based on the assumption that children who violate the law are themselves victims and their vulnerability is already elevated by the time they experience the criminal justice system. The use of witness tools in the criminal justice system is in the best interests of the child because the flexible nature of the best interest determination allows for a case-by-case approach that takes into account the unique characteristics and lived experiences of each individual child. Thus, this contribution advocates the use of section 28(2) of the Constitution to implement and interpret safeguards under section 170A of the Criminal Procedure Act. This approach to child justice ensures the establishment of the truth and is an essential component of a fair trial and in line with the ethos enshrined in the Constitution.

1 Introduction

The effects of violence in South Africa continue to devastate many lives including those of children. Children both commit and are victims of a significant number of crimes and therefore constitute an expressly vulnerable population both as perpetrators and as victims.[1] In addition, children experience violence in all settings from the privacy of their homes to their neighbourhoods and from communities to their schools.[2] Moreover, many children experience a co-occurrence of different forms

1 Van der Merwe & Dawes "Toward good practice for diversion: The development of minimum standards in the South African child justice system" 2009 *Journal of Offender Rehabilitation* 571-588.

2 Clark "Youth violence in South Africa: the case for a restorative justice response" 2012 *Contemporary Justice Review* 77-95; Hargovan "Child justice practice: The diversion of young offenders" 2013 *SA Crime Quarterly* 25-35; Songca "The africanisation of children's rights in South Africa: Quo Vadis?" 2018 *IJARS* 77-95.

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of victimisation during their childhood known as poly-victimisation.[3]

Research,[4] documents that the majority of crimes committed against children are of a sexual nature. Some of these studies show that sexual violence by and against children is on the increase.[5] Unfortunately, accurate, disaggregated and reliable data is difficult to find.[6] A paucity of data indicating the age and the number of successful prosecutions makes it difficult to establish with precision the effectiveness of the criminal justice system, and the actual numbers of children who are either victims or perpetrators of sexual offences.[7] Shortcomings in the legal and clinical definitions of sexual abuse, under-reporting of sexual crimes due to lack of centralised record systems and/or registers has further compounded the problem.[8]

Regardless of these shortcomings, contemporary research reveals high child sexual abuse prevalence rates,[9] and an increase in the number of children who commit sexual offences against other children.[10] Many child offenders fall into the highest vulnerability category because of previous sexual abuse victimisation apart from neglect or abuse.[11] Consequently, violence against and by children has resulted in a number of children being in contact with the criminal justice system as perpetrators, complainants or witnesses of crime.[12] The rise in sexual crimes by and against children has magnified their vulnerability and heightened the concern for their safety and development. Advancements in child statutes and criminal law in South Africa, aimed at protecting

3 Leoschut & Kafaar "The frequency and predictors of poly-victimisation of South African children and the role of schools in its prevention" 2017 *Psychology, Health & Medicine* 1-13. Poly-victimisation occurs when children experience abuse in the context of other forms of maltreatment and victimisation. The victims of such form of victimisation are poly-victims.

4 Hesselink & Dastile in *Vulnerable Children in South Africa: Legal, social development and criminological aspects* (2016) 12-13.

5 Clark 2012 *Contemporary Justice Review* 78; Artz *et al* "Optimus Study South Africa: Technical Report, Sexual Victimisation of Children in South Africa" 2016 http://www.cjcp.org.za/uploads/2/7/8/4/27845461/08_cjcp-report_2016-d-pdf accessed 10 July 2018.The national study shows that 34% of children are victimised before the age of 17.

6 Townsend, Waterhouse & Nomdo "Court support workers speak out: Upholding children's rights in the criminal justice system" 2014 *SA Crime Quarterly* 76-77; Artz *et al* (2016) 6-8; Leoschut & Kafaar 2017 *Psychology, Health and Medicine* 1-13.

7 See Artz *et al* (2016) 96.

8 See "Justice for child victims and witnesses of crime" 2008 Centre for Child Law, Faculty of Law, University of Pretoria *PULP* 3-5.

9 Artz *et al* (2016) 13, the study reveals that around 18 000-20 000 child sexual abuse cases are reported each year to the police.

10 See Hall "Children with harmful sexual behaviours-what promotes good practice? A study of one social services department" 2006 *Child Abuse Review* 273-284; Songca & Karels "Judicial and legislative responses to sexual crimes committed by and against children and the potential use of restorative justice practices" 2016 *Litnet Akademies* 444-478.

11 Matthias "Protecting child witnesses: New developments and implications for social workers" 2011 *Social Work* 195-204.

12 Songca 2018 *IJARS* 78.

children as a vulnerable group from various crimes including those of a sexual nature emanate from these concerns.[13]

Various policies and legislation[14] developed over the past two decades supply protections for children especially those who go through the criminal justice system. Some of the protections allow the child in legal proceedings to give evidence in a separate room other than the courtroom; they also make provision for children to make use of a closed circuit television and or an intermediary. Regarding the latter measure (which will be discussed in detail below), the author argues that intermediary services must be availed to child offenders. A humanised and fair criminal justice system engenders the fundamental rights of children in conflict with the law as well as those of children who are victims or complainants.[15]

In addition, a humanised system ameliorates mental and psychological hardships associated with the criminal justice process. Increased levels of crimes committed by and against children result in increasing number of children giving evidence in criminal courts. Thus, the purpose of the present article is to make a case for the use of intermediaries in sexual cases involving children in conflict with the law. Currently, this intervention only benefits child witnesses or child victims.[16] The author further argues that the principles of dignity, the best interest of the child and the child's right to participate are amiable to current approaches to children's rights and considered in deciding on whether to use intermediaries in cases involving child offenders.

The author argues that the vulnerable status of a child persists regardless of whether the child is a victim or an alleged offender. In the context of South Africa, this is of particular importance considering that children in conflict with the law are in most instances poly-victims and thus vulnerable to all forms of abuse and other social ills during childhood.[17] The article starts by providing a brief analysis of risk factors for victimisation of children especially during childhood that may account for their delinquent behaviours or personalities.

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13 In *Teddy Bear for Abused Children and RAPCAN v Minister of Justice and Constitutional Development* 2014 1 SACR 327 (CC) para 1 Khampepe J stated that children are special members of our society, therefore, any law that affects them must take into consideration their vulnerability and need for guidance. Moreover, she noted that courts have a duty to ensure that children receive the support and assistance essential for their growth and development.

14 For example sections 170A of the Criminal Procedure Act 51 of 1977 (hereinafter the Criminal Procedure Act); the handbook for professionals and policy makers on justice on matters involving child victims and witnesses of crime 2009 UNOCDC; the Children's Act 38 of 2005; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the Child Justice Act.

15 Handbook for professionals and policymakers on justice matters involving children child victims and witnesses of crime 1.

16 S 170A of the Criminal Procedure Act, discussed below.

17 Hesselink & Dastile 1-32; Art *et al* (2016) 33.

After providing a brief analysis of victimisation in the context of child sexual abuse, the article evaluates the difficulties children experience in legal proceedings highlighting the inimical effects of the adversarial system on children. Next considered is an analysis of the right to protection of child offenders in the South African legal system as they participate in criminal proceedings. In the final instance, the article argues for the use of intermediaries,[18] in criminal cases involving children in conflict with the law. In this regard, the article makes specific recommendations regarding amendments to section 170A of the Criminal Procedure Act.

2 Understanding child victimisation

Research informs us that children commit and are victims of significant portions of offences.[19] Therefore, as stated above, many children go through the criminal justice system either as victims, witnesses or as offenders. This part of the contribution provides a brief exposition of risk factors for victimisation of children during childhood that may account for their delinquent behaviours or personalities. Understanding child victimisation and providing appropriate and targeted interventions will go a long way in stemming the vulnerability of children to victimisation and consequent delinquent behaviours. A child's development and appreciation of right and wrong begin at home; therefore, children need stable families and loving responsible adults who will protect them in order to thrive.[20]

Structural violence and direct violence are the primary causes of crime in South Africa.[21] Structural violence is a manifestation of poor socio-economic conditions emanating from inequality and poverty.[22] Structural violence is a less visible form of violence, but its consequences are devastating and help explain why South Africa has elevated levels of direct violence.[23]

Many researchers[24] have identified factors such as unemployment, HIV/AIDS and lack of education as causes of poverty. They have also reported high rates of unemployment among the youth, which pose a risk for offending or may lead to abuse or neglect.[25] Unemployment and

18 Selected provisions of s 170A of the Criminal Procedure Act discussed below.
19 Clark 2012 *Contemporary Justice Review* 77-78; Artz *et al* (2016) 12; Bekink "The testimonial competence of children: A need for law Reform in South Africa" 2018 *PER/PELJ* 1-32; Songca 2018 *IJARS* 78-79.
20 Hesselink & Dastile 1; The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) Arts 12, 13, 15 & 17.
21 Songca 2018 *IJARS* 77.
22 Songca 2018 *IJARS* 78-80.
23 Songca 2018 *IJARS* 80-81.
24 Songca 2018 *IJARS 80-81*; Hesselink & Dastile 8-12; Songca 2018 *IJARS* 11.
25 Songca 2018 *IJARS* 11.

poverty may result in familial and parental stress that may result in various forms of child abuse.[26]

Direct violence poses multiple risks for children, which may account for delinquent behaviours. Individual crimes against children such as neglect, physical and sexual abuse are examples of direct violence emanating from structural violence. Hence, children who grow up in poverty experiencing economic exclusion are likely to engage in delinquent behaviour to try to fill the void left by the exclusion.[27]

Social norms and values emanate from cultural practices and beliefs that in turn guide the choices and reactions of people in a community.[28] Some cultural beliefs establish risk factors for children who grow up in families that ignore their rights to self-determination.[29] Various forms of abuse thrive in environments where children, due to fear of reprisals from family members, stigmatisation or fear of persecution do not report incidents of sexual abuse.[30] Structural violence, direct violence and cultural beliefs all constitute significant causes for youth crime in South Africa.[31]

The discussion above illustrates that research exists to explain the causes of violence within families that has helped to establish the link between violence and delinquent behaviour of children. Furthermore, research has proven a nexus between forms of structural violence, such as poverty, and direct violence. Nevertheless, these factors do not adequately explain why the youth commit heinous crimes.[32] The identified shortcomings illustrate the complex and interconnected nature of victimisation. They also show that victimisation of children is not a once-off incident, it occurs throughout childhood. Thus, the author supports the view that researchers should refrain from merely focusing on individual types of child victimisation. She supports the view held by some researchers that victimisation studies should focus on all forms of

26 Hesselink & Dastile 1-2.
27 Clark 2012 *Contemporary Justice Review* 80-84.
28 Clark 2012 *Contemporary Justice Review* 80-84*;* also Hesselink & Dastile 2-3.

29 In some cultures, children are viewed as the property of adults or perpetual minors and are denied their fundamental human rights and recognition as human beings. The belief in some cultures that men have right to own and discipline women and children contributes to domestic violence and in some instances to the sexual abuse of children. See Hesselink & Dastile 2-3. Nevertheless, in *S v M* the court recognised the child's right to dignity as an element of the child's right to self-determination. The court stated "… if a child is to be constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult awaiting to reach full size, he or she cannot be treated as a mere extension of his or her parents …" See also *Teddy Bear for Abused Children v RAPCAN supra*.
30 Hesselink & Dastile 2.
31 Clark 2012 *Contemporary Justice Review* 84.
32 Clark 2012 *Contemporary Justice Review* 81.

victimisation that may occur during childhood. Resultantly, this shift in focus will assist researchers in identifying appropriate interventions.[33]

The Achilles heel of victimisation studies is that they leave out the gamut of adversities that children incur during childhood.[34] It is not surprising that the recent national study on victimisation reveals that children between the ages of twelve to 22 experience various forms of victimisation mostly within their homes.[35] Children who have been victimised exhibit high levels of aggression and are likely to engage in delinquent behaviours.[36]

In conclusion, the author is of the view that poly-victimisation studies reveal the complex nature of child victimisation that requires unique and innovative interventions that mirror children's lived experiences. The criminal justice process is one of the interventions used to redress the harm caused by offending. The primary objective of the criminal process, including cases involving children, is the establishment of the truth. Other aims include the preservation of dignity of both the victim and the child offender and the protection of the child from secondary victimisation in criminal processes. Our criminal justice system steeped in adversarial process requires that proceedings take place in the presence of the accused.[37] Nevertheless, the harmful effects of the adversarial system on children are well documented and discussed below.

3 Children seeking justice in South African criminal courts

The adversarial (also known as the accusatorial) and inquisitorial systems are the two major systems of legal procedure for establishing facts.[38] None of these systems is still in their purest form; for instance, investigation of issues and the manner in which procedures are applied is different.[39] The inquisitorial model is judge centred, and the presiding officer plays a more active role. Under this model, the judge rather than the parties is responsible for developing the evidence, calling and questioning of witnesses for example.[40]

33 Leoschut and Kafaar 2017 *Psychology, Health & Medicine* 1.
34 Leoschut and Kafaar 2017 *Psychology, Health & Medicine* 1.
35 Leoschut and Kafaar 2017 *Psychology, Health & Medicine* 2; Songca 2018 I*JARS* 77-78.
36 Hesselink & Dastile 26-27.
37 S 158 of the Criminal Procedure Act.
38 See Strier *What can the American adversary system learn for an inquisitorial system of justice?* (1992) 109-111; Schwikkard, Skeen and Van der Merwe *Principles of Evidence* (1997) 365-367.
39 Hoffmann and Zeffert *The South African law of evidence* (1989) 471-474; see also Schoeman *A training program for intermediaries for the child witness in South Africa* (PHD dissertation 2006 UP) 30-31.
40 Hoffmann and Zeffert 471-474.

In contradistinction, the adversarial system has its own distinguishing characteristics. First, the parties are responsible for presenting their own evidence in support of their cases; secondly, cross-examination and confrontation processes are the hallmark of the adversarial system.[41] In the adversarial system, cross-examination of the witness takes place in the presence of the accused. Giving evidence in the presence of the accused premised on the assumption that it is the best way to establish the truth, establishing the witness's credibility and guarding against the wrongful conviction of the accused undergirds the adversarial system.[42]

The first important feature of the adversarial system relevant to this discussion is cross-examination. The right to cross-examination and its concomitant techniques is originally a common law principle embodied in statutory law and regarded as a fundamental requirement for a fair trial and an inherent right of the accused.[43] Cross-examination is essential for the establishment of the truth and regarded as "the greatest legal engine ever invented for the discovery of the truth".[44] The right to cross-examination is trite in South Africa and curtailing it inappropriately or interfering with it may render a trial unfair.[45]

Nevertheless, research findings reveal that cross-examination and the techniques employed do not facilitate the establishment of the truth especially where children appear in court proceedings.[46] The techniques employed are often hostile and intended to confuse the witness and undermine his or her credibility.[47] Moreover, South African courts acknowledge the inadequacies of criminal procedures in meeting the needs of child witnesses. In *Klink v Regional Magistrate,*[48] the court

41 Muller & Tait "The child witness and the accused's right to cross-examination" 1997 *Journal of South African Law* 519; Cassim "The rights of the child witness versus the accused's right of confrontation: a comparative perspective" 2003 *CILSA* 67-70; Songca 287-294; Schoeman 30-35.

42 See Key "The child witness: The battle for justice" 1988 *De Rebus* 54; Muller and Tait 1997 *J.S.Afri.L* 520; Muller and Tait "Section 158 of the Criminal Procedure Act 51 of 1977: A potential weapon in the battle to protect child witnesses" 1999 *SACJ* 58; Songca 288-289;

43 Hoffmann and Zeffert 456-457; Schwikkard, Skeen and Van der Merwe 365-367. S 158(1) of the Criminal Procedure Act underpins the right to confrontation by stating that "Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused." See also sections 166 (1) of the CPA 51 of 1977. Section 35(3)(i) of the Constitution provides that the accused has the right to adduce and challenge evidence. Court have held that this section 35(3)(i) embodies the accused's right to cross-examine state witnesses, see eg *S v Msimango* 2010 SACR 544(GSJ) para 27.

44 Wigmore *Evidence I Trials at Common Law* (1979) 1367; see also Muller &Tait *J.S.Afri.L* 520 1997; Zeffert and Paizes *The South African law of evidence* (2009) 906-907, on the shortcomings of cross-examination.

45 Hoffmann and Zeffert 456-457; see also *S v Msimango supra*.

46 See Schwikkard, Skeen and Van der Merwe 365-366; Key 1988 *De Rebus* 53 -55.

47 *Klink v Regional Court Magistrate supra*.

48 *Klink v Regional Court Magistrate supra*

highlighted the challenges of child witnesses of sexual offences in legal proceedings thus:

> "… child witnesses experience significant difficulties in dealing with the adversarial environment of a court-room; that a young person may experience difficulty in comprehending the language of legal proceedings and the role of various participants; and that the adversarial procedure involves confrontation and extensive cross-examination".[49]

On its part, the right to confrontation implies that the person who testifies against the accused must do so in his presence. In *S v Motlala,*[50] Colman J held that the right to confrontation means that in addition to the accused knowing what the state witnesses are saying or have said about him or her, the accused must be able to observe their demeanour and they must give evidence in the presence of the accused.[51]

In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*,[52] the Constitutional Court took notice of the unsuitability of the adversarial system involving children especially in a democratic dispensation.[53] It argued that the techniques employed in this system were unsuitable for children including the circumstances under which they gave evidence. It noted that children were at times subjected to the most humiliating and brutal treatment, which was at variance with the ethos of human dignity, achievement of equality and advancement of human rights espoused in the Constitution of the Republic of South Africa.[54] Ngcobo J ruled that our constitutional democracy has introduced a new ethos that seeks to guide and protect children through legislation that guides and enforces their rights and liberties.[55]

The author discusses some of these statutory protections below, while arguing that challenges encountered by children in adversarial proceedings are similar whether they appear as witnesses or children in conflict with the law or accused of committing crimes. As a result, the author argues that child offenders must also enjoy protections provided under section 170A of the Criminal Procedure Act.

3 1 The rights of victims versus the rights of the accused

The Constitution is a vehicle of social justice and through its Bill of Rights; it enshrines the rights of people including those of children.[56] The

49 *Klink v Regional Court Magistrate supra*
50 *S v Motlala* 1975 1 SA 814 TPD (T).
51 *S v Motlala supra*.
52 *Director of Public Prosecutions Transvaal, v Minister for Justice & Constitutional Development* 2009 7 BCLR 637 (CC).
53 Director of Public Prosecutions Transvaal, v Minister for Justice & Constitutional Development *supra*.
54 Act 108 of 1996.
55 Act 108 of 1996.
56 S 28 of the Constitution outlines the rights of children and guarantees their protection.

Constitution is an instrument of social change that seeks to transform our legal system.[57] It is the supreme law anchored on important values of human dignity; equality and freedom and thus introduces a new moral code that should permeate our legal system.[58] As stated above, the Constitution has entrenched the rights of children in section 28; in addition, the Constitution outlines several procedural rights of detained, arrested and accused persons, including those of children.[59] Section 35(3)(e) states that the accused has the right to be present when tried. The provision does not explicitly use terms such as 'confront' or 'face-to-face', however, researchers assert that this right extends to confrontation; it allows the accused to see witnesses and to observe their demeanour.[60] Although the right to confrontation is an old established rule of the law of criminal procedure in South Africa, constitutional developments resulted in the adaption of the rule allowing the child to participate effectively in courtroom proceedings.[61]

The Constitution does not explicitly guarantee the rights of victims in the criminal justice system. This omission has created the misperception amongst the public that there is undue emphasis on the rights of the alleged criminals and thus statutory protection of their rights facilitates crime.[62] These narratives pit the rights of the accused against those of victims and/or witnesses in criminal proceedings.[63]

The criminal process entails two competing interests, that of the accused and the victim. For example, the accused has a right to a fair trial and enjoys other rights contained in the Constitution; legislation and international instruments protect victims of crime.

Notwithstanding, the author argues that the issue is not whether the accused has more rights than the victims or *vice- versa* because they both have rights,[64] what is crucial is the balancing of the right of the accused

57 Songca 2018 *IJARS* 79.
58 *Director of Public Prosecutions Transvaal v Minister for Justice & Constitutional Development supra.*
59 S 35 of the Constitution.
60 Muller "An inquisitorial approach to the evidence of children" 2003 *Crime Research in South Africa* 2. S 158 (1) of the CPA encapsulates the right to confront by providing that "Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused."
61 *Klink v Regional Court Magistrate supra*. For example, s 170A was inserted in the Criminal Procedure Act by section 3 of the Criminal Law Amendment Act 135 of 1991 to protect witnesses and complainants giving evidence in courtroom proceedings.
62 Meintjies-Van der Walt "Towards victims' empowerment strategies in the criminal justice process" 1998 *South African Criminal Justice Journal* 157-172.
63 See De Klerk *The role of the victim in the criminal justice system: A specific focus on victim offender mediation and the victim impact statements* (LLM dissertation 2012 UP) 2-3.
64 For example, various policies and legislation such as the Service Charter for victims of crime, the minimum service standards for victims of crime 2004 compliment the protections afforded to witnesses and victims of crime.

to a fair trial and the interests of the victim.[65] The author supports the view that the discovery of the truth and the fundamental principle of justice must be the determining factor.[66] Fair procedures benefit both the accused and the victims in criminal processes. The manner in which parties are treated must be reflective of the ethos espoused in the Constitution including upholding principles of a fair trial. In balancing, the different rights the court must take into account all the relevant factors, including the facts of each case to ensure fairness to both the child offender and victim.[67]

The author argues that the application of the principles of human dignity and equality must ensure the continued development of children and their protection from the traumatising effects of the adversarial process. Moreover, the point of departure in cases involving children must be section 28(2) of the Constitution, which applies equally to both the accused and the victim.

The supremacy of the Constitution and its transformative elements necessitated an overhaul of various statutes to reflect its ethos especially towards children. The call for the protection of children from the consequences of the adversarial system magnified its shortcomings. In *Klink v Regional Court Magistrate* the court took judicial notice of the importance of cross-examination, however, the court could not ignore the deleterious effects of cross-examination on child witnesses leading the court to state, *inter alia* that the ordinary procedures of the criminal justice system were inadequate to meet the needs and requirements of the child witness.[68] The court noted that the system needed adaptations to enable it to function effectively and serve its ultimate purpose of establishing the truth; hence, it was of the view that section 170A served that purpose.[69]

Moreover, the law until recently was indifferent to the mental stress and indignity suffered by children giving evidence in court proceedings.[70] In most instances, children were required to give evidence in the presence of the accused, subjecting them to the most brutal and humiliating treatment by being required to relate traumatic events in the most intimate detail.[71] It is trite that children are vulnerable and need special protection and support appropriate to the age, level of

65 In *S v Zuma* 1995 2 SA 642 (CC) the court stated "[I]n any democratic criminal justice system there is a tension between … bringing criminals to book … and ensuring that justice is manifestly done to all …[b]ut none of that means sympathy for crime and its perpetrators."
66 Muller and Tait 1997 *Journal of South African Law* 528.
67 *Klink v Regional Court Magistrate supra*; Schoeman 49.
68 *Klink v Regional Court Magistrate supra.*
69 *Klink v Regional Court Magistrate supra*
70 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.
71 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*, Songca "Revisiting section 170A of the Criminal Procedure Act 51 of 1977" 2010 *THRHR* 402-414.

maturity and unique needs to obviate further hardship and trauma that may emanate from their participation in criminal processes.[72]

Thus, in South Africa, a child's best interests are of paramount importance in every matter concerning the child.[73] In addition, the Constitution enumerates protective measures for children in conflict with the law.[74] Sections 28 and 35[75] of the Constitution reflect society's belief that children are vulnerable and in need of special protection at all times.[76] In reality, children who encounter the criminal justice system do not always enjoy these rights and entitlements fully. The criminal justice system continues to pose challenges for children who encounter the system as witnesses, complainants or offenders.

The author is of the view that the Child Justice Act 75 of 2008 (hereinafter the Child Justice Act) ameliorates the concerns to a certain degree – most notably in relation to limitations on cross- examination and compulsory legal representation. It nevertheless does little to protect a child offender from the harsh reality of the courtroom as a physical space, or the trauma associated with testifying in a criminal court process.

Given these concerns, including that most child offenders are poly-victims,[77] the author opines that the best interests' principle requires the protection of both complainants and child offenders from the harm and trauma that may result from participation in sexual offence cases. Section 170A inserted in the Criminal Procedure Act allows children to testify through an intermediary to protect them from undergoing 'undue mental stress or suffering while giving evidence in court.

The relevant provisions of Section 170A discussed below include constitutional protections available to children participating in criminal processes. The author argues that child offenders are equally vulnerable and in line with their rights to a fair trial require similar protections in criminal proceedings.

72 Songca 2010 *THRHR* 402-403.
73 S 28 of the Constitution; see also Bekink "Kerkhoff v Minister of Justice and Constitutional Development 2011 SACR 109 (GNP): Intermediary appointment reports and a child's right to privacy versus the right of an accused to access information" 2017 *PER/PELJ* 1.
74 S 35 of the Constitution.
75 S 35 of the Constitution outlines various protections for arrested, detained and accused persons, these protections are applicable to alleged child offenders.
76 Simon "Pre-recorded videotaped evidence of child witnesses" 2006 *SACJ* 56-78.
77 See discussion above.

4 Statutory measures to protect children under section 28 of the Constitution

South Africa's constitutional democracy seeks to improve the lives and rights of children. The Constitution based on the foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law is the supreme law of the land.[78] In terms of the supremacy laws, any law or conduct that is inconsistent with it is invalid.[79] Section 39(1) of the Constitution provides that, when interpreting any legislation, every court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[80] The provision requires an interpretation of laws that upholds the values of the Constitution similarly, section 39(2) of the Constitution, requires an interpretation of laws, that promotes the spirit, purport and objects of the Bill of Rights.[81]

In line with the above constitutional provisions, and relevant to this submission, section 28(1)(d) of the Constitution provides that every child has the right to be "protected from maltreatment, neglect, abuse or degradation" and section 28(2) provides that "a child's best interests are or paramount importance in ever matter concerning the child". The latter provision recognises children's vulnerability and their need for special protection.[82]

Section 28 (2) was inspired by international and regional instruments on the protection of children, in particular the United Nations Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African Charter).[83]

Article 3(1) of the CRC provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".[84]

The African Charter similarly proclaims:

78 S 2 of the Constitution, 1996.
79 S 2 of the Constitution, 1996.
80 Schoeman 47.
81 See Ngcobo J in *Director of Public Prosecutions, Transvaal v Minister for Justice &Constitutional Development supra.*
82 Songca 2018 *IJARS* 82.
83 In *S v M* 2008 3 SA 232 (CC) para 16, Sachs J states that section 28 is based on international instruments of the United Nations in particular the Convention on the Rights of the Child; see also *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.
84 Art 3(1) of the CRC.

> "… *In all judicial or administrative proceedings affecting a child who is capable of communicating his/her views, the opportunity shall be provided* for the views of the child to be heard either directly or through an impartial representative …"[85]

Ratification of these conventions created obligations for South Africa relating to the protection of children and their rights; as a result, it is obliged to give effect to these instruments and to take all appropriate legislative and other measures to give effect to these instruments.[86]

The common denominator between the African Charter, the CRC and section 28 of the Constitution is the right of the child to be a child and his or her right to enjoy special care.[87] Courts are bound to give effect to the provisions of section 28 of the Constitution and to refer to regional and international instruments on the protection of children.[88] In addition, when interpreting legislation, they must use an interpretation of the legislation that is consistent with international law.[89]

5 The best interest principle as a right

The best interest principle is a common law rule that has found expression in case law and legislation.[90] Thus, contemporary foundations of children's rights and South African jurisprudence categorise the best interest as a right going further than the common law principle.

The courts at different times have defined and explained the role of the best interest principle by, for example, pronouncing that the starting point for matters concerning the child is section 28(2).[91] Moreover, courts have ruled that the best interests of the child principle creates a right that is independent and extends beyond recognition of other

85 Art 4.

86 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*. In *S v M supra* Sachs J noted that the convention (CRC) has, since its introduction, become the international standard against which to measure legislation and policies and it has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice.

87 Songca 2010 *THRHR* 408.

88 *S v M supra*.

89 *S v M supra*.

90 S 7 of the Children's Act gives content to the best interest of the child principle and in terms of section 9 of the Children's Act, the child's best interests are of paramount importance in all matters concerning the child However, courts have pronounced that the fact that the best interest of the child are paramount does not mean that they are absolute, see *S v M* 2008 3 SA 232 (CC) 250B

91 *J v National Director of Public Prosecutions supra; Sonderup vTondelli* 2001 1 SA 1171 (CC) the court interpreted section 28(2) as giving a guarantee that a child's best interests would be paramount in every matter concerning the child.

children's rights in the Constitution.[92] Resultantly, section 28(2) must be interpreted so as promote the foundational values of human dignity, equality and freedom.[93] Thus, section 28(2) as part of the Bill of Rights, protects the dignity of the child and promotes the child's worth and freedom by proclaiming that 'a child's best interests are of paramount importance in every matter concerning the child".

In Director of Public Prosecution, Transvaal v Minister for Justice & Constitutional Development, the court outlined the application of the best interest principle in the context of the Economic and Social Council of the United Nations (ECOSOC) Guidelines.[94] The court pronounced that in terms of the ECOSOC Guidelines, complainants and victims must receive special assistance and protections in order to prevent hardships and trauma that may arise from their participation in criminal proceedings.[95] Moreover, in the context of the best interests of the child the Guidelines make provision for the safeguarding of the rights of the accused, and recognises the right of every child to have his or her interests given primary consideration.[96] The latter includes the child's right to protection and to a chance for harmonious development.[97]

After taking into account the provisions of the CRC and ECOSOC, the court held that it had to apply the best interest principle; taking into account the consequences of its decision on the child. The court pronounced that the best interest principle requires the child protection from the trauma that may arise from giving evidence in court. Thus, the child must testify out of sight of the alleged perpetrator and in a friendly atmosphere. The protection afforded to the child requires professionals to assist the child and for the child to be treated as a unique and valuable human being, with his or her individual needs.[98] In the courts view, what is required is individual justice tailored to the needs of the individual case;[99] the courts successfully inter knitted the test of undue mental

92 *J v National Director of Public Prosecutions supra*.
93 Bosman-Sadie and Corrie *A practical approach to the Children's Act* (2010) 48.
94 UN Economic and Social Council (ECOSOC) Resolution Guidelines on Justice in Matters involving Child Witnesses of Crime 2005/20 July 2005.
95 *Director of Public Prosecutions, Transvaal v Minister for Justice supra*.
96 *Director of Public Prosecutions, Transvaal v Minister for Justice supra*.
97 *Director of Public Prosecutions, Transvaal v Minister for Justice supra.* The Guidelines include the right of child victims and witnesses to be treated with dignity and compassion (para 10); the right to be informed of the availability of protective measures (para 19); and to be protected from hardship during the justice process (para 29). The court recognised the child's right to a harmonious development in the *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 6 SA 632 (CC) para 26.
98 See *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) wherein the court expressed the same view.
99 *Minister of Welfare and Population Development v Fitzpatrick supra*; see also *Klink v Regional Court Magistrate supra*; *Director of Public Prosecutions, Transvaal, v Minister for Justice & Constitutional Development supra*.

stress or suffering with the best interest of the child test.[100]

In conclusion, the object of the adversarial system or prosecution is to establish the truth and ensure a fair trial for all parties. As shown above, the adversarial system is unsuited for young children and the techniques employed do not facilitate the establishment of the truth. Moreover, constitutional developments have introduced an approach to children that recognises their vulnerability and recognise that children be treated with dignity and compassion. As a result, the author argues that protections under section 170A be availed to child offenders or children in conflict with the law. Section 170A facilitates children's participation and encourages children to give evidence freely in line with the prescripts of a fair trial and section 28(2) of the Constitution.

5 1 The right to participate in criminal proceedings

Section 28 of the Constitution does not expressly provide for the right of the child to participate.[101] Nevertheless, the given interrelatedness and interdependence of children's rights, the right to participate articulated in the Children's Act,[102] provides:

> "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 a right to participate in an appropriate way and views expressed by the child must be given due consideration."[103]

Thus, the author argues that the appointment of an intermediary enhances the participation of children in criminal proceedings and is in their best interests. The intermediary by relaying questions to the child in a manner consistent with the mental and emotional development of that child facilitates the child's participation in judicial processes.[104] Furthermore, the use of intermediaries not only protects the child from unnecessary trauma, it ensures that the court receives evidence that is freely presented, and more likely to be true and better understood by the court.[105]

5 2 Protections available to children in the South African criminal courts under section 170A of the Criminal Procedure Act

Empathy towards children giving evidence in criminal courts resulted in various amendments and review of legislation relating to child witnesses

100 Fambasayi *The right to protection of children testifying in criminal proceedings* (LLM dissertation 2016 North-West University) 15.
101 Fambasayi 15.
102 S 28 of the Children's Act 32 of 2005.
103 S 10 of the Children's Act.
104 Muller & Tait 1977 *Journal of South African Law* 528.
105 *Kerkhoff v Minister of Justice supra*; see also *Klink v Regional Court Magistrate supra*.

and children in conflict with the law. For example, section 170A,[106] authorised the appointment of an intermediary. The criterion for appointing an intermediary is whether giving evidence in court is likely to expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings.[107] The court may subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary."[108]

The primary purpose for an intermediary is to shield the child from intimidation or hostility of cross-examination.[109] In terms of Criminal Procedure Act, the intermediary must convey the general purport of any question to the witness,[110] and examination or – re-examination of the witness has to take place only through the intermediary.[111] The intermediary is an expert who possesses the necessary skills in dealing with children. The intermediary helps the child to narrate his or her experiences, but cannot amend the meaning of the questions, change the questions or ask his or her own questions.[112] The section takes into account that giving evidence in court, before adults and strangers is a stressful experience for children, which often results in a child being unable to narrate his or her experiences in court.[113] Thus, an intermediary acts as a conduit between the child and the court enabling the child to relate his or her story.

The intermediary has two important functions. The first is to ensure that the child witness, who has to be in a separate room from the courtroom, is in the company of someone who can engage his or her attention, and relate all the questions put by the parties and the court.[114] Secondly, the intermediary, unless the court directs otherwise, is obliged to convey to the child witness the general purport of a party's original question in a way that is appropriate to the child's stage of development.[115] Thus, the powers of the intermediary are limited. The author argues that the intermediary must play a more active role in the

106 Criminal Procedure Act 51 of 1977 as amended by the Criminal Law Amendment Act 135 of 1991; s 170A commenced on 30 July 1993. The Children's Act recognises that children are vulnerable by extending the use of intermediaries beyond criminal matters into the realm of care and parental responsibility cases dealt with under the Children's Court. See s 61 of the Children's Act 38 of 2005.

107 S 170A of the Criminal Procedure Act.

108 S 170A of the Criminal Procedure Act. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 inserted "biological or mental" before the age of eighteen years.

109 Meintjies-Van der Walt 1998 *SACJ* 165.

110 S 170A(2)(b) of the Criminal Procedure Act.

111 S 170A(a) of the Criminal Procedure Act.

112 Schwikkard and Van der Merwe 376; Fambasayi 10; *Kerkhoff v Minister of Justice supra*.

113 *Klink v Regional Court Magistrate supra*.

114 *Klink v Regional Court Magistrate supra*.

115 *Klink v Regional Court Magistrate supra*; *Kerkhoff v Minister of Justice supra*.

interests should paraphrase or explain questions to the child to improve the efficacy of the evidence given.[116]

Southwood J in *Kerkhoff v Minister of Justice* confirmed that the purpose of section 170A of the Criminal Procedure Act is to protect child witnesses and/or complainants from psychological stress and trauma that may result from their participation in sexual offence cases if it is in their best interests.[117] Consequently, the Criminal Procedure Act protects child witnesses or complainants from undue mental stress or trauma in criminal proceedings.[118]

The Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister for Justice*, also considered the following factors pertinent to the discussion. First, in considering the need for a section 170A procedure, the court evaluated the effect of a trial on children and concluded that the appointment of an intermediary was pivotal in sexual offence cases to assuage mental stress or suffering.[119] Secondly, the court held that in every trial where a child is to testify as a witness or complainant, the court must inquire into the desirability of appointing an intermediary. In this regard, section 170A does not require the child's exposure to mental stress or suffering before the provision is invoked.[120]

In addition, the court ruled that an enquiry into the appointment of an intermediary must occur at the commencement of the trial and the overriding consideration must be to prevent the child from exposure to undue stress that may result from testifying in court.[121] The enquiry has a narrow focus, namely whether it is in the best interest of the child to appoint an intermediary.[122]

The court pronounced that section 170A not only protects child complainants from unnecessary trauma, it ensures that the court receives evidence that is freely given and more likely to be true and better understood by the court.[123] Moreover, the court noted that given

116 Cooper and Mattison "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model" 2017 *The International Journal of Evidence & Proof* 351-370.

117 The preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, acknowledges that children are among the most vulnerable members of society.

118 Schwikkard and Van der Merwe 375-378; *Kerkhoff v Minister of Justice supra*.

119 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra,* the court adopted the same procedure in *Kerkhoff v Minister of Justice supra*.

120 *Director of Public Prosecutions, Transvaal v Minister for Justice &Constitutional Development supra*; *Kerkhoff v Minister of Justice and Constitutional Development supra*.

121 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*; *Kerkhoff v Minister of Justice supra*.

122 *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*; *Kerkhoff v Minister of Justice supra*.

123 *Kerkhoff v Minister of Justice supra*.

the vulnerability of the child witness, the fairness of the trial was likely to be enhanced rather than impeded by the use of section 170A procedures. Finally, the court stated that these special procedures should not been seen as justifiable limitations on the right to a fair trial but as conducive to a trial that was fair to all.[124]

Section 170A(3) allows the child who testifies through an intermediary to do so in a separate room away from the accused and in a child friendly room. However, the provision ensures that the accused and the court are able to see and hear child.[125]

Nevertheless, researchers[126] argue that the intermediary model does not go far enough to shield the child from the hostile courtroom environment. For example, the child still re-lives and relates the traumatic events of his or her experience when testifying through the intermediary.

Unfortunately, application of section 170A of the Criminal Procedure Act is limited to complainants and witnesses of sexual abuse crimes. The author is of the view that there appears to be no justification for limiting the section to complainants and witnesses only. Research reveals that children who give information outside the courtroom experience less stress than those who do so in the courtroom.[127] Therefore, it would be in the interests of all children in general and justice in particular for them to testify outside the adversarial framework of the courtroom.[128]

The author concludes this part of the contribution by arguing that the reasons proffered for the application of this procedure are equally relevant to cases involving child offenders. Children in conflict with the law are vulnerable and likely to suffer harm or mental stress from testifying in court. The procedures outlined in section 170A of the Criminal Procedure Act should assess the vulnerable status of child offenders. Research findings,[129] show that vulnerability in the criminal justice system is not limited to children who are victims or complainants of sexual offences. Vulnerability is determined by the child's unique circumstances, such as age, social and economic background,[130] and whether the child is a poly-victim. In addition, similar to child witnesses and complainants, child offenders are unfamiliar with the judicial processes and language used in the courtroom and thus unlikely to give evidence freely. Amendments to section 170A are required, first, to do away with judicial discretion and avail the services of intermediaries in all child sexual abuse cases. Secondly, the role of the intermediary should

124 *Kerkhoff v Minister of Justice supra*; *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.
125 *Klink v Regional Court Magistrate supra*; *Director of Public Prosecutions, Transvaal v Minister for Justice & Constitutional Development supra*.
126 Simon 2006 *SACJ* 61.
127 Muller 2003 *Crime Research in South Africa* 3.
128 Muller 2003 *Crime Research in South Africa 3*.
129 Cooper & Mathisson 2017 *IJE&P* 361-367.
130 Cooper & Mathisson 2017 *IJE&P* 361.

be extended and guidelines for intermediaries be developed. Lastly, intermediaries must be available to child offenders,[131] and the guiding principle must be the establishment of the truth and the fundamental principles of justice in line with the ethos of the Constitution and contemporary studies on child victimisation.

6 Conclusion

The South African criminal justice system is adversarial in nature. Research shows that the adversarial system, including cross-examination is traumatic for children. Contemporary research reveals that children are vulnerable and need special protection and assistance while giving evidence in the courtroom. Section 170A of the Criminal Procedure Act protects child complainants and witnesses of sexual offences from the harsh effects of cross-examination by allowing them to give evidence through an intermediary. The use of an intermediary enhances their participation and ensures that the court receives evidence that is accurate and freely given. The author argues that the use of intermediaries is in the best interests of all children and must therefore be available to all children in courtroom proceedings including child offenders.

131 In Northern Ireland, Article 4 of the *Criminal Evidence (Northern Ireland) Order* 1999 sets out vulnerable witnesses eligible for assistance on the grounds of age or incapacity and includes vulnerable defendants as eligible to apply services of an intermediary.

Legal capacity of and access to justice for refugees with disabilities in Africa

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SUMMARY

Although the UN Convention on the Rights of Persons with Disabilities (CRPD) has rendered persons with disabilities more visible, their struggles are still often overlooked. One of the contexts within which this occurs is during forced migration. This is because specific barriers that Persons with Disabilities face in accessing protection and assistance when seeking asylum are yet to be recognised under international and domestic law. Therefore, through a critical and comparative approach, this paper examines the normative content of article 12 (equal recognition before the law) and article 13 (access to justice) of the CPRD to ascertain how these provisions have influenced domestic refugee laws, policies and practices in Ghana and Uganda. Furthermore, this paper considers how refugees with disabilities in these countries are recognised before the law, as well as their ability to access justice within the refugee status determination and resettlement processes. Finally, this paper contends for reforms in the substantive and procedural refugee laws and policies in these countries in a bid to guarantee access to justice for refugees with disabilities.

1 Introduction

For many decades, disability and forced migration have been a human rights issue. In 2016, the United Nations High Commissioner for Refugees (UNHCR) reported that over 65.6 million persons were forcibly displaced worldwide due to persecution, conflict, violence, or human rights violations.[1] Sub-Saharan Africa hosts a large and growing number

1 UNHCR *Global Trends: Forced Displacement in 2016* (2017) 2.

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of refugees,[2] mostly from Burundi, the Central African Republic, the Democratic Republic of the Congo, Eritrea, Somalia, South Sudan, and Sudan.[3] For instance, there were 737 400 newly recognised refugees from South Sudan, followed by Burundi (121 700 newly recognised), Eritrea (69 600), and Nigeria (64 700).[4] It has been observed that about 15 percent of the world's population has disabilities.[5] Furthermore, it is contended that the occurrence of disability is higher among forced displaces fleeing violent conflicts, who are exposed to high risk situations resulting in serious injuries such as mental, physical and/or sensory impairments.[6] Currently, there is a paucity of statistical data on disability among populations of displaced persons. The UNHCR estimates the number of forcibly displaced persons with disabilities at between 2.3 and 3.3 million, which represents between 7 and 10 per cent of forcibly displaced people; however, they often remain invisible within uprooted communities.[7] The invisibility of refugees with disabilities is not surprising because many countries have effectively excluded disability from their refugee and migration systems.[8]

Despite the adoption of the CRPD in 2006,[9] several studies have revealed that many countries have advanced disability exclusionary regimes in their refugee and migration systems.[10] This reveals a range of

2 The 1951 Convention defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country". See art 1(A)(2) of the UN Convention Relating to the Status of Refugees, 28 July 1951. The 1969 OAU Convention offers an extended definition to include "people fleeing external aggression, occupation, foreign domination or events seriously disturbing public order". See art 1(2) of the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention) (adopted 10 September 1969), 1001 UNTS 45.

3 UNHCR 14.

4 UNHCR 14.

5 WHO and World Bank *World Report on Disability* 2011 http://www.who.int/disabilities/world_report/2011/report/en/ (last accessed 2019-07-08).

6 Women's Refugee Commission, *Disabilities among Refugees and Conflict-affected Populations* (New York: Women's Refugee Commission 2008) http://womensrefugeecommission.org/programs/disabilities (last accessed 2019-07-08).

7 UNHCR "People with Disabilities", http://www.unhcr.org/pages/4a0c310c6.html (last accessed 2019-07-08).

8 Soldatica, Somersb, Buckleyc & Fleayd "'Nowhere to be found': disabled refugees and asylum seekers within the Australian resettlement landscape" 2015 *Disability and the Global South* 501-522.

9 Adopted 13 December 2006 by General Assembly Res A/RES/61/106 came into force 2008.

10 El-Lahib & Wehbi, Immigration and Disability: Ableism in the Policies of the Canadian State (2012) 55 *International Social Work*, 95-108; Mirza, *Unmet Needs and Diminished Opportunities: Disability, Displacement and Humanitarian Healthcare* (2011) 212; Soldatic & Fiske "Bodies Locked Up: Intersections of Disability and Race in Australia's Immigration System" 2009 *Disability & Society* 289-301; Kanter *The development of disability rights under international law: From charity to human rights* (2017).

tactics including refugee and asylum selection status determination processes that work to actively "screen out" persons with disabilities (PWDs) for refugee status or resettlement. Meanwhile, there is substantial empirical evidence to suggest that it is these very conditions that force people across borders thereby creating high rates of disability and impairment.[11] The challenges that PWDs encounter, in this regard, are still often overlooked and in most institutionalised settings their rights to access justice and treatment before the law are usually violated. Though the CRPD in articles 12 and 13 recognises and safeguards equal recognition before the law and access to justice of PWDs respectively, the specific barriers that PWDs face in accessing protection and assistance when seeking asylum are yet to be recognised. For instance, apart from provisions for access to social security in article 24(1)(b),[12] the 1951 UN Refugee Convention relating to the Status of Refugees (1951 Refugee Convention),[13] provides little guidance on protecting the human rights of refugees with disabilities.

It is against this background that this paper adopts a critical and comparative approach to examine how refugees with disabilities are recognised and protected during the refugee status determination and resettlement processes, with particular emphasis on the right to legal capacity,[14] and the right to access to justice.[15] The paper scrutinises the normative contents of articles 12 and 13 of the CPRD and how these provisions have influenced domestic refugee laws and policies in Ghana and Uganda. Particularly, the paper analyses the cross fertilisation between domestic disability laws and refugee laws in the selected countries. Following this introduction, section two discusses legal capacity of and access to justice for refugees with disabilities under international law. Section three examines access to justice and legal capacity of refugees with disabilities in Ghana and Uganda to appraise their compliance with the CRPD and other substantive international

11 Meekosha & Soldatic "Human Rights and the Global South: The Case of disability" 2011 *Third World Quarterly* 1383.

12 Art 24(1) of the 1951 Convention obliges "Contracting States to accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters: (b) states that Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension."

13 UN Convention Relating to the Status of Refugees 189 UNTS 150, entered into force 22 April 1954.

14 UN Convention on the Rights of Persons with Disabilities (CRPD) 2515 UNTS 3, entered into force 3 May 2008, Art 12.

15 CRPD, Art 13.

human rights instruments. Section four summarises and concludes the discussion.

2 Steps towards protection: legal capacity of and access to justice for refugees with disabilities under international law

The protection and material needs of refugees with disabilities has received little to no attention over the past decades. It has been observed that refugees with disabilities suffer triple disadvantage.[16]

Firstly, they are outside of their country of origin; secondly, they are usually stripped of the protections of a State of citizenship or habitual residence and live in fear of persecution if returned to the country from which they have fled; and thirdly, being hampered by physical, mental, intellectual or sensory impairments hinders their full and effective participation in society.[17]

Refugees with disabilities can be categorised among vulnerable persons in the world because their experience of forced migration is compounded by the manifold and varied challenges, which flow from impairment.[18] Even in countries where they do have legal recognition and protection, refugees with disabilities are normally harassed by police through physical abuse and intimidation. Addaney observes that in most African countries beleaguered by economic crises and social problems, refugees, especially those with disabilities, are used as suitable scapegoats.[19] Nevertheless, refugees with disabilities are entitled to protection under international human rights and refugee law.[20] These laws provide the framework within which the protection of and assistance to refugees with disabilities should be undertaken.

For several decades persons with disabilities were overlooked by the international human rights community.[21] For instance, the Universal Declaration of Human Rights (UDHR) adopted by the United Nations

16 Crock, Ernst & Mccallum "Where Disability and Displacement Intersect – Asylum Seekers and Refugees with Disabilities" 2013 *International Journal of Refugee Law* 735.
17 CRPD, Art 1; Crock, Ernst & Mccallum 736.
18 Crock, Ernst & Mccallum 737.
19 Addaney "Toward Promoting Protection: Refugee Protection and Local Integration in Sub-Saharan Africa" 2017 *Studia Migracyjne – Przegląd Polonijny* 71.
20 Goodwin-Gill "The politics of refugee protection" 2008 (27) *Refugee Survey Quarterly* 8.
21 As alluded to in Kayess & French "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" 2008 8 *Human Rights Law Review* 1-34; Ngwena "Disabled people and the search for equality in the workplace: An appraisal of equality models from a comparative perspective" unpublished PhD thesis University of Free State 2010.

General Assembly (UNGA) in 1948 is recognised as the first international human rights law instrument.[22] It provides that "all human beings are born free and equal in dignity and rights",[23] and establishes "a common standard of achievement for all peoples and all nations".[24] While the UDHR is a declaration and not a formal agreement, it is argued that it has assumed the position of *jus cogens* and therefore it is now binding due to its recognition as part of customary international law.[25] The UDHR, the International Covenant on Civil and Political Rights (ICCPR),[26] and the International Covenant on Economic Social and Cultural Rights (ICESCR),[27] together constitute the International Bill of Rights.[28] However, none of these instruments include disability within the list of protected groups.[29] It was not until 2006 that the UN adopted the CRPD as its first international human rights instrument addressing specifically the rights of PWDs.[30]

Moreover, United Nations (UN) has adopted specialised human rights conventions on behalf of other groups, including a specific convention on the rights of refugees.[31] Refugees with disabilities are thus at the meeting point of two main international human rights instruments, the 1951 Refugee Convention which has been in existence since the past six decades, and the CRPD. However, the CRPD signifies a momentous

22 Certain customs and principles have become so widely accepted that they have become binding as customary international law. To establish an international custom, the party must show a widespread practice by states of confirming to the alleged rule, together with evidence that states have followed this practice because they believe that they are under an obligation to do so. As such, customary human rights law may be found binding on all states without regard for whether a particular state has consented. It has been argued that the UDHR has assumed the position of a binding customary law. See, Hannum "The status of the Universal Declaration of Human Rights in national and international law" 1995 *Georgia Journal of International and Comparative Law* 287; Hunnan (ed) Guide to International Human Rights Practice (1999) 10; Addaney "A step forward in the protection of urban refugees: The legal protection of the rights of urban refugees in Uganda" 2017 *African Human Rights Law Journal* 218.

23 Universal Declaration of Human Rights, G.A. Res. 217A (111), U.N.Doc 810 at Preamble (1948).

24 Goodwin-Gill 8.

25 See, Hunnan *Guide to International Human Rights Practice* (1999) 10.

26 Adopted 16 December 1966 by United Nations General Assembly Resolution 2200A (XXI) and entered into force on the 3 of January 1976 in accordance with art 27.

27 ICCPR, Art 49.

28 Kanter "The Globalization of Disability Rights Law" 2003 (30) *Syracuse Journal of International Law and Commerce* 241.

29 See, Art 25 of the UDHR and art 12 of the IESCR refer to disability in connection to social security and health issues, not as a human right.

30 UN CRPD.

31 See, 1951 Refugees Convention; Convention on the Elimination of All Forms of Discrimination against Women, entered into force 3 September 1981; Convention on the Rights of the Child, entered into force 2 September 1990, https://treaties.un.org/doc/source/titles/english.pdf (last accessed 2019-04-08).

paradigm change in the understanding of PWDs as rights holders.[32] Responding to the intellectual and influences of the international disability rights movement, the CRPD discards the "medical/ welfare" model of disability which observes PWDs as "objects of charity, medical treatment and social protection".[33] Rather, the CRPD conceptualises PWDs as rights holders who can "claim those rights as active members of society".[34] Therefore, the CRPD indicates a revolutionary move towards acceptance of the "social" model of disability which recognises that a person's disability is formed more by society than by bodily impairment.[35] The CRPD provides that "persons with disabilities consist of those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[36] In this manner, the CRPD perceives disability from a social model of disability.

The enunciation in the ICCPR and ICESCR is the recognition of the "inherent dignity and the equal and inalienable rights of all members of the human family".[37] These guarantees, in essence, extend to refugees with disabilities since it has been observed that human rights responsibilities are owed regardless of whether an individual is a citizen of a state or not.[38] The General Comment No 31 on the nature of the general obligation imposed on states parties to the Covenant by the Human Rights Committee clarifies that "the enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons".[39] General Comment No15 on the position of aliens under the Covenant confirms that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity and irrespective of his or her nationality or statelessness".[40] These imply that the protection offered by the ICCPR and ICESCR covers refugees. This view is supported by well-established principles of treaty interpretation;[41] as the CRPD is premised on the

32 Umeh "Reading 'disability' into the non-discrimination clause of the Nigerian Constitution" 2016 *African Disability Rights Yearbook* 53; Ngwena "*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*: A case study of contradictions in inclusive education" 2013 *African Disability Rights Yearbook* 139.
33 Crock, Ernst & Mccallum 735.
34 Kayess & French 1.
35 Crock, Ernst & Mccallum 735.
36 CRPD, Art 1.
37 The preambles of the ICCPR and the ICESCR.
38 Crock, Ernst & Mccallum 740.
39 Human Rights Committee, "General Comment No 31", UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10.
40 Kayess & French 1.
41 Crock, Ernst & Mccallum 745.

principle of universality.[42] The CRPD "promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities".[43] The Preamble also recalls the "inherent dignity, worth and the equal and inalienable rights of all members of the human family", and further recognises that "everyone is entitled to all the rights and freedoms set forth in the UDHR without distinction of any kind".[44]

Article 11 affirms the provisions of the CRPD with the 1951 Refugee Convention by obliging States Parties to:

> "take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to protect persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."[45]

Without controversy, situations of risk include the three scenarios already argued that usually force people from their homes, producing refugee flows. Nevertheless, efforts to relate the protections of the CRPD to refugees will undoubtedly continue to face political resistance.[46] This is principally because of the current prevailing climate where asylum seekers are regarded as a burden on already overstretched economies and the adoption of tight border control mechanisms to stem the inflow of forced migrants.[47]

Furthermore, despite the relevance of the 1951 Refugee Convention, it applies only to PWDs who meet the definition of refugee provided in article 1A(2) of the Convention as modified by the 1967 Optional Protocol and the 1969 OAU (now AU) Refugee Convention.[48] For persons seeking asylum or resettlement, their ability to meet the definition remains critical. It is argued that at the most basic level, the cognitive impairments of a person can affect his or her ability to demonstrate fear or to articulate a claim of any kind.[49] Consequently, article 1A(2) of the 1951 Refugee Convention necessitates that a refugee's fear of persecution should be "well-founded". The term "well-founded fear" implies both subjective and objective elements such that asylum seekers must not only fear persecution but that the fear must be rational.[50] In practical terms, these elements pose challenges for refugees with

42 This principally relates to the idea of appropriating the fundamental requirements of dignity and equality to everyone irrespective of class, status or body characteristics.
43 CRPD Art 1.
44 CRPD *preamble* (a) and (b).
45 CRPD Art 11.
46 Crock, Ernst & Mccallum 755.
47 Crock, Ernst & Mccallum 755.
48 1969 OAU Convention.
49 1969 OAU Convention.
50 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992, rev edn) para 38–41.

disabilities including those whose refugee claims are not substantively related to their disability. Particularly, the need to demonstrate personal fear can be a challenge for refugees with mental or intellectual disabilities, who do not have the psychological or cognitive ability to appreciate the situations that are logically dangerous.[51] While some refugees with disabilities may be incapable of realising fear, others may hold fears that are forced by their mental or intellectual disability.

Addressing situations that involve refugees with disabilities requires the application of the principle of reasonable accommodation,[52] by the appropriate bodies to make suitable allowances for persons with disabilities. Where a person with an intellectual or mental disability is expressing a pathological fear, a sensitive approach needs to be taken in the application of the Convention's definition.[53] The starting point for analysing article 12 and article 13 should be that State parties to the CRPD are obliged under international human rights law to provide reasonable accommodation to persons with disabilities. Non provision of reasonable accommodation during the refugee status determination process and/or resettlement process of refugees with disabilities could constitute discrimination in view of the provisions of article 2 and 5.

Similarly, the rights of refugees and persons with disabilities are recognised and guaranteed by regional human rights instruments. As such, regional treaties have also been used as mechanisms to enforce human rights protection for refugees with disabilities. The African Charter on Human and Peoples' Rights (African Charter) is the fundamental mechanism of the African human rights system. It recognises and protects individual rights as well as peoples' rights including some socio-economic rights as well as civil and political rights.[54] The African Charter plainly emphasises that:

> "the virtues of the historical tradition and the values of African civilization should inspire and characterise the reflection on the concept of human and peoples' rights by recognising that fundamental human rights stem from the attributes of human beings, which justifies their international protection and as well as that the reality and respect of peoples' rights should necessarily guarantee human rights."[55]

Furthermore, the African Charter considers that the enjoyment of rights and freedom have implications on the performance of duties by everyone towards their family and society, the state and other legally

51 Crock & Berg *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (2011) 383.
52 CRPD Art's 5(3), 14(2), 18(2)(c), 18(5), 27(1)(i).
53 Crock, Ernst & Mccallum 758.
54 Van Reenen & Combrinck "The UN Convention on the rights of persons with disabilities in Africa: Progress after 5 years" 2011 *International Journal on Human Rights* 132.
55 African Charter *Preambular* para 4, 5.

recognised communities.[56] In these respects, the African Charter is in compliance with and complements the CRPD.[57]

Substantively, the African Charter provides for the right of everyone "to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status".[58] Clearly, it can be argued that refugees and PWDs fall under the "other status" category and thus enjoy the guarantee offered by this provision. Article 3 further provides that "every individual shall be equal before the law and shall be entitled to equal protection of the law".[59] In interpreting and applying this provision in the *Purohit and Another v The Gambia,* the African Commission on Human and Peoples' Rights (the African Commission) held that "articles 2 and 3 basically form the anti-discrimination and equal protection provisions of the African charter".[60] The African Commission further held that:

> "Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter."[61]

The implication of this interpretation is that refugees with disabilities are to enjoy all the rights recognised and protected under the African Charter. In addition, article 4 recognises that everyone is "entitled to respect for his life and the integrity of his person". Though not directly related to equal recognition and access to justice, this provision protects the core personhood and autonomy of an individual. The African Charter also guarantees that "every individual shall have the right to the respect of his dignity inherent in a human being and to the recognition of his legal status".[62] The African Commission has held that "human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination".[63] It has contended that human dignity is "an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right".[64] Article 13(3) of the African Charter further guarantees that "every individual shall have the right of access to public

56 African Charter *Preambular* para 6.
57 Van Reenen & Combrinck 133.
58 African Charter Art 2.
59 African Charter Art 3.
60 *Purohit and Another v The Gambia* 2003 AHRLR 96 (ACHPR 2003) 49.
61 *Purohit and Another v The Gambia*
62 African Charter, Art 5.
63 *Purohit and Another v The Gambia* para 57.
64 Van Reenen & Combrinck 133.

property and services in strict equality of all persons before the law".[65] Therefore, the African Charter guarantees the equality of all persons.[66]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) set out to adequately protect the rights of women in Africa.[67] Article 24(a) obliges States Parties to ensure the protection of some categories of women including those from marginalised population groups and to provide an environment suitable to their condition and their special physical, economic and social needs.[68] This provision is of critical importance to refugee women with disabilities because States Parties are to reasonably accommodate them at all levels of societal interactions. Significantly, States Parties are "to provide suitable legal and other remedies to any woman whose rights or freedoms, as herein recognised, have been violated".[69] Similarly, the AU (formerly OAU) in 1969 adopted a regional Convention governing the specific aspects of refugee problems in Africa (1969 OAU Convention). The 1969 OAU Convention's definition of a refugee is considered more inclusive and progressive than other regional conventions.[70] The 1969 OAU Convention obliges member states "to use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality".[71] While this provision is relevant in protecting the rights of refugees with disabilities in Africa, some states can exploit the excesses by adopting repressive laws to the contrary.[72]

Taking the discussion further, conceptually, scholars and practitioners have attempted to unpack the content of "equal recognition before the law" and "access to justice" as enshrined in articles 12 and 13 of the CRPD. Regarding equal recognition before the law, article 12(1) and (2) of the CRPD provides that:

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65 African Charter, Art 13(3).

66 African Charter, Art 19 provides that "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights". Nothing shall justify the domination of a people by another.

67 MS Nsibirwa "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women" 2001 (1) *African Human Rights Law Journal* 41.

68 Maputo Protocol Art 24(a).

69 Maputo Protocol Art 25(a).

70 The definition of refugee in art 1 of the 1969 OAU Convention incorporates the definition of the 1951 Convention by removing the temporal or geographic restrictions with further extension in the definition. Para 2 of art 1 provides that "[t]he term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

71 1969 OAU Convention Art 21(1).

72 Addaney 2017 *African Human Rights Law Journal* 218.

> "(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[73]

Although it has been argued that article 12 is the most contentious, it is also the most important and "revolutionary" provision in the Convention.[74] The revolution of article 12 rests in its acknowledgment that all persons with disabilities possess legal capacity and have the right to exercise it on an equal basis. Primarily, this provision is a complete shift from substituted decision-making to supported decision-making.[75] It symbolises "the legal aspects of living independently, exercising autonomy and having the freedom to make one's own choices".[76] Arguably, legal capacity implies legal autonomy, which is the right to make one's own choices. Schulze argues that legal capacity as used in the CRPD envelops all aspects of the capacity to act, which is the right to exercise his or her capacity in all aspects of life such as civil, criminal, as well as public.[77] Crucially article 12(3) of the CRPD obliges state parties to provide access to the support that persons with disabilities may require in exercising their legal capacity. Legal capacity is not defined in the Convention. However, legal capacity has been conceptualised as how we give effect to our preferences and choices in the real world.[78] In effect, legal capacity consists both of the recognition of a person as a right holder and the ability to exercise those rights. It can therefore be argued that enjoyment of legal capacity under article 12 is a "prerequisite for the equal enjoyment of all the other rights enshrined in the CRPD especially article 13 (the right to access to justice)".[79]

On access to justice, article 13(1) of the CRPD provides that:

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73 CRPD Art 12(1) and (2).

74 Minkowitz "The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from non-consensual psychiatric interventions" 2007 *Syracuse Journal of International Law and Commerce* 405.

75 Zinkler "Supported decision-making in the prevention of compulsory interventions in mental health care" 2019 *Front Psychiatry* 137; Szmukler "Capacity", "best interests", "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities" 2019 *World Psychiatry* 34.

76 M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities*: *A Handbook on the Human Rights of Persons with Disabilities* (2009) 60.

77 Schulze 63.

78 Pearl "Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?" 2013 *Leeds Journal of Law and Criminology* 11.

79 Gombos, Benkó B & Kovács "Written submission on the right to equal recognition before the law: Based on the case of Hungary" Submitted to the Committee on the Rights of Persons with Disabilities by the Mental Disability Advocacy Centre and the Hungarian Association for Persons with Intellectual Disability" (2009) 14, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DayGeneralDiscussion21102009.aspx (last accessed 2019-04-08).

> "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."[80]

The inclusion of access to justice in article 13 of the CRPD is a substantiation that persons with disabilities face challenges in accessing legal representation, resources as well as protection. The meaning of the term "justice" can vary between regions, countries and cultures. However, the idea of justice is common to all and generally includes concept of fairness, accountability and equity of outcome. Therefore, "access to justice" encompasses people's effective admission to the recognised and unofficial systems, procedures, information as well as locations used in the administration of justice. Bowd posits that "access to justice" encompasses the fairness with which litigants are treated, the justness of results delivered, the speed with which cases are processed, and the responsiveness of the system to those who use it".[81] He further asserts that access to justice broadly means the equity with which those from differing backgrounds are able to gain from the justice delivery system.[82] Beyond seeking legal protection or remedies, there are numerous ways in which individuals can participate in the justice system including being judges, witnesses, jurors, and lawyers. In addition one may serve as a defendant in a civil or administrative case.[83] Larson observes that challenges such as stereotyping in the refugee status determination and resettlement processes in particular exacerbate these disadvantages for persons with disabilities.[84]

Despite the recognition and protection offered in these international treaties, several barriers can be faced in terms of a country's institutional structure for administering justice such as poor law enforcement and ineffective court systems. Bhabha opines that these are often complex, involving combined forms of inaccessibility and other types of discrimination.[85] The implications of such barriers are significant in the case of refugees with disabilities as lack of access to justice can compound the disadvantages they face, leaving them unable to protect their rights and at risk of ongoing abuse including physical and sexual violence.

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80 CRPD Art 13(1).

81 Bowd *Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia* (2009) 1.

82 Bowd *supra*.

83 Lord, Guernsey, Balfe, Karr, De Franco & Flowers, *Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities* (2009) 8.

84 Larson "Access to justice for persons with disabilities: An emerging strategy" 2014 *Laws* 220.

85 Bhabha "Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Potential" 2009 *South African Journal of Human Rights* 218.

3 Measuring up to the CRPD: access to justice and legal capacity of refugees with disabilities

Ghana and Uganda have committed to protect the rights of PWDs and refugees by ratifying the relevant international and regional human rights instruments. These include the 1951 Refugee Convention;[86] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);[87] the ICCPR;[88] the ICESCR,[89] and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).[90] Furthermore, these countries have both signed and ratified the Convention on the Rights of the Child (CRC),[91] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW),[92] and the CRPD.[93] At a regional level, these countries have signed and ratified the African

86 Ghana acceded to the 1951 Convention on 18 March 1963 (Optional Protocol on 30 August 1968); Uganda acceded to the 1951 Convention and its Optional Protocol on 27 September 1976, http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (last accessed 2019-06-08).

87 Ghana signed and the CERD on 8 September 1966; Uganda signed and ratified on 21 November 1980; https://treaties.un.org/pages/ViewDetails.aspx?src = TREATY&mtdsg_no = IV-2&chapter = 4&lang = en (last accessed 2019-06-08).

88 Ghana signed and ratified on 7 September 2000; Uganda signed and ratified on 21 June 1995, https://treaties.un.org/pages/ViewDetails.aspx?src = IND&mtdsg_no = IV-4&chapter = 4&lang = en (last accessed 2019-06-08).

89 Ghana signed and ratified on 7 September 2000; Uganda acceded on 21 January 1987, https://treaties.un.org/Pages/ViewDetails.aspx?src = IND&mtdsg_no = IV-3&chapter = 4&lang = en (last accessed 2019-06-08).

90 Ghana signed the CEDAW on 17 July 1980 and ratified on 2January 1986; Uganda signed on 30 July 1980 and ratified on 22 July 1985, https://treaties.un.org/Pages/ViewDetails.aspx?src = TREATY&mtdsg_no = IV-8&chapter = 4&lang = en (last accessed 2019-06-08).

91 Ghana signed the CRC on 29 January 1990 and ratified on 5 February 1990; Uganda signed and ratified on 17 August 1990, https://treaties.un.org/pages/viewdetails.aspx?src = treaty&mtdsg_no = iv-11&chapter = 4&lang = en (last accessed 2019-06-08).

92 Ghana signed and ratified on 7 September 2000; Uganda acceded to it on 14 November 1995, https://treaties.un.org/Pages/ViewDetails.aspx?src = IND&mtdsg_no = IV-13&chapter = 4&clang = _en (last accessed 2019-06-08).

93 Ghana signed the CRPD on 30 March 2007 and ratified on 31 Jul7 2012; Uganda signed on 30 March 2007 and ratified on 25 September 2008, https://treaties.un.org/Pages/ViewDetails.aspx?src = TREATY&mtdsg_no = IV-15&chapter = 4&clang = _en (last accessed 2019-06-08).

Charter,[94] its Maputo Protocol,[95] the African Charter on the Rights and Welfare of Children (the African Children's Charter)[96] and the 1969 OAU Refugee.[97] Their respective Constitutions, along with several laws, subsidiary legislation and policies, relate to the rights of PWDs and refugees. However, similar to other countries in Africa, these countries are faced with challenges in the domestication and application of the CRPD as emphasised by Mgijima-Konopi that "most African countries face significant challenges in formulating, domesticating and implementing disability rights to make the rights guaranteed in the CRPD a reality for persons with disabilities on the continent".[98] Consequently, the relevant national legislation and policies of Ghana and Uganda are discussed below in relation to article 12 and article 13 of the CRPD.

3 1 Equal before the law? achieving social justice for refugees with disabilities in Ghana

In Ghana, there were over 18 457 persons of concern to UNHCR by the end of June 2016, comprising of 16 409 refugees and 2 048 asylum-seekers from about 25 different countries.[99] The UNHCR in Ghana prioritises mainstreaming access to basic social services for refugees into the national system and securing durable solutions for refugees.[100] Most of the refugees have been in Ghana for over five years, with the latest influx being that of Ivorian Refugees in 2011; other refugee groups arrived mostly in the 90s or early 2000s.[101] Therefore, finding durable

94 Ghana deposited on 3 March 1989, ratified on 24 January 1989 and signed on 3 July 2004; Uganda deposited on 27 May 1986, signed on 18 August 1986 and ratified on 10 May 1986, http://www.achpr.org/instruments/achpr/ratification/ (last accessed 2019-06-08).

95 Ghana signed on 31 October 2003, ratified on 13 June 2007 and deposited on 20 July 2007; Uganda signed on 18 December 2003 and ratified and deposited on 22 July 2010, http://www.achpr.org/instruments/women-protocol/ratification/ (last accessed 2019-06-08).

96 Ghana signed on 18 August 1997, ratified on 10 June 2005 and deposited on 15 July 2005; Uganda signed on 26 February 1992, ratified on August 1994 and deposited on 21 October 1994, http://www.achpr.org/instruments/child/ratification/ (last accessed 2019-06-08).

97 Ghana signed on 10 September 1969, ratified on 19 June 1975 and deposited on 18 August 1983; Uganda signed on 10 October 1969, ratified on 24 July 1987 and deposited on 7 August 1987, http://www.achpr.org/instruments/refugee-convention/ratification/ (last accessed 2019-06-08).

98 Mgijima-Konopi "The Jurisprudence of the Committee on the Rights of Persons with Disabilities and its Implications for Africa" 2016 *African Disability Rights Yearbook* 269.

99 United Nations Office in Ghana "Refugees" http://gh.one.un.org/content/unct/ghana/en/home/our-work/cross-cutting-themes/refugees.html (last accessed 2019-06-08).

100 United Nations Office in Ghana "Refugees" http://gh.one.un.org/content/unct/ghana/en/home/our-work/cross-cutting-themes/refugees.html (last accessed 2019-06-08).

101 UNHCR "UNHCR in Ghana: Protection and Solutions Strategy" Briefing note, August 2016, http://gh.one.un.org/content/dam/unct/ghana/docs/Agencies%27%20Publications/UNHCR/UNCT-GH-UNHCR-Ghana-Briefing-Notes.pdf (last accessed 2019-06-08).

solutions is of utmost importance to allow refugees to acquire or re-acquire the full protection of the State. The 1992 Constitution of Ghana (the 1992 Constitution),[102] along with other subsidiary legislation and policies, relates to the rights of refugees with disabilities in Ghana. Amongst them, the most relevant are the 1992 Constitution, the Refugee Law of 1992 and the Persons with Disability Act of 2006. After decades of political crises and frequent military takeovers, the Provisional National Defence Council of Ghana promulgated a new Constitution in 1992,[103] which was later amended in 1996.[104] The 1992 Constitution was enacted and adopted as a "framework of government which shall secure for current generation and posterity the blessings of liberty, equality of opportunity and prosperity" and "in a spirit of friendship and peace with all peoples of the world".[105] It declares and affirms the commitment to "freedom, justice, probity and accountability".[106] The Bill of Rights guarantees the basic human rights and freedoms that must be respected and upheld by all organs of state, all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided in the Constitution.[107]

Article 17 of the Constitution further guarantees everyone's "equality and freedom from discrimination"[108] and provides that "a person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status".[109] However, article 17 does not recognise disability as a protected ground of discrimination, rather article 29 seems to reflect disability related principles by providing for the protection of the rights and welfare of PWDs in Ghana. It guarantees that "disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature".[110] It also provides that "in any judicial proceedings in which a disabled person is a party, the legal procedure applied shall take his physical and mental condition into account".[111] As already argued, the fundamental rights guaranteed in the Constitution are to be upheld by all state agencies and natural persons. Therefore, courts and all administrative tribunals dealing with refugee protection issues are obliged to comply with this constitutional imperative. This call is influenced by the development of disability laws and policies in Ghana, especially article 8 which mandates parliament to enact such laws as are necessary to ensure the enforcement of the guarantees enshrined in article 29.[112] In addition, the Directive Principles of State Policy "guide

102 Constitution of the Fourth Republic of Ghana (Promulgation) Law of 1992.
103 Constitution of Ghana.
104 Constitution of the Republic of Ghana (Amendment) Act of 1996.
105 Constitution of Ghana *preamble* para 1 and 2.
106 Constitution of Ghana *preamble* para 3.
107 Constitution of Ghana *preamble* Art 12(1).
108 Constitution of Ghana *preamble* Art 17.
109 Constitution of Ghana *preamble* Art 17(2).
110 Constitution of Ghana Art 29(4).
111 Constitution of Ghana Art 29(5).
112 Constitution of Ghana Art 29(8).

all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society".[113]

In 1992 Ghana adopted the Refugee Law which recognises the 1951 UN Refugee Convention, the 1967 Protocol and the 1969 OUA Refugee Convention and recalls that "it is necessary to give effect to these Conventions and Protocol in order that the provisions of these instruments shall have the force of law in Ghana".[114] Different from other refugee laws on the continent, article 11 of the Refugee Law contains the rights and duties of a refugee, and provides that, "a person granted refugee status in Ghana shall be entitled to the rights and be subject to the duties specified in the 1951 Refugee Convention, its 1967 Protocol as well as the 1969 OAU Refugee Convention".[115] These Conventions are attached as a Schedule to the Law. This is innovative as refugees in Ghana are entitled to all the rights enshrined in these treaties. Part 2 of the Law, establishes a Refugee Board (the Board).[116] The Board is mandated to perform *inter alia* the following duties:

> "(a) receive and consider applications for refugee status; (b) recognise any person or group of persons as refugees for the purposes of this Law; (c) register and keep a register of persons recognised as refugees under this Law; (f) endeavour to ensure the provision of adequate facilities, advice and services for the reception and care of refugees in Ghana; (h) advise the Secretary on all matters relating to refugees."[117]

This provision is significant because it meets international refugee protection standards. Jastram and Achiron observe two conditions that states must meet to effectively protect the rights of refugees.[118] The first is adopting domestic refugee legislation and policies that are compliant with international standards to provide a basis for the protection of refugees. The second is integrating international human rights laws into domestic legislation, specifically in critical areas where the 1951 Refugee Convention and the 1969 OAU Refugee Convention are silent.[119] Meeting these criteria would require states to institute an expert body to examine asylum applications to guarantee the availability of procedural safeguards at various levels and to speed up the process.[120]

113 Constitution of Ghana Art 34(1).
114 Refugee Law of Ghana, *Preamble* para 3.
115 Refugee Law Art 11.
116 Refugee Law Art 4.
117 Refugee Law.
118 Jastram & Achiron "Refugee protection: A guide to international refugee law" (2001) http://www.ipu.org/pdf/publications/refugee_en.pdf (last accessed 2019-04-08).
119 Jastram & Achiron *supra*.
120 UNHCR *The 1951 Convention and its 1967 Protocol: The legal framework for protecting refugees* (2010) 2.

Regarding the protection of PWDs, the Persons with Disability Act of Ghana,[121] was enacted in 2006. It has eight parts. Part 1 sets out the "general" rights of PWDs *to inter alia* include family life and social activities, freedom from exploitation and discrimination as well as accessibility of both public places and services.[122] Part 2 sets out the rights relating to employment and rehabilitation.[123] Part 3 provides for the rights to education and training.[124] Part 4 sets out the rights relating to transportation.[125] Part 6 provides for the right to healthcare.[126] However, there is no provision for equal legal capacity in the Act. The Act is silent on the concept of equal legal capacity for PWDs and most importantly, it does not provide a definition for disability. Thus, this weakens the application and enforcement of the Act.

In instances where a PWD is a party to judicial proceedings, article 5 provides that "the adjudicating body shall take into account the condition of the PWD and provide appropriate facilities that enable the person with disability to participate effectively in the proceedings". Though this provision seems to comply with articles 2, 12 and by extension article 13 of the CRPD, the concepts of "reasonable accommodation", "legal capacity" and "access to justice" are not specifically defined. Therefore, there is a lack of clarity on the application of article 5 of the CRPD. However, the Parliament of Ghana having ratified the UNCRPD on 12 March 2012,[127] Ghana is consequently obligated to submit regular reports to the Committee on the Rights of Persons with Disabilities (CRPD) reporting on the legislative, judicial, policy and other measures being undertaken to domestically implement the rights affirmed in the Convention. These reports should particularly indicates the measures being taken in promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.[128] Ghana's first report should have been submitted in 2014 (two years after ratification). However, due to implementation challenges, Ghana was only able to submit the report in June 2018. According to the report, citing the 2010 Population and Housing Census organised by the Ghana Statistical Service, three percent of Ghanaians (737 743) were classified as People with disabilities.[129]

121 Persons with Disability Act of Ghana (Act 715) of 2006.
122 Disability Act Art 1-8
123 Disability Act Art 9-15.
124 Disability Act Art 16-22.
125 Disability Act Art 23-30.
126 Disability Act Art 31-35.
127 See, Status of ratification of CRPD, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (last accessed 2019-06-08).
128 Ministry of Gender, Children & Social Protection of Ghana (MGCSP), United Nations Convention on the Rights of Persons with Disabilities: Ghana's Initial State party Report, CRPD/C/GHA/1, 5 June 2018, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGHA%2f1&Lang=en (last accessed 2019-06-08).
129 MGCSP *Ghana's Initial State party report* 2018.

The challenges identified in the report include the exclusion of specific measures taken by the state targeting refugees with disabilities; making refugees with disabilities experience multiple forms of discrimination. There was also no statistics on refugees with disabilities in Ghana in the report. Arguably, the state has made a lot of efforts in promoting and protecting the rights of persons with disabilities. However, the initial country report concluded that although "the laws of Ghana gives recognition to every citizen irrespective of one's socio-economic status, due to inadequacy of appropriate and accessible forms of communication and inaccessible physical structures, persons with disabilities do not enjoy equal recognition before the law."[130] In order to domesticate the Convention, the report revealed that the Persons with Disability Act 715 of 2006 was being reviewed to comply with the provisions of the CRPD.[131] The CRPD Committee is yet to issue a concluding observation on Ghana's initial country report.

3 2 Hidden and forgotten: Securing justice for refugees with disabilities in Uganda

Uganda has an estimated 1.277 million refugees and asylum seekers.[132] After decades of political and constitutional volatility, the Constituent Assembly of Uganda promulgated a new Constitution in 1995, which was later amended in 2005.[133] One of the principal objectives of the new Constitution is strengthening the framework for protecting and preserving fundamental human rights and freedoms.[134] Towards the realisation of this objective, Chapter IV contains a Bill of Rights, which guarantees the basic human rights and freedoms that must be respected and upheld by all organs of state, private entities and individuals alike.[135] It declares that the fundamental rights and freedoms of the individual are inherent and not granted by the State.[136] The equality clause includes an anti-discrimination provision which specifically lists disability as a prohibited ground of discrimination.[137] Article 45 of the Constitution provides that "the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically provided under the Bill of Rights shall not be regarded as excluding others not specifically mentioned".[138] The implication of this provision is that the human rights protected in international and regional instruments ratified by Uganda cannot be debarred from the rights

130 MGCSP *Ghana's Initial State party report* 40.
131 MGCSP *Ghana's Initial State party report* 18.
132 World Bank and UNHCR "Refugee Agency: An Assessment of Uganda's Progressive Approach to Refugee Management" http://www.regionaldss.org/sites/default/files/Uganda-%20Approach%20to%20Refugee%20Management%20Final%20Report.pdf (last accessed 2019-06-08).
133 Preamble Ugandan Constitution.
134 Preamble Ugandan Constitution.
135 Ugandan Constitution Art 21(2).
136 Ugandan Constitution Art 20.
137 Ugandan Constitution Art 21(2).
138 Ugandan Constitution Art 45.

guaranteed in the Bill of Rights.[139] However, the inspiring international legal and regional framework has not always translated into respect for the human rights of refugees in general and refugees with disabilities in particular. For instance, gross human rights violations such as arbitrary detention and the use of torture by the government have been continually observed over the last decade.[140] Although human rights have received at least some legislative attention since Uganda's independence, "the specific rights of refugees have been neglected notwithstanding the country's long history as a refugee-hosting nation".[141]

Even though the rights of refugees are not explicitly guaranteed like that of PWDs,[142] the Bill of Rights specifies a wide ranging set of human rights. Article 21(1) provides that "all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".[143] In addition to the Bill of Rights, "the National Objectives and Directive Principles of State Policy", comprise of principles that are intended to direct all organs and agencies of the State including citizens and all other bodies and persons in applying or interpreting the Constitution or any other law and in implementing policy decisions. The Directive Principles specify that society and the state are to recognise the right of persons with disabilities to respect and human dignity.[144] The Directive Principles further direct that the state must advance the development of sign language for the Deaf.[145] However, the Directive Principles are only directive and not justiciable.

Uganda has also developed the Persons with Disabilities Act of 2006 (PDA). The Act was enacted in 2006 as the primary disability legislation in Uganda.[146] This Act provides for legal protection and equal opportunities for persons with disabilities and vulnerable groups in accordance with articles 32 and 35 of the Constitution.[147] Equal opportunity in its widest sense covers the provisions of articles 12 and 13 of the CPRD. The PDA predates the adoption of the CRPD. However, the philosophy and international change in attitudes towards persons with

139 See, Addaney 2017 *African Human Rights Law Journal* 218-243.
140 Human Rights Watch "Uganda: Kenyan activists at risk of torture" Press Release http://www.hrw.org/en/news/2010/09/16/uganda-kenyan-activists-risk-torture (last accessed 2019-06-08); Addaney "Enhancing the protection space for refugees in Kenya and Uganda" 2016 *Africa Policy Journal* 71.
141 Addaney 2017 *African Human Rights Law Journal* 220: Sharpe & Namusobya "Refugee status determination and the rights of recognized refugees under Uganda's Refugees Act 2006" 2012 *International Journal of Refugee Law* 563.
142 Ugandan Constitution Art 32-35.
143 Ugandan Constitution Art 21(2).
144 Ugandan Constitution Principle XVI.
145 Ugandan Constitution Principle XXIV.
146 Act 20 of 2006.
147 Articles 32 and 35 of Ugandan Constitution provide for Affirmative action for marginalised groups and Rights of persons with disabilities respectively.

disabilities that was later reflected in the CRPD, appears to have influenced the drafting of the text to a large extent. For example, the objectives of the PDA *inter alia* include:

> "the promotion of dignity and equal opportunities to PWDs, encouraging the people and all sectors of government and society to recognise, respect and accept difference and disability as part of humanity and human diversity and promoting a positive attitude and image of persons with disabilities as capable and contributing members of society".[148]

In addition, the Act makes provision for a redress mechanism in Part VIII,[149] and makes provision for offences and penalties in Part IX.[150] The PDA makes it an offence for any person to contravene, or to aid another person to contravene, any of its provision and a conviction attracts a fine.[151] Though the PDA imposes obligations on the State, it has been criticised for its "cautious approach" of using the language of human rights in a minimalist approach.[152] In addition, some practical problems have surfaced since the enactment of the Act. The most disturbing one is a disagreement between the Ministry of Justice and the National Union of Disabled People of Uganda concerning the justiciability of the legislation.[153] The Ministry maintains that the language of the PDA is "aspirational" and therefore not enforceable whereas, it is considered that since the legislation derives its validity from the Constitution of Uganda, questions regarding its justifiability or otherwise have to be resolved in line with the Constitutional imperatives.

In addition, the 2006 Ugandan Refugee Act (Refugee Act)[154] provides that refugees shall be entitled to all rights contained in all international laws that Uganda has ratified. This implies that refugees have access to the courts of law and legal assistance under the applicable laws of Uganda.[155] This means that by virtue of the section 29 (1) (h) of the Refugee Act, refugees with disabilities also enjoy this right. The practice is that there is no special attention accorded to refugees with disabilities. Refugees with disabilities are still socially excluded, compared to their counterparts who are not disabled.[156] The laws are general and do not explicitly mention either refugees or PWDs.[157] Furthermore, there are practical challenges associated with identifying and recording the

148 PDA Art 3.
149 PDA Art 41.
150 PDA Art 43.
151 PDA Art 43(1) and (2).
152 Mbazira *Enforcing the Rights of Persons with Disabilities to Have Access to a Barrier-Free Physical Environment in Uganda: Is Litigation an Option? Kampala: Legal Action for Persons with Disabilities* (2009) 14.
153 Human Rights Watch *As if We Weren't Human: Discrimination and violence against women with disabilities in Northern Uganda* (2010) 65.
154 The Refugee Act of Uganda (Act 21) 2006, Art 29(1)(h).
155 Refugee Act Art 28 and 29(1)(h).
156 Crock M *et al.* "Protection of Refugees with Disabilities: Uganda Fieldwork Report" 2013 http://blogs.usyd.edu.au/refugees-disabilities/ (last accessed 2019-06-08).
157 Ugandan Constitution Art 21(2).

specific disabilities especially those of refugees. Most of these people, specifically those with hearing, visual and mental disabilities go unidentified or even when identified, there are no special provisions in the existing refugee or persons with disabilities laws.[158] The implementation of the law is also a problem, especially the procedure for applying for refugee status. Article 19 of the Refugee Act provides that after an application has been lodged by an asylum seeker, the Eligibility Committee shall take a decision and inform the applicant within 14 days. However, in practice, it takes longer and sometimes over a year before a decision is taken.[159]

In updating the CRPD Committee on measure being undertaken by the government of Uganda in implementing the Convention, the State party report,[160] underscored article 11 of the Ugandan Constitution in relation to situations of risk and humanitarian emergencies. The government of Uganda reiterated that, under the Constitution of Uganda, article 35 prohibits discrimination against persons with disabilities and clarified that this prohibition logically extends to situations of risk including armed conflict, humanitarian emergencies and the occurrence of natural disasters as required by article 11 of the Convention.[161] On access to justice, as provided in article 13 of the CRPD, the government of Uganda contended that the various entities of the justice system including police and courts are covered by the provisions of Part V of the Persons with Disabilities Act.[162] The report further clarified that section 25 of the Act prohibits such entities to exclude a person with disability from accessing the services, including by refusing to provide the service to the person or by making it impossible or unreasonably difficult for the person to use the service.[163] In addition, the report contended that the Act provides positive duties for service providers, both in terms of physical accessibility of the service as well as a duty to provide auxiliary aid or services to enable a person with a disability to use the service.[164]

In its concluding observations relating to Uganda's initial state party report, the CRPD Committee commended the measures taken by the State to promote the rights of persons with disabilities.[165] Regarding equality and non-discrimination in article 5 of the CRPD, the CRPD Committee was concerned about persisting discrimination against persons with disabilities, including in particular persons with albinism, persons with intellectual and/or psychosocial disabilities, and on other grounds as well the insufficient legal remedies to protect them against

158 Crock *et al*. *supra*.
159 Crock *et al*. *supra*.
160 CRPD: Uganda's Initial State party Report, CRPD/C/UGA/1, 10 March 2015, 21-22.
161 CRPD: Uganda's Initial State party Report.
162 CRPD: Uganda's Initial State party Report para 111.
163 CRPD: Uganda's Initial State party Report para 111.
164 CRPD: Uganda's Initial State party Report para 111
165 CRPD, Concluding observations on the initial report of Uganda, CRPD/C/UGA/CO/1, 12 May 2016.

such discrimination.[166] It was further concerned about the non-recognition of reasonable accommodation in the legislation of the State party. The CRPD Committee consequently recommended to the State party to among others:

> "(a) Provide for legal protection against disability-based discrimination and multiple and intersectional forms of discrimination faced by persons with disabilities; (b) Incorporate the concept of reasonable accommodation in its legislation as defined in article 2 of the Convention and recognize the denial of reasonable accommodation as a form of discrimination based on disability".[167]

Concerning situations of risk and humanitarian emergencies in article 11 of the CRPD, the Committee was concerned about "the absence of specific provisions for refugees with disabilities in Northern Uganda through the Peace, Recovery and Development Plan."[168] The Committee thus recommended that the State party should "monitor, in close consultation with organizations of persons with disabilities, the implementation of the Peace, Recovery and Development Plan to ensure that the requirements of persons with disabilities, including refugees with disabilities, are addressed in the post-conflict districts of Northern Uganda."[169] These recommendations by the Committee when fully addressed by the government of Uganda will go a long way in addressing most of the challenges faced by refugees with disabilities in that country especially in accessing justice during the status determination and resettlement processes.

4 Conclusion

This paper examined the normative content of article 12 (equal recognition before the law) and article 13 (access to justice) of the CPRD to ascertain how these provisions have influenced domestic disability and refugee law, policy and practice in Ghana and Uganda. Although it underscores the significance of enacting disability specific legislation as one of the most appropriate measures for implementing disability rights,[170] it however observed that just affording equal recognition to PWDs in national constitutions and/or legislation will not in itself guarantee their protection. The paper revealed that while the CRPD has inspired national disability frameworks, little explicit provision in domestic refugee protection systems has been made for the rights of refugees with disabilities, especially the right to equal recognition before the law as well as the right to access to justice. Consequently, refugees with disabilities continue to encounter many difficulties in seeking the

166 CRPD, Concluding observations on the initial report of Uganda para 8.
167 CRPD, Concluding observations on the initial report of Uganda para 9(a)(b) and (c).
168 CRPD, Concluding observations on the initial report of Uganda para 20(b).
169 CRPD, Concluding observations on the initial report of Uganda para 21(c).
170 CRPD Committee *Guidelines on treaty-specific document* (2009) Annex para A3 2(b).

protections accorded to them by the Refugee Convention. The paper therefore argues that for refugees with disabilities to effectively go through refugee status determination and resettlement processes, States must adopt a number of positive measures to overcome the obstacles that may prevent them from successfully going through these processes. Addressing this gap requires the incorporation of articles 12 and 13 of the CRPD into national refugee protection regimes. This will provide refugees with disabilities with legitimate human rights claims, useful for engaging state institutions constructively. This will ensure the construction of enabling disability laws and policy frameworks that have the potential to promote and protect the rights of refugees with disabilities.

South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?

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SUMMARY

In late 2015, the South African government terminated all bilateral investment treaties it had signed with European countries and promulgated the Protection of Investment Act. Among the changes to the country's foreign investment regime introduced by the new Act is the removal of international investment arbitration at the International Centre for the Settlement of Investment Disputes (ICSID). An overview of recent developing-world trends points to an eagerness to facilitate a better balance between foreign investors' interests and those of the host state. In most instances, this is done by introducing domestic courts and tribunals as both first and last resort for foreign investment disputes. Against this backdrop, South Africa's move away from investor-state dispute settlement was not completely unexpected. Questions can however be raised as to whether this is an outright rejection of investor-state dispute settlement, without first establishing some sort of alternative capacity-wise. The article concludes that, in resource-constrained times, it might have been more prudent to safeguard valuable inflows of investment and resist scrapping investor-state dispute settlement in its entirety, at least until workable alternatives – such as the creation of a regional, custom-made investment arbitration system – have been secured.

1 Introduction

A provision relating to the settlement of investment disputes constitutes a key component of any bilateral investment treaty (BIT) between a host nation and foreign investor,[1] guaranteeing the investor access to a neutral forum for the resolution of any potential investment disputes with the host state.[2] The creation of the International Centre for the Settlement of Investment Disputes (ICSID) in 1966 provided such an independent dispute settlement forum, and offered foreign investors a guarantee that their investments would not be subjected to the political pressures of adjudication in host nations' national courts.[3]

1 Sornarajah *The International Law on Foreign Investment* (2010) 216.
2 Sornarajah 217.
3 *Gas Natural SA v The Argentine Republic* ICSID Case No ARB/03/10 para 29.

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Established by the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States (or the "ICSID Convention"), the ICSID has been widely accepted as the world's leading depoliticised institution devoted to international investment dispute resolution. As such, states worldwide have agreed to abide by its jurisdiction in their international investment treaties, investment laws and contracts,[4] – even countries such as South Africa, which was not a party to the ICSID Convention.[5] With the boom in BITs in the 2000s, it seemed settled that the ICSID would only grow in membership and reach.[6]

Things have however taken a surprising turn. In the past few years, some states have expressed dissatisfaction with the way in which the ICSID settles disputes, and have consequently taken a step back from international arbitration. This has seen nations such as Ecuador, Australia, Venezuela and Indonesia withdrawing from the provisions on investor-state dispute settlement in their BITs.[7] Equally unhappy with the rulings of the ICSID, the South African government too resolved to move away from international investment arbitration. Therefore, the central factor in government's decision to terminate its BITs was the matter of *Piero Foresti, Laura de Carli v Republic of South Africa*.[8] The case was the first time that the South African government had been put under the test about its policies and how they relate to investment.

Importantly, the *Foresti* case was the second case against the South African government under the international investment law. The first had been one raised by a Swiss citizen claim that South Africa had failed to provide protection and security under the Swiss-RSA BIT. This international arbitration case against South Africa was initiated in 2003 under the Swiss-South Africa investment treaty. The case involved a private game lodge and farm in the North-eastern part of South Africa that a Swiss investor acquired during apartheid years, and substantially improved. In this case, the foreign investor's property was vandalised by protests and destroyed by South African nationals. Consequently, the Swiss investor took the South African government to international Arbitration. Claimants alleged that South Africa had violated the Full Protection and Security. The South African government was found to

4 International Center for Settlement of Investment Disputes World Bank Group available at https://icsid.worldbank.org/en/Pages/process/Other-ADR-Mechanisms.aspx (accessed 2018-01-22).

5 *Piero Foresti, Laura de Carli v Republic of South Africa* ICSID Case No ARB(AF)/07/1.

6 Schlemmer "An overview of South Africa's bilateral investment treaties and investment policies" 2016*ICSID Review - Foreign Investment Law Journal* 167.

7 Olivet "Why did Ecuador leaves its bilateral Investment Treatie?" available at https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties (accessed 2019-01-22).

8 *Piero Foresti, Laura de Carli v Republic of South Africa supra*.

have breached its obligation to protect and secure the Swiss investor, and an award was rendered against South Africa.[9]

Therefore, government's decision to review its policy was triggered by the 2010 *Foresti* case and Swiss-Investor, in which South Africa was sued by a group of Italian investors who were challenging the country's black economic empowerment legislation. Having terminated some of its existing BITs, the country promulgated the new Protection of Investment Act 22 of 2015.[10] In their assessment of their risk and benefits associated with BITs, the government found that the international investment regime mainly focused on narrow issues of economic interests, while matters of national interests were exposed to unpredictable system of international arbitration, which undermined the constitutionality of the state and its space to determine domestic policy. The government noted that the proponents tended to argue BITs encourage investment and strengthen the rule of law particularly in jurisdictions where the court systems are weak or biased against a foreigner. In the government's perspective, such position is contested. It also argued that there is no correlation between FDI inflows and signing of the BITs. The Protection of investment Act came into effect under the guidance of President Cyril Ramaphosa in July 2018. Amongst others, the Protection of Investment Act provides for a mediation and arbitration process that is to be facilitated by the South African Department of Trade and Industry, and expresses a clear preference for domestic courts as a forum for resolving investor-state disputes.[11]

This decision by the South African government to move away from the established investor-state dispute settlement system in the form of the ICSID has come under fierce criticism,[12] and raises a number of critical questions about the direction in which government has opted to steer its foreign investment law. Firstly, it raises questions about foreign investors' confidence in the settlement of investment disputes through the as-yet untested means of mediation and arbitration facilitated by the Department of Trade and Industry. Secondly, the South African courts' suitability for the settlement of investment disputes is called into question, with concerns expressed that the courts may struggle to uphold foreign investors' private property rights in the face of the social and public-interest realities of South Africa. Finally, questions are being asked about whether South Africa's departure from the ICSID should be regarded as a pioneering move that may help set new standards for

9 Schlemmer 2016*ICSID Review - Foreign Investment Law Journal* 168.

10 The government terminated BITs with the following countries the UK, the Netherlands, Switzerland, Germany, France, Cuba, Denmark, Australia, Italy, Sweden, Argentina, Finland, Spain & Greece, as well as Belgium-Luxembourg Economic Union.

11 The Protection of Investment Act 22 of 2015.

12 Gazzini "Rethinking the Promotion and Protection of Investment: The 2015 South Africa's Investment Act" available at https://dx.doi.org/10.2139/ssrn.2960567 (accessed 2018-01-22).

developing countries' approach to foreign investors and investment arbitration.

This contribution aims to assess whether the investor-state dispute settlement system of the ICSID is a system worth preserving, or whether opting for local mediation procedures, exhaustion of local remedies before resorting to ICSID, revitalising the SADC Tribunal, dispute settlement in domestic courts, may be a better alternative, particularly for emerging economies in the African continent. Since ICSID arbitration still accounts for most of the treaty arbitrations when compared to non-ICSID arbitration such as UNCITRAL arbitration, this paper focuses mainly on the design of the ICSID arbitration. Much of non-ICISD treaty arbitration resembles the approach taken in the ICISD convention. To this end, arguments for and against the investor-state dispute settlement system are first discussed, and potential solutions to the challenges of the system cited. The provisions of investor-state dispute settlement under the previous South African BIT regime are then compared with the dispute resolution method under the new investment regulation regime to assess whether other developing countries should follow South Africa's deliberate break with investor-state dispute settlement at the ICSID.

2 Arguments for and against the investor-state dispute settlement system

2 1 Strength: protecting investor and host state alike

In constructing the ICSID, its architects stressed in the preamble to the ICSID Convention "the need for international cooperation for economic development, and the role of private international investment therein". In an early edition of the published Convention, Aron Broches, then general counsel of the World Bank, explained the motivation behind the establishment of the ICSID as the fear of political risks and biasness associated with national courts. Thus, investor-state dispute settlement is aimed at protecting both the investor and the host state, to the same extent and with the same vigour, not forgetting that to protect investment entails protecting the general interest of development, including the interests of developing countries.[13] The World Bank executive directors in their 1965 report on the ICSID Convention echoed this as an institution designed to facilitate investment disputes between foreign investors and host states thereby creating mutual confidence and promoting investment inflows to host states.[14]

13 *Gas Natural SA v The Republic of Argentina supra*, para 29.

14 World Bank Group, CSID Convention, Regulations and Rules 2006 available at https://Icsid.worldbank.org/cn/Documents/icsid.docs/ICSID%20Convention%20English.pdf (accessed 2018-01-22).

2 2 Strength: direct recourse to an international forum

Apart from providing equal protection, investor-state dispute settlement instruments also affords foreign investors the right to initiate arbitration proceedings directly against the host state at an independent international forum.[15] The value of such a mechanism was confirmed in the matter of *Gas Natural SA v The Argentine Republic*,[16] In that case, the tribunal identified the avoidance of the political pressures and delays inherently associated with adjudication in national courts as the primary reason for the creation of the ICSID and the subsequent adoption of a wave of BITs. This direct recourse to an international forum against the host state is therefore seen to reduce the political risks associated with investments.[17]

2 3 Strength: ensuring stable and predictable international investment relations

Proponents of investor-state dispute settlement regard it as a legitimate mechanism for structuring and stabilising international investment relations, without institutionalising a pro-investor bias and disregarding the host state's power to regulate.[18] Arbitrators, they argue, strive to be fair and impartial in their decisions, as they set a high value on their professional reputation.[19] To support this claim, staunch supporters of investor-state dispute settlement implore critics to examine the outcomes of arbitral awards, which are believed to illustrate the legitimacy of the system and the independence and impartiality of the arbitrators.[20] In addition, by holding the host state to the terms and obligations of the investment instruments, investor-state dispute settlement ensures certainty and predictability for investors, seeing to it that the host state's contractual promises are kept.[21]

15 United Nations Conference on Trade and Development "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries" available at https://unctad.org/en/Docs/diaeia20095-en.Pdf (accessed 2018-01-23).

16 *Gas Natural SA v The Argentine Republic supra*, 29.

17 Schill "In Defence of International Investment Law" 2016 *European Yearbook of International Economic Law* 314.

18 Brower & Schill "Is arbitration a threat or a boon to the legitimacy of international investment law?" 2009 *Chicago Journal of International Law* 472.

19 Kapeliuk "The repeat appointment factor: Exploring decisions patterns of elite investment arbitrators" 2010 96 *Cornell Law Review* 89.

20 Blythe "The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties" 2013 *International Investment Law Journal* 273.

21 Blythe 2013 *International Investment Law Journal* 273.

2 4 Strength: pro-host rather than pro-investor

The matter of *Chemtura Corporation v Canada,*[22] is often cited to counter arguments that investor-state dispute settlement has little compassion for host governments. In this matter, *Chemtura,* a United States agricultural product company (investor), alleged that its partner in Canada (host) wrongfully terminated its pesticides business. *Chemtura* alleged violations of the minimum standards of treatment as well as wrongful expropriation. The tribunal dismissed all claims, finding that the measures had not amounted to substantial deprivation of the claimant's investment and were in fact taken legitimately and without bad faith. Moreover, the European Federation for Investment Law and Arbitration (EFILA) points out that according to the United Nations Conference on Trade and Development, at least 53 % of cases decided by the ICSID are in favour of host states. EFILA then goes on to give compelling reasons that suggest that investor-state dispute settlement is in fact pro-jurisdiction rather than pro-investor.[23]

2 5 Strength: swift, final and enforceable decisions to protect against expropriation

Investor-state dispute settlement enables foreign investors to hold host states accountable for unreasonable interferences with their investments.[24] In particular, it offers a mechanism for rendering swift, enforceable and depoliticised awards in the event of indirect and direct expropriation without compensation,[25] – a matter in which host-state courts' neutrality is generally called into question,[26] irrespective of the sophistication of their legal systems.

While problems with non-compensated expropriation are often encountered in jurisdictions with underdeveloped legal systems, posing threats of lengthy court proceedings and corruption,[27] South Africa, with its advanced judiciary and legislative framework, has certainly not proven itself beyond reproach in this regard. In 2009, for instance, the Constitutional Court established physical acquisition of property by the state as a prerequisite for expropriation to be recognised in South African law.[28] This differs from the position in international law, which

22 *Chemtura Corporation v Canada UNCITRAL* 2 Aug 2010.
23 Alverez "Response to the Criticism against ISDS by EFILA" *Journal of international arbitration*
24 Schill 2016 *European Yearbook of International Economic Law* 315.
25 United Nations Conference on Trade and Development Reform of investor-state dispute In search of a roadmap available at https://unctad.org/en/publicationsLibrary/webdiaeapcb2013d4-en.pdf (accessed 2018-1-24).
26 United Nations Conference on Trade and Development "Reform of investor-state dispute In search of a roadmap" *supra*.
27 United Nations Conference on Trade and Development "Reform of investor-state dispute In search of a roadmap" *supra*.
28 In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 4 SA CAC 15.

recognises indirect expropriation without physical acquisition.[29] In addition, the South African Constitution, together with jurisprudence that has emerged from the Constitutional Court, fails to distinguish between direct and indirect expropriation, but prefers the words "deprivation" and "expropriation". In 2013, the Constitutional Court went on to define deprivation of private property rights as "sacrifices that holders of private property rights may have to make without compensation".[30]

As the law relating to expropriation continues to evolve in South Africa,[31] particularly so with Parliament's stated intention of amending section 25 of the Constitution to expropriate land without compensation, the attraction of investor-state dispute settlement from a foreign investor's perspective is easy to comprehend.

2 6 Strength: striking a balance between investors' and public interest

Although the South African courts are impartial and independent, the role of the South African judiciary still is to be loyal to local public interests such as affirmative action and black economic empowerment (BEE) policies, which have been entrenched in the legal system by way of various national laws.[32] Therefore, while these policies are often viewed as detrimental to foreign investors, the South African courts are bound by the Constitution to give effect to their provisions to transform society.

This was confirmed in the matter of *Agri SA v Minister of Mining and Energy*,[33] where the court acknowledged the social context of South Africa and decided, "not to over-emphasise private property rights at the expense of the state's social responsibilities".[34] Another good illustration of the conflict between the protection of foreign investors and the public interest is found in the case of *Piero Foresti, Laura de Carli v Republic of South Africa*,[35] which also served as one of the key triggers for South Africa's decision to terminate its BITs. The claimants in the matter argued that by requiring mining companies to transfer 26% ownership of mining assets to historically disadvantage South Africans, the Mining Charter advocated indirect expropriation and also breached the obligation of fair and equitable treatment, which prohibits

29 United Nations Conference on Trade and Development "Expropriation" available at https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (accessed 2018-01-22)

30 *Agri SA v Minister of Mining and Energy* 2013 4 SA (CC)1 .

31 Klaaren & Schneiderman "SA Bilateral Investment Treaty Policy Framework Review" available athttp://wiredspace.wits.ac.za/bitstream/handle/105/39/9205/SABITpolicyreviewcommentsKlaaren (accessed 2018-01-24).

32 Qumba "Safeguarding foreign direct investment in South Africa: Does the Protection of investment Act live up to its name?" 2018 *South African Journal of International Affairs* 354.

33 *Agri SA v Minister of Mining and Energy supra*.

34 *Agri SA v Minister of Mining and Energy supra*.

35 *Piero Foresti, Laura de Carli v Republic of South Africa supra*.

discrimination.[36] They further claimed that the BEE equity divestiture requirement that required foreign investors to sell 26% of their shares to historically disadvantaged South African companies amounted to expropriation. In response, the South African government argued that even if one was to admit that the Mining Charter treated foreign investors differently from their South African counterparts, the differentiated treatment would be legitimate,[37] falling squarely within government's margin of appreciation for determining which measures were reasonable and justifiable in advancing critical public interests. Thus, government contended that there could not have been indirect expropriation when, as in this case, government's actions were a rational and a proportional means of pursuing legitimate public regulatory purposes. The parties eventually reached a settlement, and the case was never argued on merit.

In short, therefore, both *Agric* and *Foresti* illustrate that foreign investors may indeed suffer the consequences of measures aimed at redressing past racial discrimination, realising land reform and promoting equitable access to South Africa's natural resources. While certainly legitimate from a social and political point of view, these measures raise concerns among foreign investors that their private property rights and business interests will be rendered worthless when pitted against the country's social transformation imperative. This, investor-state dispute settlement has been rather effective in hedging against.

2 7 Weakness: seen as pro-investor and anti-host, and thus no guarantee of economic growth

The ICSID dispute resolution system has been attacked for being biased towards investors and against host state governments, with non-transparent and inconsistent awards[38] allegedly heavily influenced by private firms and multinational corporations.[39] Concerning the inconsistency of the awards, the following Argentinian cases interpreting Full Protection and Security standard of BITs, are instructive. The administrative tribunal have held that is 'inappropriate to depart from the originally understood standard of "protection and constant security"'[40] while on the other hand it has been found that the phrase "protection and constant security"[41] as related to the subject matter of treaty does not carry with it an implication that this protection is inherently limited to protection and security of physical assets. A prime example of a case where the ICSID tribunal has ordered outrageous cost

36 *Piero Foresti, Laura de Carli v Republic of South Africa supra*.
37 *Piero Foresti, Laura de Carli v Republic of South Africa supra*.
38 Forere "Move away from BITs framework" *supra*, par 9.
39 Gazzini "Rethinking the Promotion and Protection of Investment: The 2015 South Africa's Investment Act" available at https://dx.doi.org/10.2139/ssrn.2960567 (accessed 2018-01-22).
40 *BG Group Plc. v The Republic of Argentina UNCITRAL*.
41 *National Grid plc v The Argentine Republic UNCITRAL*.

order is the case of *Occidental Petroleum Corp and Occidental Exploration Production Company V Republic of Ecuador,*[42] On 5 October 2012, an investment arbitration tribunal ordered the government of Ecuador to pay 2, 3 billion USD to the United States oil company occidental. It was the largest amount a state had been ordered a State been ordered to pay by an investor-state tribunal up to that point. For Ecuador that sum represented 59% of the country's 2012 Annual budget for education and 135% of the country's annual health care budget. Following suit, the President Rafael Correa of Ecuador publicly announced that he "had no confidence in the World Bank arbitration branch (ICSID) that heard the US oil company occidental law suit against Ecuador" and explained that "Ecuador handed over its sovereignty" when it signed international accords binding it to the Bank's ICSID.[43]

Indeed, some due-diligence findings have pointed to business connections between certain international investment arbitrators and foreign investors. What also transpired from due-diligence tests was that international investment arbitration was no longer cost-effective because of inordinate delays.[44] This is said to expose host states to protracted legal battles and arbitral claims that may trigger large sums of compensation. In the case of *Amco Asia Corporation and others v Republic of Indonesia,*[45] Indonesia requested the disqualification of Edward W. Rubin, the Claimant-appointed arbitrator in the case. Prior to his appointment as an arbitrator (but after the initiation of arbitration proceedings), Rubin had given tax advice to the controlling shareholder of the corporate Claimant. Furthermore, his law firm had shared office space and administrative services with counsel for Claimant for about half a year into the arbitration proceedings. A long-standing profit-sharing arrangement between the firms had been discontinued before the arbitration was initiated. Indonesia argued that these circumstances affected the arbitrator's independence. Also in *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*.[46] Argentina challenged the president of the ad hoc Annulment Committee, Yves Fortier Q.C. One of the partners at his law firm had previously provided tax advice to the corporate predecessor of one of the Claimants (Vivendi Universal S.A.). Fortier was not personally involved in the tax advice, which was furthermore unrelated to the claim against Argentina.

Put differently, it is claimed that the investor-state dispute settlement system has enabled narrow commercial interests to subject matters of

42 *Occidental Petroleum Corp and Occidental Exploration Production company v Republic of Ecuador* ICSID NO ARB/06/11.
43 Vincetelli "The uncertain future of ICSID in Latin America" 2010 *Law and Business Review* 409.
44 Mossalam 'The Process matters: South African Experience in exiting it BITs" *supra*.
45 *Amco Asia Corporation and others v Republic of Indonesia (Amco Asia)*, ICSID Case No ARB/81/1.
46 *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* ICSID Case No ARB/97/3.

vital national interest to unpredictable international arbitration, which in many instances has frustrated legitimate, constitutional and democratic policymaking. As such, the effectiveness of the BITs to guarantee protection of investors as a driving force for economic development has come under scrutiny,[47]

with claims of a lack of conclusive evidence that such BITs are indeed necessary to attract foreign investment and boost economic growth.[48]

2 8 Weakness: incapable of addressing domestic policy issues

By allowing foreign investors to bypass the host's national courts and take investment disputes directly to an international investment tribunal, the host nation's government policies are subjected to scrutiny by a third party, which undermines its sovereignty and regulatory power.[49] From a South African perspective, it is argued that the international arbitration system is not equipped to deal with domestic policy issues, and that its arbitrators are therefore likely to render decisions that would upset the delicate balance that the country's new Protection of Investment Act seeks to achieve.[50] Meanwhile, the country boasts an impartial and robust judiciary guaranteed by the Constitution,[51] which to government's mind is sufficiently equipped to resolve foreign investment disputes with due regard of all parties' interests.

2 9 High costs of proceedings

The ICSID arbitration system has been attacked for being skewed against host governments and in favour of foreign investors in its awards. As a result, many a host nation has called into question the legitimacy of international investor-state arbitration and its ability to balance the interests of both foreign investors and host states.[52] This perceived favouring of foreign investors also extends to the costs associated with the arbitration and the astronomical sums of compensation that host nations are often expected to pay. In 2012, for instance, an investor from the United States was awarded close to US$1, 9 billion for a claim against the government of Ecuador.[53] Low-income countries from Africa and elsewhere often lack the resources to defend themselves against

47 Department of trade and Industry "Bilateral Investment Treaty Policy Framework Review" *supra*.
48 Sornarajah 216.
49 Mossalam "The Process matters: South African Experience in exiting it BITs" *supra*.
50 Subedi *International Investment Law: Reconciling Policy and Principle* (2008) 354.
51 Subedi 354.
52 Sornarajah190.
53 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* ICSID case no ARB/06/11.

multinational corporations.[54] The fees charged by investment lawyers are not always known or disclosed, while participation by public-interest groups are often inhibited due to the high cost of travelling to arbitration venues in global cities such as New York, Paris and London.[55]

2 10 Lack of diversity of arbitrators

Concerns have been raised over the lack of diversity in the appointment of arbitrators, and particularly the lack of Africans serving on the ICSID and other international tribunals.[56] Critics argue that, since there are many excellent African scholars playing key roles elsewhere in the international domain, the lack of African arbitrators in the ISDS system can only point to a deliberate attempt to avoid diversity.[57] Admittedly, the lack of African representation at the ICSID is not ideal for the purposes of developing African-based jurisprudence in ICSD arbitration. The lack of African jurisprudence therefore affect the quality of the outcomes. Another problem is the fact that arbitrators may not be suitable for the purpose they serve. Most of them are white males that went to "Ivy league" universities and are incapable of thoroughly comprehending aspects to local policy and policy space and the need for social justice and redress in domestic countries.

2 11 Weakness: no appellate mechanism

Another inherent weakness of the investor-state dispute settlement system relates to the absence of an appellate mechanism to review decisions of arbitral bodies that might have erred in their awards. An appellate mechanism, it is argued, can ensure consistency in arbitral decisions.[58] This has led one scholar to state rather prophetically that "the business of developing the law of foreign investment is too important an area to be left to some ad hoc tribunals established under the ICSID or UNCITRAL. Hence, the onus should primarily be on countries.[59]

2 12 Potential responses to the challenges facing the investor-state dispute settlement system

Clearly, therefore, the investor-state dispute settlement system is not without its shortcomings and requires reform. While a single solution that fully satisfies both foreign investors and host nations is highly

54 Johnson "Rethinking bilateral investment treaties in sub-Saharan *Africa"* 2015 *Emory Law Journal* 920.
55 Trakman "Investor state arbitration or local courts: Will Australia set a new trend?"2012 *Journal of World Trade* 108.
56 Mbengue "The Africanization of international investment law: The Pan-African Investment Code and reform of the international investment regime" 2017 *Journal of the World Trade and Investment* 442.
57 Johnson 2015 *Emory Law Journal* 964.
58 Sardinha "The Impetus for the Creation of an Appellate Mechanism" 2017 *ICSID Review – Foreign Investment Law Journal* 504.
59 Subedi 354.

unlikely to be achieved, efforts should be made to take into account developing countries' needs.[60] In this regard, the introduction of an ICSID appeal process similar to the appeal process of the World Trade Organisation (WTO) has been recommended.[61] Some authors have also suggested that host countries' right to regulate should be featured in the content of their BITs to be able to bring counter-claims in the event of international investment disputes.[62] Others have proposed adopting an EU-style system to ensure open and transparent international arbitration, prevent treaty shopping and reject trivial matters.[63] Transpiring from the European Commission's efforts in negotiating the Transatlantic Trade and Investment Partners (TTIP) agreement, there has been talk of the establishment of a permanent investment court as tribunal of first instance, with a proper appeal process and highly qualified judges such as those of the WTO appellate body and the International Court of Justice.[64]

Yet not everyone is equally taken with these proposals. The suggestion of establishing an international investment court has for example been slammed as simply substituting one problem for another. Critics have warned that a permanent investment court would in fact encroach even more on state sovereignty than the current arbitration system, as its judges would not be removable.[65] They maintain that domestic courts are best positioned to deal with investment disputes in a fair manner by taking into account the domestic circumstances of a particular host country.[66]

So, is South Africa's move away from investor-state dispute settlement a breakthrough for establishing a new dispensation of investment relations in the developing world? Or is it a bad omen, foretelling of the steady stifling of foreign direct investment in emerging economies?

60 United Nations Conference on Trade and Development "Reform of investor-state dispute In search of a roadmap*" supra*.
61 United Nations Conference on Trade and Development "Reform of investor-state dispute In search of a roadmap*" supra*.
62 Sardinha "The Impetus for the Creation of an Appellate Mechanism" 2017 *ICSID Review – Foreign Investment Law Journal* 505.
63 Sardinha "The Impetus for the Creation of an Appellate Mechanism" 2017 *ICSID Review – Foreign Investment Law Journal* 505.
64 Sardinha "The Impetus for the Creation of an Appellate Mechanism" 2017 *ICSID Review – Foreign Investment Law Journal* 505.
65 Brower & Schill 2009*Chicago Journal of International Law* 495.
66 Sornarajah *An International Investment Court: panacea or purgatory?* Available at https://academiccommons.columbia.edu/doi/10.7916/D8RN389W (accessed 2018-02-03).

3 Parting with investor-state dispute settlement: a trend in the developing world?

3 1 Comparison of investor-state dispute settlement under South Africa's previous BIT system and dispute resolution under the new Protection of Investment Act

Investor-state dispute settlement is the legal mechanism that allows multinational corporations a forum, other than the court of the country in which the dispute arose ("host country"), to arbitrate a controversy between a corporation and the host country.[67] The types of disputes brought through the investor-state dispute mechanisms are alleged harms to the foreign corporation caused by the host country. These claims arise from the substantive provisions of the BITs or trade agreements. By implementing investor-state dispute, host state hope to provide foreign investors with a neutral forum to address claims of expropriation by the host country, to prevent discrimination of foreign corporations by offering them the same rights as local corporations or third-country corporations, and to provide fair and equitable treatment to foreign investors. The problem is that the foreign investors have the exclusive right to file claims through investors-state dispute mechanism.[68]

All South Africa's previous BITs contained a dispute resolution clause that permitted referral to investor-state dispute settlement by the foreign investor.[69] The dispute settlement mechanism meant that foreign investors had a right to take the South African government to international arbitration for alleged breach of BIT clauses, without requiring the host state's permission.[70] In so doing, South Africa conformed to the general practice, acknowledging that foreign investors often – and, in many instances, justifiably so – do not have confidence in the impartiality of the host state's judiciary.[71] Instead, they prefer to have disputes resolved before a neutral tribunal to secure impartial justice.[72] The dispute resolution clause in the now terminated United Kingdom-South Africa BIT serves as a typical example of the country's investment arbitration dispensation prior to the Protection of Investment Act. The clause read as follows:

> "(I) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been

67 Schreuer, Investment Disputes 2010 *Max Planck Encyclopedia of Public International Law* 22.
68 Osmanski "Investor-State Dispute Settlement: Is there a better alternative?" 2018 *Brooklyn Journal of International Law* 639.
69 Schlemmer 2016 *ICSID Review - Foreign Investment Law Journal* 182.
70 Schlemmer 2016 *ICSID Review-Foreign investment Law Journal* 182.
71 Sornarajah 216.
72 Sornarajah 216.

> amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes."[73]

While some of the South African BITs contained slightly different clauses that excluded international arbitration where a foreign investor had specifically chosen to approach the local courts,[74] none contained a clause requiring that foreign investors first exhaust local remedies, as exhaustion of local remedies posed the risk of creating delays and uncertainty in the process of adjudication.

In contrast, the Protection of Investment Act, specifically provides for dispute resolution through the country's domestic courts, in the following terms:

> "13(1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator."

> "(4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment. (5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor."[75]

In a rather drastic step, any reference to international investor-state arbitration, and thus the "depoliticisation" of investment disputes, has therefore been removed. Foreign investors will first be subjected to an as-yet untested mediation process led by the Department of Trade and Industry.[76] This does not bode well for attracting foreign investors.[77] Section 13(5) contains the only exception, permitting arbitration to be conducted between South Africa and the investor's home state, though still only once domestic remedies have been exhausted. This is little consolation, however, as the exhaustion of domestic remedies takes time, and the foreign investor cannot be certain that his home state would feel it necessary to intervene once all local remedies have been put to the test.[78] In addition, the legislature's choice of the words "may

73 S13 of the Protection of Investment Act 22 of 2015.
74 Schlemmer 2016 *ICSID Review - Foreign Investment Law Journal* 182.
75 S13 of the Protection of Investment Act 22 of 2015.
76 Regulation 7(2) in terms of GN 958 in *GG* 40526 of 30-12-2016. The investor and the department can jointly appoint a mediator from the list maintained by the department.
77 Notably, the European Union's Regional Chamber of Commerce and Industry.
78 Schlemmer 2016 *ICSID Review - Foreign Investment Law Journal* 182

consent to international arbitration" in this subsection allows government wide discretion to refuse to consent to such arbitration for fear that the international tribunal might scrutinise its domestic policies.

It is therefore safe to conclude that by removing the investor-state arbitration method of resolving investment disputes, the South African government has severely eroded the protection to which the country's foreign investors have become accustomed.[79]

3 2 Spotting a trend amongst developing countries

While South Africa's decision to suspend its BITs and do away with investor-state dispute settlement has caused a stir,[80] the country is by no means the only one choosing to step back from international investment arbitration. Nations such as Bolivia, Ecuador and Venezuela have also terminated several international investment agreements and withdrawn from the ICSID,[81] India has frozen all investment negotiations,[82] and the Union of South American Nations (UNASUR) has created an alternative investment arbitration forum. Also in terms of Brazil's new partnership agreements, state-to-state resolution is the last resort for dispute settlement, with no reference being made to investor-state dispute settlement.[83] China, in turn, has introduced the exhaustion of local remedies as a prerequisite for investor-state dispute settlement to occur.[84] Although a developed nation, Australia too has indicated that it will no longer agree to investor-state dispute settlement in their international investment agreements, and that disputes would be resolved before the national courts. Assessing investor-state dispute settlement on a case-by-case basis, the country recently concluded an investment treaty with the Pacific Islands that excludes international dispute settlement, instead providing for dispute resolution in national courts or through a mechanism mutually agreed by the parties.[85] Central to developing nations' increasing move to terminate and or make fundamental changes to their international investment frameworks is the fact that investor-state dispute settlement exposes developing countries to heavy penalties.[86] Moreover, there is growing evidence that countries are eager to balance investment protection with the host state's right to regulate for public benefit.[87] A new generation of BITs are emerging that

79 Qumba 2018 *South African Journal of International Affairs* 354.
80 Markus Schrader, head of economic cooperation and development at the Embassy of Switzerland, is reported to have said: "The South African government was not in a position to take such measures, considering South Africa's relatively low ranking in reports like *Doing Business*."
81 Osmanski 2018 *Brooklyn Journal of International Law* 639.
82 Osmanski 2018 *Brooklyn Journal of International Law* 639.
83 Art 24 cooperation and facilitation investment Agreement of the Federative Republic of Brazil.
84 Art 9(2)(b) of the Chinese model BIT version III.
85 UNCTAD World Investment Forum, Traidcraft Exchange "International investment agreements under scrutiny" available at https://www.tni.org/files/downloads/iias_report-feb_2015.pdf
86 *Occidental Petroleum v Ecuador* ICSID Case No ARB06/11 of 5 Oct 2012.

attempt to strike a balance between these competing goals.[88] This is done in a bid to limit the power of arbitral tribunals and ensure that host states' regulatory power remains unimpaired.[89]

At a regional level, this has also seen a determined move on the part of the Southern African Development Community (SADC), which has removed the investor-state arbitration provided for in its 2006 Protocol on Finance and Investment (FIP), with article 25 of the 2016 edition now providing for access to domestic courts and tribunals for foreign investors. In effect, this means that the 2016 SADC FIP deals with state-state arbitration only. This follows South Africa's proposal during the consultative process that article 28 of the 2006 SADC FIP be removed due to concerns about the way in which investor-state disputes were being dealt with by international tribunals.[90] These concerns included a "perceived lack of transparency and legitimacy of the international arbitration process, conflicting arbitral jurisprudence, the independence of arbitrators and the prohibitive legal costs associated with international commercial arbitration and excessive damages".[91] Although none of the SADC member states showed any intention to remove investor-state arbitration at the time,[92] the 2016 SADC FIP shows clear signs of a growing dissatisfaction with this dispute resolution mechanism. Therefore, the 2016 SADC FIP surprisingly maintains the defunct SADC tribunal, despite that body's questionable legitimacy.[93] Following the matter of *Mike Campbell v Republic of Zimbabwe*,[94] the SADC tribunal suffered a blow to its integrity, and in effect became toothless. In that case, the Zimbabwean government failed to abide by the tribunal's decision after the country was found to have been in breach of the provisions of the SADC treaty. In particular, the Zimbabwean government was found to have committed unlawful expropriation for refusing to pay compensation after it had taken possession of private property. In response, the Zimbabwean government questioned the legitimacy of the tribunal and lobbied for political support, which eventually saw the tribunal being suspended. One may therefore question how a tribunal that has fallen into disrepute would protect foreign investors, having previously failed to enforce its awards.

87 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* ICSID Case No. ARB/12/40.
88 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia supra*.
89 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia supra*.
90 Kondo" A Comparison with Analysis of the SADC FIP before and after its Amendment" 2017 *Potchefstroom Electronic Law Journal* 34.
91 Trakman "Investor state arbitration or local courts: Will Australia set a new trend?"2012 *Journal of World Trade* 108.
92 Kondo *2017 Potchefstroom Electronic Law Journal 34.*
93 Art 26SADC FIP.
94 *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2

Displaying an equally negative attitude towards ISDS in the SADC region is the SADC model BIT, which recommends that member states in the region reject this dispute settlement mechanism.[95] Similar to the 2016 SADC FIP, the model BIT seems to favour a state-state dispute settlement approach that permits state parties to initiate arbitration on behalf of foreign investors for an alleged violation of a treaty provision, although only subject to the exhaustion of local remedies or if a contracting state can demonstrate that there are no local remedies available.[96] This approach again throws up the challenges of political interference and questions about the independence of domestic courts, and may see foreign investors rather opting for other investment destinations that would still allow them to turn to the ICSID or another international arbitral tribunal in the event of a dispute. However, it remains to be seen whether African countries in the SADC region will eventually adopt the recommendations of the model BIT. The only country that has indicated its intention to do so is South Africa.[97]

Developing countries and African countries in particular, seem eager to prove that their judiciaries are sufficiently independent and robust and their jurisdictions adequately equipped to deal with international investment matters.[98] Another interesting development in the African region is the new Pan African Investment Code (PAIC). In 2016, during the last consultation of African Union (AU) ministers in charge of regional integration, the AU developed the draft PAIC.[99] The objective of the code is to promote, facilitate and protect investments that foster sustainable development in member states, particularly in the member state where the investment is located.[100] In terms of the code, investment disputes should be resolved within six months through consultations and negotiations.[101]

The code provided for the option of excluding a provision on investor-state arbitration in an international forum.[102] Instead, the code provides for an arbitration system that may be conducted at any established public or private African alternative dispute resolution centre.[103] Although the code is but a guide and non-binding, it does serve as a prime example of the move away from international investor-state arbitration forums towards investment resolution in African-based centres. With regard to arbitration between home and host states, article

95 Art 29 SADC model BIT.
96 Art 29 SADC model BIT.
97 TRALAC available at https://www.tralac.org/publications/article/6771-the-sadc-model-bilateral-investment-treaty-template-towards-a-new-standard-of-investor-protection-in-southern-africa.html (accessed 8 August 2018).
98 Kidane *Alternatives to investor-state dispute settlement: an African perspective* (2018).
99 The draft Pan African Investment Code was amended in Nairobi, Kenya, in November 2016.
100 Art 1 of the Pan African Investment Code.
101 Art 42(1)(b) Pan African Investment Code.
102 Art 42(1)(d) Pan African Investment Code.
103 Art 42(1)(d)Pan African Investment Code.

41(1) of the PAIC requires states to consent to arbitration, which must be conducted in an established public or alternative African dispute resolution centre.[104] The requirement to agree to arbitration, however, assumes that both the home and host state are willing to arbitrate against each other.[105] Currently, state-state arbitration is very rare in international investment jurisprudence. States may therefore opt against arbitration in an effort to protect economic and political relations, which would leave the foreign investor's cause of complaint without appropriate redress.[106] Yet the proposal of creating venues for African arbitration is a promising innovation that may go a long way towards growing African capacity and challenging the general perception that African judiciaries are ineffective.

The inclusion of an ISDS provision in the PAIC was hotly debated among African member states, and the investor-state dispute resolution clause contained in the code could therefore be considered a compromise.[107] With some SADC states fiercely opposing the inclusion of an ISDS provision, and others seeking its inclusion, article 42(1) was drafted to accommodate these divergent approaches. This provision gives each member state control over the investor-state arbitration process, and safeguards domestic policies. It requires member states to agree to utilising an investor-state dispute settlement mechanism that aligns with their domestic policy directives, thereby countering foreign investors' unilateral power to refer investment disputes to ICSID arbitration without first seeking host states' consent.

Surprisingly, article 42(1)(a) of the PAIC then affords member states and investors leeway to resolve investment disputes under those agreements that govern their relations, which reveals that many African member states do still see a need for ISDS to attract foreign investment inflows, and are not necessarily set on doing away with ICSID arbitration altogether.[108] From this, it would appear that a number of African nations realise that they are unlikely to attract foreign investment if they do not afford foreign investors the right to challenge them before an independent investment tribunal of sorts.[109] In this regard, the PAIC can therefore be said to grant member states a middle-ground solution to either make use of ISDS or reject it, depending on each member state's choice.

In article 42(1)(b), the code encourages the resolution of disputes through consultations and negotiations.[110] Admittedly, resolving disputes through consultations and negotiations would serve to maintain

104 Art 41(1)(d)Pan African Investment Code.
105 Art 41(1)(d) Pan African Investment Code.
106 Schlemmer 2016 *ICSID Review - Foreign Investment Law Journal* 182.
107 Mbengue 2017 *Journal of the World Trade and Investment* 442.
108 Mbengeu 2017 *Journal of the World Trade and Investment* 443.
109 Johnson 2015 *Emory Law Journal* 965.
110 Art 42(1)(b) Pan African Investment Code.

business relations between foreign investors and host governments.[111] However, in the event of small to medium-sized foreign investors, the drawbacks associated with such consultations and negotiations may be considerable.[112] In this respect, therefore, it is argued that the PAIC offers less protection to this specific category of foreign investor, who might lack sufficient negotiating power compared to the host government.

Generally, the choice of law by both parties to a treaty is fundamental, as it may determine the outcome of any potential investment dispute. It is worth emphasising that both parties normally agree on the applicable law, which is then binding on arbitrators, who may only exercise their discretion in the absence of an express choice of law in a treaty.[113] Under article 42(1)(c) of the PAIC, however, disputes may be resolved through arbitration, subject to the applicable laws of the host state,[114] – laws which foreign investors may not be acquainted with. Moreover, article 42(1)(c) introduces the exhaustion of local remedies before resort is made to arbitration.[115] This may be equally worrisome to foreign investors, as the time lost exhausting local remedies could be detrimental to their business interests.

Further compromising the protection of foreign investors in this provision of the PAIC is its implied restriction on investors' access to ISDS. While ISDS may be considered, this is made subject to the national laws of the host state and or mutual agreement between the host state and foreign investor. In effect, therefore, if an African country's national laws do not permit ISDS, as is the case in South Africa's Protection of Investment Act, foreign investors cannot refer disputes for arbitration by the ICSID or any other international body.[116] Moreover, where the host state's laws do allow for ISDS, both disputing parties first have to agree to follow this route.[117]

Should consultations fail, disputes may be referred for arbitration, subject to the applicable laws of the host state and or the mutual agreement of the disputing parties, as well as the exhaustion of local remedies. This code too does away with international arbitration, although provision is made for arbitration to be conducted at any established African public or private alternative dispute resolution centre or the Permanent Court of Arbitration Centres in Africa.[118]

111 Salacuse "Is there a better way? Alternative methods of treaty-based, investor-state dispute resolution" 2007 *Fordham International Law Journal* 141.
112 Schill 2016 *European Yearbook of International Economic Law* 112.
113 Banifatemim 'The law applicable in investment treaty arbitration' in Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2010) 191.
114 Art 42(1)(c)Pan African Investment Code.
115 Art 42(1)(c) Pan African Investment Code.
116 S 13 of the Protection of Investment Act 22 of 2015.
117 Art 42(1)(c) Pan African Investment Code.
118 Art 42(1)(c) *Pan African Investment Code.*

Therefore, the contemporary trends in treaty practice show that host countries, particularly those in the developing world, are keen to assume a level of regulatory control instead of simply leaving all dispute resolution and regulation to international arbitrators. South Africa is thus not alone in questioning investor-state dispute settlement. Add to that the poor African representation in terms of the number of arbitrators at the ICSID,[119] and the country's move away from the investor-state dispute settlement system does not come as much of a surprise. Of greater concern, though, is the fact that the South African judiciary is not generally known for its expertise in the field of international investment law, while the as-yet untested mediation and arbitration processes of the Department of Trade and Industry will not do much to allay foreign investors' fears.

4 The way forward

The legal framework for foreign investors is crucial in creating a climate conducive to investment. Moreover, a key element of this framework is an impartial and effective dispute settlement mechanism between host states and foreign investors. For decades, investor-state dispute settlement at the ICSID served this purpose, but the system has recently encountered opposition from host nations wanting to play a more active role.

As seen from the discussion above, the dissatisfaction with investor-state dispute settlement stems from the fact that it affords the foreign investor a unilateral right, whilst the government of the host nation does not enjoy that same entitlement. Despite improvements in recent times, the system remains unbalanced, with no apparent move to enable host states to initiate proceedings against foreign investors. The only developments in recent treaty drafting is the provision for counter claims rather than the states making direct claims against foreign investors. For example, article 43 of the Pan African Investment Code allows a host government to file a counterclaim during ISDS. To this end, the article provides that where an investor is alleged to have failed to comply with the provisions of the PAIC, the competent body dealing with such a dispute shall consider whether the breach is materially relevant to the issues before it, and if so, what offsetting effects this may have on the merits of the investor's claim or on any potential damages awarded.[120] It should be noted, however, that the ICSID Convention already permits host governments to file counterclaims against foreign investors upon the fulfilment of certain conditions.[121] The provision for counterclaims in recent treaty drafting, in turn, allows host governments to invoke relevant treaties protecting human rights, environmental and labour

119 Mbengeu 2017 *Journal of the World Trade and Investment* 443.
120 Art 43(1) *Pan African Investment Code.*
121 Art 46; ICSID arbitration rule 40I CSID Convention.

standards.[122] Yet, even though these treaties protect important cornerstones of democracy, such as human rights and environmental sustainability, this does raise the question whether African countries would not perhaps invoke counterclaim defences simply to undermine legitimate claims by foreign investors.[123]

Staunch critics of investor-state dispute settlement have concluded that the system is not worth preserving, as its existence comes at the expense of host states' regulatory mechanisms and restrict their ability to make policies suited to the nation. These arguments have seen a trend of stepping back from investor-state dispute settlement in the developing world, with the South African government now also having distanced itself from the ICSID and terminated its BITs with foreign investor countries. With a new generation of BITs emerging, many more in the developing world may soon follow suit. However, is a sudden outright rejection of investor-state dispute settlement, without first establishing some sort of alternative capacity, wise? Will foreign investors have the stomach to stick it out and see whether future investment disputes can indeed be satisfactorily resolved through domestic means? In resource-constrained times, it might be more prudent to safeguard valuable inflows of investment and resist the temptation of scrapping investor-state dispute settlement in its entirety, at least until workable alternatives have been identified, tried and tested.

One such alternative could be the initiation of strong regional efforts amongst developing countries, coming together as a bloc towards creating a sensible, custom-made system of international investment arbitration – with African countries creating an African solution for a unified system that could take the interests of foreign investors as well as the continent's needs into account. Such an approach could for example incorporate the appointment of regional arbitrators, who are more likely to understand the unique circumstances of emerging economies. What would make this more appealing than the suggested way forward in South Africa's new Protection of Investment Act is that disputes would be settled based on the common understanding of a group of developing countries instead of through a unilateral decision by a single host State.

Until such an ideal can be achieved, the best interim measure may be for developing countries to insist on and monitor improvements in the investor-state dispute settlement process to make it more transparent. This could include bringing pressure to bear on international lawmakers to introduce local litigation as a precondition for investor-state dispute settlement. It could entail pushing for the introduction of an appeal process to seek redress, not only on procedural aspects, but also on the merits of a case to call arbitrators to account. It could involve campaigning to have stronger African and developing-country representation in the ICSID and any future appellate body to ensure

122 Art 43(1)Pan African Investment Code.
123 Trakman 2012 *Journal of World Trade* 604.

broader representation and inspire confidence in the system. Nevertheless, for this to occur, developing nations must – for now – remain part of the system.

Judging by host nations' objections against investor-state dispute settlement, South Africa's outright rejection of the system in exchange for investment arbitration through domestic means is not that surprising. To some, it may even seem like a breakthrough, finally affording the country more control over how foreign investments are regulated and managed. It is only hoped that this move does not go down in history as a bad omen that foretold of a final breakdown in investor confidence and the drying up of capital inflows into a country and continent that desperately needed it.

"Affirmative" (measures in) action? Revising the lawfulness of racial quotas (in South African (professional) team sports)

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SUMMARY

This contribution critically examines the lawfulness of the use of race quotas in the selection of South African (professional) sports teams. These quotas purportedly function as affirmative action measures, and their legitimacy in this light is considered with reference to relevant case law on affirmative action and, more specifically, on the use of quotas in the application of affirmative action (as this has featured in other contexts in the case law to date). In the process, the author evaluates the constitutionality of such quotas (with specific reference to their apparent irrationality in the specific context of (professional) sport and its nature and characteristics). The piece further considers the legitimacy of these quotas at the domestic level in light of the application of the applicable labour legislation (specifically the Employment Equity Act, 1998), and at the international level in light of the applicable rules of international sports governing bodies in the relevant sporting codes. The author concludes that these race quotas are unconstitutional and have no legitimate place in South African sport and in the continuing process of sports transformation, and calls for their abolishment as a matter of urgency.

1 Introduction

Twenty-two years into a democratic South Africa, the national cricket governing body, Cricket South Africa ("CSA"), in August 2016 announced the first national team to be selected (officially) in terms of race-based selection criteria, for a Test match series against New Zealand. Media reports recognised that the last national side to be specifically governed

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by racial guidelines was during the 1969/70 home series against Australia, when apartheid precluded the inclusion of any black players.[1] We may appear to have come full circle, although racial quotas in sports teams and developments around "sports transformation" have been a feature of the national discourse for the whole of the young life of this democracy. Maybe not surprisingly, the transformation agenda tends to rear its head especially in election years.

South African rugby has openly (off and on) followed a quota system in some of its competitions for the last few years. The former president of the South African Rugby Union ("SARU"), Oregan Hoskins, was quoted in the media in 2014 saying that rugby "will need to make "radical, drastic, immediate changes" to comply with the pressure being brought upon it by the Sports Ministry after Saru and other federations met with the government regarding the proposed changes, including a possible reintroduction of quotas into the Absa Currie Cup and Vodacom Super Rugby competitions:[2]

> "Minister Fikile Mbalula threatened to withhold permission for sporting federations to compete internationally if there was not a 60-40 split between black and white players in future representative teams, saying the pace of transformation was too slow among sporting federations. Hoskins said that rugby 'doesn't have a choice but to comply' and committed all 14 provincial unions and Saru to 'meet the challenges as rugby and tackle it head on' to make South Africa proud as a nation. 'With the amount of pressure that we are under now by the Minister of Sport to change at the highest level, we've been told in no uncertain terms that there needs to be a radical, drastic and immediate change,' Hoskins told supersport.com. 'The only way we can effect change is to use the quota system even more extensively than we currently do. This is not the optimum way to transform, it a short-term measure and there is no other way to change representation in teams in the immediate short-terms (sic).' 'While it may not be perfect, and not be optimum, there is no other way we can meet the demands of the Minister of Sport and seriously implement transformation in the Absa Currie Cup and at franchise level. We've been put under serious threat by government, and we don't really want to have government intervening in sport. It's not good for the game, so we have no alternative as a federation but to look at quotas in our senior ranks."[3]

Of course, as has been the experience of sports transformation measures since the dawn of our democracy, the process is often clouded in uncertainty and, specifically, a significant measure of ambiguity in respect of the terminology used by both government spokespersons and sports federations in describing measures as constituting either "targets" or "quotas". Following Hoskins's above media statement in 2014,

1 See R Houwing "NZ tests: 'SA will be quota-based'" (04-08-2016) *Sport24* http://www.sport24.co.za/Cricket/Proteas/nz-tests-sa-will-be-quota-based-20160804 (accessed 2018-11-12).

2 See report of B Nel "Quotas for Currie Cup, Super Rugby?" (23-04-2014) *Supersport* http://www.supersport.com/rugby/sa-rugby/news/140423/Quotas_for_Currie_Cup_Super_Rugby (accessed 2018-11-11).

3 B Nel "Quotas for Currie Cup, Super Rugby?" (23-04-2014) *Supersport*.

SARU's *Competition Format 2015,*[4] contained the following regarding rules for teams in respect of "Representation" for the ABSA Currie Cup competition:

> "SARU has adopted a comprehensive Transformation Charter that will guide SARU and its Provinces on this critical aspect of the game. Quotas no longer apply to the ABSA Currie Cup Competition. However, it is expected of each Province to take serious cognisance of the issue of representativity of players on the field of play in order to support SARU's broader transformation objectives."[5]

While "quotas" may have no longer applied to the Currie Cup competition at the time, the same document contained the following in respect of "Representation" for the Vodacom Cup competition:

> "Each Province shall take serious cognisance of the issue of representivity of players on the field of play, to support SARU's broader transformation objectives. 7 (Seven) players of colour shall be in the squad of 22 (twenty-two) players of whom 2 (two) players shall be forwards. At least 5 (five) players of colour shall be included in the starting line-up."[6]

Even though SA Rugby took the public stance that quotas no longer apply (at least in certain of its competitions, it appears), its strategic transformation plan provides that 50% of the Springbok team must be made up of "players of colour" by 2019. As recently as May 2017 a spokesperson for SA Rugby was quoted as saying that the organisation is willing to defend its "quota stance" in court.[7] Media reports recounted race-based team selection in cricket World Cup matches (in 2007 in the Caribbean), as well as rumoured interference in team selection by cricket administrators (in South Africa's semi-final loss in the 2015 ICC World Cup). Some sports federations, unlike SA Rugby (as per the quoted media statement by Hoskins above) have continued to refer to these largely government-imposed quotas as "targets". However, events in 2016 provided some clarity on the true nature of these measures. At a media briefing on 25 April 2016, upon the occasion of the release of the 2014/15 Eminent Persons Group *Transformation Status Report*, the then Minister of Sport, Fikile Mbalula, made the following announcement:

> "I have resolved to revoke the privilege of Athletics South Africa (ASA), Cricket South Africa (CSA), Netball South Africa (NSA) and South African Rugby (Saru) to host and bid for major and mega international tournaments in the Republic

4 SARU "SARU's Competitions Format and General Rules (2015)" *Supersport* http://images.supersport.com/content/SARU%27s%20Competitions%20Format%20and%20General%20Rules%202015%20-%20Final%201.pdf (accessed 2018-12-11).

5 "SARU's Competitions Format and General Rules (2015)" para 1.9.

6 "SARU's Competitions Format and General Rules (2015)" para 2.5.

7 Unknown "SA rugby willing to defend its "quota stance"" (04-05-2017) *Sport24* https://www.sport24.co.za/Rugby/sa-rugby-willing-to-defend-its-quota-stance-20170504 (accessed 2018-11-11).

> of South Africa as a consequence of the aforementioned federations not meeting their own set transformation targets, with immediate effect."[8]

The Sports Minister's action was subsequently endorsed by Cabinet,[9] although the legality of the ban is questionable. Along with the ban came threats of non-recognition by government of these sporting codes (with the implication, most notably, of withdrawal or refusal of national colours for athletes participating in such codes, and their resultant non-participation on the international stage for the near future). The reason for the ban, according to the Ministry, was punitive in nature, and had the stated objective of forcing these federations to toe the line in respect of government's demands regarding race-based transformation. In addition, it is in this that we find an indication of the true nature of these measures. It is generally recognised that targets in affirmative action measures are aspirational, as opposed to quotas, which constitute a set number or percentage of places to be reserved for beneficiaries, at all costs. The difference was succinctly explained in the American context in *Local 28, Sheet Metal Workers' International Association v EEOC*:[10]

> "A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications ... . By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job."[11]

One aspect or characteristic of a measure that might (in fact, should) tip the scales in favour of determining that it is a quota rather than a target or numerical goal is if some punitive sanction is imposed on the responsible official or employer who fails to reach the set number/percentage of representation of persons from designated groups (under the EEA) or persons previously disadvantaged by past unfair discrimination (under the more general application of section 9(2) of the Bill of Rights). By its nature one cannot punish someone for not reaching an aspirational target – or, at least, one could not do so rationally. And it is here that it seems to become clear that the Sports Minister's ban of April 2016, *by definition and expressly*, constitutes the imposition of a punitive sanction on the relevant sports federations for their alleged

8 See 'Mbalula bans SA from bidding for major rugby, cricket events' (25-04-2016) Drum https://www.news24.com/Drum/Archive/mbalula-bans-sa-from-bidding-for-major-rugby-cricket-events-20170728-5 (accessed 2018-11-27)

9 See Anonymous "Cabinet cheers Fikile's plan" (30-04-2016) *The Citizen* https://citizen.co.za/news/south-africa/1095316/cabinet-cheers-fikiles-plan/ (accessed 2018-11-11).

10 478 US 421 (1986) 495.

11 As quoted by Katz J in *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice And Constitutional Development* 2015 1 All SA 589 (WCC) para 211.

failure to meet a "target". Clearly these euphemistically-labelled "targets" function as nothing other than quotas.[12]

What has been largely absent from media reports and the sports transformation narrative to date has been an examination of the legality and constitutionality of such efforts at the imposition of race as a criterion for selection of professional sports teams on both the global and domestic stage. I have in the past written (rather extensively) on various aspects of race-based sports transformation policies and measures,[13] and feel that the time is ripe for yet another analysis of the legal implications. At the heart of this analysis is the realisation that race-based team selection is, at least purportedly, a rather atypical species of the application of affirmative action. Once one accepts this it is imperative to examine the constitutional and legislative parameters of lawful affirmative action, and to determine whether cricket or rugby quotas in fact make the grade in terms of the law. Here we must be guided by the latest jurisprudence on affirmative action in the employment and other contexts, including judgments of the Constitutional Court handed down in the past four years. However, the legal analysis must be much broader, in recognition of the fact that sports transformation in South Africa is not just a political hot potato on the domestic stage. The application of racial quotas in representative national teams and at other levels (for example, professional franchise teams) occur within a significantly globalised professional sports industry. It implicates fundamental principles of international (sports) law, and the South African government and domestic sports federations are not operating within a vacuum, even if they (especially government) might seem to believe so.

In the section that follows (section 2) I will briefly examine the legal framework for lawful affirmative action in terms of the Constitution of the Republic of South Africa, 1996 ("Constitution") and in terms of our

12 For further discussion of this point, see the text to part 4 below. It should be noted that the language of the Minister's ban in no way indicates an intention to sanction designated (professional sports) employers for a failure to, for example, address and remove employment barriers for players from designated groups (which they are obliged to do under the EEA). The ban as a sanction appears to relate to nothing other than a response to such employers' failure to meet the relevant demographic "targets".

13 See AM Louw "Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (part 1)" (2004) 15 *Stell LR* 119; AM Louw "Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (part 2)" (2004) 15 *Stell LR* 225; AM Louw "Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (part 1)" (2004) 15 *Stell LR* 409; AM Louw "Transforming South African Professional Sport: Some Observations on Recent Developments" (2005) 9 *Law, Democracy & Development* 193-218; AM Louw "Evaluating Recent Developments in the Governance and Regulation of South African Sport: Some Thoughts and Concerns for the Future" (2006) 1-2 *International Sports Law Journal* 48; AM Louw "Extrapolating 'equality' from the letter of the law: The limits of affirmative action under the Employment Equity Act" (2006) 18 *SA Merc LJ* 336-354.

labour legislation. I will focus specifically on the law's treatment of the use of race-based quotas as opposed to racial targets, with reference to the most recent jurisprudence on this issue. In section 3, I will briefly examine the experience of the continued and persistent application of race quotas in our sport, after briefly considering the application of the relevant legislation in this context, and then I will consider the international implications. In section 4(1) will briefly consider currently ongoing litigation on sports quotas in a pending case before the Labour Court. Section 5 will conclude.

2 The legality of quotas in the application of affirmative action, more generally

Recent years have seen increasing calls from the African National Congress ("ANC")-led government to (re)institute race-based quotas in (professional) sports teams, to ensure that teams are demographically representative of the South African people. I have written elsewhere about the role and place of "demographic representivity" in the application of affirmative action, and have expressed my view that representivity has very little to do with equality and that the pursuit of demographic representivity as a prime objective of the application of affirmative action (as it is done in terms of the Employment Equity Act 55 of 1998 ("EEA")) does not conform with the parameters for lawful affirmative action in terms of section 9(2) of the Bill of Rights.[14] I will not address those issues again here, but wish to revisit one specific aspect of the sports transformation debate, which is particularly problematic in the context of our jurisprudence on affirmative action, namely the use of (racial) quotas.

The late 1990s and most of the 2000s saw a measure of ambivalence in South African law on affirmative action in respect of the distinction between affirmative action quotas and targets (or numerical goals), and their respective legitimacy. The EEA contains a rather ambiguously worded prohibition on the use of quotas in affirmative action programmes implemented under the Act. Section 15 of the Act describes "affirmative action measures" as including "measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce",[15] but section 15(3) provides that such measures "include preferential treatment and numerical goals, but exclude quotas". This weakly worded prohibition on quotas led to a measure of uncertainty as to the legitimacy of the use of

14 See AM Louw "'*I am not a number, I am a free man!*' The Employment Equity Act, 1998 (and other myths about 'equality', 'equity' and 'dignity' in post-apartheid South Africa (Part 1)" (2015) 18 *PELJ* 594-667; and AM Louw "'*I am not a number, I am a free man!*' The Employment Equity Act, 1998 (and other myths about 'equality', 'equity' and 'dignity' in post-apartheid South Africa (Part 2)" (2015) 18 *PELJ*.

15 S 15(2)(d) as amended by the Employment Equity Amendment Act 47 of 2013.

quotas. It prompted me, in 2006, to examine the differences between targets and quotas (and to argue for the illegality of the use of quotas as opposed to targets).[16] Now, more than ten years later, we are probably not much more enlightened as to the exact meaning of what constitutes a "quota", mainly because the majority of the Constitutional Court in *South African Police Service v Solidarity obo Barnard* ("*Barnard*"),[17] by way of Moseneke J, expressly refrained from defining quotas in this context.[18] While heeding Pretorius's call for a normative rather than definitional approach to determining the legality of numerical goals in an affirmative action programme which may function as quotas,[19] one does have to consider what actually constitutes a quota, and how it differs from a numerical target. I have attempted to do so elsewhere.[20] However, I would suggest that we are at the current point in time, at least somewhat more enlightened regarding the constitutionality of quotas in the application of affirmative action.

In *Barnard* we find Moseneke J expressly condemning quotas, by observing that "the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]".[21] A number of the judges in that case referred to the use of quotas and appeared to reject their constitutionality.[22] In subsequent cases, following on *Barnard*, we find other courts also engaging with the issue and apparently holding that quotas are unconstitutional,[23] including the

16 In Louw (2006) *SA Merc LJ* 336-354.
17 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC).
18 *South African Police Service v Solidarity obo Barnard* para 42.
19 JL Pretorius "The limitations of definitional reasoning regarding 'quotas' and 'absolute barriers' in affirmative action jurisprudence as illustrated by *Solidarity v Department of Correctional Services*" (2017) 28 *Stell LR* 269.
20 If I may be allowed to quote my own, rather simplistic, distinction between these two concepts as contained in an earlier article: "Goals [or targets] represent a preconceived target or objective of what is rationally capable of achievement in the light of the expected impact of external factors. Quotas, on the other hand, function as an end in themselves by providing a 'target' that is non-negotiable, fixed and removed from the reality of factors that determine the achievability of a true goal. Accordingly (in the context of transformation), while 'goals' represent objectives, a quota functions as a measure in itself." See, Louw (2005) *Law, Democracy & Development* 207.
21 *South African Police Service v Solidarity obo Barnard* para 54.
22 *South African Police Service v Solidarity obo Barnard* paras 42 and 54 per Moseneke ACJ (and, by implication, in paras 65 and 66); Cameron J, Froneman J and Majiedt AJ in para 87 (and by implication, in paras 91, 96, 119, 123); and Van der Westhuizen J (by implication in footnote 132 to the text of para 127). It is interesting that Jafta J, who apparently expressly approved of race-based job reservation (in para 227), made no mention of the issue of quotas, as legitimate or otherwise.
23 See Davis JA in *South African Police Service v Public Service Association of South Africa* 2015 36 ILJ 1828 (LAC) para 41; see Thlothlalemaje AJ in *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) para 49 and paras 53-54; see Katz AJ in *South African Restructuring And Insolvency Practitioners Association v Minister of Justice And Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice And Constitutional Development* 2015 2 SA 430 (WCC) paras 203-217.

Constitutional Court itself.[24] In fact, the courts have on occasion displayed a willingness, following *Barnard*, to be quite direct and to the point in roundly condemning quotas:

> "Racial or gender quotas as applied within the workplace as indicated in Barnard equate to job reservation, and furthermore attract negative connotations and for good reasons. Not only are they inherently and irrationally discriminatory, they are also demeaning in implementation in that they fail to acknowledge an individual's worth. In most instances, and unwittingly so, they promote mediocrity and incompetence, and instil a false sense of entitlement. Invariably and whether rightly or wrongly, beneficiaries of the quota system will always be viewed as inferior and incompetent, as the assumption will always be that they got recognition or appointment simply to make up the numbers rather than based on their suitability or competencies. In a society such as ours and in our workplaces, where we are still battling the demons of racial polarisation and tensions, the use of quotas adds fuel to those tensions and creates further suspicions and resentment. Any affirmative action measure based on quotas is inherently 'arbitrary, capricious and displays naked preference', and would accordingly not pass [the] constitutional test [for lawful affirmative action] as stated in Van Heerden and Barnard."[25]

I am buoyed by signs of an apparent, impending about-turn in the jurisprudence – even if evident thus far mostly in minority judgments,[26] – regarding both the rationality and fairness of the EEA's "numbers game" when it comes to its affirmative action scheme. I have argued previously that rigid demographics-based target-setting inevitably turns constitutionally legitimate targets into illegitimate quotas.[27] Briefly, the argument goes thus: The EEA requires affirmative action measures to be taken in order to achieve "equitable representation" or groups in the workplace. A designated employer must take such measures once it is found that a group or groups are "under-represented". Such employer may then set targets for the achievement of equitable representation. When demographic statistics are used – especially if they are used as

24 As per Zondo J (writing the majority judgment) in *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) paras 50-51; and Nugent J (writing for the minority) paras 109-111; paras 114-115 and para 118.

25 Per Thlothlalemaje AJ in *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) para 54.

26 One never knows what the impact of such minority judgments may be in future. As Franny Rabkin observes: "Judges must disagree sometimes – dissenting judgments are crucial. As the late justice Ismail Mahomed famously said: 'The orthodoxy of yesterday often becomes the heresy of tomorrow. The most famous example of the importance of dissenting judgments is the lone dissent in the US Supreme Court's *Plessy vs Ferguson* ruling on segregation laws, which years later laid the basis for *Brown vs Board of Education*, which repudiated the doctrine of separate but equal. As the late chief justice Pius Langa also said in 2007, dissent makes judicial deliberation stronger: 'If people speak up, the group as a whole is more likely to reach the correct outcome'." From F Rabkin "Judges' claws come out in Pretoria street name case" (02-08-2016) *BDLive* http://www.bdlive.co.za/opinion/columnists/2016/08/02/law-matters-judges-claws-come-out-in-pretoria-street-name-case (accessed 2018-11-18).

27 See Louw (2015) *PELJ* (Part 1) 594-667.

rigidly as they were by the DCS in *Solidarity v Department of Correctional Services* ("*Solidarity*"), with reference to the actual demographic representation of each racial group in the national population – any level of representation of a specific group which falls below the demographic representation of the relevant group would mean that such group is under-represented, and that such demographic target must be pursued until such time as the relevant percentage representation for the group has been reached. This percentage is then, clearly, no longer a "target", and the requisite percentage representation of the group has inevitably come to function as a rigid quota.[28] Nugent J (with Cameron J concurring) expressed clear and forceful reservations about the "fundamental malaise" inherent in such a numbers game, in *Solidarity*:[29]

> "The passages from judgments of [the Constitutional Court] … all recognise that reconciling the redress the Constitution demands with the constitutional protection afforded the dignity of others is profoundly difficult. That goal is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. It is only in that way that the constitutional tensions referred to in Barnard are harmonised. And it is in that way that the Constitution's demand for a public service that is "broadly representative of the South African people" will be realised. Ours are a vibrantly diversified people. It does the cause of transformation no good to render them as ciphers reflected in an arid ratio having no normative content."[30]

One can only hope that what these last two judges refer to as the "cold and impersonal arithmetic" approach to affirmative action,[31] will soon be a thing of the past.[32] There are indications that this may be the case, as I will discuss below.

Fundamental to the problem with quotas is the fact that they are a very blunt instrument, which fail dismally to harmonise or even address the "constitutional tensions referred to in *Barnard*". They are insensitive to context and by definition apathetic towards their impact on beneficiaries

28 See also Pretorius (2017) *Stell LR* 284-285

29 *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 133.

30 *Solidarity v Department of Correctional Services* Para 133.

31 *Solidarity v Department of Correctional Services* Para 102.

32 De Vos has also expressed reservations about the approach of the majority in the *Solidarity* judgment: "The majority judgment, in my view, is a text of its time and goes further than previous Constitutional Court judgments in insulating redress measures from constitutional attack. The judgment would make it difficult to invalidate employment equity measures unless they allow for the appointment of unqualified candidates or are implemented in a corrupt or nepotistic manner. In this sense, it may well be far less of a victory for the litigants than they might at first have thought." P de Vos "Constitutional Court: Addressing redress" (20-07-2016) *Daily Maverick* http://www.dailymaverick.co.za/opinionista/2016-07-20-constitutional-court-addressing-redress/?utm_source = Daily + Maverick + First + Thing&utm_campaign = 08901ae808-Afternoon_Thing_28 + june&utm_medium = email&utm_term = 0_c81900545f-08901ae808-127639953#.V7HR1E0w_IX (accessed 2018-11-11).

and non-beneficiaries alike. In addition, Pretorius succinctly explains why (what he calls) the "definitional approach"[33] of the courts (as opposed to a normative approach) to assessing the legality of quotas or the rigid application of numerical goals is lacking in constitutional legitimacy:

> "[T]he ultimate marker to distinguish acceptable numerical targets from unlawful quotas or barriers is not whether an employment equity plan contains a deviation clause as such, but whether the flexibility that such a clause makes provision for can accommodate all the implicit considerations of an inclusive notion of substantive equality, along with all the constitutionally protected interests, rights and values inherent in such disputes. Thus, the narrow deviation clause in [Department of Correctional Services] arbitrarily diminished the contextual factors that should have steered the design and implementation of the numerical employment equity targets in line with an inclusive notion of substantive equality and a holistic reading of the Constitution (or, in Sachs J's words … "the fundamental constitutional values called into play by the situation.").[34] One struggles to comprehend how a plan that omits considerations that could very well be intimately related to the substantive equality ideal of realising the equal worth and dignity of all can be called "flexible" in any constitutionally normative sense, and claim to promote the purpose of the substantive equality right."[35]

I would suggest that such definitional approach also loses sight of the express wording of the first sentence in section 9(2) of the Bill of Rights, which calls for recognition of substantive equality embracing the "full and equal enjoyment of all rights and freedoms". Focusing on deviations from otherwise rigid numerical goals would seem to limit constitutional scrutiny to a generally narrow class of (frequently, minority designated group) potential beneficiaries (where such deviation clauses are, by definition, the exception rather than the rule). In addition, as Malan observes, in stressing the importance of the first sentence of section 9(2) in the context of an inter-textual reading of the equality clause as a whole and section 9(2), specifically:

> "The restitutionary measures authorised in the second sentence of section 9(2), that is, the "… legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination …" are in fact authorised to promote, in the words of the first sentence of section 9(2) "… the full and equal enjoyment of all rights and freedoms". Restitutionary measures may therefore quite obviously not create new inequalities. If so, they unjustifiably go beyond the aim of such measures and are incompatible with the above quoted first provision of section 9(2).

33 Pretorius refers to the courts' apparent preference for focusing on deviation provisions in policies that constitute otherwise rigid numerical goals in order to distinguish between legitimate numerical goals and illegitimate quotas – see, generally, Pretorius (2017) *Stell LR* 269.

34 In *Minister of Finance & Another v Van Heerden* 2004 25 *ILJ* 1593 (CC) para 140.

35 Pretorius (2017) *Stell LR* 281.

> They are provided for in order to enable full and equal enjoyment of all rights and freedoms, not only for some categories of persons but for all."[36]

More recently, in respect of the constitutionality of quotas, the following view was expressed by Mathopo JA in the Supreme Court of Appeal in *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* ("*SARIPA*)":[37]

> "[R]emedial measures must not … encroach, in an unjustifiable manner, upon the human dignity of those affected by them. In particular, as stressed by Moseneke J in para 41 of Van Heerden, when dealing with remedial measures, it is not sufficient that they may work to the benefit of the previously disadvantaged. They must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally authorised end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota."[38]

Sadly, in the Constitutional Court in *SARIPA*,[39] Madlanga AJ (Kollapen AJ and Froneman J concurring) once again showed a disinclination on the part of a Constitutional Court judge to engage directly with the constitutionality of quotas, by expressly refraining from examining the issue.[40] I have elsewhere observed that Jafta J's apparent endorsement of race-based job reservation in *Barnard,*[41] – and this in the face of Moseneke J's observation in the majority judgement in that case that "[q]uotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]"[42] – is extremely troubling. In addition, it would seem that Madlanga AJ in *SARIPA* (CC) shares this world view, when he states, "I see no irrationality in distributing work in a way that uses the demographic make-up of South Africa as a point of departure in order to promote equality".[43] I previously lamented the lack of clarity in

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36 K Malan "Constitutional Perspectives on the Judgments of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard) v South African Police Services*" (2014) *De Jure* 118-140 139. See also Louw (2015) *PELJ* (Part 2) 672-673.

37 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2017 3 SA 95 (SCA).

38 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 32.

39 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* CC [2018] ZACC 20.

40 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* Saying the following (at para 79): "This Court has in the past pointed towards the possibility of the use of quotas being constitutionally impermissible under certain legislation. I do not find it necessary to engage in a debate whether – under section 9(2) – quotas are similarly outlawed."

41 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 227 in that judgment.

42 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 54.

43 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 98.

the Constitutional Court on (or even just real engagement with) the purported link between demographic statistics and the pursuit of substantive equality in terms of our Constitution and the empowering legislation,[44] and this statement by Madlanga AJ is another example of somewhat fluffy reasoning – with quite far-reaching implications – not backed up by proper explanation or reasons. Race-based job reservation based on the "cold and impersonal arithmetic" of rigid recourse to population statistics may in some way be rational (although not to my mind),[45] but one wonders whether it can be proportional and fair in the context of the constitutional purpose (and, importantly, the limits) of remedial and restitutionary measures. Unfortunately, and I would suggest, shockingly, our highest court may appear not to be the forum we should expect clear answers from in this regard in the foreseeable future.

Help may, however, soon be forthcoming from other quarters. The South African Human Rights Commission ("SAHRC"), in its *Equality Report 2017/18* released on 12 July 2018, remarked that the Constitutional Court in its judgments regarding the application of affirmative action in certain government departments (see *Barnard* and *Solidarity*) is "sharply divided" in its determination of whether purported numerical targets amount to rigid quotas. In addition, this it condemns:

> "However, the Constitutional Court has been sharply divided in determining whether the implementation of purported numerical targets by certain government departments amounts to rigid quotas. Moreover, the Court has inadvertently created the risk that members of designated groups – and especially those individuals who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of targets, thereby raising the spectre of new imbalances arising."[46]

The SAHRC condemns Zondo J's extension (in *Solidarity*) of the "*Barnard* principle"[47] to apply also to other designated groups (African, coloured and Indian persons and to different genders):

> "This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman. The latter application of the Barnard principle therefore conflicts with the [United Nations Committee for the Elimination of Racial Discrimination's] requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach

44 In Louw (2015) *PELJ* (Part 2) 669-733.
45 See Louw (2015) *PELJ* (Part 1) 624-633.
46 South African Human Rights Commission *Equality Report 2017/18: Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa* 35-36.
47 Namely, that where members of a designated group (in *Barnard*, white females) are over-represented in the workplace, they may be denied the benefits of advancement under an affirmative action policy by a designated employer.

> reflected in the National Development Plan, whereby preference should be accorded on the basis of race 'for at least the next decade' when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are 'designed' to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and 'token' affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered."[48]

Ultimately, the SAHRC found (in its 2nd finding regarding the compliance of South Africa with international obligations in respect of affirmative action or special measures) that the EEA's current affirmative action scheme is likely unconstitutional. In addition, it condemned the use of quotas:

> "It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous peoples and people with disabilities, the [Department of Labour], in collaboration with the [Commission for Employment Equity] and in consultation with National Treasury, undertakes a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas."[49]

It is significant that the SAHRC has suggested substantial amendments to the EEA,[50] in order to move away from the current identification and classification of "designated groups" – a move away from the EEA's demographics-based "numbers game" and its absolute preference for race, to a needs-based system that would place socio-economic circumstances and disadvantage much higher on the totem pole. It is submitted that such legislative amendments, if effected, would ultimately sound the death knell for (race-based) quotas. As our courts have confirmed, quotas are essentially not context-sensitive, and seeing that it would be impossible to formulate a one size-fits-all classification based on (what would have to be imaginary) uniform socio-economic circumstances calculated along racial lines, race-based quotas would be impossible to both formulate and implement. And this should also, to my mind, require adaptation if not the wholesale removal of the demographic representivity yardstick from section 42 of the EEA (although, as I previously observed, it might deserve retention as one potential means of *benchmarking* designated employers' progress in

48 SAHRC *Equality Report 2017/18* 36.
49 SAHRC *Equality Report* 39.
50 The report recommends that the Department of Justice and Constitutional Development, the Department of Labour the Commission for Employment Equity "must jointly report to the Commission within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations", including the suggested amendments to the EEA.

implementing affirmative action, rather than – as it currently functions – as the ultimate *objective* of affirmative action under the Act).[51] It could likely be replaced with a mechanism or mechanisms similar to the NSFAS student loan system (where students whose parents earn more than R600 000 per year, do not qualify for assistance).[52] Classification of potential beneficiaries of affirmative action would proceed divorced from the use of the invidious apartheid-era racial classifications, which has so blighted the EEA since its inception. In addition, this would be a positive development, if only to curb the unintended consequences of the EEA's current obsession with race and with demographics and representivity. As Dupper points out:

> "[I]n order for affirmative action policies to have more than a "remote distributive effect", a tight fit between status and disadvantage is required. If not, it invites the familiar objection that affirmative action is both over- and under-inclusive. To put it succinctly: if the aim of affirmative action measures is to address socio-economic disadvantage, then a group demarcated by status, such as race or gender, might, for example, be over-inclusive by including wealthier black or female people, and under-inclusive, by excluding poor white men."[53]

A needs-based system of classification of beneficiaries based on socio-economic circumstances and lived disadvantage would avoid the current EEA scheme's major shortcoming, whereby "affirmative" action under the Act "[i]nstead of promoting non-racialism … promotes … for the want of a better phrase – perverse race rivalry- and instead of embracing non-sexism it proffers tokenism. Instead of promoting harmony, peace and stability it holds potential for considerable inter group contestation, conflict and protests amongst the designated groups. This undermines the pursuit of non-racialism and non-sexism".[54]

It is ironic, however, that if the suggested amendments to the EEA are effected in order to bring the Act's affirmative action scheme in line with the Constitution, the impetus for such process would not have come from our highest court. Instead, and somewhat reminiscent of the process of the demise of apartheid, it would come ultimately from international pressure in terms of South Africa's commitments under international law (by means of the SAHRC's obligations to comply with United Nations obligations regarding the eradication of racial discrimination).

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51 See Louw (2015) *PELJ* (Part 1) 627-629.

52 This example is referred to in an article on the SAHRC Equality Report by T Eloff "The SAHRC Equality Report: Light at the end of the tunnel for minorities?" (11-09-2018) *FW De Klerk* http://www.fwdeklerk.org/index.php/en/latest/news/805-article-the-sahrc-equality-report-light-at-the-end-of-the-tunnel-for-minorities (accessed 2018-11-20).

53 O Dupper "Affirmative action in comparative perspective" in O Dupper & K Sankaran (eds) *Affirmative Action: A View from the Global South* (2014) 21-22.

54 In the words of Shaik AJ in *Naidoo v Minister of Safety and Security* 2013 3 SA 486 (LC) paras 177 and 188 (in condemning an employment equity plan applied in terms of the EEA).

It would seem (and it is hoped) that the above development, albeit snail-paced, of jurisprudence on the illegality of quotas may augur the imminent demise of such measures in the application of affirmative action in employment. But will this translate to its demise in (professional) sport?

3 Why race-based quotas in sports teams are illegal

Mention was made earlier of the frequent demands from government for the implementation of racial quotas in a number of prominent sporting codes. Such demands have now translated into actual and aggressive punitive measures imposed by government on sports federations (such as the ministerial ban on bidding for and hosting of future international events, as mentioned in the introduction above). Such demands have been successful, and they translated into actual implementation of such policies – in rugby, 2014 saw the introduction of racial quotas in the Currie Cup and Vodacom Cup competitions, and, in 2016, CSA announced the first official race-based quota selection policy for the national team in the democratic era. The following, from a September 2014 media report, illustrates the level of the quota rot in South African rugby as planned for implementation at that time:

> "By 2019, half the players in all these teams – at national, Super Rugby, Currie Cup and Vodacom Cup levels – must be black. Under the targets set for next year:
>
> Seven out of the 23 players in all the Super Rugby teams must be black and five black players must be on the field at all times.
>
> Eight out of the 23 players in Western Province's Currie Cup team must be black and a minimum of six black players must be on the field at all times. Saru has set quota systems for all teams right down to U-18 Craven Week and the amateur teams. These teams have to abide by the quotas before September 2015.
>
> Southern union teams have higher quota requirements than unions up north. In the Western Province, 35 percent of players must be black while the Lions and Bulls have to have 30 percent black players. Saru president Oregan Hoskins said yesterday the quotas were higher for southern unions because there were more black players playing the game in this union.
>
> Saru also aims to increase the number of rugby players at primary, high school and community leagues - and to train more referees and coaches. The plan says that in future 80 percent of all players recruited for Saru academies must be black."[55]

55 C Coetzee "SARU stands by rugby quota plan" (08-09-2015) *IOL* https://www.iol.co.za/capetimes/news/saru-stands-by-rubgy-quota-plan-1747229 (accessed 2018-11-20).

What baffles the mind, in light of the above examination of the constitutionality of quotas as reflected in the recent jurisprudence emanating from our courts, is how those in power in government and in these sporting codes have managed to get away with this, virtually scot-free (if not in the public discourse, then in the courts). To my knowledge, just one case has been brought before a court to challenge the legality of this form of "sports transformation", to date (a matter that is currently pending before the Labour Court, which will be discussed briefly in part 4 in the text below). I find the lack of litigation in this context over the past two decades truly puzzling. As an academic lacking direct *locus standi*, however, I can only lament the state of affairs and explain here why I find it so puzzling and troubling.

3 1 The applicability of the relevant domestic legislation and the South African Constitution

The National Sports and Recreation Act 110 of 1998 (as amended),[56] (the "NSRA") provides for the application of affirmative action in sport. Section 4(2)(g) and (h) of the Act state specifically that the national policy on sport as determined by the Minister of Sport may relate *inter alia* to "help in cementing the sports unification process; and instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process". Section 13A (inserted in the Act in 2007) provides that "[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport and recreation". Furthermore, the catch-all provision in section 14(k) of the Act provides the Minister with the power to make regulations "generally, as to any other matter in respect of which the Minister may deem it necessary or expedient to make regulations in order to achieve the objects of this Act". Section 13(5)(a)(ii) of the Act empowers the Minister to intervene in any non-compliance with guidelines or policies issued in terms of section 13A or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution, by referring the matter for mediation or issuing a directive, as the case may be". Apart from these provisions, it is unclear what "instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process" entails, exactly. The NSRAA did curb the Minister's powers in this regard in respect of the issuing of directives, quite significantly. Section 13(5)(b)(ii) provides as follows:

> "The Minister may not interfere in matters relating to selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport and recreation body".[57]

56 By the National Sport and Recreation Amendment Act 18 of 2007 ("NSRAA").

57 This provision, of course, seems to directly prohibit the former Minister of Sport's ministerial ban on the hosting of events of April 2016, as referred to in the introduction above. This is a saga for another day.

Generally speaking, the NSRA provides little guidance on the exact meaning of "affirmative action" in the context of sport (and recreation). As such, it provides no discrete source of legislative authority for some special form of affirmative action (as the EEA does, which diverges significantly from the constitutional license for affirmative action contained in section 9(2) of the Bill of Rights).[58]

The NSRA does not appear to be a legislative measure that pertinently regulates the application of affirmative action in terms of section 9(2) (as referred to in section 9(4) of the Bill of Rights). Also, unlike section 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"),[59] the NSRA does not qualify its application to sport in any way *vis a vis* other legislation – particularly labour legislation. Accordingly, like all legislation, it must comply with the Constitution and its parameters for constitutionally legitimate affirmative action. Moreover, accordingly, what was said above about the use of racial quotas as affirmative action measures, generally, must hold true in the context of sport as regulated under the Act.

When it comes to the application of employment laws in the professional sports industry, our courts and the Commission for Conciliation, Mediation and Arbitration ("CCMA") have on a number of occasions held, quite clearly, that professional athletes in team sports such as rugby, cricket and football, are "employees" as defined by our labour legislation. As employees, such players are covered by such legislation.[60] This includes the Labour Relations Act 66 of 1995 and notably for present purposes, the EEA. Accordingly, the above-mentioned prohibition (in section 15(3) of the EEA) on the application of

58 As explained in more detail in Louw (2015) *PELJ* (Part 1) 594-667.

59 Section 5(3) of PEPUDA provides that: "This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998) applies".

60 The EEA and Labour Relations Act take precedence over any other conflicting statute such as the National Sport and Recreation Act that may purport to regulate the employment relationship. For recognition of the employment status of players, see generally R le Roux "Under Starters Orders: Law, Labour Law and Sport" (2002) 23 *ILJ* 1195; Jordaan in JAA Basson & MM Loubser *Sport and the Law in South Africa* (2000) ch 8–1; MW Prinsloo "Enkele Opmerkinge oor Spelerskontrakte in Professionele Spansport" (2000) *TSAR* 229 229-230; A van Niekerk "Labour Law in Sport: a Few Curved Balls" (1997) 6 *Contemporary Labour Law* 91; S Smailes "Sports law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength" (2007) 28 *ILJ* 57; and in the case law *McCarthy v Sundowns Football Club* 2003 2 BLLR 193 (LC); *Augustine and Ajax Football Club* 2002 23 ILJ 405 (CCMA) (where the CCMA assumed jurisdiction over an unfair dismissal dispute between a professional footballer and his club, although preferring to refer such dispute to private arbitration as agreed between the parties in the employment contract); *Smith v United Cricket Board* 2003 5 BALR 605 (CCMA); *SARPA obo Bands / SA Rugby (Pty) Ltd* 2005 2 BALR 209 (CCMA); *SA Rugby (Pty) Ltd v CCMA* 2006 1 BLLR 27 (LC); *Botha v The Blue Bulls Co* case no JR1965/2005 of 27-06-2008; and most recently at the time of writing *SA Football Players Union v Free State Stars Football Club (Pty) Ltd* 2017 38 ILJ 1111 (LAC).

quotas in an affirmative action policy or programme implemented under the EEA applies to sports employers (professional franchises or clubs, provincial unions and the relevant national federation as employer of nationally contracted players) as designated employers under the EEA. Even though the provisions of section 42 of the Act (as amended) still allow designated sports employers to consider national and regional demographics in setting targets for the equitable representation of employees (including professional athletes), the use of quotas is prohibited.[61]

It bears mentioning that even absent the EEA's prohibition on quotas, the above-mentioned jurisprudence from the courts has, in any event, to a significant extent condemned the legitimacy of quotas, and such condemnation should even apply to affirmative action outside the corners of the EEA, as being constitutionally non-compliant with the prescripts of section 9(2) of the Bill or Rights. Accordingly, the use of race-based quotas in amateur sport would also fall foul of the Constitution.

In a nutshell, therefore, there is nothing contained in the applicable legislation, which allows for the use of racial quotas in professional sports teams, and, in fact, the applicable labour legislation (the EEA) *expressly* prohibits its use. In contexts where the labour legislation does not apply, such as amateur sport, the apparent unconstitutionality of (racial) quotas in terms of the evolving jurisprudence on the issue must also be taken to be an absolute bar to its application.

61 Some proponents of the use of race-based quotas in professional sports teams may argue that the context should be distinguished from the application of affirmative action in more run-of-the-mill employment scenarios, where, in the latter case, affirmative action is applied primarily in recruitment and selection processes while, in the former case, affirmative action is applied only in the selection of players to compete in matches (and thus would not necessarily affect the actual employment of non-selected players). This loses sight of the fact that the EEA provides that affirmative action in line with the purposes of the Act may provide justification for an employer for what would otherwise amount to unfair discrimination (section 6(2)), and that the Act prohibits unfair discrimination in "any employment policy or practice" (which is very broadly defined in the Act). Also, it would lose sight of the fact that race-based quotas may very likely determine hiring decisions; a franchise or club faced with the necessity to select a fixed number of players of colour in a team would likely tailor its squad of players to contract for the upcoming season in order to enable it to select the requisite number of players of colour (ie fewer white players would be contracted). Also, I have argued before that professional sport is characterised by its nature as an entertainment industry, coupled with player sponsorships and endorsement contracts. Non-selection of white players based on a race-based quota could significantly impact such contracted players' future employment prospects and secondary streams of revenue (ie non-exposure in matches would mean that even a contracted white player, who still receives a salary under the playing contract, would potentially miss out on sponsorship and endorsement deals as a result of non-exposure, not to mention match bonuses). The implications of the application of affirmative action in team selections for non-beneficiaries are very similar to its application in other employment contexts.

3 2 While the cat's away … the practical experience of sports quotas

At its heart, race-based quotas in sport, as a transformation measure, stumble very early on in the race, at the hurdle of rationality. There is probably no better context than sporting competition to illustrate the arbitrary and capricious nature of such application of what purports to be constitutionally mandated affirmative action but is nothing of the sort. In addition, post-apartheid South Africa, of course, has the shameful distinction of being rather unique in the world in terms of the levels of foolishness reached. I have written previously about Netball South Africa's ("NSA") racial quota system. In 2007 it was reported that NSA had devised a system to reward teams that comply with the required racial quotas; instead of docking points from teams that do not meet the quota (which had been the previous practice), any team that had the required five-two ratio on court at all times would receive an additional six goals. NSA regulations required teams to field a ratio of five to two on court at all times – either five white and two black players, or five black and two whites. In the past, teams such as Zululand and other rural areas, who have no white players, were consistently docked points, and in some cases, failed to win their section even after winning all their matches. NSA's president was quoted at the time as explaining, "In the past, some teams were docked so many points that they went into negative territory".[62] Really?

Alternatively, let's consider the more recent tragic-comic events that transpired in a Highveld Lions franchise cricket match in Johannesburg. In a match against the Titans in February 2016, the Lions fell foul of CSA's race quota, which requires teams to field six players of colour, of which three must be Black African. African leg-spinner, Eddie Leie, was injured during the pre-match warm-ups. The Lions had arrived at the venue with only 12 squad members, and they had no choice but to phone CSA and to obtain permission to include a white opening batsman (which CSA agreed to). The problems did not end there, though. When one of the opening bowlers was injured a couple of overs into the match, the Lions were forced to include their (Black African) coach, Geoffrey Toyana, who had retired from professional cricket in 2011. Toyana had to do some fielding, until the Lions managed to rope in a spectator, a young white student, who then took to the field in Leie's kit. Probably the best thing that happened on that fateful day was that the match rained out and there was no official result after all these shenanigans.

In a nutshell, it appears to require very little more explanation why racial quotas in national (or other) sports teams, both professional and amateur, are not only clearly unlawful in terms of South African law but also so irrational that they are making a mockery of our sport in the eyes

62 From a media report entitled "Rewards for racial quotas" (07-08-2007) http://www.news24.com/News24/Sport/More_Sport/0,,2-9-32_2159954,00.html (accessed 2018-11-19).

of the world. Much has been written in criticism of the very low standard for the adjudication of the constitutionality of affirmative action as set in *Minster of Finance v Van Heerden ("Van Heerden")*,[63] and confirmed in *Barnard*, namely that of rationality.[64] I would suggest that the above (and other examples) of the innate irrationality and arbitrariness of the application of racial quotas in sports teams – and the sometimes farcical implementation of such policies – would disqualify such measures as being constitutional even in terms of this very low bar. If we apply the words of Moseneke J in *Barnard* to racial sports quotas as purported restitutionary measures under section 9(2) of the Bill of Rights (and, in that case, within the context of the application of affirmative action in terms of the EEA), their unconstitutionality is starkly on display:

> "The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be, yes. There is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose. As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally."[65]

If the legitimate governmental purpose of special measures is to facilitate the racial transformation of a sporting code, it is highly doubtful that the cosmetic window-dressing exercise of implementing a racial quota which changes only the complexion of the relevant team (and does so in terms of a measure that ignores or significantly devalues sporting merit and the competition principle in sport) is rationally connected to such purpose. The measure itself, our courts are starting to say (and the EEA expressly says), is illegal. If irrational conduct in implementing a lawful measure attracts unlawfulness, irrational conduct in implementing an unlawful measure should be even more readily earmarked as being unlawful.

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63 2004 6 SA 121 (CC). For further discussion of the *Van Heerden* test and its aftermath, see Albertyn "Adjudicating affirmative action within the normative framework of substantive equality and the Employment Equity Act – An opportunity missed? *South African Police Service v Solidarity obo Barnard*" 132(4) *SALJ* (2015) 711.

64 M McGregor "Affirmative action on trial – determining the legitimacy and fair application of remedial measures" (2013) *TSAR* 650-675; JL Pretorius "Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*" (2013) 130 *SALJ* 31-44; IM Rautenbach "Requirements for affirmative action and requirements for the limitation of rights" (2015) *TSAR* 431-443.

65 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 38-39.

While it appears trite to say that these racial quotas are a (rather atypical and internationally unique) form of application of affirmative action, it bears consideration whether such quotas as applied to professional sports teams, in fact, make the grade as "affirmative action measures" under the EEA (which, as mentioned above, applies to designated employers and player employees in this context). The Johannesburg Labour Court recently had occasion to consider whether a somewhat similar employment policy in fact constitutes an affirmative action measure. In *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality,*[66] the Court confirmed that a legitimate affirmative action measure must pass the three-pronged test from *Van Heerden*, and that the sticking point in many cases will be whether such a measure passes the third leg of this test, namely whether the measure promotes the achievement of (substantive) equality. It held:

> "The EEA clearly envisages a structured approach to the implementation of affirmative action measures. The measures must be such that, amongst others, there are targets, numerical goals and objectives that can be monitored and measured. The Staffing Policy lacks this. In the absence of measurable numerical targets and properly formulated measures, it would be impossible for an applicant who is excluded from promotion or an appointment to challenge the process and to uphold his or her human dignity."[67]

The staffing policy in this case made no provision for numerical goals and objectives based on an analysis of under-representation of designated groups. The court held that this policy was not an affirmative action measure. The acting human resources director of the respondent had conditionally approved the shortlisting (which was later nullified) of the applicant, a white male, subject to the condition that only candidates from designated groups should be shortlisted. This decision to impose a condition was based solely on workplace profile statistics reflected on the form submitted to the director for approval:

> "His only consideration was the numbers in a table on the form. Those numbers gave him the impression that there were 'too many' white males reflected in the group. He conceded that there were no numbers or numerical targets against which he could compare the white male representation."[68]

In the circumstances, the court held that the relevant policy was not an affirmative action measure under the Act and that the respondent's conduct constituted unfair discrimination against the applicant. The race quotas applied in professional sport are quite similar. There is no indication that sports employers have set rational numerical goals in respect of an objective to achieve equitable representation of players

66 *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality* 2016 37 ILJ 2144 (LC).

67 *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality* paras 84-85 of the judgment.

68 *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality* paras 4-13 of the judgment.

from designated groups.[69] In fact, the relevant transformation policies sometimes expressly call these quotas what they are, inflexible quotas rather than aspirational targets, and there appears to be no evidence that these quotas have followed on analyses regarding under-representation of players from designated groups based on national and regional demographics in respect of the economically active population (as section 42 of the EEA requires). Of course, as I have argued before, the context of sporting competition is probably the supreme example of the inherent irrationality of the implicit assumption that, had it not been for past unfair discrimination, our sports teams would have perfectly or even just closely resembled the national demographics in terms of race. While the role of merit in the affirmative action debate may have become significantly undervalued in recent years (in part because of the EEA's "suitably qualified" provision in section 20 of the Act), it surely must play a special role in the context of (professional) sport, where innate sporting talent, physical characteristics and "big match temperament" are just some of the intangibles which distinguish a Tiger Woods from the weekend golfer. I am again reminded of the trenchant criticism by Thomas Sowell of this mysterious assumption of a natural, demographically equal spread of skills and talent in the human population, which underpins the demographic representivity-based social engineering agenda of the EEA.[70] This reminds one of the words of the counsel for an applicant in another matter: "A target is something to be aspired to because it is based on some scientific data whereas a quota system has no science or law. It is arbitrary."[71] In short, such race quotas are little other than measures that are "arbitrary, capricious or display naked preference", as warned about in *Van Heerden*.

A related issue regarding the lawfulness of such quotas in the professional sports context (under the EEA) is the Act's prohibition on affirmative action measures constituting "absolute barriers" for the employment or advancement of persons not from designated groups, as

69 The rationality of affirmative action measures is to an extent to be determined with reference to whether they are implemented in terms of a carefully crafted and designed employment equity plan – see *Gordon v Department of Health: Kwazulu-Natal* 2008 ZASCA 99; *Munsamy v Minister of Safety and Security and Another* 2013 ZALCD 5.

70 As succinctly explained by Sowell: "The enormous variety of geographic, cultural, demographic, and other variables makes an even, random, or equal distribution of skills, values, and performances virtually impossible. How could mountain peoples be expected to have seafaring skills? How could an industrial revolution have occurred in the Balkans, where there are neither the natural resources required for it nor any economically feasible way of transporting those resources there? How could the indigenous peoples of the Western Hemisphere have transported the large loads that were transported overland for great distances in Europe and Asia, when the Western Hemisphere had no horses, oxen, camels or other comparable beasts of burden?" (T Sowell "Discrimination, Economics and Culture" in A Thernstrom & S Thernstrom (eds) *Beyond the Color Line: New Perspectives on Race and Ethnicity in America* (2002) 167-180, 171)

71 From counsel for the applicant's submissions in *Mgolozeli v Gauteng Department of Finance* 2015 3 BLLR 308 (LC) para 24.

contained in section 15(4) of the Act. I previously wrote about the fact that this "prohibition" is worded in a rather weak manner,[72] but our courts have concurred in condemning measures, which constitute such absolute barriers. In the (professional) sports context, it should be noted that opportunities for athletes to compete at especially the higher levels are limited, and the pool of potentially suitable athletes is relatively small. While evidence may be largely anecdotal (compare the well-known claims by South African-born English Test cricket batsman, Kevin Pietersen, that he left South Africa for greener pastures abroad as a result of non-selection under racial quotas), it is at least likely that a race quota in, for example, the national rugby team might serve to constitute an absolute barrier to the employment of a white player who would in the absence of race-based selection likely have made the team on merit.

Apart from the above-mentioned domestic law implications, racial sports quotas are also clearly not in line with international standards and fundamental principles of international sports law, and international law more broadly. I remarked (in part 2 above) that the impetus for development of our law in respect of the banning of racial quotas as legitimate affirmative action measures appears to be coming from South Africa's international law obligations. Proponents of racial quotas in sport should likewise take heed of the fact that the domestic sports transformation process does not occur within a vacuum, and that in this context the professional sports industry is a particularly globalised industry within which domestic stakeholders are to a significant degree beholden to the rules and regulations of international sports governing bodies. In that light, let us consider the legitimacy of race quotas in (professional) sports teams in terms of the relevant principles of international sports law.

3 3 Race-based quotas and international (sports) law

In the waning years of apartheid, South Africa was, rightly, banned from fielding its racially-engineered, all-white teams in international sporting competitions. The reason for this is that there were rules about this sort of thing. What may (but should not) surprise the current South African government is that there still are.

72 S 15(4) does not expressly prohibit absolute barriers, but rather provides that "nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups'. What adds to the uncertainty regarding whether this constitutes a prohibition on the creation of absolute barriers, is the fact that section 15(4) starts with the words 'Subject to section 42 …". Does this mean that employers are, in fact, allowed to create absolute barriers based on demographic representation of designated groups in the economically active population? If this is the case this provision would be unconstitutional, and our courts have condemned the creation of absolute barriers. Case law in recent years appears to have settled the question in favour of the prohibition of such barriers.

The 4th Fundamental Principle of Olympism, as contained in the Olympic Charter,[73] provides that "The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play." The 6th Principle provides that "[t]he enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 of the Constitution,[74] of the International Association of Athletics Federations ("IAAF") provides that the objects of the IAAF include "To encourage participation in Athletics at all levels throughout the world regardless of age, gender or race", and "To strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist, or is allowed to develop in Athletics in any form, and that all may participate in Athletics regardless of their gender, race, religious or political views or any other irrelevant factor".

Bye-Law 3 of World Rugby (the erstwhile International Rugby Board) describes the objectives and functions of World Rugby, which includes "To prevent discrimination of any kind against a country, private persons or groups of people on account of ethnic origin, gender, language, religion, politics or any other reason".[75]

Article 12 of the International Cricket Council (or "ICC")'s Articles of Association (approved by its full council on 22 June 2017) is entitled "Non-discrimination and stance against racism", and provides as follows:

> "Neither the ICC nor any of its Members shall at any time offend, insult, humiliate, threaten. disparage, vilify or unlawfully discriminate against persons based on their race, religion, culture, colour, descent, gender, and/or national or ethnic origin."

It is clear that, in principle, the imposition of race quotas in any of the relevant sporting codes by a domestic member federation would in all probability fall foul of these provisions. Apart from the uniqueness of such a "transformation policy" in the international sports context, and even bearing in mind that under South African law legitimate affirmative action does not constitute unfair discrimination (as per Moseneke J's

73 The current version of the Olympic Charter, in force as from 2 August 2015, is available at https://stillmed.olympic.org/Documents/olympic_charter_en.pdf (accessed 2018-11-11).

74 Current version in force as from 1 November 2015 is available at https://www.iaaf.org/about-iaaf/documents/constitution (accessed 2018-11-11).

75 Bye-Law 3(f).

majority judgment in *Van Heerden),*[76] the express prohibition on the use of quotas contained in the EEA (in the professional sports context) and the apparently growing backlash amongst members of the judiciary against the constitutionality of (race) quotas as part of affirmative action (in the amateur sports context) would likely disqualify such quotas as legitimate affirmative action and expose them to unfair discrimination review.

There is another, important, aspect of the international governance of sport, which bears consideration in this context. It is an accepted principle of international sports governance that domestic sports federations, as members of the relevant international governing body and as representative of the relevant sporting code within the domestic territory, must act independent from political and governmental interference in the governance of the sport. The founding documents of international governing bodies invariably contain provisions to this effect, frequently providing such international governing bodies the power to suspend or expel member federations who (or, more accurately, whose governments) transgress in this regard.

Rule 27 of the Olympic Charter, for example, provides as follows in respect of the mission and role of National Olympic Committees ("NOCs"):

> "27.5 In order to fulfil their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations. However, they shall not associate themselves with any activity, which would be in contradiction with the Olympic Charter. The NOCs may also cooperate with non-governmental bodies.
>
> 27.6 The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter."

I have written previously about the strange behaviour of the South African Sports Confederation and Olympic Committee ("SASCOC"), when one considers these provisions of the Charter. SASCOC has for years now been actively involved in pushing the governmental sports transformation agenda, including the enforcement of race-based quotas, and I seriously doubt the legitimacy of such activities in light of the above Charter provisions and fundamental principles of sports governance.[77]

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76 Although, as I have argued before, it appears that Moseneke J's view might actually just have exempted legitimate affirmative action from the presumption of unfairness contained in sec. 9(5) of the Bill of Rights, rather than providing an automatic and blanket exclusion of affirmative action measures from determination of whether they might, in fact, constitute unfair discrimination in any given case – see Louw (2015) *PELJ* (Part 1) 602.

77 See Louw (2006) *International Sports Law Journal* 48; AM Louw "Why South African Sport Should Say No to a State-Sanctioned SASCOC Autocracy – Part 1: The background and nature of SASCOC" (2007) *De Jure* 257-276;

Other international governing bodies have similar rules. Bye-Law 14(e) of World Rugby (formerly the International Rugby Board) provides that:

> "A Union may be expelled from World Rugby membership pursuant to World Rugby Bye-Laws and/or Regulations if state authorities interfere in its affairs in such a manner that
>
> (i) It may no longer be considered as fully responsible for the organisation of rugby related matters in its territory;
>
> (ii) In the opinion of Council or the Executive Committee it is no longer in a position to perform its constitutional and regulatory tasks in an appropriate manner."

When one considers the content of the above-quoted media statement by former SARU president Oregan Hoskins (quoted in the introduction above) regarding governmental pressure to impose race quotas, it is questionable whether SA Rugby would be "considered as fully responsible for the organisation of rugby related matters in its territory" by its international governing body. Article 2.9(B) of the Articles of Association of the International Cricket Council provides as follows:

> "Where a government interferes in the administration of cricket by a Member, including but not limited to interference in operational matters, the selection and management of teams, the appointment of coaches or support personnel or the activities of a Member, the Executive Board shall have the power to suspend or refuse to recognise that Member …".

The implications of this in the current context are obvious. One such international governing body that has in recent years actively enforced provisions regarding political interference by domestic governments is the Fédération Internationale de Football Association ("FIFA"). The world football governing body has suspended a number of member federations on this basis, in terms of the following provisions of the FIFA Statutes (April 2016 edition):

> "Article 15:
>
> Member associations' statutes must comply with the principles of good governance, and shall in particular contain, at a minimum, provisions relating to the following matters:
>
> a) to be neutral in matters of politics and religion;
>
> b) to prohibit all forms of discrimination;
>
> c) to be independent and avoid any form of political interference;
>
> …"

AM Louw "Why South African Sport Should Say No to a State-Sanctioned SASCOC Autocracy – Part 2: Questioning the legitimacy of SASCOC" (2008) *De Jure* 16-35.

> "Article 19.1:
>
> Each member association shall manage its affairs independently and without undue influence from third parties."

The repeatedly reported claims of governmental pressure on sports federations to transform, and governmental support for the use of race quotas in this process would probably fall foul of such prohibitions on governmental interference in sport. More specifically, it is submitted that the Minister's ban on bidding for and hosting future events of April 2016 (as discussed in the introduction above) is just such a form of illegitimate political interference in sports governance. The ban was apparently not imposed in terms of the 2010 Bidding and Hosting Regulations issued in terms of the NSRA (which contain criteria for the evaluation of bidding for events which appear to be in line with a legitimate governmental purpose, namely to protect the fiscus and ensure the public interest is served by hosting the relevant events). The ban was expressly imposed as a punitive measure to punish poor performing federations in respect of race-based transformation (amidst a milieu of governmental pressure on federations to implement racial quotas in representative teams). Of course, one could argue that the transformation of South African sport is a legitimate governmental objective. However, the majority of the Constitutional Court in *Barnard* held that a lawful (affirmative action) measure must also be lawfully implemented.[78] In the same judgment the court held that the use of rigid quotas in the application of affirmative action is probably unconstitutional.[79] Accordingly, it is highly questionable whether the bidding and hosting ban, with its clear objective of enforcing (through a punitive measure) a racial quota contained in the Memorandum of Agreement entered into between government and sports federations[80] constitutes a legitimate implementation of a lawful governmental objective. The accompanying threats by government regarding other potential punitive measures are similarly troubling in this regard, especially the potential to revoke the

78 *South African Police Service v Solidarity obo Barnard* paras 38-39.

79 *South African Police Service v Solidarity obo Barnard* paras 42 and 54.

80 The former Minister, writing in the foreword to the 2014/15 EPG Transformation Status Report (the "EPG Report") – the document upon whose findings the Minister ostensibly based his decision to impose the ban – explained that the actual source of the ban is to be found in a Memorandum of Agreement ("MoA") which the "big five" sports federations had signed – "out of their own volition" – with government's Department of Sport and Recreation in May 2015. The Minister continued to explain that this MoA provided for punitive measures to be imposed against the respective federations in the event of non-compliance in respect of transformation goals and targets, including the following:"In essence, [to] revoke a federation['s right] to host and bid for major and mega international tournaments in the Republic in writing in pursuance of the prescripts of the Bidding and Hosting of Major Events Regulations *Gazetted* and Published in line with the National Sports and Recreation Act and also as a result of not recognizing the said federation.' From the foreword of the EPG Report at vi. A full extract of the text (from pages v-vi): "The findings and recommendations were announced at a public event in May 2015

opportunity for athletes of such federations to obtain national colours for purposes of national or international competitions. Such a punitive measure would not only involve interference in the governance and management of the relevant federation (a voluntary association), but would also implicate the rights of individual athletes to compete at the pinnacle of domestic and international competition (while it would conceivably, in respect of professional athletes, constitute a limitation of their constitutional freedom of trade, occupation and profession as well as their freedom of association, which, I would argue, is not justifiable under law).

Finally, apart from international sports law, racial quotas in sport are probably also inconsistent with international law, more generally. The Solidarity trade union, in August 2016, made submissions in a complaint regarding the alleged illegal use of affirmative action by the South African government before the United Nations Committee on the Elimination of Racial Discrimination ("CERD").[81] Media reports of the proceedings are scarce. Solidarity's web site, however, includes the following, which (if an accurate reflection of the proceedings) may provide some indication of the Committee's views as formulated during the hearings:

> "Baron Marc Bossuyt, President-Emeritus of the Belgian Constitutional Court and a member of the committee, responded by mentioning a misunderstanding about special measures (or affirmative action, as it is termed in America). It is generally accepted that merit has to play a role. It seems that, in the political arena, it is implemented in another way. The focus

where after the five federations, had out of their own volition, signed a Memorandum of Agreement (MoA) with the Department of Sport and Recreation South Africa in 2015. The MoA is premised on the transformation barometer with clear and concrete transformation targets and goals over the next five years. The MoA further delineates roles and responsibilities of each party to the agreement and stipulates punitive measures to be taken in the event of non-compliance. These punitive measures include among others the following:

(i) Suspending or withdrawal of Government's funding to the Federation in terms of section 10(3)(a) of the Act in writing, if applicable;
(ii) Withdrawal of Government's recognition of the particular federation as a National Federation in terms of section 10(3)(b) the Act in writing where after the Minister may publish such a decision in the Government Gazette;
(iii) In essence, revoke a federation to host and bid for major and mega international tournaments in the Republic in writing in pursuance of the prescripts of the Bidding and Hosting of Major Events Regulations *Gazetted* and Published in line with the National Sports and Recreation Act and also as a result of not recognizing the said federation;
(iv) Withdrawal of the federation's opportunity to be awarded national colours via SASCOC to players who participate under the auspices of that particular federation in order to represent the Republic internationally and nationally;
(v) Terminate the existing five year agreement in writing due to non-compliance; or
(vi) Request the Minister in writing to consider issuing a directive in terms of section 13(5)(a) of the Act as SRSA deems fit and appropriate, which may include but not limited to the withdrawal of political support and endorsements for sponsorships."

81 Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

> there is on quantitative rather than on qualitative outcomes. In South Africa, affirmative action is applied too severely by using the national demographics as formula. It could still be justified at certain government entities but rigid measures in the economic and private sector, as well as in sport are absurd, Bossuyt said. "If you want to help people, it should be done on the basis of need and poverty and not on the basis of skin colour. [CERD] wants to eradicate racism. The notion of representivity goes against the Convention. It could lead to a system similar to the former apartheid system. Certain committee members indicated that the criteria for affirmative action are inadmissible under the Convention. The way in which it is being implemented is no less important than the goal. Race as sole criterion is not permissible. Other members of the committee were of the opinion that new forms of discrimination may not be allowed as no form of discrimination was indeed acceptable."[82]

At the very least, these reported observations by members of the Committee do not augur well for future consideration on the international stage of the legitimacy of the South African government's sports transformation agenda, which appears to have for years been so obsessed with racial representivity and the use of the blunt measure of race quotas. Surely "affirmative" measures have a place in the development of sporting talent, short of express and blatant race-based selection. It is expected that pressure may in future be put on international sports governing bodies to address the South African government's agenda regarding the application of such quotas in sport (even if only indirectly, by means of the potential imposition of sanctions against domestic member federations – and, consequently, their athletes – who implement such measures).

4 Sports quotas before the courts: current litigation

I have previously lamented the fact that, to date, the burning issue of race quotas in sport has not engaged the attention of the judiciary, and I expressed surprise at the lack of litigation on the subject. At the time of writing, however, such a case is currently pending before the Johannesburg Labour Court. While the eventual outcome is, of course, uncertain at this time, it deserves brief attention here.

The Solidarity trade union (a frequent litigator in challenges to the application of affirmative action before the courts) cited SA Rugby, CSA, Athletics South Africa ("ASA"), NSA, the Minister of Sport and SASCOC as respondents.[83] Solidarity is challenging the constitutionality and lawfulness of "the mechanical application of demographic profiling and transformation targets derived from the provisions of the Sport

82 From a report of Solidariteit: Anonymous "Member of UN committee equates SA government's racial quotas with apartheid" (10-08-2016) *Solidariteit* https://solidariteit.co.za/en/member-of-un-committee-equates-sa-governments-racial-quotas-with-apartheid/ (accessed 2018-11-24).

83 Johannesburg Labour Court case number J963/17.

Transformation Charter … read into the [Memorandum of Agreement] entered into between [each of] the first to fourth respondents with the Sports Minister (fifth respondent) and the sixth respondent [SASCOC]".[84] The applicant is seeking an order that the offending provisions of the Charter and the agreements be declared invalid and of no force and effect, and be set aside; and that the respondents be interdicted and restrained from implementing the offending provisions of the Charter and the agreements insofar as they –

- apply quotas in determining team selection at a national or provincial level; and
- apply quotas in determining the appointment or declining to make appointments within the administration, management and specialised support structures of the first to fourth respondents based purely on such criteria of such quotas.

Solidarity claims that the transformation targets which the relevant federations adopted in their agreements with the Minister and SASCOC function as rigid quotas, and also constitute absolute barriers to the employment and advancement of "persons who are not categorised as generic black or black African". Solidarity identifies ASA as a "top culprit", citing its transformation targets which mandate "100% black African as well as 100% generic black representation at the … levels [of] full time employed staff employees, board members, [and] finance committee members".[85]

The respondents in this matter filed consolidated heads of argument taking issue with a number of aspects of the applicant's case. Firstly, the respondents dispute that the applicant has *locus standi* in this matter (mainly because the union's application was not brought on behalf of a member). Secondly, the respondents claim that the Labour Court does not have jurisdiction, as the matter was not first referred to conciliation before the CCMA, and because the applicants were late in referring the matter for conciliation and has not asked for condonation for such lateness. On the merits, the respondents take issue with the applicant's allegations that the relevant transformation targets as contained in the Transformation Charter and the memoranda of agreement signed between the first four respondents, on the one hand, and the Minister and SASCOC, on the other, constitute rigid quotas:

> "The Transformation Charter and the impugned agreements do not impose inflexible, rigid racial quotas for employment in sport. Instead, the transformation policy adopted by the Respondents is multi-faceted, flexible, context-sensitive, and aims to promote the achievement of equality in the long-term. The Charter and the agreements make it clear that punitive measures do not follow if the number targets are not reached without more. Transformation goals are determined holistically and not based on numerical

84 From the Applicant's Heads of Argument, dated 31 May 2018, 4 (copy on file with the author). Regarding the memorandum of agreement referred to, see the text to n 80 above.

85 Applicant's Heads of Argument, 55.

> targets alone: the transformation policies adopted by the Respondents are constitutional redress measures."[86]

A central pillar of the respondents' argument addresses the applicant's claim that the Minister's punitive ban on the relevant federations regarding bidding for and hosting events (as discussed in the introduction above) constitutes a sanction for non-compliance with the relevant targets, which indicates that such "targets" in fact function as quotas. The respondents deny that the power to sanction non-performance turns a target into a quota, relying on the Constitutional Court judgment in *Solidarity*, where Zondo J held as follows in this regard:

> "Section 24(1)(a) [of the EEA] places an obligation on a designated employer to assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan. Section 24(1)(b) obliges a designated employer to provide the managers with "the authority and means to perform their functions". Obviously, those functions are the functions concerning monitoring and implementing the employer's employment equity plan. Then section 24(1)(c) obliges a designated employer to "take reasonable steps to ensure that the managers perform their functions". Managers are employees. An employer is entitled to indicate to an employee that, if he or she fails to perform his or her duties or functions properly, disciplinary steps may be taken against him or her. There is no reason why a provision in an employment equity plan to the effect that managers who fail to perform their duties properly in regard to the monitoring and implementation of the employer's employment equity plan will be disciplined should be held against the employer or should be said to render numerical targets quotas."[87]

Of course, this seems to lose sight of the fact that the Minister's punitive ban in the current context has nothing to do with section 24 of the EEA, or an employer's authority over its employees in giving effect to an employment equity plan, and it appears that Zondo J's views in that regard are thus irrelevant. In essence, we have here a sanction imposed upon employers by an outside agency – in respect of transformation "targets" imposed by such employers under pressure from such outside agency – where the sanction was not imposed based on the fact that the EEA allows that "managers who fail to perform their duties properly in regard to the monitoring and implementation of the employer's employment equity plan will be disciplined". If we recall the wording of the Minister's media statement quoted in the introduction above, the Minister resolved to revoke hosting and bidding privileges of the relevant federations "as a consequence of the aforementioned federations not meeting their own set transformation targets". To my mind, this equates to the clear and unequivocal imposition of a sanction based on the failure

86 From the Respondents' Consolidated Heads of Argument, 2 (copy on file with the author).

87 *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) paras 62-63.

to meet a target. That surely means that such alleged "target" is actually a rigidly enforced quota.[88]

In a nutshell, the respondents' argument is that the relevant transformation "targets" that were challenged form just one part of a multi-faceted, holistic policy to transform sport, and as such cannot be deemed to be rigid quotas that must be achieved at all costs. Along the way, the respondents address the applicant's above-mentioned challenge regarding, specifically, ASA and the NSAs' "100% target" in certain posts:

> "The Applicant argues that because ASA's and NSA's forecasted transformation undertakings for certain positions is 100% black representation, ASA and NSA have undertaken to hire only black people for those positions. This, the Applicant submits, constitutes a quota and an absolute bar to employment. The Applicant's reading of these forecasts ignores the context within which the undertaking was made. These undertakings and forecasts, as explained above, are a single factor within a multi-faceted measure that holistically transforms sport. ASA and NSA have not undertaken to reach 100% black representation in those positions at all costs. They have simply indicated that on their prediction, certain positions will have 100% black representation by a certain date. The undertaking and the respective contracts between NSA and ASA, on the one hand, and the SRSA, on the other hand, does not require them to fulfil those forecasts rigidly and absolutely. A proper implementation of the Transformation Charter and the EPG Reports does not entail such rigidity."[89]

I am rather baffled by this. Even if not a target, or even a quota, how does one arrive at a "forecast" that predicts that in future certain positions will eventually be filled by "100% black representation", unless one is in the process of actively engineering that outcome (through the imposition of quotas, or some otherwise nefarious[90] scheme)? Even if such "undertakings" by federations (if not actual "targets", nor "quotas") are just one little cog in a great transformational machine of multi-faceted and holistic measures and policies to transform sport, they surely smack of racial quotas which those making these "predictions" must be well aware of and actively supporting to implement.

I will not comment further on this matter, which is currently before the court, nor on the prospects of the respective parties (based solely on their respective heads of argument). My above discussion might create an impression on the part of the reader of a lack of objectivity on my part. If this is accurate, I can only apologise and say that my views are

88 Consider the words of Thlothlalemaje AJ in *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) para 53: "'*Quotas*' … are externally imposed, (e.g by way of legislation, policy, regulations or even practice) and the failure to meet them is usually met with a sanction."

89 Respondents' Consolidated Heads of Argument, 33-34.

90 I would suggest that, even in the (what I view to be dubious) world of demographics as a proxy for equality, predicting and pursuing 100% representation of any one race group would be unlawful and anathema to the constitutional value of equality.

motivated by sincere excitement at the fact that, at long last and after more than 20 years of similar "sports transformation measures", a court of law is finally being called upon to assess the legality of what has been going on, blatantly, for so long, and with very little oversight from the legal community to date.

5 Conclusion

Fourteen years ago, I wrote an article on sports transformation, which I started with the following quotation:

> "The moral position is absolutely clear. Human beings should not be willing partners in perpetuating a system of racial discrimination. Sportsmen have a special duty in this regard in that they should be first to insist that merit. And merit alone, be the criterion for selecting athletes for representative sport."[91]

When that article was published, we were nearly a decade into our then still new (and exciting) democracy. We were also nearly a decade into the experience of sports transformation measures aimed at turning "lily-white sports teams" into teams more acceptable to the whole of our nation and its diverse conglomeration of people from different ethnic, racial, cultural and social origins.

It is 2019 now. Our country has gone from the excitement of new beginnings and apparently limitless prospects for a brighter future, through the disappointments and frustrations at often corrupt and ineffective political leadership and "state capture", to a more recent "new dawn" of cautious optimism that SAS South Africa would leave the doldrums and turn its bow towards warmer climes of economic growth, a future of steadily declining poverty and inequality, and prosperity, peace and security for all. During all this time, there appears to have been one constant cause of concern (and frustration for many): frequent and pervasive instances of poor service delivery by government (at all levels, and in all provinces) to its people.

Which brings me to the role of government and of sports federations in ensuring the transformation of sport. Many commentators have lamented the "top down" approach of the imposition of race quotas at the highest levels of competition in certain sporting codes in order to "transform" those codes. This is an artificial exercise, which, apart from its dubious legality and constitutionality, holds little potential for real transformation in the form of the increased development of future talent from disadvantaged communities. It is simply a matter of logic that real transformation can only work (and be sustainable) if talent from disadvantaged groups is nurtured and developed, from a young age. In addition, government (and sports federations) have frequently come

91 Abdul S Minty, African National Congress (from a paper prepared for the United Nations Unit on Apartheid. 1971), as quoted in Louw (2005) *Law, Democracy & Development* 193-218.

under fire for the failure to promote the achievement of this. The political correctness of organisations such as the Solidarity trade union (and the civil rights organisation Afriforum) is frequently questioned, but these organisations have for years actively engaged in the public debate on sports transformation and have commissioned studies and published reports in this regard, which are publicly available. Compare the following from an undated report (which appears to date from 2017) entitled *Transformation in SA Sport*:

> "According to the South African Institute of Race Relations (SAIRR) only 57,8 % of public schools in the country have sporting facilities. The quality of the existing facilities is often substandard and facilities are very unevenly distributed. For instance, whilst 77,5 % of public schools in Gauteng and 75,1 % of schools in the Western Cape have sporting facilities, only 40,6 % of public schools in the Eastern Cape possess such facilities. If the figures are broken down further, an even more dismal situation emerges. 3 245 out of 5 461 public schools in the Eastern Cape had no sporting facilities in 2015. For the rest, only 1 412 schools had soccer facilities, 164 had cricket facilities, and only 333 had rugby facilities. In KwaZulu-Natal, 3 207 out of 5 861 schools had no sporting facilities. Only 1 591 had soccer facilities and 258 had cricketing facilities; and a mere 111 could boast rugby fields ... While the top sporting schools in the country operate on little or no government assistance and are largely funded and supported by the parents, the dysfunctional schools are held ransom by very limited government budgets, militant unions such as the South African Teachers Union (SATU), and absent and/or unmotivated teachers. Classrooms are overcrowded and the schools try to serve communities plagued by huge socio-economic problems and their attendant social ills, such as drugs, single-parent (or child-led) households and teenage pregnancies."[92]

If these statistics are accurate they paint a dismal and very disturbing picture for anyone who supports the calls for real transformation of sport in this country (which is a constitutional imperative that may rank rather low on the list of priorities in our attempts to normalise this very broken society, but which remains important).

What illegal and unconstitutional quotas, as tokenistic attempts to create a socially-engineered semblance of normality or of progress in transformation, do is to provide politicians with talking points to stir up emotions and rally political support. In addition, it may serve to hide yet another example of a clear lack of service delivery. It is understandable that government suffers under often-severe capacity constraints, and that sport may (as mentioned above) be relatively low on the list of priorities that face the country. However, race quotas can be nothing but an ostensible quick fix; in fact, they do not fix a thing in the long run or in any real way. They are divisive measures, which offend against our key constitutional objective of the achievement of non-racialism, and

92 From E Brink & J Nortje "Transformation in SA Sport" (2017) *Solidariteit* 9 https://solidariteit.co.za/wp-content/uploads/2017/07/Transformation-in-sport-SA-eng.pdf (accessed 2018-11-24).

they may very well, in fact, be essentially racist in nature.[93] Affirmative action – which complies with our Constitution – does not constitute "reverse discrimination". However, race quotas in sports teams are not a form of affirmative action, which complies with our Constitution. It is a pernicious form of unfair discrimination based on race. Two wrongs do not make a right. It is scandalous that nearly fifty years after Mr Minty uttered the above-quoted words before the United Nations, we are back to a system of racially discriminatory selection of sports teams. This offends not only our own Constitution, but also both the spirit and the letter of the laws of international sport.

93 I have previously questioned whether there might be something inherently racist in the view that a sports team can only be "representative" of our people if composed along demographic lines.

The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa

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SUMMARY

This article provides a critical analysis of the judgment of the Constitutional Court of South Africa in *Law Society of South Africa and Others v President of the Republic of South Africa and Others.*[1] The article analyses the decision and its implications on South African constitutional law and the future conduct of international relations by the South African executive. It further provides a broader legal-historical context of the Southern African Development Community (SADC) decision-making processes and the SADC region's general relationship to the rule of the law. Ultimately, the paper discusses the reasoning of the minority judgment to try to make sense of it.

1 Introduction

Having been disbanded by the Summit of the Heads of State or Government (Summit) of the Southern African Development Community (SADC),[2] there is now a possibility, at least in theory, that the SADC Tribunal might be revived. There is also the likelihood that SADC citizens might again have the opportunity to bring their cases, be they of commercial, human rights or of any other nature, to the regional judicial institution when they believe that they have been failed by domestic

1 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC).

2 Communiqué Extraordinary Summit Heads of State and Government of the Southern Africa Development Community Windhoek, Republic of Namibia 20 May 2011 http://www.swradioafrica.com/Documents/SADCSummit240511.pdf (accessed 2019-08-20).

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courts of SADC Member States.[3] For all this, thanks to the intervention of South Africa's domestic courts.[4]

In a landmark decision that has far reaching implications for South African constitutional law and South Africa's international relations, the South African Constitutional Court has announced, confirming a High Court decision, that the constitutional prescription that the President must always act rationally and lawfully is not only valid in the domestic arena, but follows the President even when conducting international relations.[5]

The case of *Law Society of South Africa and Others v President of the Republic of South Africa and Others,*[6] is refreshingly disruptive of the classical view which seem to be still part of the jurisprudence of some constitutional democracies, that give too much deference to the executive when it comes to the conduct of international relations;[7] where the executive reigns supreme with very limited, if any, judicial and parliamentary oversight.

The Constitutional Court has held that in disbanding the SADC Tribunal and purporting to replace it with a weaker one and doing so contrary to the provisions of the SADC Treaty, the Summit acted unlawfully and irrationally. Consequentially, the South African President's participation in the decision-making processes and his own decisions to suspend the operations of the SADC Tribunal, and his signature on the 2014 Protocol on the Tribunal in the Southern African Development Community (2014 Tribunal Protocol) were, by reason of sections 7(1) and (2) and section 8(1) of the South African Constitution, unconstitutional, unlawful and irrational.[8] The court then ordered the president to withdraw his signature from the 2014 Tribunal Protocol.

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3 Ngatane "Ramaphosa withdraws SA from controversial SADC Tribunal Protocol" https://ewn.co.za/2019/08/18/ramaphosa-withdraws-sa-from-controversial-sadc-tribunal-protocol (accessed 2019-08-19); Asmeslash "Southern African Development Community (SADC) Tribunal" https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/2496_Southern_African_Development_Community_Tribunal.pdf (accessed 2019-08-19).

4 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra. Law Society of South Africa and Others v President of the Republic of South Africa and Others* (20382/2015) [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP). See also Ngatane *supra*; Asmeslash *supra*; Swart "A house of justice for Africa: Resurrecting the SADC Tribunal" https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/ (accessed 2019-08-19).

5 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*.

6 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra.*

7 See African Peer Review Mechanism Country Review Report No. 8 on The Federal Republic of Nigeria (Review Report is on file with authors).

8 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 93.

While remarkable and refreshing, the position taken by the Constitutional Court is not surprising. It resonates with the South African constitutional scheme, both in letter and in spirit.[9] The President is a public servant who should always act within the prescriptions and proscriptions of the Constitution.[10] The President does not suddenly mutate into a Leviathan once she/he enters the international relations arena.[11] In a way, the court's message to the president is that she/he is the torchbearer of the South African constitutional normative values both within and outside the Republic. In the apt words of the court:

> "… the President of South Africa] is never at large to do whatever leaders of other nations consider to be in the best interests of our and their nations. She is always to be guided by the Constitution and the law. For she is the nation's constitutional messenger and may only do what would benefit us and project our country in a positive light".[12]

According to the reasoning of the Constitutional Court, while courts should take care not to unnecessarily constrain the President in the exercise of her/his constitutional powers, this deference to the executive in the policy making and implementation arena:

> "is not to be understood as an endorsement of, or solicitation for a licence to exercise presidential or executive powers in an unguided or unbridled way, [as all] presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objectives of the Bill of Rights, our domestic legislative and international law objectives."[13]

In this article, we provide a critical analysis of the majority decision and its implications on South African constitutional law and the future conduct of international relations by the South African executive. We also provide a broader legal-historical context of SADC decision-making processes and the SADC region's general relationship to the rule of the law. We also briefly discuss the reasoning of the minority judgment to try to make sense of it.

9 See inter alia Preamble to the Constitution of the Republic of South Africa, 1996.

10 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 20.

11 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) 2011 (7) BCLR 651 (CC).

12 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 89.

13 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 3.

2 Factual and legal background to the Constitutional Court decision

Much has been written about the ill-fated SADC Tribunal, both in scholarship and in judicial and quasi-judicial decisions.[14] Furthermore, part of the story has been succinctly and eloquently summarised by the Constitutional Court of South Africa in the case under discussion.[15] In this article, a broader contextual, factual and legal background to the SADC Tribunal, and how the determination of its fate ended up in South Africa's domestic courts, is set out. This broader legal-historical context focuses not just on the suspension of the SADC Tribunal but also on the subject of SADC's general relationship to the rule of law.

SADC's predecessor, the Frontline States, was mainly concerned with ensuring the end of colonialism and apartheid in Southern Africa.[16] When the total political liberation of the whole of Southern Africa was on the horizon, focus shifted to regional economic integration and economic independence especially from apartheid South Africa.[17] This led to the establishment of the Southern African Development Co-ordination Conference (SADCC) in 1980, which was later transformed into a treaty-based organisation – the Southern African Development Community in 1992.

The values of democracy, individual human rights and the rule of law were not high on the agenda of the Frontline States and SADCC, unless of course they were directly linked to the liberation of the peoples as a collective.[18] However, with the winds of democratic change blowing

14 See for example, de Wet "The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa" 2013 *FILJ* 45; Cowell "The death of the Southern African Development Community's human rights jurisdiction" 2013 *HRLR* 153; Nathan "The disbanding of the SADC Tribunal: A cautionary tale" 2013 *HRQ* 870; Ebobrah "Tackling threats to the existence of the SADC Tribunal: A critique of perilously ambiguous provisions in the SADC Treaty and the Protocol on the Tribunal" 2010 *MLJ* 199; Ndlovu "*Campbell v Republic of Zimbabwe*: A moment of truth for the SADC Tribunal" 2011 *SADCLJ* 63; *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007); *Luke Munyandu Tembani & Another v Angola & 13 Others*, African Commission on Human and People's Rights (Communication 409/12); *Gramara (Pvt) Ltd v Government of Zimbabwe* HC 33/09; *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

15 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, paras 8-16.

16 The relevant historical material presented here is derived from https://www.sadc.int/about-sadc/overview/history-and-treaty/#sadc (accessed 2019-01-18).

17 Saurombe "The role of South Africa in SADC regional integration: The making or breaking of the organization" 2010 *JICLT* 124.

18 Viljoen *International Human Rights Law in Africa* (2007) 492.

across the entire globe from the mid-1980s, the people of Southern Africa were also hungering for democracy, individual human rights and the rule of law.[19] Unsurprisingly, the 1992 Treaty and the Declaration establishing the Southern African Development Community (the 1992 SADC Treaty) explicitly provided for democracy, human rights and the rule of law as part of the principles of SADC.[20] Subsequent amendments to the Treaty in 2001 saw the normative value of democracy becoming part of the SADC objectives as well.[21] The normative values of democracy, human rights and the rule of law also feature prominently in a number of SADC Protocols and policy documents.[22]

In addition to making the normative values of democracy, human rights and the rule of law part of the principles of SADC, and the promotion of democracy part of the objectives of SADC, the SADC Tribunal was established as part of the core institutions of SADC.[23] In terms of the SADC Treaty, the mandate of the SADC Tribunal is "to ensure adherence to and proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon disputes as may be referred to it".[24]

However, there was an evident reluctance to operationalise the SADC Tribunal. Instead of setting out in detail the full extent of its jurisdictional competence, composition and other matters in the text of the SADC Treaty itself, these matters were deferred to a Protocol to be adopted later. In 2000, the Protocol on the Tribunal in the Southern African Development Community and Rules thereof (2000 Tribunal Protocol) was adopted; but SADC Member States were reluctant to ratify it so as to operationalise it. It took a SADC Treaty amendment and the amendment of the Protocol itself to remove it from the tentacles of the ratification process and to make it the only Protocol that formed an integral part of the SADC Treaty, subject to the same amendment process as the

19 Lieberman "Organizational cloaking in Southern Africa, South Africa and the SADCC after apartheid transformation http://www.princeton.edu/~esl/esl/papers_&_publications_files/Lieberman%20Organizational%20Cloaking%20in%20Southern%20Africa.pdf (accessed 2019-08-19).

20 See art 4(c) of the 1992 SADC Treaty.

21 See art 5(1)(b) of the SADC Treaty as amended in 2001. The equivalent provision in the 1992 Treaty did not mention democracy. The Consolidated Text of the Treaty of the Southern African Development Community which incorporates the 2001 and subsequent amendment https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf (accessed 2019-01-18).

22 See for example item 1.5.3 of the SADC Regional Indicative Strategic Development Programme (RISDP) https://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/ (accessed 2019-08-19).

23 See article 9 of the Consolidated Text of the SADC Treaty https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty__scanned_21_October_2015.pdf (accessed 2019-08-19); MR Phooko *The SADC Tribunal: its Jurisdiction, Enforcement of its Judgments and the Sovereignty of its Member States* (LLD dissertation 2016 UNISA) 9.

24 Art 16(1) of the SADC Treaty.

Treaty.[25] Even then, it would take some more years for the judges to be appointed and the Tribunal Registry to be set up and for the Tribunal to start operating in 2007.[26] Therefore, while the other SADC institutions got to work immediately, it would take a long 15 years for the SADC Tribunal to be operational.[27]

In terms of design, the 2000 Tribunal Protocol was very progressive: SADC citizens could approach the SADC Tribunal alleging, among other things, violation of the SADC Treaty by a SADC Member State,[28] but only after exhausting local remedies or proving that local remedies were not available.[29] In making its determination, the SADC Tribunal had a wide pool of sources of law to draw on – the SADC Treaty; the 2000 Tribunal Protocol; and subsidiary instruments adopted by the Summit, by the Council of Ministers or by any institution or organ of SADC pursuant to the Treaty or protocols. It was also given the power to "develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of international law and principles of the laws of Member States".[30]

When it eventually started operating, the SADC Tribunal developed an impressive jurisprudence covering diverse legal fields including labour law,[31] the law of agency,[32] and human rights law,[33] among other areas of law. The Tribunal's progressive and well-reasoned human rights jurisprudence incensed countries with poor human rights records, particularly Zimbabwe.[34]

In one of the first cases before the SADC Tribunal, *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe*,[35] the Tribunal found Zimbabwe's chaotic and violent land reform programme to be contrary to several SADC Treaty provisions. It thereafter ordered the Zimbabwean government to protect the right to property in relation to the farms that had not been expropriated and to pay compensation to those whose

25 Arts 18 and 21(a) of the 2001 Agreement Amending the Treaty of the Southern African Development Community; Agreement Amending the SADC Tribunal Protocol 2002.
26 Ebobrah "Litigating human rights before sub-regional courts in Africa: Prospects and challenges" 2009 *AJICL* 83.
27 Nyathi *The Southern African Development Community and Law* (2019) 67.
28 Art 15(1) of the 2000 Tribunal Protocol.
29 2000 Tribunal Protocol *supra*, art 15 (2).
30 2000 Tribunal Protocol *supra*, art 21.
31 *See for example Ernest Francis Mtingwi v SADC Secretariat* SADC (T) 1/2007; *Kethusegile-Juru v SADC Parliamentary Forum* SADC (T) 02/2009.
32 *United People's Party v Southern African Development Community and Others* SADC (T) 12/2008.
33 See for example *Mike Campbell (Pvt) Ltd and Another v Republic of Zimbabwe* SADC (T) 02/2007 *supra*; *Barry L.T. Gondo and 8 Others v the Republic of Zimbabwe* SADC (T0 05/2008; *Zimbabwe Human Rights NGO Forum v Republic of Zimbabwe* SADC (T) 05/2009.
34 Phooko "No longer in suspense: Clarifying the human rights jurisdiction of the SADC Tribunal" 2015 *PELJ* 556.
35 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) *supra*.

farms had been expropriated.[36] The Zimbabwean government defied this ruling. The noncompliance was referred to the Summit. Compliance with the SADC Tribunal's judgments was not forthcoming on the part of Zimbabwe, even after the successful litigants sought and obtained orders from the Tribunal to enable the SADC Summit to compel compliance by Zimbabwe.[37]

Instead of the SADC Summit acting to ensure that Zimbabwe complied with the SADC Tribunal judgments, it sided with Zimbabwe which had begun a diplomatic attack on the Tribunal employing very weak legal arguments alleging that the SADC Tribunal was not lawfully established owing to the non-ratification of the 2000 Tribunal Protocol.[38] Furthermore, Zimbabwe claimed that the SADC Tribunal did not have jurisdiction to determine human rights issues.[39] The Summit eventually decided not to reappoint those Members of the Tribunal (the judges) whose terms of office were ending in 2010 nor replacing those whose term of office would end in 2011.[40] The Summit also directed the Tribunal not to receive any new cases pending a review of the Tribunal's "terms of reference".[41] These developments effectively meant that the SADC Tribunal was emasculated and could not operate. In the words of one scholar, the Tribunal was 'disbanded'.[42] All this – the non-renewal of the judges' terms of office (and the non-appointment of their replacements) and the directive not to receive new cases, had no basis in the SADC Treaty and the 2000 Tribunal Protocol, and was therefore unlawful.[43]

Subsequently, the SADC Summit adopted a new Tribunal Protocol in 2014 in violation of clearly set out Treaty procedures.[44] The 2014 Tribunal Protocol no longer forms an integral part of the SADC Treaty like its "predecessor", and is being subjected to a ratification process which

36 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) *supra*, para 59.

37 *Mike Campbell (Pvt) Ltd and Others v the Republic of Zimbabwe* SADC (T) 11/2008 (18 July 2008); *William Michael Campbell and Another v the Republic of Zimbabwe* SADC (T) 03/2009 (5 July 2009).

38 Ngandwe "The Predicament of African regional courts: Lessons from the Southern African Development Community Tribunal" 2012 *PAYL* 54; *The Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC). Phooko (2016) 78, 79.

39 See for example the arguments advanced by Zimbabwe in *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012) para 10.

40 SADC Summit decision of August 2010.

41 SADC Summit decision of August 2010 *supra*.

42 Nathan "The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35/4 *HRQ* 870.

43 See also *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* Cause No. 23 of 2014 (Judgment delivered on 6 June 2019) (decision on file with authors).

44 Being an integral part of the Treaty, the Summit should have amended both the relevant provisions of the SADC Treaty and those of the 2000 Tribunal Protocol through employing the procedure requiring three quarters of the Members of the Summit.

means that it might take many years, if at all, for the Tribunal to be re-established since two thirds of SADC Member States would need to ratify the 2014 Tribunal Protocol for it to come into force.[45] It also seeks to create a weaker Tribunal that would no longer accept cases from individual SADC citizens.[46] In addition, its substantive jurisdiction would be very limited and its sources of law reduced to just the SADC Treaty and the applicable SADC Protocol.[47]

An attempt to revive the SADC Tribunal through the African Commission on Human and Peoples' Rights (African Commission) was not successful.[48] The main argument before the African Commission was that in denying SADC citizens access to the SADC Tribunal, the SADC Heads of State or Government violated binding provisions of the African Charter by, among other things "interfering with the independence, competence and institutional integrity of the SADC Tribunal" and "terminating existing proceedings and vested remedies".[49] The ACHPR rejected this argument and reasoned, quite unsatisfactorily, that the African Charter did not impose any obligation on SADC Member States to guarantee the independence, competence and institutional integrity of the SADC Tribunal.[50] Further, it held that the African Charter does not create an obligation on SADC Member States to ensure access to the SADC Tribunal.[51]

Some SADC citizens, including those that had approached the African Commission, decided to approach the South African Courts for relief. They lodged their application with the High Court,[52] which held that the South African President's participation in the processes that led to the disbanding of the SADC Tribunal and the adoption of the 2014 Tribunal Protocol were unconstitutional, unlawful and irrational. Since the declaration of constitutional invalidity needed to be confirmed by the Constitutional Court, the matter ended up at the Constitutional Court, which has confirmed the High Court decision and given an expanded rationale for its decision.

2 1 The Constitutional Court judgment

A preliminary objection was raised that this matter was not ripe for adjudication on the basis that the 2014 Tribunal Protocol was merely

45 Arts 52 & 53 of the 2014 Tribunal Protocol.
46 2014 Tribunal Protocol *supra*, art 33.
47 2014 Tribunal Protocol *supra*, art 35.
48 *Luke Munyandu Tembani and Benjamin John Freeth v Angola and Thirteen Others* Communication 409/12.
49 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 115.
50 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 144.
51 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra,* para 145.
52 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (GP) *supra*.

signed but not ratified and therefore, the applicants ought to have challenged the President's conduct after ratification. Overall, the respondents were of the view that the President's signature on the 2014 Tribunal Protocol had no force and effect. The court dismissed the preliminary objection as it reasoned that the signing of a treaty by the South African President "creates far-reaching possibilities that could have irreversible consequences".[53]

The court in part based its decision dismissing the preliminary objection on an important principle of international law that a party that has signed but not yet ratified a treaty, is under an obligation not to defeat the purposes and objects of that treaty.[54] Therefore, even if South Africa has merely signed the 2014 Tribunal Protocol but not ratified it, it would still be obliged not to act contrary to the provisions of the 2014 Tribunal Protocol. In other words, South Africa cannot sit back and do nothing when its citizens have no access to courts at a SADC regional level or do something that is contrary to the principles of democracy, human rights and the rule of law.

The main argument advanced by applicants was that the President, through his conduct, acted irrationally, violated human rights, the rule of law, denied South African citizen access to regional justice and acted outside the perimeters of the Constitution.[55] The respondents argued that the President's signature did not violate the SADC Treaty or the 2000 Tribunal Protocol. Further, they argued that the President's reasons for his signature were explained, and that his signature was not "purposeless, irrational or in bad faith".[56]

After considering the conflicting submissions, the court determined that the 2010 and 2011 SADC Summit decisions which resulted in the non-appointment of new judges, refusal to renew the lapsed terms of other judges and the moratorium on the referral of disputes to the SADC Tribunal and the signing of the 2014 Tribunal Protocol essentially destroyed the SADC Tribunal. The Court reasoned as follows:

> "What the principle of legality entails in the present context is that our President may only exercise power that was lawfully conferred on her and in the manner prescribed. That power must be exercised in good faith and should not be misconstrued. Legality therefore exists to ensure that the repository of public power stays within the vital limits of the power conferred and being exercised. Both Houses of our Parliament resolved, in terms of the predecessor of section 231(2) of our Constitution, to ratify the Treaty. For this reason, no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions. They are all, as agents of the

53 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (GP) *supra*, para 48.
54 See article 18 of the Vienna Convention on the Law of the Treaties 1155 UNTS 331, 8 I.L.M. 679, adopted on 23 May 1963 and entered into force on 27 January 1980.
55 Applicant's written submissions paras 20 and 23 (on file with authors).
56 State's written submissions para 4.30 (on file with authors).

> State, under an international law obligation to act in line with its commitments made in terms of that Treaty".[57]

The court therefore found no legal basis for the President to have acted contrary to the provisions of a binding Treaty. The court was also alert to the fact that the law required the President to act in line with the dictates of the rule of law as embodied in the Constitution of South Africa. It emphasised that the 2000 Tribunal Protocol could only be amended via a provision of the SADC Treaty, which allows amendments to be made.[58] According to the court, this could not be done via a protocol such as the 2014 Tribunal Protocol but through the requirement of three-quarters of the SADC Member States. In the words of the court:

> "The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty's more rigorous threshold of three-quarters of all its Member States. The protocol route would have been an easy way out in that it only requires the support of ten Member States to pass. But, it is not a legally acceptable procedure for stripping the Tribunal of the most important aspect of its jurisdiction."[59]

The Constitutional Court therefore found that the decision of SADC Member States "to amend the Treaty through the Protocol evidences a failure to adhere to the provisions or proper meaning of the Treaty".[60] The court concluded that by suspending the SADC Tribunal, the President acted "in a manner that undermined our international law obligations under the Treaty".[61]

The court also discussed whether the President acted in good faith when he ignored the prescribed procedure for treaty amendment and opted to sign the 2014 Tribunal Protocol outside the perimeters of the law. The court *inter alia* concluded that the "… illegality of his conduct also stems from purporting to exercise powers he does not have".[62]

Therefore, this rendered the President's conduct unlawful. In light of the previously mentioned considerations, the Constitutional Court confirmed the order of the High Court and ruled that the President's participation in the decision-making process and his own decision to paralyse the SADC Tribunal is unconstitutional, unlawful and irrational.[63] Additionally, it ruled that the President's signature on the 2014 Tribunal

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57 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 48.
58 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*.
59 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 49.
60 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 50.
61 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 53.
62 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 56.
63 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*.

Protocol is unconstitutional, unlawful and irrational. Finally, the President was ordered to withdraw his signature from the 2014 Tribunal Protocol.

While reference to the place and value of international law in South Africa and how the former contributed to the attainment of democracy in the latter is prominent in the Constitutional Court decision,[64] in the main, the decision falls within the realm of South African Constitutional law. First, the president could not act contrary to the provisions of the SADC Treaty, as that would be contrary to the principle of legality.[65]

Second, the Constitutional Court has made it clear that it is the South African Constitution that burdens the office of the President with the requirements of rationality and constitutionality and that these requirements do not fall off the President when she/he acts outside the domestic sphere but they remain attached to her/him as she/he engages in international relations.[66]

Third, the normative values embodied in the South African Constitution including democracy, respect for the rule of law and respect for human rights, among others, must find expression in South Africa's relations with foreign states. The relationship between the South African Constitution and international relations has never been expressed in clearer terms. It is not a political policy choice but a constitutional imperative that South African Constitutional values should permeate its international relations. The Constitutional Court spoke plainly on this issue, to *wit*:

> "Our signing of the [2014] Protocol is thus very weighty and significant. It announces to all that South Africa is about to make a radical paradigm shift that is inextricably tied up to who we are as a nation. Specifically, it signifies that access to justice, a commitment to the rule of law and the promotion of human rights would no longer be a paramount feature of our national vision and international relations."[67]

The court was clear that the matter was not just about respecting the letter and the overall scheme of the South African Constitution, but it was also about projecting a proper constitutional image of South Africa in international relations. According to the court, the Presidents' involvement in the processes that disbanded the SADC Tribunal including the signing of the 2014 Tribunal Protocol conveyed a different message. It could be viewed as indicating that South Africa is no longer interested in the promotion, protection and fulfilment of human rights

64 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, paras 4-5.
65 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 48.
66 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 75.
67 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 31.

and/or honouring obligations flowing from the SADC Treaty and the 2000 Tribunal Protocol. It could also be interpreted as an indication that South Africa is no longer subscribing to issues of access to justice for its citizens at a regional level or that it does not bother whether or not its citizens are ill-treated beyond its borders. In the actual words of the Constitutional Court:

> "That signature … also says to the SADC Member States that South Africa has shorn itself of its key responsibilities of protecting and promoting some of the values foundational to our democracy including fundamental rights. This constitutes a serious threat to the image and very essence of South Africa's constitutional democracy and citizens' rights. Our President's signature is symbolic of a warm welcome by South Africa of the stealthy introduction of impunified disregard for and violation of fundamental rights or key Treaty provisions. It inadvertently but in reality reassures all others that we would turn a blind eye to human rights abuses and non-adherence to the rule of law in their jurisdictions even if it affects our people."[68]

The import of the above dictum is that since South Africa plays an influential role within the SADC region, its withdrawal from key human rights instruments may send a negative message to other countries who generally do not observe the principles of democracy and the rule of law. It is important to highlight that this Constitutional Court decision does not bind other SADC Member States but may serve as a persuasive authority before other domestic courts in other SADC Member States.

3 The implications of the Constitutional Court decision

The Constitutional Court decision has major implications both at the domestic level in the Republic of South Africa and at the SADC region level. First, it has laid down a binding constitutional principle that in engaging in international relations, the president must always be guided by the letter and spirit of the South African Constitution. Executive conduct in the international arena has thus been determined to be reviewable, and the standard for review is the South African Constitution. The Constitutional Court has made it clear that if South Africa is party to an international organisation and that international organisation seeks to promote such normative values as access to justice and the rule of law, among others, the President of South Africa has a duty to protect those normative values as long as they are still part of the South African constitutional scheme. Comity and other considerations that are inimical to the South African constitutional project thus have no place in the conduct of South Africa's international relations.

68 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 32.

Going forward, and with respect especially to SADC where democracy and the rule of law appear to be constant challenges,[69] this means that not only should the President of South Africa be South Africa's constitutional messenger always exuding the South African constitutional spirit, but s/he should always act rationally and legally as if s/he is exercising domestic powers.

It would appear that the Constitutional Court decided to take the opportunity presented by this case to lay the foundation of future jurisprudence in the area of domestic constitutional amendment. In remarks that seem to be *obiter dicta* but that might have been intended to be seen as deliberate warning shots, the Constitutional Court, although dealing with the amendment of the SADC Treaty, appears to suggest that it would not hesitate to review an amendment of the South African Constitution and that in doing so, it would not confine itself to the procedural aspects of the amendment but would assess the rationality of the amendment. In the words of the Constitutional Court:

> "The purpose for the conferment and exercise of the power to amend the Treaty is to do what is in the best interests of the people of SADC. That power is therefore never to be exercised lightly. It is to be exercised in a manner consistent with the seriousness of its consequences to ensure that the invaluable gains and interests of the people of SADC are preserved. The exercise of the power to amend the Treaty must reflect that steps followed in the process leading to the amendment bear a rational relationship with the legitimate purpose for which the power to amend was conferred or exercised."[70]

The judgment further states:

> "This disregard for the amendment procedure set out in the Treaty and the concomitant failure to appreciate the purpose for the exercise of the power to amend within the context of binding Treaty provisions is irrational and invalidates the President's conduct in relation to the amendment."[71]

The above *dicta* are by no means clear with regard to their import. However, it is difficult to escape the conclusion that the vagueness and lack of elaboration was a deliberate ploy by the court to deftly introduce a principle of rationality in treaty (read constitutional) amendment, which it would be ready to build on once an opportunity presents itself. With the process under way to amend the Constitution of the Republic of South Africa to enable the state to compulsorily acquire land without compensation, which those advocating for the amendment prefer to call a matter of constitutional clarification rather than introducing something new, the possibility of the Constitutional Court interfering with the

69 For a glimpse into the state of democracy and the rule of law in SADC, see generally, Nathan "Solidarity triumphs over democracy – The dissolution of the SADC Tribunal" (2001) *DD* 123.

70 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 68.

71 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 70.

resultant amendment on the ground of rationality is something to watch out for.

The decision of the Constitutional Court therefore has serious implications for the relationship of South African constitutional law to South Africa's international relations and it also promises to herald new jurisprudence in the area of constitutional amendment.

Beyond the South African domestic realm, the Constitutional Court decision has the potential to affect, in a practical way, the discourse around the SADC Tribunal in the SADC region. The decision disbanding the SADC Tribunal was made by the Summit. The SADC Treaty prescribes the consensus decision method for the taking of decisions by the Summit,[72] unless there are contrary provisions in the SADC Treaty prescribing a different method. Such contrary provisions apply to the Summit's decision amending the SADC Treaty, which requires a three-quarters majority.[73] The other contrary provision relates to the admission of new Member States into SADC, which requires unanimity.[74] Had the letter of the SADC Treaty been followed, the decision changing the status of the SADC Tribunal (its jurisdictional competence and other matters) would have been in the form of treaty amendment, requiring a three-quarters majority of SADC Summit Members, although eventually this would have also resulted in the amendment of the 2000 Tribunal Protocol as well, in order to bring it into line with the SADC Treaty. But having followed the wrong procedure in disbanding and purporting to replace the SADC Tribunal by way on an ordinary decision, and employing (presumably) the consensus decision making process; and since the South African President has been ordered to withdraw South's Africa's signature, it follows that there is no longer consensus and those decisions should, on their own basis, wrong as they were, be reversed.

But that is just in theory. It is not easy to predict the reaction of the other Members of the Summit to the South African Constitutional Court decision. What is certain though is that as far-reaching as the Constitutional Court's decision is in South Africa's domestic sphere, it is a different matter at SADC level especially since there does not currently exist a judicial organ within SADC with jurisdiction to deal with that matter. The fate of the SADC Tribunal appears to lie in the unpredictable hands of politics.[75]

The decision of the South African Constitutional Court is therefore significant and welcomed. In compliance with the Court's decision, it has been reported that Mr Ramaphosa, the South African President, "has officially withdrawn South Africa's signature from [the 2014 Tribunal

72 Art 10 (6) of the SADC Treaty.
73 SADC Treaty *supra*, art 36 (1).
74 SADC Treaty *supra*, art 8 (4).
75 Cowel "The death of the Southern African Development Community Tribunal's human rights jurisdiction" 2013 *HRLR* 4.

Protocol]".[76] The withdrawal took place at the 39th SADC Summit, which took place in Tanzania from 17 to 18 August 2019.[77] It has furthermore been reported that the Summit "noted the withdrawal of South Africa's signature from the Protocol on the Tribunal in the Southern African Development Community of 2014 in compliance with a Constitutional Court ruling".[78] Perhaps the Summit is now aware of the legal ramifications arising from South Africa's withdrawal. It can only be hoped, in the absence of corrective measures taken by the Summit itself, that the courts of other SADC Member States and Heads of State will follow the route taken by the South African courts and its Head of State to uphold and respect the rule of law by accepting that the 2014 Tribunal Protocol was adopted outside the perimeters envisaged by the 2000 Tribunal Protocol.

Indeed, since the South African Constitutional Court decision, it appears that the winds of change have begun to blow in the right direction as the Tanzanian High Court also held that:

> "The suspension of the operations of the SADC Tribunal; and failure or refusal to appoint Judges contrary to the clear Treaty provisions, was inimical to the Rule of law as a foundational principle inherent to the legitimacy of the Community; and as expressly entrenched in the Treaty."[79]

The High Court of Tanzania has consequently held that it will adjudicate future disputes arising from the SADC Treaty between individual and legal persons against the Government of Tanzania until the SADC Tribunal has been reinstated.[80]

However, the South African Constitutional Court judgement has some few shortcomings, the most notable of which is its failure to properly capture the correct legal position regarding the amendment of the SADC Treaty. The Constitutional Court appears to suggest that three-quarters of SADC Member States are required to amend the SADC Treaty.[81] That is not so. While there are provisions to ensure that there is some input from Member States in the process of the amendment of the SADC Treaty,[82] the ultimate decision to amend the SADC Treaty rests with the SADC

76 Ngatane *supra*.
77 Communique of the 39th SADC Summit of Heads of State and Government, Julius Nyerere International Convention Centre Car Es Salaam, United Republic of Tanzania 17 – 18 August 2019 https://www.sadc.int/files/1915/6614/8772/Communique_of_the_39th_SADC_Summit-English.pdf (accessed 2019-08-19).
78 Communique of the 39th SADC Summit of Heads of State and Government, *supra*.
79 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania supra*.
80 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania supra*.
81 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 49.
82 SADC Treaty *supra*, art 36 (2).

Summit as an institution of SADC.[83] A member of the SADC Summit, purporting to represent their country's interests,[84] may propose an amendment of the SADC Treaty triggering a process where the SADC Executive Secretary sends out a notice of amendment to all SADC Member States inviting comments within three months.[85]

With or without any comments, the Summit, *qua* Summit, can proceed to amend the SADC Treaty and the amendment would become effective if accented to by three-quarters of the Members of the Summit. There is no requirement for ratification by Member States. While each member of the Summit represents their respective Member State, when it comes to the amendment of the SADC Treaty, the involvement of the whole constitutional machinery of each Member State, predicated on the doctrine of separation of powers, is not envisaged as is the case with other regional economic communities, most notably, the East African Community, the Economic Community of West African States and the European Union.[86]

Of course, in some SADC Member States like South Africa, the domestic constitutional imperative is such that the legislature would have to play a role in the ratification of the amendment;[87] but in terms of the SADC Treaty, the involvement of domestic legislatures in SADC Member States is not a requirement. Therefore, equating three quarters of the members of the Summit to three quarters of the SADC Member States in the context of SADC, and particularly in the context of SADC Treaty amendment, does not reflect the correct legal position. However, this lapse by the Constitutional Court does not affect its overall reasoning.

Finally, and surprisingly, the Constitutional Court, *mero motu*, decided to engage itself in the discussion of a moot point on the question of the hierarchy between the SADC Tribunal and domestic apex courts. In monologue fashion, the court pointed out:

> "A matter of great importance that need only be flagged at this stage is whether the Tribunal has jurisdiction even where national apex courts have pronounced themselves on the same issue between the same parties, which would then elevate it to a super-regional court or whether its jurisdiction is only triggered when a domestic court lacks jurisdiction in a particular matter,

83 SADC Treaty *supra*, art 10(1).
84 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra* par 66. This is properly captured in the judgement where it is stated: "But the Summit, on behalf of Member States, has the power to amend the Treaty and to even disestablish its institutions".
85 SADC Treaty *supra*, art 36(2).
86 See art 150 of the Treaty for the establishment of the East African Community; arts 89 & 90 of the Revised Treaty of the Economic Community of West African States; art 48 of the Consolidated version of the Treaty on European Union.
87 Sec 231(2) of the Constitution of South Africa, 1996.

involving alleged violation of treaty provisions" as is the case with Zimbabwe."[88]

In our view, this flagging was not necessary. By coming together under a regional integration scheme in the form of SADC, the SADC Member States agreed to be bound by certain principles and objectives at the regional level; and they established several institutions to carry out the regional integration agenda. The SADC Tribunal is one such institution. There does not appear to be any conflict between what the Member States agreed to at the regional level with regard to the hierarchy between the SADC Tribunal and the apex domestic courts of SADC Member States. A holistic reading of the SADC Treaty and the 2000 Tribunal Protocol is clear on the relationship of the SADC Tribunal to domestic courts.[89]

The issue of the hierarchical relationship of the SADC Tribunal to the apex domestic courts of SADC Member States is matter was not before the court and ought to have not been raised. If there is any conflict regarding the hierarchy between the SADC Tribunal and apex national courts of SADC Member States, that is a matter that should be dealt with as and when such a dispute arises. However, as we have already indicated, there is enough clarity on this issue in the SADC Treaty itself and in the 2000 Tribunal Protocol.

4 The minority decision

Since the Constitutional Court decision does not in any way dispose of the issue at the regional level, and since there is a possibility that some in the SADC region may appear to be persuaded by the minority opinion, either sincerely or as a matter of political convenience, it is necessary to analyse the minority opinion. It is important to note that the minority agree with the majority on the unconstitutionality, irrationality and unlawfulness of the President's participation (and signature) in the processes that resulted in the suspension of the SADC Tribunal. The minority decision also agrees with the order in the majority judgment. However, they differ with the majority on the basis that "[t]he majority judgement … seems to locate the unlawfulness of the President's conduct in international law terms"[90] and they reason that this is a wrong approach since "[t]he President cannot, in this or in any other capacity, directly fall foul of the international law of treaties".[91]

The minority judgment is wrong in two respects. First, they fail to appropriately grasp the reasoning of the majority judgment. The majority

88 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 57.
89 See Arts 15 (1) and (2) and 21 of the 2000 Tribunal Protocol.
90 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 99.
91 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CC) *supra*, para 100.

judgment is firmly anchored in the South African Constitution whose relevance, the majority reason, is not limited to the domestic arena but extends to the executive's conduct of international relations. The matter does not involve state accountability/responsibility at international law. It revolves around acceptable constitutional conduct by the President in the international arena where s/he should act not as a free and unconstrained political agent, but should always be guided by the letter and spirit of the South African Constitution and should also always espouse South Africa's constitutional values. The harder the minority try to distance themselves from the majority on this point, the closer they unwittingly associate themselves with them.

Second, the minority judgment's appreciation of the current state of international law seems faulty. The minority decision espouses the classical international law position, which only viewed states as subjects of international law.[92] International law has however evolved over time. Individuals, including heads of state, are now also direct subjects of international law and are capable of violating international law.[93] In the final analysis, the minority judgment was as unnecessary as it is unhelpful. It does not in any way propose a persuasive alternative jurisprudence in that area of the law.

5 Conclusion

The decision of the South African Constitutional Court is welcomed as it signals the court's commitment to uphold the principles of democracy, human rights and the rule of law not only in South Africa's domestic arena but also at the international level. It also presents an opportunity for the possible revival of the SADC Tribunal although at the end of the day, the fate of the Tribunal would likely lie in the hands of politics. Overall, this decision is a victory, although it might just be a psychological one, for the human rights movement in South Africa and in the SADC region as far as access to justice at the regional level is concerned. It is hoped that the South African President's withdrawal of South Africa's signature from the 2014 Tribunal Protocol will influence other SADC leaders to reconsider their decisions about reviving the SADC Tribunal. In fact, the Tanzanian High Court has also condemned the Tanzanian government's support to dissolve the Tribunal.[94] It is likely that with these developments, mobilisation by civil society organisations and other stakeholders in SADC will follow in order to revive the Tribunal.

92 Scheneeberger "Responsibility of the individual under international law" (1946-1947) 35 *GLR* 481.

93 See, for example, Nwosi *Head of State Immunity in International Law* (LLD dissertation 2011) 272; *The Prosecutor v Charles Taylor* Case No SCSL -03-01-PT.

94 *Tanganyika Law Society and Others v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*, *supra*.

Making the case for mental health expertise in *crimen iniuria* cases: An issue awakened by the Vicki Momberg sentence

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SUMMARY

Fewer topics have recently divided South African discourse than the controversial sentencing of Vicki Momberg. Ultimately convicted of four counts of *crimen iniuria*, she was sentenced to an effective two year direct prison sentence as a first time offender, a sentence which is unprecedented as far as South African criminal law is concerned. This sentence has simultaneously been lauded as an effective deterrent for racial hatred and branded an unjust sentence indicative of selective prosecution and the unjust disparity between various judicial platforms. The better part of the criticism stems from the fact that the sentence was unjust. This state of affairs brings sharply into focus practical issues, in particular, the determination of just and proportional sentences in cases relating to *crimen iniuria*. Notably, to establish that a person's dignity has been impaired, two elements need to be proved. Firstly, the victim should have been aware of what the accused was doing to them. Secondly, the victim should have felt humiliated or degraded as a result of what the accused did to them. The point of departure of this paper is that the legality of the sentence in *crimen iniuria* is necessarily tied to the harm involved and this cannot be gauged physically, but rather, psychologically. The purpose of this article, therefore, is to underscore the role of expert evidence, in particular, expertise of mental health professionals, in translating the harm caused into quantifiable mitigating and/or aggravating factors with a view to ascertaining an appropriate sentence in terms of the established South African sentencing regime. This paper concludes that just and proportional sentences demand an in-depth evaluation of the "impairment of dignity" element in light of the requirement of fair, just and proportional sentences that satisfy the right to equality. This evaluation makes the role of mental health experts indispensable, yet, thus far, this has not been the case in most *crimen iniuria* proceedings.

1 Introduction

The crime of *crimen iniuria* finds its roots in common law. In terms of common law, it constitutes an act of "unlawful, intentional and serious

* Ms. Jana Milne, a former colleague and lecturer at the University of Venda, suddenly passed away while we were in the process of conceptualising the idea in this article. We had some discussions about this publication but she passed away before this article could be written. Her contribution towards the conceptualisation of some ideas advanced in this article is acknowledged. May her soul rest in peace.

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violation of the dignity and privacy of another."[1] Like any other common law offence, it has been the subject of prosecution,[2] however, fewer decisions have recently sparked debate in the South African discourse than the *crimen iniuria* case pertaining to Vicki Momberg. Vicki Momberg, a former real estate agent, was convicted of using the "K-word"[3] against police officers and was sentenced to three years of imprisonment, one of which was suspended for three years (*Momberg* case).[4] This sentence has been one of its kind as it is the very first in which the crime of *crimen iniuria* has attracted a custodial sentence. Not coincidentally, the sentence has ignited discussions and responses across sections in South Africa's society. Some have praised it, with different justifications being advanced. Notably, in handing down the decision, Magistrate Pravina Rugoonandan noted that the sentence was warranted in light of the fact that everyone has a right to dignity, which is worth protecting and respecting.[5] Andrews, an academic, is of the opinion that "symbolically it sends a message that racism is not to be tolerated."[6] A similar tone echoes through the words of Shaun Abrahams, the former National Director of Public Prosecutions, who observed that "[the sentence constitutes] victory for the rule of law and sends a strong message to every citizen to treat every other person with dignity and not to discriminate on the basis of race."[7] Singing a similar chorus, Michael Masutha, the former Minister of Justice, was of the view that the strong sentence "will deter would-be hate crime perpetrators in [...] society."[8]

1 Snyman *Criminal law* (2014) 469. See also *S v Sharp* 2002 1 SACR 360 (Ck) 372b; Burchell "Protecting dignity under common law and the Constitution: The significance of crimen iniuria1 in South African criminal law" (2014) *South African Journal of Criminal Justice* 250-271.

2 See e.g. decision in the following cases, *van der Merwe & Others v State* Appeal No: A366/10, free state High Court, Bloemfontein republic of South Africa; *S v Sharp* 2002 1 SACR 360 (Ck); *S v Msoetrt* 2006 1 SACR 560 (N); *Pistorius v The State* (253/13) (2014) ZASCA 47.

3 The phrase "K-word" is used to disguise the word "Kaffirs." According to the Online Oxford English Dictionary, the term "Kaffir" is "used in several geographically quite disparate parts of the world, it ranges from being a racial insult considered so offensive in South Africa that its usage is now legally actionable there to being a perfectly neutral name for an ethnic group of South and mainland South-East Asia." See Online Oxford English Dictionary, https://public.oed.com/blog/word-stories-kaffir/ (accessed 2019-07-28).

4 The full judgment in the case of *S v Momberg* (*Momberg* case) remains inaccessible. However, the decision of the Court in this case has become judicial notice and has been reported on cites including: Gasa and Abdul Karrim, The murky case of Vicki Momberg and *Crimen Injuria,* 29 March 2018. http://www.witsjusticeproject.co.za/news-and-insights-category/the-murky-case-of-vicki-momberg-and-crimen-injuria (accessed 2019-07-28).

5 *Momberg* case *supra*.

6 The Conversation, Jail time for South African woman using racist slur sets new precedent, 29 March 2018. http://theconversation.com/jail-time-for-south-african-woman-using-racist-slur-sets-new-precedent-94179 (accessed 2019-09-28).

7 Daily Maverick, Landmark decision to jail race hatred woman, 29 March 2019 http://legalbrief.co.za/story/landmark-decision-to-jail-race-hatred-woman/ (accessed 2019-07-28).

8 Daily Maverick

The sentence has also been welcomed by organisations including the Democratic Alliance,[9] the South African Human Rights Commission[10] and the Kathrada Foundation.[11]

Some sections of the South African society have, however, been skeptical of the sentence, raising concern that it could set a problematic precedent. Kevin Lawlor, Momberg's lawyer at some point, for one, considered the sentence unfair and unbalanced.[12] Afriforum, a civil rights organisation has also expressed unease about the sentence, stating that it is a clear demonstration of inconsistences in the sentencing regime.[13] Sharing the sentiments of other commentators,[14] Afriforum takes the view that other individuals caught up in circumstances similar to those Momberg was entangled in were not subjected to such harsh punishment.[15] This, Afriforum contends, is a demonstration of double standards and could risk undermining the public's faith in the justice system.[16] Several other commentators remain critical of the sentence handed down in the *Momberg* case, contending that it might not only fail to stand legal scrutiny, but also, can hardly be upheld on appeal.[17] Much of this controversy appears to stem from the blurriness of the seriousness of the crime of *crimen iniuria*. Magistrate Rugoonandan, in handing down the sentence in the *Momberg* case, alluded to the fact that "the crime of

9 Democratic Alliance, DA welcomes Vicki Momberg sentencing, 28 March 2018 https://www.da.org.za/2018/03/da-welcomes-vicki-momberg-sentencing/ (accessed 2019-07-28).

10 South African Human Rights Commission, The Vicki Momberg case: Equality Court vs Criminal Court, 4 April 2018. https://www.sahrc.org.za/index.php/sahrc-media/news/item/1289-the-vicki-momberg-case-equality-court-vs-criminal-court (accessed 2018-09-28).

11 Pitt, Momberg sentencing 'will act as a deterrent to other racists' - Kathrada foundation, *News24*, 29 March 2018, https://www.news24.com/SouthAfrica/News/momberg-sentencing-will-act-as-a-deterrent-to-other-racists-kathrada-foundation-20180329 (accessed 2019-07-28).

12 Pijoos, Vicki Momberg denied bail, sentenced to three years in prison for racist rant, *Mail & Guardian*, 28 September 2018, https://mg.co.za/article/2018-03-28-vicki-momberg-sentenced-to-an-effective-2-years-in-prison-for-racist-rant (accessed 2019-07-28).

13 Pijoos, Momberg's sentence confirms double standards in SA – AfriForum, *News24*, 28 March 2018, https://www.news24.com/SouthAfrica/News/mombergs-sentence-confirms-double-standards-in-sa-afriforum-20180328 (accessed 2019-07-28).

14 Anderson, Vicki Momberg supporter says sentence was unfair, News24, 2 April 2018, https://www.all4women.co.za/1431189/news/south-african-news/vicki-momberg-supporter-says-sentence-unfair (accessed 2019-07-28).

15 Pijoos, Momberg's sentence confirms double standards in SA – AfriForum, *News24*, 28 March 2018, https://www.news24.com/SouthAfrica/News/mombergs-sentence-confirms-double-standards-in-sa-afriforum-20180328 (accessed 2019-07-28).

16 Pijoos, Momberg's sentence.

17 Davis, Analysis: Why the Vicki Momberg racism sentence deserves scrutiny, Daily Maverick, 29 March 2018, https://www.dailymaverick.co.za/article/2018-03-29-analysis-why-the-vicki-momberg-racism-sentence-deserves-scrutiny/ (accessed 2019-07-28).

crimen iniuria is generally not considered a serious offence",[18] thus, confirming the general premise that *crimen iniuria* is not a serious offence. Yet, in handing down the sentence, which the Magistrate herself considered harsh, she observed that though generally considered a non-serious offence, "it depends how a particular person's dignity has been impaired."[19] Implicitly, Magistrate Rugoonandan would appear to have suggested that *crimen iniuria*, though generally categorised as a minor offence, could attract a harsh sentence if the dignity of a person is severely impaired.

If the extent to which the dignity of a person is impaired impacts directly on the sentence handed down, then, the manner in which the dignity of a complainant is impaired warrants proper assessment in keeping with the notions of just and proportional sentences. Notably, to establish that a person's dignity has been impaired, two elements need to be proved. Firstly, the victim should have been aware of what the accused was doing to them.[20] Secondly, the victim should have felt humiliated or degraded because of what the accused did to them.[21] The point of departure in this discussion is that the legality of the sentence in *crimen iniuria* is necessarily tied to the harm involved and this cannot be gauged physically, but rather, psychologically. This makes the testimony of those with expertise in psychology inevitable in assessing how the dignity of a person has been impaired. Yet, while much criticism and praise surrounds the *Momberg* case, very little has been written about the actual determination of this sentence. This article demonstrates that despite the critical role of the expertise of mental health professionals, hardly any recourse to such expertise has been made by the courts in *crimen iniuria* cases. It is therefore recommended that this nature of expertise becomes part of proceedings in *crimen iniuria* cases with a view to ensuring just and proportional sentences. To advance this argument, this article is divided into four parts. Following this introduction, the second section highlights the role of mental health expertise in cases of *crimen iniuria*. The third section briefly discusses selected *crimen iniuria* cases, demonstrating two things. First, that in all these cases, no prison sentence was handed down and secondly, that hardly any recourse was had to the expertise of mental health professionals. The fourth section draws a conclusion and makes appropriate recommendations.

Of course, Momberg's appeal against her sentence in the High Court has since been dismissed. She, however, still has the option to file for leave to appeal at the Supreme Court of Appeal. If the Supreme Court of Appeal confirms the decision, she could appeal further to the Constitutional Court. This suggests that this case is far from being settled. These and other developing issues in this case are not addressed in this

18 Capetown etc "Vicki Momberg's lawyers say prison sentence is too harsh", 11 April 2018, http://www.capetownetc.com/news/convicted-racist-vicki-momberg-back-in-court/ (accessed 2019-07-28).
19 Vicki Momberg lawyers (2018).
20 Snyman 471.
21 Snyman 471.

article. Instead, the article purely focuses on the question whether the time has come for due regard to be accorded to the expertise of mental health professionals in *crimen iniuria* cases with a view to ensuring just and proportional sentences.

2 Expert evidence and the role of mental health professionals in *crimen iniuria* cases

Expert evidence falls within the ambit of opinion evidence.[22] Opinion evidence is generally inadmissible so expert evidence constitutes an exception to such rule. Expert evidence becomes relevant if the issue for determination before a given court is of such a nature that the opinion of an expert can help the court to arrive at an informed decision.[23] The question to be asked therefore is- can the expert be of appreciable help to the court? In this regard, Allan and Meintjes submit that over and above the expert's knowledge, skill and expertise on the specific issue to be assessed by court, the expert should be able to be of appreciable help in guiding the court to arrive at decisions.[24] Expert evidence is particularly critical in light of the fact that it is common knowledge that "there are subjects upon which the court is usually quite incapable of forming an opinion unassisted."[25] An expert's opinion, therefore, comes in handy because "by reason of their special knowledge and skill, they are better qualified to draw inferences than judicial officers."[26]

It could be assumed that issues pertaining to the impairment of the dignity of an individual are within general knowledge of courts. However, for a technical issue such as this, to do so would be to underestimate the complexity assessment of such impairment and the expertise required in conducting such an evaluation. Lay opinion, including the opinion of the judicial officers may be inadequate since as Zeffert and Paizes aptly put it, "there is a strong tendency in practice, certainly in criminal proceedings, to regard lay opinion when received, as constituting *prima facie* evidence only."[27] Presently, however, the expertise of psychologists and other mental health professionals is hardly made use of in proceedings pertaining to *crimen iniuria*. As already alluded to, determining whether the dignity of a person has been impaired in cases of *crimen iniuria*, two aspects are to be proved. The first is the complainant must have knowledge of the action taken or conduct of the

22 Schwikkard *et al Principles of evidence* (2013) 83-103.
23 Schwikkard 83-103.
24 Allan and Meintjes-Van der Walt "Expert evidence" in Kaliski (ed.) *Psycho-legal assessment in South Africa* (2006) 343. See also the case of *Jacobs v Transnet* 2015 (1) SA 139 (SCA), para 15 where the Court ruled, amongst others, that "It is well established that an expert is required to assist the court […]." This means that if the court cannot receive any appreciate help form the expert then their opinion is irrelevant.
25 Zeffert and Paizes *The South African law of evidence* (2009) 237 and 321.
26 Zeffert and Paizes 237 and 321.
27 Zeffert and Paizes 340.

accused towards them (complainant). Secondly, the complainant must have felt humiliated or degraded as result of the conduct of the accused towards them (complainant). Presently, courts do not make use of expert evidence regarding the said two elements, with the cases briefly discussed below constituting a clear demonstration of such reluctance. In practice, the court assesses whether a reasonable person, caught up in circumstances similar to those the complainant was caught up, would have felt degraded or humiliated by the accused's conduct. Although unassisted, judges have relied on common sense, experience and knowledge to draw inferences and conclusions on the nature and extent of impairment of dignity caused as a result of the conduct or action of an accused in the various cases, it is contended that courts are ill-suited to draw such conclusions with a view to assuring consistence in sentencing. It is not only indicative of the underestimation of the complexity surrounding this assessment, but also, risks undermining the notions of just and proportional sentences resulting from arrival at conclusions regarding a field that requires special expertise.

The issue of impairment of dignity as noted already cannot be gauged physically, but rather, psychologically. In this regard, Snyman avers that dignity, self-esteem, self-respect and mental tranquility are at the heart of this evaluation.[28] Snyman underscores that feelings such as mental tranquility and self-esteem are highly emotional concepts, with their manifestation varying from one person to another.[29] From the foregoing elements, one can clearly garner that there is a psychological dimension surrounding this evaluation. This brings sharply into perspective the expertise of mental health professionals such as psychologists and psychiatrists. Questions arise whether they should have a role in such evaluation. Notably, clinical psychologists and psychiatrists, by virtue of their training, possess specialised knowledge necessary to identify and evaluate the mental, emotional and behavioural dynamics surrounding issues such as the effect of degrading and humiliating conduct on the mental state of an individual.[30] This places them in good stead to evaluate and offer expert opinion on the implication of the accused's conduct for the dignity of the complainant. Their evidence becomes especially crucial in light of South Africa's history of discrimination, subjugation and racism where certain conduct and phrases need to be placed in proper context to avoid being misinterpreted and

28 Snyman 471.
29 Snyman 471.
30 See generally, Hamza "The roles of forensic mental health experts in the legal system: What practitioners of law may need to know" (2016), http://www.voiceforthedefenseonline.com/story/roles-forensic-mental-health-experts-legal-system-what-practitioners-law-may-need-know (accessed 2019-10-31); Golding "Mental health professionals and the courts: The ethics of expertise" (1990)13. *International Journal of Law and Psychiatry* 281-307; Muzaffar "Psychiatric evidence in criminal courts: The need for better understanding" (2011) *Med Sci Law* 141-145; Gordon "Crossing the Line: Daubert, Dual Roles, and the Admissibility of Forensic Mental Health Testimony" (2016) *Cardozo Law Review* 1345-1399.

misunderstood. Such overall evaluation becomes critical in assessing the extent of impairment to the complainant and more generally, to a reasonable person. Yet, the expertise of these professionals has hardly featured when courts arrive at sentencing conclusions in cases of *crimen iniuria*. Moreover, the evidence of mental health professionals would also be relevant in advancing the accused's case particularly as it pertains to the mental state of the accused at the time of the commission of the conduct or action in issue. In this regard, such expertise could be of help to the court in drawing conclusions about the accused's mental state and ultimately, extent of liability. These and many factors pertaining to the mental state of the accused and the complainant could prove to be relevant mitigating or aggravating factors in the course of sentencing. Properly assessed by individuals with the relevant expertise, this could go a long way in ensuring that just and proportional sentences are arrived at.

Criminal justice systems could be weary of the opinion of mental health experts usurping the role of judicial officers, a fear that commentators consider a fallacy,[31] with some commentators placing the expertise of mental health professionals in proper perspective. DeMatteo, for instance, submits as follows: "Our work is really about showing how psychology can be used to help courts and juries make more educated decisions."[32] Muzaffar adds, "human behavior and mental disorders are hard to fit into the categorical view of human behavior that the law follows. The task of the psychiatric expert is to marry these two philosophically different branches [without undermining the role of judicial officers to arrive at independent decisions]."[33] Arguably, the failure to understand the interface between law and psychiatry/ psychology often leads to the total exclusion of experts in the field of psychiatry and psychology. The unfortunate fact, however, is that courts, when deprived of such expertise, risk arriving at inconsistent or uninformed decisions. By placing their knowledge and expertise at the disposal of judicial officers, mental health experts help the courts to improve the assessment of the issue of impairment of dignity. The author agrees with Magistrate Rugoonandan to the effect that *crimen iniuria*, though generally considered a minor offence, can attract harsh sentences if the dignity of the complainant is severely impaired. The question, however, arises, if the nature of impairment caused to the complainant impacts on the sentence handed down, isn't it about time that the process of arriving at such a conclusion is accurately and competently accounted for? Perhaps yes and this makes the evidence of mental health professionals inevitable in not only

31 Stevens and Lubaale, Revisiting the historical context surrounding the development of the ultimate issue rule to inform its future in South African law of evidence (2016) *Fundamina: A Journal of Legal History* 94-117.

32 As interviewed by Novotney "Helping courts and juries make educated decisions: Forensic psychologists are in hot demand for their ability to bring the science of human behavior to the judicial system" (2017) *American Psychological Association* 70.

33 Muzaffar 141-145.

defending the integrity of the decision of the court but also, advancing the goal of just and equitable sentences.

3 Overview of the nature of proceedings in selected *crimen iniuria* cases

The purpose of this section is to provide an overview of selected *crimen iniuria* cases, with a view to assessing the manner in which the sentences were arrived at. Did the assessment of impairment of dignity of victims of this crime go beyond mere physical harm and if so, did the court accord any regard to the expertise of mental health professionals? Three cases are briefly discussed with a view to demonstrating that generally, in all these *crimen iniuria* cases, the courts have hardly had any recourse to the expertise of mental health expertise and this could potentially affect the proportionality of the sentence handed down. In cases where the matter is addressed from a civil law perspective, it could profoundly affect the scope and nature of order handed down regarding damages. Before engaging with these cases, it is critical to briefly discuss the tenets of just and proportional sentences in terms of South African case law.

3 1 Mental health expertise as a means to guiding sentencing discretion in arriving at just and proportional sentences

Punishment is part of criminal prosecution and it mainly plays out at the sentencing stage. In the words of Burchell, "punishment is an integral part of the concept of a crime. Without the liability to punishment, there would be no distinction between penal and non-penal laws. Thus it follows that to render any act criminal in our law, there must be some punishment affixed to the commission of the act and where no law exists affixing such punishment there is no crime in law."[34] In South Africa, common law and legislation on sentencing map out the contours and parameters of the penalties that sentencing courts may impose. The nature and scope of the sentence may be either determinate or indeterminate. The crux of the matter however is that it has to be subject to an empowering law, be it common law or legislation.

A number of principles governs the process of sentencing, one such principle being proportionality. This principle underscores the need for the punishment to fit the crime committed.[35] Proportionality seeks to ensure, amongst others, the protection of society from imposition of

34 Burchell *Principles of Criminal Law* (2005) 99; Santoro "Crime and punishment" in Bernstein *et al Political Concepts: A Critical Lexicon* (2018) 65-76.

35 *S v Rabie* 1975 4 SA 855 (A) at 861A. See also 2017 decision in *S v Nakani* (SS15/2015) (2017) 2 ZAWCHC 55, in which the principle espoused in the *Rabie* case was re-echoed.

sentences that are not just, respect for the law and fundamental justice.[36] The Constitutional Court has observed in the case of *S v Makwanyane* that in determining if the sentence handed down is degrading, inhuman and cruel, a question that one would need to as is whether such a sentence is proportional.[37] In *S v Dodo*, the Constitutional Court identified a number of factors to be relied on in determining the proportionality of a sentence including the nature of the crime and personal circumstances of the offender.[38] These factors can also be gleaned from the case of *S v Zinn,*[39] in which the Court considered the nature of the crime, society's interests and the personal circumstances of the offender in ensuring that a sentence is proportional. In the Constitutional Court's view, in the *Dodo* case, "to attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity."[40]

To arrive at a decision on the exact sentence to hand down, judicial officers exercise profound discretion in light of the fact that different cases present unique and varying circumstances. For sentencing courts, therefore, this discretion ensures that, the sentence handed down is not only fair, but also, individualised. The individualisation of sentencing by courts can be illustrated in the decision of *S v Matlotlo*.[41] In this case, the accused was convicted and sentenced to three years of imprisonment by the Magistrate Court upon pleading guilty to the crime of shoplifting. The convict appealed against this sentence in the High Court. Bosielo J reversed the three-year sentence, substituting it with an order of rehabilitation. In addition, half of the three years term of imprisonment was suspended subject to the accused undergoing treatment. This was in light of the fact that the accused allegedly had problem of kleptomania. It can be deduced from this decision that the discretion at the disposal of judicial officers allowed for the kleptomania circumstance of the offender to be taken into account in deciding on the sentence to be handed down.

However, such wide discretion is not without challenges. Notable is the risk of inconsistencies in sentencing. The Constitutional Court has acknowledged this dilemma, observing that:

36 *R v Arcand* [2010] AJ No 1383 (Alta CA), 52.
37 *S v Makwanyane* 1995 2 SACR 1 (CC), para 94.
38 *S v Dodo* 2001 1 SACR 594 (CC), para 37. The Principle in the *Dodo* case has found application in recent cases including a 2018 High Court decision in the case of *Zamla v S* (A207/2016) (2018) ZAWCHC 130, para 13.
39 *S v Zinn* 1969 2 SA 537 (A) at 540G. See also *S v Selebi* (Judgment on sentence) (25/2009) (2010) ZAGPJHC 58, para 1.
40 *S v Dodo supra*, para 38, referring to *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC), para 31.
41 *S v Matlotlo* 2004 2 SACR 549 (T). On the individualisation of sentences, see also S *v Scheepers* 2006 1 SACR 72 (SCA), para 11; *S v Baartman* 1997 1 SACR 304 (E); *S v Mzazi* 2004 2 SACR 549 (T).

> "imperfection inherent in criminal trials … means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials. We have to accept these differences in the ordinary criminal cases that come before court, even to the extent that some may go to jail when others similarly placed are acquitted or receive non-custodial sentences."[42]

One garners from the above dictum that it is in fact possible for offenders who are similarly positioned to receive different sentences, with such difference going as far as some offenders receiving custodial sentences while others receiving non-custodial sentences. This dilemma underscores the critical need for sentencing courts to ensure proportionality in the sentencing process. One way of advancing this is ensuring that courts are availed with all the information and expertise relevant in helping judicial officers exercise their discretion. Jameson[43] has submitted, rightly so, that:

> "the scant information placed before the courts may in certain circumstances lead to the imposition of wrong sentences, because the courts do not have sufficient information to exercise their sentencing discretion properly. The review and appeal tribunals emphasise that this phase is just as important as any other phase of a criminal trial, and should receive the same attention and treatment as any other phase. The courts must have sufficient information before them to exercise their sentencing discretion properly."[44]

In light of the above, an issue warranting resolution is – Thus far, how have courts dealt with the element of impairment of dignity and what implication could this have on the justness and proportionality of sentences? The next subsections engage with this question by critically analysing selected cases on *crimen iniuria.*

3 2 *State v van der Merwe*[45]

This matter was first heard by the Bloemfontein District Court. In this case, the accused persons (four university students enrolled at the University of Free State at the time) were convicted of *crimen iniuria*, a crime they committed while at the University of Free State. The charge against them arose from a video they recorded. The video depicted the accused persons preparing food for the victims, urinating in it, and tricking the complainants into consuming the said food. The court, however, set the record straight, making it clear that "all these were sheer acts of playful simulation." In fact, there was no urination in the food by the accused and forced ingestion of the food by the

42 *State v Makwanyane supra*, para 54.
43 Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* (PhD Thesis 2018 North-West University) 36.
44
45 *State v van der Merwe* Appeal No.: A366/10, Free State High Court Bloemfontein, South Africa.

complainants. The Court *a quo* found that the conduct of the accused had the effect of impairing the dignity of the complainants. The accused persons, who all pleaded guilty to the charge of *crimen iniuria*, were sentenced to a fine of R 20000 and in the alternative, imprisonment for a period of 12 months. In addition, they were sentenced to a period of six months, all of which were suspended subject to multiple conditions including non-commission of the crime of *crimen iniuria* during the period of suspension. Dissatisfied with the sentence handed down, the accused (who at the time of the appeal were appellants), appealed the decision of the District Court before the High Court of Bloemfontein. Upon considering multiple factors, including the fact that the video that formed the crux of the charge was just a simulation, the sentence handed down by the District Court was set aside and replaced with a fine of R 10000. As the discussion in this article focuses on the court's assessment of the notion of impairment of dignity, the analysis here is restricted to this aspect and how the court dealt with it. In demonstrating how impairing the conduct of the appellants were, recourse can be had to some rulings by the appellate court. The court, noted, for example, that:

> "by secretly video-taping the urination scene without the knowledge and consent of the complainants the appellants betrayed the complainants in a big way. It was precisely the secrecy around the urination scene, which made the black playmates of the appellants to feel very badly betrayed. [...] Such ignominious treatment of one by another has all the criminal hallmarks, which underscored the essence of the crime of iniuria. Everyone is entitled, as a matter of right, to freedom from such contumelious treatment."[46]

As consistently noted, to establish that a person's dignity has been impaired, two elements need to be proved. Firstly, that the victim was aware of what the accused was doing to them and secondly, that the victim felt humiliated or degraded because of what the accused did to them. As has been argued, feelings of humiliation and being degraded cannot be gauged physically, but rather, psychologically. The court also underscored the psychological angle to the crime of *crime iniuria* in *S v S*, with Marais J observing that "in the case of *crimen injuria*, otherwise than in the case of defamation, we are more concerned with the emotional values of words than with their intellectual connotations; the dubious or inadequate nature of the latter rarely affects the impact of the former."[47] Yet, one garners from the ruling in the *van de Merwe* case that the Court's decision on this issue was based on a general analysis by the presiding judge. Throughout the judgment, no reference, whatsoever was made to the expertise of mental health professionals, thus begging the question: could this have had implications for the courts' analysis and ultimately the sentence handed down? If so, can such a sentence be considered just and proportional to the crime? Arguably not.

46 *State v van der Merwe supra*, para 43.
47 *S v S* 1964 (3) SA 319 (T).

3 3 *Ryan v Rodwin Petrus*[48]

This matter was before the High Court of the Eastern Cape. It involved Mrs. Ryan, who though staunchly religious, did not consider adultery sinful from a religious point of view. Because of this, she got involved in an adulterous affair with Vernon Petrus. On 24 December 2005, while Mrs. Ryan was in the company of Mr Vernon Petrus, Rodwin Petrus (a son to Mr. Vernon Petrus) uttered the following words to her: "Jou teef. Jy is 'n naaier. Jy naai saam met my pa en jy en my pa maak van my ma 'n poes. Jou kaffir, jy is 'n hoer." Aggrieved by these utterances, Mrs. Ryan instituted proceedings against Mr. Rodwin. The Court treated the matter before it as *crimen iniuiria*. The court took into account the evidence of Mrs. Ryan (the plaintiff/appellant) to the effect that "she had been deeply hurt and humiliated by the insults hurled at her. She stated that the fact that she was involved in an adulterous affair did not give defendant license to speak to her in such a manner. Her dignity, she said, had been impaired." In assessing whether or not the dignity of Mrs. Ryan had been impaired, the Court observed that:

> "the use of the word 'hoer' or 'whore' also clearly constitutes an unlawful aggression upon appellant's dignity. "Whore" is defined in the Concise Oxford English Dictionary as meaning "prostitute" and "prostitute" is defined in turn as meaning "a person, typically a woman, who engages in sexual activity for payment". In my view, to call any woman, who is not a prostitute, a whore, regardless of whether or not that woman is conducting an adulterous affair, is, absent any innocuous context, to degrade and humiliate her."[49]

The Court added, "in all the circumstances, [the] plaintiff has established that her dignity has been impaired. She is accordingly entitled to an award of damages to compensate her for the hurt and humiliation suffered by her." Thus, having had regard to multiple circumstances including the appellant's testimony, previous court decisions and the court's own analysis of the humiliating nature of the defendant's utterances, the court found that the dignity of the appellant had been impaired. Accordingly, the court ordered that the defendant pay R 15000 to the plaintiff in damages. Just like the *Van der Merwe* case above, it is apparent in the *Ryan* case that the court heavily relied on the appellant's own testimony and its own analysis to determine the impairment of dignity. Human J rightly ruled in *S v Jana,*[50] that "the concepts of self-respect, mental tranquility and privacy are judged both objectively and subjectively in that it depends upon the particular person and the circumstances whether it can be said that his dignitas has in fact been impaired." Human J evidently took cognisance of the psychological dimension that the analysis of the crime of *crimen iniuria* takes. Yet, in all cases of *crimen iniuria*, including the *Ryan* case, recourse was not made to the expertise of experts in this field.

48 *Ryan v Rodwin Petrus*, Case No: CA 165/2008, in the High Court of South Africa (Eastern Cape, Grahamstown.
49 *Ryan v Rodwin Petrus supra,* 8.
50 *S v Jana* 1981 (1) SA 671 (TPD) 675 A-B.

Reference may also be made to the decision in the case of *State v Molapo*.[51] This case was also in respect of the crime of *crimen iniuria*. It was before the High Court of the Orange Free State. In setting aside the *crimen iniuria* conviction by the court *a quo*, the Court ruled, amongst others, that it remained unclear "whether the complainant's dignity was indeed impaired."[52] Clarity on this issue would arguably have required evidence from multiple sources, most notably, experts in mental health given the nature of assessment to be conducted i.e. issues of self-respect and mental tranquility. Yet, the record suggests that in arriving at this decision, the court merely drew inference from the general set of facts before it and the testimonies of the various witnesses.

Cases are inexhaustible. This brief examination of cases at random leads to a few conclusions. The first being that in cases prior to the *Momberg* case, no offender was sentenced to a custodial sentence. Secondly, even when the presiding officers, in all the cases including the *Momberg* case, stressed the issue of impairment of the complainants' dignity, at no point did the prosecution and the courts have recourse to the expertise of mental health professionals, who as consistently argued in this case, are better placed to conduct an assessment on feeling of humiliation on the part of the complainant in *crimen iniuria* cases. The fact that prior to the *Momberg* case, none of the *crimen iniuria* convictions resulted into a custodial sentence, causes one to take a step back and to ponder? Could it be that the nature and scope of impairment of dignity in the *Momberg* case was more severe than that in previous cases? Assuming that this is the position, on what basis was that conclusion arrived at? Of course, when sentencing, multiple factors are taken into account and it cannot merely boil down to issues of scope and nature of impairment of the dignity of the complainant. Nonetheless, in these cases, issues of impairment of dignity play a key role in assessing the nature and gravity of the crime and ultimately, the sentence handed down. It follows logically then that if impairment of dignity is an issue that is to be gauged psychologically, and then such assessment needs to be appropriately done. Experts in the field of psychology would play a crucial role in such assessment and it is about time that *crimen iniuria* decisions to reflect such expertise.

4 Conclusion

The purpose of this article was to demonstrate the role of expert evidence, in particular, expertise of mental health professionals in *crimen iniuria* cases. The paper opened with a brief discussion on the controversy surrounding the recent sentence against Momberg to a custodial sentence. The sentence handed down against Momberg has been criticised by some as unfair and a demonstration of courts'

51 *State v Molapo* Review No: 213/2006 In the High Court of South Africa (Orange Free State Provincial Division).
52 *State v Molapo supra*, para 14.

inconsistency in the sentencing regime of South Africa as it pertains to *crimen iniuria* cases. As the crime of *crimen iniuria* revolves around impairment of dignity, the discussion proceeded on the premise that equitable sentences can only be arrived at if courts' analysis of the element of "impairment of dignity" is appropriately conducted. A premise on which this discussion was further based was that the issue of impairment of dignity cannot be gauged physically, but rather, psychologically, thus, making the expertise of mental health professionals very pivotal. This analysis has, however, demonstrated that in all cases of *crimen iniuria*, including the *Momberg* case, courts have hardly had recourse to such expertise. Rather, presiding officers have generally conducted general analyses or relied on complainants' testimonies to draw inferences to arrive at conclusion that dignity has been impaired. In all these cases, the issues analysed by the courts have generally had a psychological dimension i.e. feelings of humiliations etc. This has made it apparent that the judges are incapable of forming an opinion on the feelings of the complainant unassisted. Nonetheless, judges have drawn inferences without receiving appreciable help from mental help experts, a practice that puts into question both the convictions and sentences handed down in these cases. Mental health expertise does not establish the guilt or innocence of the accused in *crimen iniuria* cases, neither does it provide definite answers regarding the sentence to be handed down. Nonetheless, the knowledge, skill and expertise of these professionals on issues of mental health place them in good stead to be of appreciable help in guiding the court to arrive at decisions on conviction and sentencing in *crimen iniuria* cases.

Ignore this heading. It will not influence your interpretation of this article … or will it?

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SUMMARY

The contractual drafting process has been plagued with the copy-and-paste phenomena in which clauses are often incorporated into an agreement on the strength that such a clause is considered standard or a boilerplate, with little consideration to the rationale for its potential interpretative value in a contract. A headings clause has fallen victim to this drafting practice. A headings clause is often used as an interpretative tool to address the manner in which headings would be interpreted within the context of a contract. Headings certainly have practical purposes and normally serves as a navigational tool, but may also have interpretational value on the substantive provisions of a contract. This paper considers four scenarios in which headings could impact the interpretation of a contract and the influence a headings clause may have in such scenarios. A headings clause could, for example, only require the interpreter to consider headings for convenience and thereby circumvent any other interpretative value of the heading, other than serving as a navigational tool. Headings clauses may also exclude the operation of headings from the interpretative processes altogether in which case the interpreter is directed to ignore the headings used in the contract. Although strictly speaking this would mean that headings cannot be used in the interpretation process at all, it seems likely that headings would still under the circumstances be used as navigational tools. On occasion headings may influence the interpretation of sub-clauses, or sub-clauses may be incorrectly drafted which headings may then clarify. Headings may also inaccurately reflect the content of the agreement or sub-clauses which may lead to the availability of *iustus error* to escape the contract. Headings clauses may be included in a contract in an attempt to circumvent such risks and create a safety net for drafting errors. It is apparent that a headings clause would have an impact on the interpretation of the contract and can hardly be considered as a standard provision within a contract.

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1 Introduction

In the drafting of contracts, headings are used in various ways. Headings can be included in the interpretation of an agreement or could be used as a tool to navigate an agreement. A heading could refer to the heading or title of the agreement itself, which often describes the type of agreement,[1] or it could refer to the headings used within the text of the agreement.[2]

Generally, the purpose of headings are to guide and assist the reader to navigate the agreement. Headings have been described as organisational tools,[3] rough indicators of the content of the sub-sections,[4] abbreviations,[5] and even preambles to those sections that follow the heading.[6] Headings essentially help the reader to digest the content of the document, without which a lengthy agreement could become overwhelming.

Headings, in their assistance in digesting written discourse, have been recognised and encouraged in plain language drafting. The Companies Act 2008, Consumer Protection Act 2008, National Credit Act 2005, requires certain agreements (and other documents) to be drafted in plain language.[7] It is worth noting that, although the Consumer Protection Act 2008 and the National Credit Act 2005 only applies to certain agreements, these Acts encourage the use of headings to achieve plain language in agreements. Headings are obviously also used in other agreements that do not fall within the scope of the Consumer Protection Act 2008 and the National Credit Act 2005.

Sometimes drafters attempt to remove the application of the headings in an agreement by including a headings clause. A headings clause can

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1 The heading to the agreement can also be called the headnote or title. The description found in the heading is often used to describe the specific type of contract. The type of contract is, however, not determined by what the contract is called in its title but instead the type of contract is determined by the *essentialia* found in the agreement.

2 Headings can also be referred to as captions or titles.

3 The US case of *McEwan v Mountain Land Support Corporation* 116 P.3d 955 2005 UT App 240 961, the court describes headings in contracts to be "… more appropriately regarded as organizational tools than substantive contract provisions".

4 *Rex v Associated Trade Suppliers Ltd and Another* 1945 AD 611 616.

5 *Sentinel Mining Industry Retirement Fund and Another v Waz Props (Pty) Ltd and Another* 2016 JOL 35527 (SCA) 7.

6 The *Rex* case 615, referencing *Fletcher v Birkenhead Corporation*, describes a heading as a preamble, which implies that the heading has no substantive force but is useful in "explaining doubtful expressions in the body of a section". In other words, headings do not appear, in themselves, to create obligations. It does, however, like with a preamble of a contract, influence the interpretation of a contract by providing interpretative guidance to the provisions that follow.

7 S6bis(5) of the Companies Act 61 of 2008; s22bis(2)(d) of the Consumer Protection Act 68 of 2008; s64bis(2)(d) of the National Credit Act 34 of 2005.

be as wide as stating that headings do not influence the interpretation of the agreement, or as narrow as stating that headings are only included in the agreement for convenience. Such headings clauses are often thought to be boilerplate or some standard provision normally included in agreements.[8] The myth of standard clauses has unfortunately been perpetuated by the copy-and-paste phenomena found in contract drafting practice. Notwithstanding this, each clause must have a purpose and there must be a reason for the inclusion of the provision in the agreement. It is not good enough to include a provision in an agreement on the strength of the perception that such a provision is considered to be a standard clause.

In addition, a presumption exists in our law that every word included in an agreement has meaning and a purpose.[9] If every word in an agreement has an attached meaning, then by implication such a word would influence the interpretation of an agreement. The same reasoning would apply to headings in agreements. Therefore, headings clauses could influence the interpretation of an agreement. Some agreements, however, exclude headings from the interpretation of an agreement.[10] The exact reason for such exclusion may be to avoid errors or incomplete headings influencing the interpretation of the clauses bundled underneath the heading.[11] Taking the presumption that every word contained in the agreement would influence the interpretation of the agreement as the starting point, it is not the norm to intentionally exclude headings from the interpretation of an agreement, as headings would have been included in the agreement for a reason.[12]

To understand the purpose and effect of headings in agreements, a closer inspection of the headings clause is necessary. Some headings clauses describe headings as being included in the agreement for convenience only, which implies that there may still be some scope for headings to be part of the interpretation of the agreement.[13] The second

8 The term boilerplate is used to refer to standardised clauses in a contract. See: Anderson & Warner in *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 1; Stark in *Negotiating and Drafting Boilerplate* (2003) 9-10.

9 Cornelius in *Principles of the Interpretation of Contracts in South Africa* (2007) 122.

10 For the purposes of this this article, these types of provisions will be referred to as headings clauses.

11 Bracher "Headings will be taken seriously" 2015 *Financial Institutions Legal Snapshot* http://www.financialinstitutionslegalsnapshot.com/2015/06/headings-will-be-taken-seriously/ (accessed 2019-11-19), which notes due to the interpretational impact headings may have on a contract it is the reason "… why many contracts exclude the headings as part of the document".

12 Toedt "General provisions in contracts" 2012 *Common Draft Annotated Compendium* http://www.oncontracts.com/general-provisions/#fn.51 (accessed 2015-09-13).

13 An example is found in Fosbrook & Laing in *The A-Z of Contract Clauses* (2014) I.343, "the headings in this Agreement are for convenience only [and] shall have no effect on the interpretation of the document", or I.349, "[h]eadings, clauses and other parts are for reference only and are not to be construed as part of this Contract".

type of headings clause excludes headings from the agreement altogether, or states that headings should be ignored.[14] If the application of headings are removed from the agreement through headings clauses, then the agreements may achieve the same outcome by simply eliminating the use of headings from the document altogether.

This article considers the purpose of headings in an agreement and the use of headings clauses by examining four general examples, each setting out different scenarios in which headings and headings clauses could be used in an agreement.

2 First example: headings are for convenience only[15]

In this example, the use of headings do not create ambiguity in an agreement, but a headings provision provides that headings should only be used for convenience. In this case, headings are not necessarily intended to be excluded in their entirety from an agreement and are still intended to be used as navigational tools within the document.

Take for instance a shareholders agreement, which typically includes a number of headings. Should the reader wish to find the provisions relating to, for example, voting rights, they would look for the relevant heading to guide them to the right section in the agreement. Headings, in this instance, have undoubtedly been used to aid the reader in digesting and navigating the agreement.

A presumption exists in our law that there are no superfluous or meaningless words included in an agreement.[16] Starting from this basis, the use of a heading must have intended to mean something when it was included in the agreement. In this example, the headings are clearly intended to function as a navigational tool, but headings clauses also typically state that headings should not be used for interpretation or give substantive weight to the agreement. Therefore, the headings clause often intends to exclude the substantive application of headings, but at the same time intends to use headings in the traditional sense to navigate the document. It could be argued that merely having included the heading as part of the text, has already influenced the interpretation of

14 Fosbrook & Laing I.341 sets out the following example: "[c]lause headings or titles do not form part of this contract and shall not affect its interpretation".

15 My gratitude is extended to Mr Angelo Christophorou for his valuable insights and providing this example to illustrate the practical functioning of a headings clause.

16 Cornelius 122, every word in a contract has a purpose and there are no meaningless, superfluous or tautological words contained in a contract. On this basis, if a heading had been included in a contract, then the heading must serve a purpose and would then influence the interpretation of the contract to some extent. See also: *Benz v SA Lead Works Ltd* 1963 3 SA 797 (A).

agreement. This line of reasoning seems artificial in that the headings clause has already directed how the headings should be used in the interpretation of the agreement. This first example, however, does highlight that headings could be included in an agreement to serve as a navigational tool in order to help readers traverse their way through an agreement.

3 Second example: headings should be ignored[17]

A headings clause could also be an attempt to overcome errors or shortcomings found in the manner in which an agreement was drafted. Headings in these instances may cast doubt, or create some level of ambiguity, in the interpretation of sub-clauses. Take for example the ambiguity where a section heading is titled "warranties" and underneath the heading one of the sub-clauses states that the creditor will make payment of the fees into the debtor's bank account by electronic funds transfer. The heading refers to a warranty, but the sub-clause beneath it does not. If the heading is ignored then the creditor should make payment to the debtor by electronic funds transfer. If the heading is read together with the sub-clauses, then the heading may amplify the meaning of the sub-clause and could imply that the obligation is, in fact, a warranty. The heading would then expand and possibly change the original meaning of the sub-clause. To avoid these types of interpretative consequences, drafters often include a headings clause directing the interpreter to ignore the interpretational impact of the headings within the text.[18] Excluding the interpretative application of the heading in this fashion could very well render headings in the agreement without purpose or function.

17 Fosbrook & Laing I.341.

18 A similar example is discussed in Adams "You might want to make your section headings non-random" 2012 http://www.adamsdrafting.com/you-might-want-to-make-your-section-headings-non-random/ (accessed 2019-11-19), which discusses the US case of *Corbin Bernsen v Innovative Legal Marketing*. In this case the section heading was called "Indemnification" and read as follows: "VI. INDEMNIFICATION. Network will name Talent on its general liability insurance policy. Talent agrees to not commit any act or do anything which may tend to bring Talent into public disrepute, contempt, scandal or ridicule or which might tend to reflect unfavorably on the Network, their clients or on the Talent." It is clear from the content of the clause that there was no indemnification in the so-called morality clause. The argument that the clause contained some form of implied indemnification did not succeed in this case.

If headings are to be ignored in their entirety then the interpreter may not take into account the headings at all when reading the agreement.[19] It could then be argued to mean that headings cannot be used for convenience to navigate the agreement, as shown in the first example.[20] If this was the intention of the headings clause, then the drafter could have achieved the same result by excluding headings from the agreement altogether.

The rules of interpretation notes that every word in the agreement has been included for a specific reason and purpose.[21] After all, the interpretation of an agreement cannot be sliced, diced and compartmentalised.[22] Instead, an agreement should be interpreted as a whole to ascertain the intention of the parties. As such, the headings clause in this example does not appear to have the effect of excluding headings from the agreement altogether, but the heading could still have the purpose of navigating the agreement.

It may also be suggested that the purposes of a headings clause is to clarify the ambiguity between headings and substantive provisions. If this was the case, then the same outcome could be achieved by adapting a conflict clause to state the substantive provisions of the sub-clauses would take preference over any conflict with the headings clause.[23] The provisions found underneath a heading would most likely contain the intention of the parties.[24] The headings and the provisions sub-clauses found underneath it should be read together, and insofar as they are inconsistent, the courts have indicated the substantive provision would take preference.[25] Therefore, including an adapted conflicts clause adds little additional value to the existing position.

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19 See for example the US case of *Sunoco Inc (R&M) v Toledo Edison Co* 129 Ohio St.3d 397 2011-Ohio-2720 413, where the headings clause functioned as a type of waiver in which the parties could not rely on the headings in interpreting the agreement. Also, in the US case of *Home Gas Corporation v Strafford Fuel Inc. and Edward C. Dupont. Jr.* 130 N.H. 74 1984, the headings were ignored in the interpretation of the section because of the inclusion of a headings clause in the agreement.

20 See discussion in para 2.

21 Cornelius 122.

22 In the US case of *Nicolas M Salgo Associates v Continental Illinois Properties* 532 F.Supp. 279 1981 281, the court confirmed that a part of a contract cannot be interpreted in isolation but must be considered as a whole. This is similar to the South African approach to the interpretation of contracts.

23 This type of provision could read to say that any conflict between the heading and the substantive provisions underneath it, the substantive provisions would take preference.

24 The *Sentinel Mining Industry Retirement Fund* case 7.

25 The *Sentinel Mining Industry Retirement Fund* case 7, the court provides guidance to the interpretation of conflicts between the headings and sub-clauses by stating "[i]t seems to me common sense that where a heading conflicts with the body of the contract, it must be the body of the contract which prevails because the parties' intention is more likely to appear from the provisions they have spelt out than from an abbreviation they have

This second example illustrates that the headings clause could be used to remove headings from influencing the substantive form to the agreement and may also exclude headings from the interpretation of the agreement altogether. This, however, does not appear to impact the navigational function of headings in an agreement.

4 Third example: headings are used to avoid ambiguity[26]

Sometimes the incorrect use of headings creates ambiguity. It may be suggested that the inclusion of a headings clause is intended to avoid such ambiguity. This is not always necessarily the case. Ambiguity can also be created where a headings clause has been included in the agreement and sub-clauses either do not refer to heading, or makes an incorrect reference to the heading.

Take for example a clause that is titled "19. Liability". The first sub-clause, clause 19.1, speaks to the creditor being liable for any negligent actions in loading machines onto the debtor's vehicle. The second sub-clause, clause 19.2, speaks to the debtor being liable for any loss or damage to machines whilst such machines are in the debtor's custody. The third sub-clause, clause 19.3, reads: "Nothing in this clause shall imply that a party will be liable for indirect or special damages whatsoever." The heading does not, in itself, create ambiguity as it accurately captures the theme of the sub-clauses, being the allocation of liability between the contracting parties. The ambiguity is, however, introduced in the manner in which clause 19.3 is drafted. Without the heading "Liability", clause 19.3's use of the words, "this clause" is ambiguous, in that it is not clear whether "this clause" refers to clause 19.3 itself or to clause 19 as a whole. The inclusion of the heading potentially removes such ambiguity.[27] The question that is derived from this scenario is whether a headings clause that instructs the reader to ignore headings could result in the heading "Liability" not be considered at all when interpreting clause 19.3. The author would argue that this line of reasoning creates a level of artificiality and unnecessary technicality in interpreting the agreement. Despite this textual ambiguity, it remains likely that the drafter intended clause 19.3 to refer to the heading "Liability".

This example illustrates that the heading itself did not create the ambiguity but rather that the manner in which the sub-clauses were drafted and the inclusion of a headings clause resulted in the textual

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chosen to identify the effect of those provisions[,] … but that where the heading and the detailed provisions can be read together, that should be done".

26 This example is adapted from a contract that the author reviewed.

27 *Kilburn v Tuning Fork (Pty) Ltd* 2015 6 SA 244 (SCA) 249, when the heading and the body of the agreement was read together the ambiguity that existed was resolved.

ambiguity. Any references to the headings in the sub-clauses could, in itself, create ambiguity and even more so where headings clauses have been included in the agreement.

5 Fourth example: headings highlighting the content of the agreement

Headings could highlight the content or theme of sub-clauses within the agreement and thereby limit a party from arguing that a misunderstanding existed regarding the content of the agreement. The text of an agreement may, for example, be misleading,[28] and could induce a person in signing the document.[29] This may give rise to the argument of *iustus error*. This could include instances where the incorrect or incomplete use of headings[30] creates an impression contrary to the provisions in the contract. Consequently, the contracting party would not have expected such provisions in a particular type of agreement. There are a number of factors that can influence whether the argument of *iustus error* would be successful and the use of headings can be one of these factors.

In *Fourie v Hansen*,[31] the manner in which the document was structured discouraged a person from reading it.[32] The heading of the document did not bring to the signatory's attention the exemption provision contained in the document and the signatory was led to believe that the document was nothing more than a confirmation of receipt. The signatory, therefore, did not expect an exemption clause to be present in the agreement.[33]

Another example is where the heading to the agreement did not fully describe its content of the agreement. This was the case in *Keens Group v Lotter*,[34] where the contract was titled as "Confidential: Application for Credit Facilities", but the agreement contained a suretyship. This

28 *Brink v Humphries & Jewel (Pty) Ltd* 2005 2 All SA 343 (SCA) 345, a document can be found misleading in its terms, which would constitute a misrepresentation and could cause the signatory to rescind the contract where the misrepresentation was material.

29 Adams "Accentuating the positive in section headings" 2011 http://www.adamsdrafting.com/accentuating-the-positive-in-section-headings/ (accessed 2019-11-19), states that section-headings, being a summary of the clause, could also be considered to be misleading if incorrectly described.

30 The *Brink* case 348-349.

31 *Fourie v Hansen* 2000 JOL 5993 (W).

32 The *Fourie* case 14, the court stated that a different colour, underlining or having the clause in bigger font would bring the provision to the reader's attention.

33 The *Fourie* case 16.

34 *Keens Group Co (Pty) Ltd v Lotter* 1989 1 All SA 49 (C).

amounted to the inclusion of an unusual term in the agreement and allowed for the successful argument of *iustus error*.[35]

Incorrect headings are not the only factor and cannot, in itself, be the sole feature that determines whether *iustus error* applies, as seen in *Brink v Humphries*.[36] In other instances, the courts have upheld the principle of *caveat subscriptor*, insisting that the reader should have read the agreement before signing it.[37] The inclusion of correct headings could be used to reinforce the *caveat subscriptor* principle in such instances.

A number of factors would influence whether a party can successfully rely on the argument of *iustus error*, but the test ultimately rests on whether a reasonable man would find the text misleading.[38] Take for instance *Brink v Humphries*,[39] in which some of these factors included:[40] (i) whether the heading of the contract was misleading,[41] (ii) whether the signatory had to sign twice in different capacities, (iii) the fact that some of the clauses had to be completed by the signatory's own hand, and (iv) the fact that the surety provision was in capital letters.[42] In this instance, headings were not the only influencing factor,[43] but headings could be an influencing factor where there is a duty placed on a party to bring to the signatories' attention certain provisions.[44] A drafter could, in such circumstances, use other mechanisms to draw the signatory's attention to provisions, including different colour text, font size, capital letters, underlining or bolding text or even having the signatory initial next to the provision.

The converse may also be true in that sub-clauses, for example, have a wider meaning than the heading used to describe the clause, which could create a false impression to the contracting parties. Take for instance a clause titled "Assignment", which may not accurately reflect the sub-clauses that includes a prohibition against informal cession or a

35 The *Keens Group* case 56, the court favoured the use of a separate document so that the intention of the parties was clear.
36 The *Brink* case 348-349. See also: *Roomer v Wedge Steel (Pty) Ltd* 1997 JOL 1345 (W); *Royal Canin South Africa (Pty) Ltd v Cooper* 2009 JOL 22720 (SE).
37 Take for example *Blue Chip Consultants (Pty) Ltd v Shamrock* 2002 JOL 9307 (W) 13 in which the court found the form was not misleading because of the relationship of the parties.
38 The *Brink* case 348-349.
39 The *Brink* case 345.
40 The *Brink* case 348-349.
41 The fact that the credit application in this case did not make reference to the suretyship was misleading in itself.
42 In this case the effect of the capital letters was diluted by the preceding clauses being in capital letters as well.
43 For example, *George v Fairmead* 1958 3 All SA 1 (A), the words "I hereby agree" was an indicator that an agreement was being entered into irrespective of it being called a hotel register.
44 In *Diners Club SA (Pty) Ltd v Livingstone* 1995 4 All SA 334 (W), the typographical readability of the contract was poor, and the font was so small that a magnifier was necessary to read the text.

pactum de non cedendo, which is not strictly the same legal concept as "assignment" set out in the section heading.

This final example illustrates another purpose of headings, being that headings highlight the content and substance of an agreement.

6 Conclusion

The use of headings can create ambiguity if headings do not accurately reflect the content of the sub-clauses.[45] Similar pitfalls may exist where references are made to the heading in the sub-clauses.[46] In addition, the use of headings in an agreement will either facilitate or prevent misunderstandings in relation to the content of the text.[47]

From the examples discussed, it is apparent that the so-called standard headings clauses are not so standard after all and that headings, in whichever form used, can become an interpretative risk in poor contractual drafting.[48] Sometimes, it seems that a headings clause is an attempt to cast a safety net in an agreement to catch any drafting errors. It has, however, been illustrated that the drafting errors cannot always be hidden behind the protection of the headings clause.[49]

Headings may influence interpretation of an agreement and usually do not pose a problem if drafted correctly, in that the heading is concise, to the point and accurate. If a drafter wishes headings to be ignored, then headings could be avoided altogether from the agreement. By doing this, however, it could create difficulties in navigating the document,[50] and the agreement would ultimately be a poorer document as a result.

There are, however, clear and practical reasons for using headings in agreements. Not only do headings serve the purpose of being a navigational tool, but they also highlight the content of the document to the parties, which could limit a party's ability to rely on misunderstandings in cases of *iustus error*.

There is no right or wrong way when drafting a contract, but there are often better ways of drafting.[51] It is always advisable to draft correctly

45 See discussion in para 3.
46 See discussion in para 4.
47 See discussion in para 5.
48 Adams "A reminder regarding section-heading protocol" 2011 http://www.adamsdrafting.com/a-reminder-regarding-section-heading-protocol/ (accessed 2019-11-19), echoes the statement that headings provisions are often used to overcome poor drafting by stating that: "… a provision regarding the effect of section headings can save you from the consequences of careless drafting".
49 See discussion in para 4.
50 See discussion in para 2.
51 A saying used by Prof SJ Cornelius in his lectures on the drafting and interpretation of contracts.

and accurately. This will reduce the risk of having inaccurate headings which may have an interpretational influence on the substantive content of the contract.[52] Whichever approach is taken, the inclusion of a headings clause cannot be said to be standard, and it ultimately rests on the drafter to consider whether it is appropriate to include or exclude a headings clause from an agreement.

52 Adams "A reminder regarding section-heading protocol" 2011, referring to the US case of *Sunoco Inc (R&M) v Toledo Edison Co* Adams points out that: "drafters should make sure any given provision is clear enough so that no one has to look to the heading for clues as to meaning" and that "drafters should make sure no section heading suggest a meaning that is broader or narrower than what's covered in the related section".

Autonomy in organ donations v family consent: a South African legislative context

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SUMMARY

The lack of availability of transplantable donor organs remains the main obstacle to improving organ donation rates on a global level. The purpose of this article is to investigate the role of family consent in the donation process from a legal perspective. The question is posed whether family members should be approached to provide consent for deceased organ donation or whether the right to self-determination of the deceased should be honoured. The article analyses Chapter 8 of the National Health Act 61 of 2003 to determine the current legal position with regard to consent in the organ donation process. It is concluded that due to the continued stagnant state of the availability of donor organs in South Africa, at the very least appropriate, valid consent should not be nullified by a relative's objection.

1 Introduction

Due to the continued stagnant state of the availability of donor organs in South Africa, we are of opinion that at the very least appropriate, valid consent should not be nullified by a relative's objection. There is a desperate need for transplantable organs worldwide.[1] In South Africa, approximately 4300 people are waiting for an organ transplant.[2] In 2017[3] only 371 solid organ transplantations were performed in the public and private sector.[4] South Africa follows an "opt-in" procurement system meaning people must give consent for a donation before organs will be procured.[5] This can be viewed as a scheme of "giving" as it is based on the idea that your right to self-determination implies the right

1 World Health Organization https://www.who.int/bulletin/volumes/85/12/06-039370/en/ (accessed 2019-08-08).
2 Due to the fact that there is no national waiting list or national organ procurement organisation, the statistics with regard to organ donation in South Africa is not reliable.
3 The statistics for 2018 are not available as yet.
4 Statistics supplied by the South African Transplant Society. The Society educates healthcare professionals, public and patients on organ transplantation.
5 For a definition on "opt-in" see Delgado, Molina-Pèrez, Shaw and Rodriguez-Arias "The role of the family in deceased organ procurement: a guide for clinicians and policymakers" 2019 *Transplantation* 113.

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to make decisions about what happens to your body (even after death).[6] Other countries like France and Belgium follows a system of "opt-out". This means that every citizen is an organ donor unless he or she has registered an objection to a donate after death.[7] Not opting out is considered presumed consent and can be labelled 'taking' as opposed to "giving".[8] The question is usually asked whether presumed consent automatically leads to more organs being available for transplantation. This is a presumption rather than based on scientific evidence.[9] Recently, Wales, for example, have legalised presumed consent but this has not led to an increase in deceased organ donation.[10] The question can be posed if presumed consent does not improve numbers what could then be done? The Norwegian Association for Organ Donation recommends the following:

> "Spain,[11] is the leading country in organ donation. They have an opt-out system but in reality, it is the conversation with the relatives that counts – just as in Norway. If you look at Spain, it is clear that the opt-out system has little to say and the keys to their results are organization, sufficient resources and educated health staff at the hospitals."[12]

It thus seems that legislation cannot by itself improve donor rates. Practices regarding family communication should be the focus to find a solution for the organ shortage. This is a hot debate as family members need to be approached in a time of grief. The question asked by Jensen and Larsen becomes applicable: "Is it desirable to image doctors and nurses wheeling a deceased patient to the operating theatre for organ procurement without asking the family – or worse, against the wishes of the family – families they have spent the last days and hours supporting and comforting?"[13] It is the focus of this article to investigate the role of family consent in the donation process from a legal perspective. Should family members be asked for their consent for an organ donation after a loved one has died; or should the wishes of the deceased be honoured, and the family only asked to authorise a donation. Before the questions

6 Den Hartogh "Respect for autonomy in systems of postmortem organ procurement: a comment" 2019 *Bioethics* 550.

7 For a definition on "opt-out" see Delgado, Molina-Pèrez, Shaw and Rodriguez-Arias 2019 *Transplantation* 113. See also Csillag "Brazil abolishes "presumed consent" in organ donation" 1998 *Lancet* 1367.

8 Jensen and Larsen "The public debate on organ donation and presumed consent in Denmark: Are the right issues being addressed?" 2019 *Scandinavian Journal of Public Health (Scand J Public Health)* 2.

9 See Jensen and Larsen 2019 *Scand J Public Health* 2.

10 Parsons "Welsh 2013 deemed consent legislation falls short of expectations" 2018 *Health Policy* 941; Albertsen "Deemed consent: assessing the new opt-out approach to organ procurement in Wales" 2018 Journal of Medical Ethics (*J Med Ethics)* 314.

11 See Matesanz and Miranda "A decade of continuous improvement in cadaveric organ donation: the Spanish model" 2002 *Journal of Nephrology* (*J Nephrol*) 22-28; Rodriguez-Arias, Wright and Paredes "Success factors and ethical challenges of the Spanish Model of organ donation" 2010 *Lancet* 1109-1112.

12 Jensen and Larsen 2019 *Scand J Public Health* 4.

13 Jensen and Larsen 2019 *Scand J Public Health* 5.

can be answered it is necessary to analyse legislation regarding organ donation and transplantation in South Africa.

2 The National Health Act 61 of 2003

South Africa does not have a specific piece of legislation dealing with solid organ donation and transplantation.[14] The legislative requirements for valid donations and transplantation are covered in Chapter 8 of the National Health Act 61 of 2003 (NHA). The relevant section in the Act concerning the donation of organs is section 62, entitled "Donation of human bodies and tissue of deceased persons". The title addresses "tissue" but according to the definitions in the Act, tissue includes an organ.

> "Section 62 states the following:
>
> 62(1)(a) A person who is competent to make a will may –
> (i) in the will;
> (ii) in a document signed by him or her and at least two competent witnesses; or
> (iii) in an oral statement made in the presence of at least two competent witnesses,
> donate his or her body or specified tissue thereof to be used after his or her death or give consent to the post mortem examination of his or her body, for any purpose provided for in this Act.
> (b) …
> (c) …
> (d) …
>
> (2) In the absence (own emphasis) of a donation under subsection (1)(a) or of a contrary direction given by a person whilst alive, the spouse, partner, major child, parent, guardian, major brother or major sister of that person, in the specific order mentioned, may, after that person's death, donate the body or any specific tissue of that person to an institution or a person …"

The section thus determines that an adult person of sound mind can decide while still alive whether he or she wants to be an organ donor after death. According to testamentary law, a competent person of 16 years of age can draw up a legally valid will.[15] The problem with donating your organs in a will or final testament is that after death the will or testament

14 Countries like Canada, India, New Zealand, Singapore, United Kingdom and the United States have separate pieces of legislation regulating organ donation. Previously, South Africa had a separate Act concerning organ and tissue donation and transplantation, the Human Tissue Act 65 of 1983. This Act was repealed in total in 2012 when the Regulations to Chapter 8 of the NHA was promulgated. Currently organ donation and transplantation are only addressed in Chapter 8 of the NHA and the regulations in terms of the Act.

15 This section poses a further discrepancy with the Children's Act 38 of 2005 which states in section 129 that a child over the age of 12 with sufficient maturity is allowed to consent to surgical operations if duly assisted by his or her parent or guardian.

must be validated by the Master of the High Court. This process takes days and seems futile as time is of the essence in organ transplantations. The second requirement, that you as a living person can donate your organs after death by stating your wish in a document signed in the presence of two competent witnesses (14 years or older), seems the best solution and will be elaborated on below, before that is done, the third possible way of donating an organ should be addressed. The Act states that you can donate your organs by way of an oral statement but in front of witnesses. This could be very controversial as who will attest to that and how would it be proved. This requirement thus also seems futile. The only stipulation in the Act worth exploring is thus the second one of a written statement.

This statement should be distinguished from a living will. A living will have no legal status in South African law[16] but because the NHA specifically states that a donation may be made in a document signed by the donor and two competent witnesses, the Act creates a legally valid document. Unfortunately, this requirement is ignored by organisations involved with donor awareness. The Organ Donor Foundation (ODF) for example, requires registration as a donor. This can be done online or manually by filling in a form. There is no space for two signatures of witnesses and therefore it does not comply with the legal requirement. The registration process with the ODF is merely for statistical purposes. This is unfortunate, because if the ODF made it compulsory for donor registration to have the signatures of two competent witness, with the signature of the donor, it would have been a legally valid document and a valid reflection of the donor's wishes. Because this does not happen the registration as an organ donor practically serves no purpose other than indicating to the family that the deceased wanted to be a donor.

The sticker on a driver's license is also just an indication of the deceased wishes but not legally binding. The same goes for the donor card distributed by the ODF to be kept in a purse. The general practice in hospitals in South Africa is thus that the default position is followed in all instances of a possible organ donation. The family of the deceased is approached for consent to remove organs from the deceased body. Although the Act specifically states that "in the absence of …" an indication that the person wanted to be an organ donor, all indications are ignored, and the family must consent. This general practice in hospitals has proven unsuccessful as there are never enough donations to supply in the demand. Family members who are grieving about the death of their loved one, most of the time do not want to consent to organ donations for various reasons that will be discussed below. If the deceased had indicated he or she wanted to be a donor after death, it makes the decision of the family easier, although many families still refuse, based on their views about organ donations. It is our belief that if the law is followed, meaning the deceased drew up a document while still

16 Skeen "Living Wills and Advance Directives in South African Law" *Medicine and Law* 2004 937-43. See *Clarke v Hurst NO* 1992 (4) SA 630 (D).

alive and signed it with two competent witnesses, it should be enough proof of his or her wishes as it is stipulated in an Act. Therefore, the hospital staff should respect the wish and act accordingly by removing viable organs for transplantation purposes.[17] The family should not be ignored, but their authorisation is all that will be required, not their consent.

The ideal situation could be that an organisation is established to distribute donor documents which should then be signed by the donor and two competent witnesses. This document should be filed as a legally valid document. The personal information of the donor, for example, his or her identification number should then be electronically recorded on an application for a smartphone. If the person should then die in a manner that his or her organs could be used for transplantation, the medical staff in the intensive care unit should utilise the application, using the deceased identification number to verify whether he or she was a valid organ donor according to the Act.[18] If it is the case, the hospital should respect his or her wishes and take the organs to be used for transplantation. The family of the deceased could be informed of the process and their authorisation towards the donation could be recorded, but they will not be expected or required to give consent. Should there be a scenario where the family members are unhappy about the process, the hospital staff should explain to them the validity of the donation according to the stipulations in the NHA.[19] If the family should still institute legal action,[20] it should be clear that a court of law will determine whether there is in fact a legally signed document in existence and if that is the case, then the family will have no cause for action. In any event, more good follows from a process of organ retrieval and 8 lives could be saved than overruling the donor's wish by the preconceived views of the family.

17 This is also underscored by the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes R380 in GG 35099 issued in terms of the National Health Act 61 of 2003 dated 2 March 2012, s 14(3) "If a person who have died has in her or his will or in a document donated tissue of her or his body, a medical practitioner may act upon that will or document if on the face of it appears to be legally valid."

18 Currently, neither transplant coordinators nor transplant centres have access to the registered organ donors database.

19 The NHA and the regulations in terms of the Act have been discussed, unfortunately there is no case law in South Africa on the topic of family consent in organ donations.

20 May, Aulisio and DeVita "Patients, families and organ donation: Who should decide?" 2000 *The Milbank Quarterly (Milbank Q)* 333 the authors refer to the anecdotal statements of organ-procurement coordinators: "dead patients don't sue, but live families do." In fact, "fear of being sued" was cited as among the common reasons for ignoring a valid donor card and, instead, seeking consent from family.

3 Personal autonomy v family consent

The Constitution of the Republic of South Africa, 1996 guarantees the right to self-determination.[21] This right translates in the right to personal autonomy. It is more in line with respect for autonomy to adhere to the wishes of the deceased than to ask relatives at the time of death.[22] Giving the relatives decision power with regards to the removal of organs from a deceased body will have to be weighed against possible violations of the respect for the deceased's autonomy[23] to determine a better way forward. According to us, respect for personal autonomy is the only moral consideration worth fighting for in the organ shortage debate.

Rosenblum *et al,*[24] states that the involvement of the family in deceased organ procurement worldwide is unclear. They investigated 54 nations that either has an opt-in or opt-out procurement system,[25] concerning the involvement of family members in the organ donation process. They found that the family of the deceased in the organ procurement process were involved with the decision making in most nations, regardless of the consent principle and whether the deceased has expressed a wish to donate or not – "[t]he next-of-kin have a considerable influence on the organ procurement process in both presumed and explicit consent nations".[26] After a death the relatives when approached for organ donation can do the following: (a) they can inform the hospital staff that they are aware of the deceased's wishes and would like them to act accordingly, or (b) the relatives can indicate they have no idea what the wishes of the deceased was, and therefore they would rather not donate,[27] or (c) they can indicate they know the wishes of the deceased but would like to *veto* or overrule it[28] because of their own preferences or (d) they can consent to a donation even though they do not know the express will of the deceased.[29]

21 S 12 of the Constitution of the Republic of South Africa, 1996.
22 Den Hartogh 2019 *Bioethics* 553.
23 Den Hartogh 2019 *Bioethics* 554.
24 Rosenblum *et al*, "The authority of next-of-kin in explicit and presumed consent systems for deceased organ donation: an analysis of 54 nations" 2012 *Nephrology Dialysis Transplantation (Nephrol Dial Transplant)* 2533-2546.
25 Rosenblum *et al,* 2012 *Nephrol Dial Transplant* 2533.
26 Rosenblum *et al,* 2012 *Nephrol Dial Transplant* 2533.
27 See Sque *et al,* "Bereaved donor families' experiences of organ and tissue donation, and perceived influencers on their decision-making" 2018 *Journal of Critical Care (J Crit Care)* 82-89.
28 See Shaw *et al*, "Family over rules? An ethical analysis of allowing families to overrule donation intentions" 2017 *Transplantation* 482-487; Cay "Contemporary issues in law and ethics: Exploring the family veto for organ donation" 2019 *Journal of Perioperative Practice* 1-7.
29 For a more in-depth discussion of the possible roles of the family in organ donation see Delgado, Molina-Pèrez, Shaw and Rodriguez-Arias 2019 *Transplantation* 114-115.

Shaw *et a,l*[30] list six arguments in favour of the right of family members to overrule a donors wish: it reduce families' distress; it minimise stress for healthcare staff; a donation cannot proceed without information being provided by the family; families might have new information about a patient's refusal to donate; going against the wishes of the family may weaken trust in the donation process and by adhering to the wishes of the donor too much emphasis is placed on individualism.[31] They have only five arguments against family overrule: firstly, it violates the wishes of the deceased; it takes away the burden of decision making from families; it guards against a regret for overruling a deceased's wishes; it helps patients waiting for an organ and it is more in line with laws guiding donations in nearly all jurisdictions that makes it clear that the patient's wishes should be respected.[32]

May *et al,*[33] states there is a significant discrepancy between an individual willing to donate and their family's willingness to give consent after his or her death. They refer to a study by the United Network for Organ Sharing (UNOS) in the United States of America that found that 35 of 36 organ procurement organisations (OPO's) they studied, will never recover organs or tissue from a patient with a signed donor card against family wishes.[34] They also refer to the Centre for Organ Recovery and Education (CORE) an OPO operating tin the regions of New York, Pennsylvania[35] and West Virginia that adopted a 'controversial' policy of acting on the documented wishes of individuals to donate, independent of family consent. Families are informed of the organ procurement process instead of asking their consent for it. "CORE has discovered that families rarely oppose donation when they are *informed* about it, rather than when they are asked to consent".[36] We agree with the authors that the practice adopted by CORE is justified and morally required.

When someone has died, there is immense grief and sometimes even unresolved issues. It is a fact that the family remaining behind is suffering and sensitivity to their grief is a profoundly and important part of ethical and humane healthcare practices. However, it must be balanced against the respect for the rights of patients.[37] The deceased wish should therefore be established and if he or she wanted to be an organ donor it should be respected. An advance directive is a form of guidance for the family but if the deceased executed his or her will to be an organ donor in the way and according to the NHA[38] as discussed above, it should take

30 Shaw *et al,* 2017 *Transplantation* 482-487.
31 Shaw *et al,* 2017 *Transplantation* 484.
32 Shaw *et al,* 2017 *Transplantation* 485-486.
33 May, Aulisio and DeVita 2000 *Milbank Q* 323-336.
34 May, Aulisio and DeVita 2000 *Milbank Q* 323.
35 Pennsylvania Act 102 (1994) explicitly upholds the validity of a properly executed donor card, Pennsylvania driver's licence, or living will indicating a wish to donate.
36 May, Aulisio and DeVita 2000 *Milbank Q* 324.
37 May, Aulisio and DeVita 2000 *Milbank Q* 326.
38 S 62(1)(a)(ii) of the National Health Act 61 of 2003.

precedence over family wishes. Such a directive should be both definitive and directly applicable.

> "The assumed conditional clause ("If I am dead…") in a directive for organ donation is not uncertain. The medical state of the donor is death: he or she is not 'probably" dead or "likely to be" dead. Therefore, subsequent instruction must be applied unless it is illegal, impossible or unethical. Similarly, the directive ("I consent to organ donation") is not ambiguous and requires no interpretation about intent or meaning. Because there is no uncertainty about intent, diagnosis, or instruction in the scenario of organ donation from a dead potential donor, it is a more powerful document than an advance directive."[39]

This argument by May et al, makes perfectly sense and underlines personal autonomy as every individual should have the right to decide for him or herself what should happen with his or her body after death. This is whole point of drawing up a document and signing it in the presence of two competent witnesses. An adult person of sound mind should be viewed as being a master of his or her own body and be able to take a decision what should happen with it after death. The whole idea also of a written signed document, is to take the pressure off family members to decide during an uncomfortable time. The decision has been made while the deceased were still living, all that is required of the family members and the hospital staff is to respect the wishes indicated in a document.

A survey among healthcare professionals in 1996 found that 98 percent of respondents believed that a conflict between a deceased's wishes to be a donor and family refusal should be resolved by accepting the deceased's directive.[40] It is also a stress reliever for them should there be such a legally valid document indicating the deceased's wish.

A current problem with advanced directives which could be cancelled out if a document is specific and signed by the donor and witnesses is the vagueness of consent. Shaw[41] in an article addressing the vagueness of consent to organ donation states that a sticker on a driver's licence, a donor card, or even a tattoo or wrist band indicating the person is a donor is too vague to be legally binding. He states that under normal circumstances if a person must consent to a medical intervention three criteria must be met. The patient must be adequately informed about the treatment and potential benefits and risks or side-effects of the treatment, as well as the consequences of not receiving the treatment. Secondly, the patient must have the mental capacity to decide and thirdly, the patient must be free from coercion. But, registering as a donor is very simple, with no checks on whether any of these criteria are met.[42] The patient will be dead and thus permission must be given for

39 May, Aulisio and DeVita 2000 *Milbank Q* 327.
40 Spielman and Verhulst "Discussing organ donations with patients" 1996 *Journal of Family Medicine (J Family Med)* 698-701.
41 Shaw "The consequences of vagueness in consent to organ donation" 2017 *Bioethics* 424-431.
42 Shaw 2017 *Bioethics* 425.

something that will happen after death. It is our submission that if the NHA[43] is followed the document that the donor should sign could be drawn up in such a way that he or she can indicate there is no coercion, that he or she is an adult of sound mind and that he or she understand what organ and tissue donations entails. The fact that the person consenting signs the document in front of two competent witnesses attesting to the fact that the donor is of sound mind and filled in the form him or herself should counter the argument of Shaw and exclude vagueness. Shaw, and we agree with his sentiments, concludes his arguments for less vagueness in the consent process by saying that the creation of a new consent system may discourage some people from donating, but it would increase the chances that the wishes of someone who does want to donate will be respected. This could substantially increase health professionals' and families' confidence in the consent of donors and also reduce the distress caused to both families and healthcare staff.[44]

South Africa could learn from the Human Tissue Authority (HTA) defined in the Human Tissue Act 2004 of the United Kingdom (UK). The UK has a separate piece of legislation for human tissue, whereas South Africa only have a chapter in the NHA addressing organ donations and transplantation.[45] The HTA has a Code of Practice for donation of solid organs and tissue for transplantation.[46] This Code addresses living and deceased donations. Section 117 states concerning deceased donors that "[t]here is no legal right for anyone in a qualifying relationship to revoke a legally valid decision to give or withhold consent." In section 120 it is stated; "[a] relative's objection does not nullify appropriate, valid consent from the prospective donor." The Code gives the following example:

> "A prospective donor has given valid consent to the donation of her organs for transplantation. Her son does not want the donation to proceed because he does not want organ retrieval to take place during a traumatic time for the wider family. The donor's consent is still valid, and retrieval should proceed. The son should be sensitively encouraged to support his mother's wishes."[47]

Section 121 states that the appropriate, valid consent permits an activity to proceed, but does not mandate that it must. The final decision about whether to proceed with the activity rests with the medical practitioner.

43 S 62(1)(a)(ii) of the National Health Act 61 of 2003.
44 Shaw 2017 *Bioethics* 31(6): 431.
45 See Slabbert "The law as an obstacle in solid organ donations and transplantations" 2018 THRHR 70-84.
46 HTA (F) Donation of solid organs and tissue for transplantation: Code of Practice, published 3 April 2017 https://www.hta.gov.uk/code-practice-2-donation-solid-organs-transplantation. (Accessed 2019-07-17).
47 HTA (F) Donation of solid organs and tissue for transplantation: Code of Practice, published 3 April 2017 https://www.hta.gov.uk/code-practice-2-donation-solid-organs-transplantation. (Accessed on 2019-07-17).

4 Conclusion

This article sought to investigate the role of family consent in the donation process from a legal perspective. The question was posed whether family members should be asked for consent for deceased organ donation or whether the wishes of the deceased should be honoured. Due to the continued stagnant state of the availability of donor organs in South Africa, we are of opinion that at the very least appropriate, valid consent should not be nullified by a relative's objection. Section 62 of the NHA already makes a provision for a valid donation to occur by means of a document attested by two witnesses. It is merely a case of implementing valid legal measures into the organ donor registration process. By implementing this procedure, the right to autonomy as guaranteed by the Constitution will be truly upheld and respected.

The auditor's liability for audited financial statements

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SUMMARY

Two Supreme Court of Appeal judicial decisions have changed the manner in which courts will have to view an auditor's liability to third parties. The first decision was written by Brand JA in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*, where he held that a misstatement in the auditor's report by the auditor was grossly negligent but not wrongful. The auditor was afforded immunity from liability for a negligent misrepresentation which consisted of a misstatement in the audit report which rendered the audit report "unusable" thereby defeating the purpose for the auditor's existence. This paper demonstrates that it is clearly wrongful for an auditor to make negligent misstatements in his or her audit report, however it is reasonably possible that the test for legal causation may render the auditor immune from liability. The second decision was written by Navsa JA in *Axiam Holdings Ltd v Deloitte & Touche* where he held that an auditor may have a duty to warn a third party about the incorrectness of an audit report even if the auditor is unaware of its incorrectness, and ignorant to whom the warning must be made, if the third party can show that the auditor ought reasonably to have known of the incorrectness. This paper demonstrates that while an auditor has a duty to speak, such a duty cannot exist without a third party to speak to.

1 Introduction

Two Supreme Court of Appeal (SCA) judicial decisions have "set the cat among the pigeons" when they have regard to the delictual liability of the registered auditor (auditor)[1] to third parties[2] in South Africa. The first decision was written by Brand JA in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*,[3] where he held that a misstatement in the auditor's report by the auditor was grossly negligent but not wrongful.

* This paper is dedicated to those foremost authors in the field of delict you know who you are. A gigantic thank you must go to Professor Jooste of the University of Cape Town who wrote the first paper regarding the "silence of the auditors". As usual nothing in the law of delict can be written without reference to words of Professor Johan Neethling, South African law is deeply indebted to you.

1 As defined in s 1 of the Auditing Profession Act 26 of 2005.

2 S 1 of the Auditing Profession Act defines a "client" as: the person for whom a registered auditor is performing or has performed an audit and a "third party" as any person other than a client.

3 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) Maya, Cachalia, Shongwe JJA and Swain AJA concurring.

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The contentious issue in this court case was that the auditor was afforded immunity from liability for a negligent misrepresentation which consisted of a misstatement in the audit report which rendered the audit report "unusable". This paper demonstrates that it is clearly wrongful for an auditor to make negligent misstatements in his or her audit report, however it is reasonably possible that the test for legal causation may render the auditor immune from liability.

The second decision was written by Navsa JA in *Axiam Holdings Ltd v Deloitte & Touche*[4] where he held that an auditor may have a duty to warn a third party about the incorrectness of an audit report even if the auditor is unaware of its incorrectness, and ignorant to whom the warning must be made, if the third party can show that the auditor ought reasonably to have known of the incorrectness. This decision raises the unsettling issue of a representation by "silence", which could extend an auditor's liability to a third party beyond what may be the generally perceived boundaries.[5] This paper demonstrates that while an auditor has a duty to speak, such a duty cannot exist without a third party to speak to.

These two court cases have the ability to change the basis upon which the delictual liability of the auditor is determined. For many years the present writer and others have adamantly believed that a negligent auditor is a wrongful auditor. These two court cases change this perception dramatically.

2 The legal framework

The delictual liability of auditors to third parties has been regulated since 1951[6] by legislation, which differs from the common law position.[7] This is reflected particularly in the prescripts of section 46(3) of the Auditing Profession Act 26 of 2005.[8] Section 46(3) of the Auditing Profession Act creates two significantly different requirements. First, section 46(3)(a) of the Auditing Profession Act "limits"[9] the auditors liability to third parties who can prove: the auditor was negligent in expressing the opinion, or making his or her report or statement; the third party relied upon the opinion, report or statement; suffered loss as a result of the reliance; that the auditor knew or reasonably could have been expected to know at the time the negligence occurred that the third party would rely on the opinion, report or statement. Second, section 46(3)(b) of the Auditing Profession Act provides that if after the audit opinion was given, the registered auditor represented to a third party that it was correct, while

4 *Axiam Holdings Ltd v Deloitte & Touche* 2006 1 SA 237 (SCA) Howie P and Jafta J concurring.
5 Jooste R "The Spectre of Indeterminate Liability Raises its Head" (2006) *SALJ* 563.
6 Public Accountants' and Auditors' Act 51 of 1951.
7 Neethling *Potgieter Visser Law of Delict* (2015) 321.
8 Neethling 305.
9 S 46 of the Auditing Profession Act falls under the heading "Limitation of liability".

at the same time he or she knew or could reasonably have been expected to know that the third party would rely on the opinion, he or she will be liable if the third party suffers loss as a result of the reliance on the negligently given opinion. In other words, the representation to the third party that the report was correct, and the presence of knowledge, real or constructive existed, on the part of the auditor that the third party would rely on the report.[10]

Both section 46(3)(a) and (b) of the Auditing Profession Act provide oversight of the auditor's negligence. It is self-evident that these two provisions cannot cover the same principles. Section 46(3)(a) of the Auditing Profession Act covers the auditor's negligence prior to or at the date the audit report is signed.

Auditors who are unaware of their negligence do not have a legal duty to speak under section 46(3)(a) of the Auditing Profession Act. This provision places the onus on the third party to prove that the auditor was negligent. The wording of this provision makes it clear that section 46(3)(a) of the Auditing Profession Act deals with the auditor's negligence at the time when the negligence occurred, which is either at the date of signing the auditor's report or prior:

> "[K]new, or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred ... that the opinion, report or statement would be used by a client to induce the third party."

Under this provision Axiam simply had to prove that Deloitte & Touche were negligent which the judge agreed that they were. There is no obligation for an auditor to express any reservation regarding the audit report as with hindsight they have been judged as negligent. The negligence of Deloitte & Touche under section 46(3)(a) of the Auditing Profession Act has regard to where the auditors appeared to have foreseen the reasonable possibility of their conduct injuring Axiam. It is self-evident that Deloitte & Touche did not take reasonable steps to guard against such an injury.

Section 46(3)(b) of the Auditing Profession Act deals with a completely different scenario. This provision deals with the auditor's negligence post signing of the audit report. It is clear that such a provision cannot apply to Axiam. In signing the audit report the auditor makes a representation that his or her opinion is correct at that date and this includes third parties such as Axiam. Section 46(3)(b) of the Auditing Profession Act can only mean that the auditor has made a representation to a third party not foreseeable at the date of signing the audit report. It must be noted that auditors are not liable to any unforeseeable third party.

This has the impact that under section 46(3)(b) of the Auditing Profession Act the auditor must have made a representation directly to a third party who was unforeseeable at the date of signing the audit report

10 Neethling 322.

and must have made contact directly to a third party: "[The auditor] represented, at any time after the opinion was expressed or the report or statement was made, to the third party." In other words while an auditor has a duty to speak under section 46(3)(b) of the Auditing Profession Act, such a duty cannot exist without a third party to speak to.

The typical situation as envisaged by section 46(3)(b) of the Auditing Profession Act is one where a banker calls the auditor to discuss the information on the AFS after signing the audit report and the auditor engages in a discussion with the banker about accounts receivable, inventory, or fixed asset values on the AFS. The auditor readily responds to the enquiries, not once suggesting to the banker that the AFS were misleading. The auditor by engaging in a discussion with the banker makes a representation contemplated by section 46(3)(b) of the Auditing Profession Act.

3 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*[11]

This matter arose in the Cape High Court a result of a written sale of business agreement concluded between Cape Empowerment Trust Limited (CET) and another listed company, Paradigm Interactive Media Ltd (Paradigm), for the purchase of a business from a subsidiary of Paradigm (Intella). The written sale agreement included a profit warranty by the seller to the purchaser that the profits of the business purchased were not less than R10 million. CET requested that Fisher Hoffman Sithole (FHS) a firm of auditors, verify the correctness of the profit warranty. FHS issued a profit certificate (audit report) that the profits of the business purchased were not less than R10 million. The audit report proved to be misleading as the profits of the business purchased turned out to be significantly less than R10 million.

CET brought a delictual claim against FHS for the recovery of wasted expenditure incurred as a result of having been induced to enter into a detrimental business contract based on the negligent misstatement in the profit certificate by one of the partners of FHS. The SCA held, unanimously that FHS could not be held liable for a negligent misstatement which caused the CET to enter into a written sale of business agreement for the purchase, in the amount of R137 million, of an unprofitable business from a third party.

The SCA held that wrongfulness had not been established. The SCA held, that it would be unreasonable to impose liability on FHS for a loss to which CET had exposed itself, and hence rendered itself vulnerable, by entangling itself in an agreement so complicated that it would not be able to rely on the contractual remedies available to it.

11 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA).

4 *Axiam Holdings Ltd v Deloitte & Touche*[12]

It was alleged by Axiam Holdings Ltd (Axiam) that the Business Bank's (TBB) AFS misrepresented its net worth – reflecting a profit before tax of R29 266 176 whereas, in fact, it had suffered a loss of R77 899 201. The third party from whom Axiam obtained title to sue, in subsequently purchasing the TBB, relied on an audit report by Deloitte & Touche, a firm of auditors, in terms of which it opined that the AFS fairly presented the TBB's financial position. It was Axiam's case that Deloitte & Touche knew or ought to have known that reliance was to be placed on the audit report and that in the circumstances had a duty to warn the third party about the inaccuracies in the AFS.

Deloitte & Touche excepted to Axiam's particulars of claim on the basis that, on the facts presented, it did not owe the purchaser a legal duty to inform it of the errors in the AFS of the TBB and that the failure to warn the purchaser was insufficient in law to constitute a representation in terms of section 20(9)(b)(ii) of the Public Accountants' and Auditors' Act 80 of 1991, which became "word for word" section 46(3)(b) of the Auditing Profession Act.

5 The cause of action

The legal matrix in which the plaintiff third party's claim in both these court cases were placed and judged, was that of "negligent misrepresentation" which causes pure economic loss, as opposed to physical injury to person or property, and not made in a contractual context. Such a claim is recognised in South African law as one of the instances of the application of the extended *actio legis Aquiliae*. This was established by the Appeal Court in *Administrateur, Natal v Trust Bank van Afrika Bpk.*[13]

This action has since been affirmed in *Siman and Co (Pty) Ltd v Barclays National Bank Ltd*;[14] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*;[15] *Bayer South Africa (Pty) Ltd v Frost*;[16] *Mukheiber v Raath;*[17] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd;*[18] and *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar;*[19] Reflecting the general principles and requirements of Aquilian liability in South African law, the action is available to a plaintiff who can establish:

12 *Axiam Holdings Ltd v Deloitte & Touche* 2006 1 SA 237 (SCA).
13 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).
14 *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A).
15 *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A).
16 *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (AD).
17 *Mukheiber v Raath* 1999 3 SA 490 (A).
18 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA).
19 *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 5 SA 499 (SCA).

that in making the misstatement the auditor concerned acted wrongfully; the auditor acted negligently; that the plaintiff third party suffered loss; that the said damage was caused by the misstatement; and that the damages claimed represent proper compensation for such loss.[20]

In all the cases cited above the SCA cautioned against the danger of limitless liability produced by the application of the extended Aquilian action. According to Corbett CJ in *Bayer South Africa (Pty) Ltd v Frost*:[21]

> "[T]he duty of the Court (a) to decide whether on the particular facts of the case there rested on the defendant a legal duty not to make a misstatement to the plaintiff (or, to put it the other way, whether the making of the statement was in breach of this duty and, therefore, unlawful) and whether the defendant in the light of all the circumstances exercised reasonable care to ascertain the correctness of his statement; and (b) to give proper attention to the nature of the misstatement and the interpretation thereof, and to the question of causation."

Olivier JA explained in *Mukheiber v Raath*[22] that:

> "The danger of limitless liability in particular as far as negligent misrepresentation as a cause of action is concerned can be averted if careful consideration is given to the dictates of public policy, keeping in mind that public policy can easily become an unruly horse."[23]

6 The representations

In *Axiam Holdings Ltd v Deloitte & Touche,*[24] Deloitte & Touche conducted an audit and on 1 July 1999 issued an auditor's report that included the following representations:

> "In our opinion, these annual financial statements fairly present, in all material respects, the financial position of the company at 31 March 1999 and the results of its operations and cash flow for the period then ended in accordance with generally accepted accounting practice and in the manner required by the Companies Act."

In *Cape Empowerment Trust Limited v Fisher Hoffman Sithole,*[25] the profit certificate contained the following representation: "I am satisfied that the after tax profit of Intella group for the period 1 March 1999 to 30 June 1999 amounted to in excess of R10 million."

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20 *Bayer South Africa (Pty) Ltd v Frost supra* 568 B - D for a statement of these requirements.
21 *Bayer South Africa (Pty) Ltd v Frost supra* 568 D.
22 Mukheiber v Raath *supra*.
23 *Mukheiber v Raath supra* para 7.
24 *Axiam Holdings Ltd v Deloitte & Touche supra* para 3.
25 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 8.

7 Falsity of the representation

In *Axiam Holdings Ltd v Deloitte & Touche*[26] the representations made by Deloitte & Touche were incorrect. The 1999 AFS failed to present fairly financial "health" of Axiam. Deloitte & Touche failed to discover: a bad debt valued at R29 million which was accounted for incorrectly as goodwill; non-existent income in an amount of R10 million; and an irrecoverable debt worth R28 million, which was accounted for incorrectly as a loan to a shareholder. Had the auditor discovered these errors the AFS would have fairly represented TBB's financial "health", or alternatively, the auditor's would have contained a qualified audit opinion.

In *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*[27] it was discovered that the profit of Intella group for the period 1 March 1999 to 30 June 1999 did not exceed of R10 million. Had the auditor performed his work sufficiently and appropriately the report would have revealed this deficiency.

8 Negligence

In considering the question of negligence, it is necessary to consider the foreseeability of harm.

In *Cape Empowerment Trust Limited v Sithole*[28] Binns-Ward AJ explained:

> "Nield [the auditor] must have, or at least should have appreciated that the information was being sought for a serious purpose related to what he knew to be the business of the meeting. Nield should moreover have foreseen that if the warranted profits had not been attained, the implication to the intending purchaser would be that the business had not achieved a significant turnaround in its business fortunes that the warranted profit figure would suggest."

Also relevant to the question of negligence is whether steps could have been taken to guard against the loss. In this context Brand JA stated as follows:

> "AMT Technologies, the subsidiary of Intella which rendered the invoice of R10 249 800 to Ubunye, raised very serious doubts and pertinent questions about the validity of the claim. Nield proceeded to issue the profit certificate based on this doubtful claim, apparently without any further investigation … This is why I believe the finding of gross negligence was justified."

26 *Axiam Holdings Ltd v Deloitte & Touche supra* para 4.
27 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 9.
28 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 1999 3 SA 490 (A).

In *Axiam Holdings Ltd v Deloitte & Touche,*[29] the issue was not whether the misstatements in the audit report were negligent, although that was clearly the case, it was about whether Deloitte & Touche's failure to warn Axiam as to the errors in the AFS, when it had actual or constructive knowledge that Axiam would rely on the correctness of the audit. This reliance should have been foreseeable prior or at the date of signing the audit report.

In *Mccann V Goodall Group Operations (Pty) Ltd,*[30] Van Zyl J made some crucial comments as follows:

> "[T]he defendant [Mccan], through his experience as a motor-vehicle salesman, must have known that a dealer could be exempted from payment of general sales tax. It was also held that the defendant knew that dealers who sold vehicles to the public had to be registered as such and had to be the holders of a general sales tax certificate. The defendant likewise knew that a seller would be penalised for not collecting the requisite general sales tax from any purchaser other than a registered dealer. In this regard the court was satisfied that the defendant had a legal duty to disclose to the plaintiff that he was not thus registered and had breached such duty by negligently failing to inform the plaintiff accordingly. This would amount to a negligent misrepresentation in the form of a negligent omission to make the said disclosure."

Navsa JA *Axiam Holdings Ltd v Deloitte & Touche*[31] was of the view:

> "[A] reasonable person in the defendant's position would … have known of the defects in the report. On that basis one … possessed of such knowledge, the reasonable person would not have kept silent but have expressed at least a reservation as to the reliability of the report …. It is clear from the essentials of Axiam's alternative claim that it relies on a negligent misstatement by omission (during the period 1 July 1999 to 22 February 2000) to the effect that Deloitte's prior (negligent) certification was correct. This cannot be faulted either notionally or conceptually."

9 Wrongfulness

Wrongfulness – sometimes also referred to as unlawfulness – is one of the elements of delictual liability.[32] South African law has made wrongfulness a central element of delictual liability.[33] It is held that this element is important to police the ambit of the law of delict - it would otherwise be too wide if all harm that was brought about negligently was regarded as actionable.

In *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*:

29 *Axiam Holdings Ltd v Deloitte & Touche* paras 20, 21 and 22.
30 *Mccann V Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (C) 279.
31 *Axiam Holdings Ltd v Deloitte & Touche supra* paras 20, 21 and 22.
32 FDJ Brand "Aspects of Wrongfulness: A Series of Lectures" 2014 *Stell LR* 451.
33 Brand (2014) *Stell LR* 451.

> "Negligent conduct giving rise to damages is, however, not actionable per se. It is only actionable if the law recognises it as wrongful … Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss."[34]

In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms.[35] Whether a particular harm is wrongful or not depends on judicial discretion.[36] It is said that the criterion for the determination of wrongfulness is a general criterion of reasonableness, whether it would be reasonable to impose a legal duty on the defendant[37]

Where that terminology is employed, however, it is to be borne in mind that what is meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence.[38] It concerns the reasonableness of imposing liability on the defendant.[39]

Brand JA explains in *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd:*[40]

> "When we say that a particular omission or conduct causing pure economic loss is 'wrongful' we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not. Perhaps it would have been better in the context of wrongfulness to have referred to a 'legal duty not to be negligent', thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just to a 'legal duty'."

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34 *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2007 1 SA 240 (SCA) para 10; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 12; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) para 12.

35 *Administrator, Natal v Trust Bank van Afrika Bpk supra* 833A; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 22; *Gouda Boerdery BK v Transnet supra* para 12.

36 Brand (2014) *Stell LR* 462.

37 *Government of the Republic of South Africa v Basdeo and another* 1996 1 SA 355 (A) 367E-G*; Gouda Boerdery BK v Transnet supra* para 12.

38 *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd supra* para 12.

39 Anton Fagan "Rethinking wrongfulness in the law of delict" 2005 *SALJ* 109.

40 *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd supra*.

The question arises for any jurist, legal scholar or a university student is how would a court in South Africa determine wrongfulness? Paizes describes wrongfulness as "confusing, unclear, contradictory and vague".[41]

Leach JA in *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar,*[42] considered the following relevant policy factors assembled from previous court decisions:

> "[1] Whether the plaintiff was vulnerable to the risk (which would favour a finding of liability) or could have avoided it by contractual means such as a disclaimer (which would operate against liability); [2] Whether the extension of liability would impose an unwarranted burden on a defendant or, conversely, whether it would not unreasonably interfere with the defendant's commercial activities as the defendant was already under a duty to take reasonable care in respect of third parties; [3] The nature of the relationship between the parties, contractual or otherwise; [4] Whether the relationship between the parties was one of 'proximity' or closeness; [5] Whether the statement was made in the course of a business context or in providing a professional service; [6] The professional standing of the maker of the statement; [7] The extent to which the plaintiff was dependent upon the defendant for information and advice; [8] The reasonableness of the plaintiff relying on the accuracy of the statement."

Consideration number one known as "vulnerability to risk" has gained substantial importance as regards determining wrongfulness. In fact in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*[43] despite the other seven considerations listed above, "vulnerability to risk" became the only factor in providing the auditor FHS immunity from liability. It is inconceivable that the SCA failed to consider the applicability of section 46(3)(a) of the Auditing Profession Act.

The impact of such a provision is that the auditor will incur liability, subject to the determination of wrongfulness, if the third party can prove the auditor was negligent in the performance of his or her duties. The finding of gross negligence by the court *aquo* and the SCA indicates to any right minded person that the auditor incurs liability to a third party subject to the assessment of wrongfulness.

It is important to stress that the public and legal policy regarding the auditor's liability to third parties has as its essence the courts acceptance that a third party has suffered loss as a result of the negligence of the auditor. What the SCA failed to recognise is that a negligent auditor is an anathema to society and it is inconceivable that an auditor who is negligent in the role that society has mandated for them is not wrongful. If Brand JA and Maya, Cachalia, Shongwe JJA and Swain AJA had considered the other seven policy factors as set out in *Delphisure Group*

41 Andrew Paizes "Making Sense of Wrongfulness" 2008 *SALJ* 371.
42 *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar supra* 508–509.
43 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 9.

Insurance Brokers Cape (Pty) Ltd v Dippenaar[44] it is highly probable that the auditor would have incurred compensatory liability to the third party. However, based on Brand JA's views regarding the different roles in delictual liability of negligence and wrongfulness, that by according weight to negligence in imposing liability on the auditor, it tantamounted to confusing wrongfulness and negligence. It is wrongful for an auditor to negligently render a set of AFS "unsuitable" for use, and no it is not confusing wrongful with negligence. It is the act of rendering the AFS "unsuitable" that is embodied in the wrongfulness element of delict. The SCA had "judicial myopia"[45] when it came to the language as contained in section 46(3)(a) of the Auditing Profession Act and the role played by the auditor in society.

In applying the "vulnerability to risk" Brand JA explained:

> "[V]ulnerability to risk signifies that the plaintiff could not reasonably have avoided the risk of harm by other means … What is now well established in our law is that a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant."

What Brand JA was implying in his judgment was that the CET could reasonably have avoided the harm by other means and therefore simply based on this consideration the auditor was afforded immunity from liability. There are a number of crucial reasons why such a conclusion is not above any criticism. Neethling and Potgieter are of the view: "[I]t appears that perhaps too much emphasis was placed on "vulnerability to risk" as a factor determining wrongfulness."[46]

Audits serve a vital economic purpose and play an important role in serving the public interest to strengthen accountability and reinforce trust and confidence in financial reporting. The users of financial information need not just information, but accurate, reliable as well as quality information, thus they depend on auditors to serve as objective intermediaries who will lend credibility to the financial information.

The question is how does the auditor fulfil such a mandate? It is through the medium of the audit report through which the auditor communicates with shareholders, creditors, employees and with the public at large. The only observable outcome of the audit process is the issued audit report. The auditor's "error" permitted a person to suffer loss which is a right protected in the South African Constitution (not to be arbitrarily deprived of property) and by affording immunity to the auditor for a negligent misrepresentation in its only available means of communicating with society renders the financial information which

44 *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar supra* 508–509.

45 A phrase created by the author.

46 Neethling & Potgieter "Vulnerability to Risk as a Factor Determining Delictual Liability for Pure Economic Loss" (2015) *THRHR* 638.

must be protected, not fit for purpose and thereby defeats the purpose for the auditor's existence.

Centlivres CJ in *Herschel v Mrupe*[47] describes the public interest role of those professional persons who offer their services to the public for reward, in which they offer their knowledge and skills in the services of others and that have responsibilities and obligations to those who rely on their work: "Certain functionaries such as sworn appraisers, notaries and the like have had a kind of patent of credibility and efficiency conferred upon them by public authority."

The auditor as one of these persons has a duty to furnish the correct information in his or her official capacity. The reason is that members of the public are invited and entitled to repose confidence and trust in the acts of an auditor in his official capacity. Also there was no question of limitless liability in this case as the claim was by a single identifiable plaintiff for a single loss occurring but once and which was unlikely to bring in its train a multiplicity of actions.[48] Moreover, the defendant knew that the plaintiff would rely on his profit certificate.[49]

In *Holtzhausen v ABSA Bank Ltd*[50] the plaintiff undertook to deliver a number of uncut diamonds of which he had been the owner, to a person (A) (whom he had met fortuitously) as agent for an unidentified buyer (B) for an amount of R500 000. The plaintiff furthermore undertook to pay A R20 000 in commission if the contract of sale was concluded. A informed the plaintiff that the purchase price had been paid into the latter's account and supplied three telephone numbers to verify this.

Having established that the money had been paid into his account, and assuming that payment took place by way of a cheque, the plaintiff informed the bank manager (C) of the transaction so that C could determine whether it was safe to proceed with the transaction and hand over the diamonds. The three telephone numbers were also given to C.

After investigating the matter, C ensured the plaintiff that the purchase price was safe and that he could proceed with the transaction. C personally authorised the withdrawal of R20 000 in commission to A. Subsequently it transpired that fraud had been committed and that the credit on the plaintiff's account was withdrawn by the bank. The plaintiff claimed damages from the bank.

On appeal the plaintiff based his claim not on breach of a contractual obligation, but rather on delict for pure economic loss; and it was clearly stated that "a right which he had independently of any such contract, was

47 *Herschel v Mrupe* 1954 3 SA 464 (A).
48 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd supra*.
49 *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar supra* 508-509.
50 *Holtzhausen v Absa Bank Ltd* 2008 5 SA 630 (SCA). This narrative has been extracted from: Neethling & Potgieter "'Vulnerability to Risk' As a Factor Determining Delictual Liability for Pure Economic Loss" (2015) *THRHR* 641.

infringed". The plaintiff countered by arguing that C had not acted wrongfully.

Cloete JA disagreed with the defendant. He explained:[51]

> "So far as unlawfulness is concerned, the following findings might be made on the evidence led thus far: That the statement by the bank manager was made in response to a serious request; that the plaintiff approached the bank manager because of his expertise and knowledge of banking matters; and that the plaintiff's purpose in making the enquiry was, to the knowledge of the bank manager, to ascertain whether he could safely proceed with the transaction. It could be inferred that the bank manager realised that the plaintiff would rely on his answer. On the evidence led thus far, it might further be found that there are no considerations of public policy, fairness or equity to deny the plaintiff a claim; that no question of limitless liability could arise; and that an unfair burden would not be placed on the manager or the bank if liability were to be imposed inasmuch as the manager could have refused to act on the plaintiff's request and could have protected himself and the bank against the consequences of any negligence on his part by a disclaimer."

Wrongfulness in *Axiam Holdings Ltd v Deloitte & Touche*[52] had regard to the following:

> "Although the application of the criterion of a reasonable person concerns the negligence aspect of liability, from which the legal duty element is quite separate, the provisions of s 20(9)(b)(ii) of the Act provide a clear pointer that a negligent representation falling within its terms is indeed wrongful … Whether the representation by silence alleged in this case does fall within the section's terms depends on whether there was a duty to speak. In other words the duty relied on for there having been a representation will be the same duty relied on for the allegation of wrongfulness … As to the existence of that duty, a court apprised of all the factors and circumstances referred to in *Minister of Law and Order v Kadir* at 318H-I could find, on the framework of the allegations made in the particulars of claim, and on final evaluation, that the defendant's ignorance of its negligent report is no bar to concluding that it bore the alleged duty"

10 Causation

As far as factual causation is concerned, the SCA follows the condictio sine qua non – or "but for" – test.[53] In accordance with this test, as Corbett CJ explained in *International Shipping Co (Pty) Ltd v Bentley*:[54] "[O]ne must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant."

51 *Holtzhausen v Absa Bank Ltd supra* 635.
52 *Axiam Holdings Ltd v Deloitte & Touche supra*.
53 *Minister of Police v Skosana* 1977 1 SA 311 (A) 34 F-35 G.
54 *International Shipping Co (Pty) Ltd v Bentley supra* 700F-G.

Brand JA stated in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*:[55]

> "In applying this test Binns-Ward AJ held – and I believe rightly so – that had the profit certificate reflected the true financial position of the Intella business, CET's shareholders would not have approved the transaction which would in turn have caused the train of events to come to an abrupt halt."

Once factual causation has been established, however, the question of limiting the defendant's liability for the factual consequences of his or her conduct arises.[56] The SCA has in this context has always applied the test of so-called "legal causation".[57]

Brand JA stated in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*:[58]

> "Having said that, it is equally apparent, on the other hand, that wrongfulness and remoteness are not the same in all respects. They involve two different elements of the law of delict, each with its own characteristics and content. Even where negligent conduct resulting from pure economic loss is for reasons of policy found to be wrongful, the loss may therefore, for other reasons of policy, be found to be too remote and therefore not recoverable … Determination of remoteness also requires application of yardsticks such as foreseeability and direct consequences which do not play a role in establishing wrongfulness."

A defendant should be liable for all the "direct consequences" of his or her negligent conduct.[59] However a defendant does not act negligently towards a plaintiff unless it is reasonably foreseeable that the particular plaintiff will be injured.

Accordingly, the defendant is not liable to an unforeseeable plaintiff, even though the harm has flowed directly from the defendant's conduct, and despite the fact that it is foreseeable that other persons may have been injured.

Brand JA made some crucial comments in this regard:[60]

> "With regard to foreseeability CET contended that the wasted expenses for which it claims resulted from the implementation of the business sale agreement and were thus foreseeable by Nield when he made the misstatement on 3 December 1999. As far as the statement goes, it seems to be correct. However, what was not foreseeable by Nield, as I see it, is that CET would not avail itself of the contractual safety nets – a due diligence investigation by its own auditors and the profit warranty – that were

55 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 20.
56 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 1999 *supra* para 35.
57 *International Shipping Co (Pty) Ltd v Bentley supra*; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764.
58 2013 5 SA 183 (SCA) para 36.
59 Neethling 205.
60 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 9.

> stipulated in its favour in terms of the business sale agreement. On the contrary, the most likely inference, I think, is that if Nield were to have applied his mind to the potential consequences of a misstatement, he would have thought that even if his statement proved to be untrue, CET would be adequately protected by the safety nets for which it had stipulated. After all, these safety nets were installed to provide precisely for that eventuality."

The "vulnerability to risk" consideration appears to bear a resemblance to the formulation of the test for legal causation, which is concerned with whether it would be reasonable to hold the defendant auditor liable.[61] The application of the "vulnerability to risk" consideration shifts the blame from the defendant auditor to the plaintiff client who had the ability to extricate itself from the risk that caused it to suffer financial loss and it did not.

If the auditor in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole,*[62] should have been immune to liability the reason provided should have been remoteness and definitely not wrongfulness. The fact that CET did not "immediately latch on to the opportunity to extricate itself from the business sale agreement which had lapsed … that the maze-like structure of agreements in which CET entangled itself did not allow it", together with the unforeseeability of the potential consequences places the loss suffered by CET squarely on the shoulders of CET. This is the "crux" of legal causation. This has nothing to do with wrongfulness, an auditor's negligent conduct of his or her audit and the resultant misstatements are clearly wrongful.

An auditor was appointed as the statutory auditor of the Deals Group of Companies.[63] A third party International Shipping provided various financial facilities to the Deals Group.

The Deals Group was liquidated in 1981. International Shipping claimed damages from the auditors on the basis that the AFS he had audited were materially false and misleading. The SCA held that there was conduct and that the conduct had been both wrongful and negligent. The question that remained was whether the factual causation between the conduct and the harm was sufficiently close for the court to attribute liability to the auditors.

Here the court held that International Shipping had allowed the Deals Group's indebtedness to escalate in an uncontrolled way. In addition, International Shipping had become involved in the Deals Groups administration and had significant insight into the Deals Group's financial affairs. A member of the board of directors had been deceived and that International Shipping must have been aware of the deception, or at least suspected the dishonesty. It was readily apparent that from a policy perspective International Shipping (the third party) despite all the

61 Neethling & Potgieter "Wrongfulness and Legal Causation as Separate Elements of a Delict: Confusion Reigns" 2014 4 *TSAR* 898.
62 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 36.
63 *International Shipping Company (Pty) Ltd v Bentley supra*.

"red flags" did not take reasonable care for the protection of its own interests. In other words International Shipping was not vulnerable to risk. They had sufficient insight into the business of the Deals Group to have reduced the risk of financial loss dramatically.

11 Comments and conclusion

As regards *Cape Empowerment Trust Limited v Fisher Hoffman Sithole,*[64] wrongfulness is established, because public policy requires that auditors be held liable for negligent conduct and thus be incentivised to take adequate care to avoid causing harm to others.[65] For the community it would inconceivable that an auditor who made such mistakes as for example in *Axiam Holdings Ltd v Deloitte & Touche*[66] would not be held liable. The community expects auditors not to make mistakes that render the AFS "unusable". There is a great public interest in making sure that auditors in assuming the role of the public watchdog succeed in thwarting avoidable harm.[67] If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm.[68] Policy objectives, such as the deterrent effect of liability, underpin one of the purposes of imposing delictual liability.[69] The convictions of the community as to policy and law clearly motivate for liability to be imposed.[70] The auditor's negligent inaccurate statements are therefore wrongful. A reasonable auditor would have foreseen the possibility that the mistakes would cause harm. When one is tasked with protecting the community by giving credibility to the AFS, it is simply not reasonable to make such blatant errors of judgment without adequately verifying what the correct approach should have been.

In respect of the judicial decision in *Axiam Holdings Ltd v Deloitte & Touche,*[71] the essence of the court's decision can be found in the following words of Navsa JA:

> "[A] reasonable person in the defendant's position would… have known of the defects in the report. The reasonable person would not have kept silent but have expressed at least a reservation as to the reliability of the report".

The question arises as to whom should such a reservation be made? This does not appear to be a consideration of the court. Without a "to whom" the reservation should be made the prospect of indeterminate liability

64 *Cape Empowerment Trust Limited v Fisher Hoffman Sithole supra* para 9.
65 *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) para 51.
66 *Axiam Holdings Ltd v Deloitte & Touche supra.*
67 *Loureiro and Others v Imvula Quality Protection (Pty) Ltd supra* para 56.
68 *Loureiro and Others v Imvula Quality Protection (Pty) Ltd supra* para 56.
69 *Loureiro and Others v Imvula Quality Protection (Pty) Ltd supra* para 56.
70 *Loureiro and Others v Imvula Quality Protection (Pty) Ltd supra* para 56.
71 *Axiam Holdings Ltd v Deloitte & Touche supra* paras 20, 21 and 22.

appears on the horizon, something that section 46 of the Auditing Profession Act was specifically designed to eliminate.

Section 46(3)(b) of the Auditing Profession Act is clear in that the representation must "in any way represented … to the third party". This means that the representation explicitly or implicitly (by silence) must be made directly to a third party. This will eliminate any potential for indeterminate liability as any liability is limited to a specific defendant in very specific circumstances. If the judicial decision in *Axiam Holdings Ltd v Deloitte & Touche*[72] is permitted to stand then there is no doubt that this extends the boundaries of the auditor's liability to third parties which clearly is not the intention of the legislation.

The case of *Dimond Manufacturing Company Limited v Hamilton,*[73] illustrates the law "*quod sit lex*"[74] as intentended by the tenets and prescripts of section 46 of the Auditing Profession Act. In *Dimond Manufacturing Company Limited v Hamilton,*[75] the auditor was unaware that the AFS were to be used by a potential possible purchaser of shares in the company. A third party potential purchaser, Mr Horwath met with the auditor Mr Meek. At the meeting Mr Meek handed the AFS over to Mr Horwath in order that Mr Horwath make extracts of the AFS to begin negotiations for the purchase of the shares in the company.

Turner J in *Dimond Manufacturing Company Limited v Hamilton*[76] held that at the point where no extracts were made or handed over to Mr Howarth that he [Turner JA]: "would hold that no representation regarding the balance sheet [AFS] had yet been made by Mr Meek." Turner J held that as soon as the AFS were handed over to Mr Horwath:

> "[There was] no doubt that at the interview … by personally producing the balance sheet to him [Mr. Horwath] and acquiescing in his copying its figures, Mr Meek made an implied representation to Mr Howarth as to the correctness of the balance sheet."

Neethling is supportive of this view when he explains that while section 46(3)(b) of the Auditing Profession Act, appears to be aligned with the common law, however important differences exist. Although a negligent breach of an auditor's duty is in principle wrongful, in the case of section 46(3)(b) of the Auditing Profession Act the wrongfulness must be clear towards an identified third party.[77]

This view was also supported by the judgment of Van Zyl J in *Mccann V Goodall Group Operations (Pty) Ltd,*[78] where the duty to speak was directed towards an identified third party, a Mr Goodall.

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72 *Axiam Holdings Ltd v Deloitte & Touche supra.*
73 *Dimond Manufacturing Company Limited v Hamilton* 1969 NZLR 609.
74 The law as it should be.
75 Dimond Manufacturing Company Limited v Hamilton supra.
76 *Dimond Manufacturing Company Limited v Hamilton supra* 636.
77 Neethling 321.
78 *Mccann V Goodall Group Operations (Pty) Ltd supra* 279.

Thus, some contact must take place between the third party and the auditor after the release of the report, during which a representation is in some manner, either expressly or implicitly, made that the report is correct, or, as stated by Cloete JA in *Axiam Holdings Ltd v Deloitte & Touche*[79] "the auditor must, subsequent to the audit, take responsibility to the third party for its accuracy".

However, it may be extremely difficult for another court to dispel these concerns without differing from the majority.[80] It is not a matter of the auditing profession being unhappy, it's a matter of serious concern that the SCA ignored the language contained in section 46(3)(b) of the Auditing Profession Act, by suggesting that the key issue is that auditors have a duty to speak even when there is no one to speak to.

79 *Axiam Holdings Ltd v Deloitte & Touche supra* para 32.
80 Jooste (2006) *SALJ* 567.

DE JURE LAW JOURNAL
SPECIAL ISSUE

CENTRE FOR CHILD LAW
"Imagining children constitutionally: 20 years of strategic litigation and advocacy"

CONTENTS

Foreword

"Imagining children constitutionally: 20 years of strategic litigation and advocacy"

Karabo Ozah[1]
Director: Centre for Child Law, Faculty of Law
University of Pretoria

In December 2018, the Centre for Child Law hosted a conference under the theme "*Imagining children constitutionally: 20 years of strategic litigation and advocacy"*. The conference deliberations focused on the following themes:

Constitutionalisation of children's rights	Children's rights: An African agenda
Child justice & sexual offences	Jurisprudence arising from children's rights instruments
Corporal punishment	Children and migration

The aim of the conference was to celebrate the Centre's contribution to the development of child law and the implementation of children's rights in South Africa over the past 20 years (1998-2018). I wish to thank all the presenters and participants at the conference, who engaged in two and half days of vibrant discussions on imagining children "constitutionally". Special thanks go to the two Constitutional Court Justices who graced our convening – Justice Sisi Khampepe and Justice Albie Sachs. Justice Khampepe delivered a keynote address on day one and Justice Sachs delivered the second keynote address on day two of the conference. I also wish to thank Prof Benyam Mezmur (UWC Prof; ACERWC member & CRC member) for giving the opening address. Special mention also goes to Adv Steven Budlender SC who argued some of the Centre's landmark cases over the past ten years.

1 I wish to also thank our donors ELMA Foundation and Constitutionalism Fund for their generous financial assistance for the conference as well as the journal special issue. While many worked to ensure the success of the conference, I would like to especially thank the Centre's former director Prof Ann Skelton, Pontso Phahlane, Isabel Magaya, Zita Hansungule and the rest of the Centre for Child Law team for their tireless efforts. Special thanks also go to Isabel Magaya for her assistance with the internal review process for the special issue. Lastly, I would like to thank the University of Pretoria's Faculty of Law and Prof Andre Boraine (the then Dean), for all the support.

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Participants at the conference deliberated not only on South Africa's watershed moments in child rights litigation during this period but also on best practices and developments from other regions. The conference was enriched by presentations from national, regional and international speakers (both academics and legal practitioners). Speakers also included former child clients who shared their experiences on the value of having a legal representative who acted in their interests.

Following the above, I introduce articles and speeches that pursue these and other issues in greater depth.

Keynote address

Centre for Child Law 20 Year Conference 5 December 2018, 09:40

Justice Sisi Khampepe

Thank you for that kind introduction. And special thanks to Prof Anne Skelton of the Centre for Child Law for inviting me to give this keynote address at this prestigious event. I am truly humbled to have been asked.

This conference is a celebration of the dedication of the **phenomenal work** that has been done by the Centre for Child Law, over the last 20 years in furtherance of the realisation of a better South Africa. A South Africa, that protects and promotes those who are among the most precious and the most vulnerable in our society, **our** children.

The Constitution of South Africa makes express provision for children's rights in section 28. Recognising the special place that children occupy in our society, the **Constitution** provides rights beyond that afforded to every other person within this country's borders. Every child, it says, has **rights**. To a name and nationality from birth. To family and pre-natal care. To basic nutrition, shelter, health care, and social services. To be protected from maltreatment, neglect, abuse or degradation. To be protected from exploitative labour practices. These rights are in addition to other rights under the Constitution, which are afforded to all persons. Everyone, including every child, has the right to dignity. Everyone, including every child, has the right to privacy. And everyone, including every child, has the right to equality and non-discrimination. Most importantly, section 28(2) of the Constitution states "a child's best interests are of paramount importance in every matter concerning the child".

But these words have no meaning unless they are **brought** to life. The past system of apartheid caused much trauma, oppression, hatred, and sadness. Throughout the duration of that oppressive system, **children** were there. Children suffered. Some were detained without trial. Some were tortured and assaulted. Many faced discrimination. It was the mobilisation of the youth in the 1976 riots, and the horrific deaths that resulted, that shed light on the atrocities of the apartheid system and undoubtedly contributed to its eventual downfall. As a member of the Truth and Reconciliation Commission, I heard many accounts of the **pain** and **suffering** endured by children during those years. The most innocent, the newest members of our society had horrific harms inflicted upon them by people who believed them to be inferior human beings. **Through it all**, children raised their voices to be heard.

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It is public interest institutions like the Centre for Child Law, who have been at the forefront of the promotion, realisation and advancement of children's rights for the last 20 years and who have succeeded in breathing life into the rights enshrined in our Constitution. The Centre for Child Law seeks to make these rights real for all children, including children with disabilities, migrant children, and undocumented children.

It is **my** view that this work is not just for the benefit of the children, but the **entire nation**. The legacy of apartheid creates a context in which the Centre for Child Law's use of effective public interest litigation, has been crucial to advance the capacity of other similar public interest organisations to use the law as an instrument to promote and protect children's rights. This is crucial to how our society advances, and to how it heals.

And so we must ask ourselves the question posed in the theme of this conference. What does it mean to imagine children constitutionally? This year's conference deliberations canvas a range of themes, from the constitutionalisation of children's rights to corporal punishment, to child justice and sexual offences, and to migration.

There have been a number of cases that have been decided by the Constitutional Court that deal with these very topics. As a judge on the Court, it has been my honour to preside over some of them, and to play a role, however small, in the advancement of children's rights in this country.

Today, I was asked to speak specifically about the Constitutional Court's judgment in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*. This is a unanimous judgment penned by myself in which the Constitutional Court opted to protect children's sexual development by holding that it was unconstitutional to criminalise consensual sexual activity of children between the ages of 12 and 16. As I wrote in the judgment:

> "Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development ... We must be careful ... to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development."

The case was primarily concerned with Part 1 of Chapter 3 of the Sexual Offences Act, which criminalised the performance of certain consensual sexual acts, by both adults and children, who are between 12 and 16 years old. Section 15 of that Act created the offence of "statutory rape" in relation to the commission of "sexual penetration". Sexual penetration, was widely defined in the Act to include vaginal, anal and oral sexual intercourse, as well as some forms of masturbation by another person.

Under the Act, statutory rape would be found to be committed in two instances. First, if an adult or a child who was 16 years or older engaged in consensual sexual penetration with an adolescent, and second, if adolescents engaged in consensual sexual penetration with each other. In the case of the latter, both children had to be prosecuted. Both children were at risk of being found guilty of having statutorily raped the other. The Act also created the offence of statutory sexual assault in relation to the commission of a "sexual violation." The term "sexual violation" included broad references to "direct or indirect contact" including some forms of masturbation by another person, petting, kissing and hugging.

Similarly to the offence of statutory rape, statutory sexual assault could be committed in two circumstances. First, if an adult or a child who was 16 years or older engaged in consensual sexual violation with an adolescent; or second, if adolescents engaged in consensual sexual violation with each other. Again, in the case of the latter, both of the children involved had to be prosecuted.

For statutory sexual assault alone, a "close-in-age" defence was afforded to those who had an age difference of not more than two years between them. In other words, if a sexual violation, such as kissing or petting or mutual masturbation, took place between a 12-year old and a 15-year old, both would have committed an offence in terms of section 16, and both would have been prosecuted. In addition, the Act created a statutory obligation and an offence for the failure to report sexual offences against children.

Before the Constitutional Court, the Centre for Child Law, on behalf of the applicants, submitted that the breadth and formulation of the impugned provisions of the Act harmed the very children they were intended to safeguard. It was the Centre for Child Law that brought forward the context the Court needed to realise the full potential effects of the provisions -- early exposure of minors to the harshness of the criminal justice system, the chilling effect of the exposure on the development of a proper understanding of, and healthy attitudes to, sexual behaviour.

Astutely, the Centre for Child Law relied extensively on an expert report by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Ms Anik Gevers, a clinical psychologist specialising in child mental health at the University of Cape Town. The report compiled information about the sexual development of children. It came to the conclusion that the impugned provisions the Act sought to criminalise, are activities that are potentially healthy if they are conducted in ways in which the individual is emotionally and physically ready and willing. The report cited the importance of supportive relationships with adults to help children make healthy decisions, and went on to explore the various social and psychological effects the impugned provisions may have had on children's development, including sparking shame, embarrassment, anger and regret.

The second and third amici, the Women's Legal Centre Trust and the Tshwaranang Legal Advocacy Centre both provided important submissions with respect to the right to equality in section 9, and the disproportionate impact of the impugned provisions on girl children. The rights of girls to access health care services, and reproductive health care, in particular, was argued to have been violated.

In order to come to the determination it did, the Constitutional Court had to consider whether there was a limitation of rights in the circumstances, and if so, whether the limitations were reasonable and justifiable in terms of section 36 of the Constitution, and if not, what the appropriate remedy would be.

In the judgment, I quoted Justice Sach's words in *S v M (Child for Centre Law as Amicus).* His words **give expression** to the weight of children's rights and the importance of the framework through which to view the rights of children. In that decision Justice Sachs wrote:

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

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, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood."

We **must** start with this framework when we imagine children constitutionally. We **must** start from a place where we envision children as individual rights-bearers, and not mere extensions of their parents or mere reflections of what limitations we may wish to legally impose at the outset. When we **breathe life** into the mere words and promises that make up constitutional rights, **each child** takes form as its own person, with its own journeys and personalities. Importantly, as I set out in the judgment, the Constitutional Court was not tasked with giving an answer as to whether children should or should not engage in sexual conduct. The Constitutional Court was also not tasked with deciding whether Parliament may set a minimum age for sexual conduct. Rather, the Constitutional Court was asked to address the narrow issue of whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith. That is **what** the judgment purported to do.

In the judgment, I found that the impugned provisions of the Act infringed on children's rights to dignity, privacy and violated the guiding principle of the best interests of the child.

With respect of the violation of the right to dignity, I took note of the Constitutional Court's previous findings in *De Reuck* and *S v M* that children's dignity rights are of special importance and are not dependent on the rights of their parents. It was **obvious** to me, and other members of the Court, that the criminalisation of consensual sexual conduct is not neutral—it is a form of stigmatisation which is degrading and invasive, and has significant impact on one's self-worth and dignity.

The violation of the right to privacy was likewise clear. The creation of these offences created a legal sanction for police officers, prosecutors and judicial officers to scrutinise and assume control over the intimate relationships of adolescents. The **intrusion** was exacerbated by the reporting obligations of trusted third parties in section 54. I also found that the intrusion upon privacy rights, in an interconnected fashion, further impacted upon the violation of the dignity rights of children.

With respect to the best interests of the child as protected in section 28(2), there are at least two separate roles created by the provision: it is a guiding principle in each case, and it is a standard against which to test provisions or conduct which affect children in general. Even if applied flexibly, it was **clear to me** that the best interests of the child was violated because subjecting the conduct of children, the numbers of which the expert report stated would be in the majority of adolescent of South Africans, to the harshness and risks associated with the criminal justice system, could not be said, to be in the best interest of the child.

The judgment is one of the ones of which I am most proud. Not only does it underscore that children are fundamental bearers of human rights, it recognizes that the criminalization of conduct can be an overly harsh consequence. The judgment recognises that while criminalizing conduct may be intended to keep people safe, including the most vulnerable in our society, the criminal justice system, is not always well-equipped for that purpose. With the uncontradicted social and psychological evidence before the Court, **I simply could not find,** that the means chosen by Parliament, in this instance, were rationally connected to the dream of a South Africa that we all want to see. **Rather**, ensuring that our laws promote healthy development in our young people is fundamental to curbing some of the issues that plague our society today, including all forms of gender-based violence. It was through the superb engagement of the Centre for Child Law that the Court was able to fully understand, and capture, the implications of the impugned provisions of the Sexual Offences Act.

The Teddy Bear Clinic judgment then formed the pretext for a subsequent case, decided just one year later, *J v National Director of Public Prosecutions*. Here the Constitutional Court found that it was unconstitutional to require automatic placement of child offenders on the

Sex Offenders Register. The Court stepped in to prevent the harrowing consequences that the criminalisation of our young people can have. Here again, imagining children constitutionally meant less harsh consequences.

The law has developed in all realms of children's rights over the last twenty years. For instance, over the course of its existence, the Constitutional Court has heard more than one case involving corporal punishment.

In *S v Williams*, six young people were sentenced to receive "moderate correction" of a number of strokes with a light cane, a sanction meted out in terms of section 294 of the Criminal Procedural Act. It was in that case in 1995 that the Constitutional Court declared judicial corporal punishment unconstitutional, finding that it violates dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. The Constitutional Court found that juvenile whipping violated the dignity of the juvenile as well as that of the person administering the whipping.

In the case of *Christian Education South Africa v Minister of Education* the Constitutional Court was against called to deal with the issue of corporal punishment, this time in schools. Parliament passed a law prohibiting corporal punishment in all schools. The question was whether Parliament had unconstitutionally limited the rights of parents of children in independent schools who sought to consent to "corporal correction." The Court was unanimous. In a judgment penned by Justice Sachs in 2000, the Court found that although religious and community rights had been limited, the limit was justifiable in an open and democratic society. No exemption would be provided for schools which, although they were independent, functioned in the public domain.

And just last week, the Constitutional Court heard the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* in which the Centre of Child Law appeared as amicus. The case concerns the appeal of a High Court judgment and order handed down in October 2017 which found that the common law defence of reasonable chastisement for parents charged with assaulting their children is unconstitutional and no longer applies in the law. An application for leave to appeal against the judgment to the Constitutional Court seeks to have it overturned. Again, here, the Court will have to consider the full breadth of the Constitution and what the appropriate balance is between freedom of religion and the constitutional rights of children.

The Centre for Child Law continues to utilise the law to protect and advance children's rights. Next year this Court will hear an application brought by the Centre for Child Law, in *Centre for Child Law and Others v Media 24 Limited and Others*, to confirm an order of constitutional invalidity of certain provisions of the Criminal Procedure Act insofar as they fail to protect the anonymity of children as victims of crimes during

criminal proceedings, and whether their identity should remain protected after they turn 18.

The breadth of these cases demonstrates the hard work that the Centre for Child Law does to ensure the rights of children are protected in multiple settings and to ventilate the full content of their constitutional rights. It also demonstrates the painstaking way that public interest litigation occurs. As issue after issue is raised, so comes a slow ventilation of the content of rights.

I am deeply proud of the jurisprudence of the Constitutional Court, and humbled by the role I have been able to play in it. But I also recognise that the Court cannot operate alone. Without litigants, the Constitutional Court building will stand empty and the promises of the Constitution will stand unfulfilled.

The incorporation of special provisions that protect children's rights in our constitution sheds light on the importance of children in the project of reconciliation. As I have previously said, reconciliation is like a tree that needs to be watered continuously, until it grows, and takes firmly to root. Without the full ventilation of children's rights as constitutionally guaranteed, we will never be able to have our tree take root. We will never see it grow tall and strong, for generations to come. And we will never be able to enjoy the benefits of the shade the tree will provide.

This conference is a celebration of 20 years of important, influential work. The Centre for Child Law has much to be proud of. But it is also a time to reflect and strategize for the next 20 years. We live in a violent society where the rights of women and children are still under threat.

This calls for vigorous action on the part of institutions such as the Centre for Child Law.

Children make up about 35 percent of the Country's 57.73 million population. So the challenges facing the Centre for Child Law are immense. In looking forward, it is also important for institutions such as the Centre for Child Law to remember that, as much as we look to the Courts to be the bastion of our democracy and the upholder of the rights entrenched in our Constitution, litigation can only take us so far. We must not forget that sometimes engagement with government and mobilisation can have much greater and more immediate effectiveness. Even when using litigation to realise children's rights, it is important to utilise those wins in the right manner, with the correct follow through so as to ensure that they are not just once off wins, but can be used to build upon and to realise even greater achievements.

In imagining children constitutionally, the Centre for Child Law must continue to stir the imagination of all South Africans, that we may dream to wake up one day in a country where the rights of all children are **equally protected**. That one day we may look into the faces of all of our

young ones with **pride**, with a sense of **accountability**, and have them know we **love them**, we **hear them**, and we **will always fight for them**.

Thank you again for allowing to me address you all here today and I hope that you enjoy the remainder of what I don't doubt will be an extremely fulfilling conference.

Opening

Imagining children constitutionally-strategic litigation and advocacy for children's rights in South Africa

Sarisa van Niekerk

Good morning to everyone present and to those who will either be presenting or in some way share their insights and work with colleagues in the field of children's rights. I have been asked to launch the Centre for Child Law's 20 Year publication during this session. At the outset, I would like to give you a bit of background about who I am and to share my story with you, especially how the Centre assisted me many years ago during my parents' custody battle. I will then speak about the contents of the publication and how it is a narrative of the Centre's work in the last 20 years. Then I will finally close off with a last thought on the conference.

1 Who I am and how I have been involved with the Centre for Child Law

I have known the Director of the Centre, Prof Ann Skelton, for almost 17 years, who has been a great mentor and role model throughout my studies and more recently a colleague at the University of Pretoria. The reason I have known her for so many years is because I was the Centre's first child client.

Like most of you, I am a lawyer by profession. I have been working at a Law Clinic for the past 2 or so years while completing my Master of Laws degree. Growing up, as a child I never wanted to become a lawyer. I grew up on a farm just outside the Kruger Park in Mpumalanga and went to school in a small town called Skukuza. My parents separated and we subsequently moved to Pretoria when I was about ten. Before and during the divorce my father became abusive towards us and so we decided not to have contact with him at all. He wouldn't accept it and so we approached the Centre for Child Law at the University of Pretoria to assist my sister and me to get our own lawyer to represent us. Professor Skelton was my lawyer and our case would become the first case in South Africa in which children were allowed to have their own separate legal representative in their parents' divorce case. Being in and out of court since age ten was not exactly what I imagined to be doing for the rest of my life. But, although I did not realise it at the time, that experience planted a seed to ensure that justice is done that became my destiny, as I eventually became a lawyer myself. Someone, Professor Skelton, had cared enough to speak for me, and so I felt I had to do so as well for others. From a young age, especially around the time our court case was

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taking place, I could not tolerate bullies in my school and often found myself defending my sister who had a learning disability, first against our then abusive father and later against bullies in school. I would also speak up for, and sometimes physically defend children who were bullied in my class, often to my own detriment. When I was in grade four – the year our court case started – I remember an incident where a girl in my class was, still during the Outcomes Based Education Syllabus, particularly good at making projects for assessments, even though she could not draw very well. A group of her friends, out of jealousy, surrounded her and started calling her names, saying that her parents did her projects for her as she could not possibly create such excellent projects as she could not even draw well. I had been sitting at a different table and heard the commotion. Something in me made me stand up, walk up to them and tell them that we are all different and that God gave us all different talents – one person can ride a horse, another can draw well and this particular girl was good at making projects, even though she could not draw. The group did not like my audacity and, since I had kicked the hornets' nest, they started attacking me. That did not stop me from speaking up for people who did not have a voice and, 17 years later, I have become an advocate myself.

I would say that having been involved in a court case where I had my own legal representative speaking for me and who was fighting to protect my interests, especially at a time when it was taboo, definitely had an influence on me and my eventual decision to become an advocate - paying it forward. It has made me more empathetic towards vulnerable people in society, such as people who are bullied, people with disabilities, and given me an interest in women's and children's rights in general.

2 What it felt like to be legally represented

I remember how it felt when I went to court for the first time. I had gone to court, because I had wanted to speak to the judge and to tell him why I did not want to have contact with my abusive father. Back then, it was unheard of for children to have a say in their parents' custody issues. I remember feeling extremely disappointed that the judge did not even acknowledge my presence in court, saying things like that he did not want me to say one day say that "*that* judge or *that* court kept their parent away from them." I felt like I was being treated as part of the furniture and found it fascinating – and disappointing – that he could assume to know what was best for me without even having met me nor spoken to me. I felt absolutely voiceless. Ignored. Like I didn't matter. The Family Advocates involved in our case at the time were also not listening to the pleas of my sister and I not to see our father and were making decisions for us, without taking our views into account. This felt extremely frustrating and we were really helpless. We felt like we were being bullied. The Centre then brought a court application for an order to have our own legal representative appointed for us. As part of the court documents, I had written a very emotional letter to the judge and

expressed how I disliked the system and how the courts were treating us like second-class citizens. After a long fight and a lot of persistence, the Centre finally succeeded in helping us to get a say in our parents' custody battle. For the first time I had a voice, and little did I know back then, so would other children have, too, thanks to the Centre's hard work and dedication.

I had a feeling of déjà vu when I sat in the Constitutional Court a week ago observing Prof Skelton and all the other lawyers arguing for children's human dignity, among other rights, to be respected by outlawing spanking as a form of parental discipline, and they were being quite vigorously questioned by the court. Thankfully, they stood their ground and I hope, for the sake of all children in this country, that all forms of spanking or violent behaviour towards children, which is nothing more than assault, will be outlawed, and that there will be a new culture of positive parenting established in its stead.

I also found it interesting that during that case, Justice Cameron pointed out that outlawing this particular mode of disciplining children is perhaps an Afro-centric idea as it has already been done in several African countries. To me, respect for children's rights is at the heart of *Ubuntu,* an African term that means "I am who I am because of who we all are." It calls for respect of children's human dignity. And, in former Justice Albie Sachs' famous words in the *S v M* case – the Centre's first case in the Constitutional Court – where he said that every child has his or her own dignity and further: "If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. 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, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood." This is the type of jurisprudence that I support and that the Centre has stood for and fought for throughout its existence.

Enough on the background and more on the Centre's Publication. Interestingly, as I was reading the Centre's Publication, Justice Sachs' "Strange Alchemy of Life and Law" for some reason sort of reverberated in my mind as it follows a similar structure.

The publication starts off with a foreword by the current director of the Centre, Prof Skelton, followed by a brief history of the establishment of the Centre by Prof Boezaart, the founding director of the Centre, setting out the why, how, where and when their involvement in children's rights and the Centre came about and, similar to the "Strange Alchemy of Life and Law" and in former Justice Sachs' words, how life experiences affect

legal decision-making – and legal pathways I would like to add – in unexpected ways.

Among other things, Prof Skelton also mentions in the foreword to Constitutional Court Judge Yvonne Mokgokoro's 1999 article about the Centre and quotes a part thereof where she states that "We must guard vigilantly against places like the Centre for Child Law becoming a white elephant by becoming places of talk shops and places of sterile research." Prof Skelton quite humorously mentions that they are not an elephant of any kind, except the kind that does not forget. I would like to add that, having done the excellent work it has for the past 20 years and all the many successes it has achieved, as this publication is a reflection of, the Centre for Child Law is in fact an elephant – one with a *very* thick skin – considering how it has fought for children's interests and treaded new paths for children in South Africa through the jungle of legal discourse and legislation, setting precedents and landmarks as far as it went.

After the *S v M* case, nineteen Constitutional Court cases followed. That is *incredible*. This publication discusses some of these landmark cases and is a narrative of the Centre's work over the last 20 years that not only reveals its achievements throughout the past two decades, but also serves as a valuable educational tool for children's rights advocates in South Africa and abroad, showing how it has used the law to establish, protect and affirm children's rights.

In Nelson Mandela's famous words "there can be no greater revelation of a society's soul than the way in which it treats its children." The way the Centre for Child Law has impacted and advanced the realm of child justice in South Africa celebrates this vision and has certainly revealed and improved the soul and attitude of South African society's treatment of its children: From protection for migrant children, parental care and state intervention, surrogacy and assisted reproductive technologies' impact on the rights of children, to name just a few of its projects.

Other topics of interest and valuable resources are the various advocacy publications of the Centre such as a guide to the registration of child and youth care centres, advancing the rights of children with disabilities, and justice for child victims and witnesses of crimes, to name a few.

I once came across a quote that reads: "where there is a will, a plan and some consistency, there is a way." The existence of the Centre for Child Law reminds me of a tree. As the saying goes, the best time to plant a tree was twenty years ago. Thankfully, the seed or idea of the Centre was planted two decades ago and for the past twenty years, as this publication proves, the team at the Centre for Child Law's dedication, persistent will, hard work, planning and consistency has borne fruit – the fruit and shade of which many generations to come will still be enjoying. But, like any living tree, it must be continually nurtured and looked after in order to keep existing. The Centre for Child Law has pioneered and keeps forging paths for children's rights in South Africa.

In closing, there is a children's story book by Dr Seuss called "The Lorax," which tells the story of a forest creature who famously jumps out of a tree stump and says "I am the Lorax, I speak for the trees, I speak for the trees, for the trees have no tongues." Drawing an analogy to children, may you, like the Lorax, use your voice to speak for children, the most vulnerable people in our societies, who cannot all speak for themselves. There is still a lot more work to be done in the field of children's rights in South Africa and around the world. I end this talk with a last quote by the Dr Seuss' Lorax that goes: "unless someone like *you* cares a whole awful lot, it's not going to get better, it's not."

Children's rights jurisprudence in South Africa – a 20 year retrospective

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SUMMARY

This article provides a 20 year overview of children's rights jurisprudence in South Africa, with a predominant focus on cases in the public law arena (as opposed to family law). After identifying various themes that the author believes are worthy of note, such as the interplay between best interests and the child's rights to dignity; the innovative remedies that have characterised child rights case outcomes; and the courts' engagement with international law, the article concludes that constitutionalising children's rights has the advantage of elevating their status to the highest point in a legal system. Moreover, rights having the capacity to shift the balance of power, and for children, the framing of their rights in constitutional terms has resoundingly dislodged paternalistic approaches rooted in welfarism.

1 Introduction

This retrospective builds on a number of previous endeavours to give life to the significant jurisprudence that has developed in 20 years of children's rights litigation in South Africa. This article will provide a synopsis of previous efforts to unpack the overarching contribution of children's rights litigation over somewhat more than two decades, with a few brief updates of more recent cases. Thereafter, the article will engage with specific themes that emerge from the case law. A summative assessment of the contribution of children's rights litigation to the constitutional project of embedding children's right ideals in practice forms the conclusion.

2 Overview of previous endeavours

Articles in 2002, 2008 and 2013 appear to have laid a basis for the systemic consideration of South African children's rights jurisprudence in aggregate. The 2002 publication[1] was undertaken in an effort to explore whether the generous predictions of an earlier article on the supposed impact that the constitutionalisation of children rights was going to have, had in fact born fruit. The findings of that analysis were that the initial

1 Sloth-Nielsen "Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child" 2002 *IJCR* 137.

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constitutional promise had not been met. It was asserted that children's constitutional rights had largely been harnessed by adults in pursuit of their own claims, and that children's individual interests had not taken centre stage. Children had been all but invisible in constitutional litigation at that point, prompting Justice Albie Sachs in an oft quoted postscript to lament that that the Constitutional Court (hereafter CC) was not even appraised of the views of the scholars whose parents were seeking a confirmation of their parental rights to permit the practice of corporal punishment in private schools.[2] This period also saw the disappointing outcome for children's rights advocacy heralded by the then major socio-economic rights case, *Government of the Republic of South Africa and others v Grootboom and others*.[3] The CC declined to interpret the child's rights to basic nutrition, shelter, basic health care and social services in section 28(1)(c) of the Constitution to encompass a directly enforceable claim for a minimum level of shelter against the state for destitute children, unless such children were orphaned, abandoned or otherwise lacked a family environment. The decision thereby evidently closed the door to a more expansive reading which would see children have a preferential claim to resources, as some academics had suggested was the true meaning of section 28(1)(c).[4]

The 2008 article, published in the same journal, was geared towards an international audience potentially following the desirability of justiciable and constitutionally enshrined legal rights for children as an avenue for the enhanced domestication of the United Nations Convention on the Rights of the Child (CRC).[5] This article[6] adopted the framework of the four cardinal pillars of the CRC – non-discrimination, best interests, the right to life, survival and development, and freedom to express views and have those views taken into account – and attempted to classify an increasing array of case law concerning children's rights into one of those headings. The article indicated that the pendulum had indeed swung towards an identification of children's interests *eo nomine*.

2 *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC).

3 2000 11 BCLR 1169 (CC).

4 Creamer "The implication of socio-economic rights jurisprudence for government planning and budgeting: the case of children's socio-economic rights" 2004 *Law, Democracy and Development* 221.

5 UNICEF Innocenti Centre "Law reform and the implementation of Convention on the Rights of the Child" 2008 available at https://www.unicef-irc.org/publications/493-law-reform-and-the-implementation-of-the-convention-on-the-rights-of-the-child.html; see for examples of the international interest in the South African experience of constitutionalising children's rights, Tobin "Increasingly seen and heard: the constitutional recognition of children's rights" 2005 *SAJHR* 86 and O'Mahony "The promises and pitfalls of constitutionalising children's rights" 2019 *Human Rights Law Review* (in press).

6 Sloth-Nielsen and Mezmur "2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)" 2008 *IJCR* 1.

Cited examples of cases during that era illustrating this point were *Centre for Child Law v Minister for Home Affairs*[7] (concerning the interests of migrant children in detention), *AD v DW*[8] (whether "nude" guardianship orders could be granted to subvert the intercountry adoption process), *De Reuck v DPP*[9] (upholding the ban on possession of child pornography in children's best interests), and *Brandt v S*[10] (juvenile sentencing and the restrictive use of deprivation of liberty). The conclusions were reached that children's interests had featured prominently in litigation during that period, with their views being taken into account, legal representation for them being raised by judges *mero motu*, and curators appointed to oversee their interests in legal proceedings. Furthermore a notable increase in public interest litigation had surfaced, in cases such as *Khosa*[11] (forcing the payment of social grants to children of permanent residents) and *Treatment Action Campaign*[12] (declaring the limitations on the public health sites at which the anti retroviral drugs would be available to mothers giving birth unconstitutional). Children's rights had been employed both as a sword (including an order compelling the provision of adequate sleeping facilities for children in alternative care in the so called *Luckhoff* case brought by the Centre for Child Law on behalf of the school with that name,[13] for instance) and as a shield (for example, in *De Reuck* to resist a claim that the offender's right to privacy and freedom of expression were violated via the legislative ban relating to child pornography). Further, customary law had been shaken to the core in the *Bhe* case,[14] which overruled the foundational system of male primogeniture in inheritance. The reasons advanced at the time for the upswell in children's litigation remain valid: we averred that "substantial credit must go to public interest litigators, such as the Womens' Legal Centre (who took the *Bhe* case to the CC), and the Centre for Child Law, established during the period covered by that review, for bringing children's interests to the fore in judicial proceedings."[15] We suggested that there was no reason to believe that the impact of public interest litigation in this sphere was going to decline or dissipate and hence, that "the further development of a coherent and rights-based child jurisprudence seems promising."[16] As the title of the article suggested, it was argued that the impact of children's rights litigation in constitutional jurisprudence was already, by then, more than the sum of its parts.

7 2005 6 SA 50 (T).
8 2008 3 SA 183 (CC).
9 2004 1 SA 406 (CC).
10 2004 JOL 1322 (SCA).
11 *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC).
12 *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).
13 *Centre for Child Law v MEC for Education Gauteng* 2008 1 SA 223 (T).
14 *Bhe v Magistrate*, Khayelitsha 2004 2 SA 544 (C).
15 Sloth-Nielsen and Mezmur 2008 *IJCR* 27.
16 Sloth-Nielsen and Mezmur 2008 *IJCR* 27.

In 2013, a follow up was penned by myself and Helen Kruuse.[17] The article highlighted eight areas of distinction in this five-year period. These included: judicial approval of resource mobilisation for the fulfilment of children's rights,[18] emphasis on the quality of and standards in education;[19] the development of innovative remedies to deal with unreasonable state measures affecting children;[20] and an increasing focus on the right to dignity of the child.[21]

The authors concluded that the scope of the cases cited pointed to the growing insertion of children's rights considerations in increasingly diverse areas of legal interaction. Furthermore, the authors posited that the CRC and ACRWC – together with non-binding sources of international law – had substantively informed and enriched the jurisprudence of South African courts, such that it was claimed that South Africa may have crossed an invisible line from being a dualist to a monist state regarding the incorporation of international law in so far as children's rights were concerned. Finally, it was suggested that South African courts had begun to construct an image of the "constitutional child". It was asserted that a starting point must be the now famous dictum of Sachs J in *S v M:*[22]

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them".[23]

Elaborating this vision, Justice Sachs continued in a less often quoted vein:

> "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, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to

17 Sloth-Nielsen and Kruuse "A maturing manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012" 2013 *IJCR* 646.

18 *NAWONGO v MEC of Social Development, Free State* 2010 ZAFSHC 73; 2011 ZAFSHC 84; *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

19 *Governing Body of the Juma Musjid Primary School v Essay* 2011 8 BCLR 761 (CC); *Centre for Child Law v Minister of Basic Education* 2012 ZAECGHC 60; *Section 27 v Minister of Education* 2012 ZAGPPHC 114.

20 *DPP, Transvaal v Minister of Justice and Constitutional Development* 2009 2 SACR 77 (CC); *Jonker v The Manager, Gali Thembani/JJ Serfontein School* 2012 ZAECGHC 12.

21 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC). See too *C v Department of Health and Social Development, Gauteng* 2012 ZACC 1 and *M v Johncom Media Ltd;* 2009 4 SA 7 (CC).

22 *S v M (Centre for Child Law as Amicus Curiae) supra*.

23 Para 18.

childhood is the promotion of the rights as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."[24]

The picture of constitutional childhood, the authors said had been painted, was one of protection coupled with emancipation, of freedom to explore, blended with adult guidance and compass.[25]

3 Other significant more recent overviews

Skelton's new chapter in *Child Law in South Africa*[26] provides a comprehensive analysis of the constitutional protection of children's human rights. She explains at length the role of *amici curiae* in children's rights litigation, citing a string of cases, especially post 2008, in which the *amicus* briefs played a substantial role.[27] She illustrates the nascent but significant dynamic of children's direct involvement in litigation, citing amongst others *Centre for Child Law v Hoërskool Fochville*[28] in which a group of children were represented collectively by the Centre, and had their expressed views and interests taken into account by way of questionnaires that they had completed. Two noteworthy (and child rights compliant) features of the skirmish included that the right to represent the children's views was accepted in the face of a claim that their interests could be perfectly adequately put forward by their parents, since these had been cited as respondents in the case; and that the children's privacy and anonymity would be preserved through denying the applicants direct access to the individual questionnaires.

Skelton's chapter expounds on the array of remedies that have been fashioned in constitutional litigation concerning children, including orders of invalidity resulting in severance of offending provisions, orders of invalidity resulting in a "reading in", orders of invalidity resulting in the requirement of amending legislation,[29] structural interdicts or supervisory orders, and damages awards, such as in *MR v Minister of Safety and Security*[30] where the child successfully sued for wrongful arrest and detention.[31]

Understandably, and somewhat concealed in the analysis, are the gains for children's rights brought about by settlements and agreements:

24 Para 19.
25 Sloth-Nielsen and Kruuse 2013 IJCR 671.
26 Skelton "Chapter 11: Constitutional protection of Children's Rights" in Boezaart T (ed) *Child Law in South Africa* 2017.
27 Skelton "Chapter 11: Constitutional protection of Children's Rights" 334.
28 2016 2 SA 121 (SCA).
29 Notably after *Teddy Bear Clinic v Minister of Justice and Constitutional Development* 2014 2 SA 208 (CC) which lead to the promulgation of the Criminal Law (Sexual Offences) Amendment Act 5 of 2015.
30 2016 2 SACR 540 (CC).
31 See further Jephson and Mngomezulu "Constitutional Litigation Procedure" in J Brickhill (ed) *Public Interest Litigation in South Africa* Juta 2018 147 *et seq*.

a recent example concerns the settlement between the Centre and the MEC for Social Development, Gauteng, MEC for Health Gauteng and MEC for Education, Gauteng[32] relating to the absence of any services for children with severe or profound disruptive behaviour disorders who come into conflict with the law. This settlement saw the Departments agreeing to the development of a properly costed and budgeted intersectoral policy and implementation plan to ensure, amongst others, that appropriate prevention and early intervention plans are implemented to cater for children at risk of developing severe or profound disruptive behaviour disorders, within their families and communities as far as possible; and that an appropriate spread of residential programmes and mental health care services specifically geared towards catering for children with severe or profound disruptive behaviour disorders be developed and provided.

Not unexpectedly, Skelton reflects on the key relationship between s 28(2) enshrining the paramountcy of the best interests of the child principle, and other constitutional rights. As a self-standing right and a guiding principle,[33] it has been drawn into a variety of cases she cites concerning the right to parental or family care, international child abduction, child pornography, the right to housing, adoption, customary inheritance law, health care, the right to social assistance, child's right to privacy and dignity, the testimony of child victims and witnesses, the right of children removed from their families to have that removal reviewed by a court, the right of children not to be prosecuted for consensual sexual activity, the right of child sex offenders not to be automatically placed on the sex offenders register, and the rights of children in conflict with the law not to be detained except as a measure of last resort.[34]

She concludes that the case law referred to "demonstrates a real commitment by the courts towards interpreting and applying these paper rights to the real-life situation of children. The approach to children in litigation encompasses both the need to protect children and advance their [autonomy] rights."[35]

An even more upbeat assessment is provided by her in the recent publication on "Public Interest litigation in South Africa".[36] Using as a leitmotif the food metaphor inherent in the claim that children's rights

32 Case 77362/16 Gauteng Provincial Division Pretoria.

33 Although, as courts have pointed out, this does not mean that s 28(2) is not itself capable of limitation: see for a fuller discussion *S v M (Centre for Child Law as Amicus Curiae)* par 25 and 26 and *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SA SACR 477 (CC).

34 Skelton "Chapter 11: Constitutional protection of Children's Rights" 346- 347.

35 Skelton *supra* 358.

36 Skelton "Children's Rights" in J Brickhill (ed) *Public Interest Litigation in South Africa* Juta 2018 at 258.

were "chicken soup",[37] she asserts that "the South African courts' treatment of children's rights has been far more piquant than the bland potage that was apparently expected".[38]

In this chapter, she engages in a cook's tour of significant cases in more or less chronological order, starting with Williams[39] in the interregnum during which the interim constitution held force, and proceeding to the landmark judgment in *TAC*[40] in 2002, before describing the effervescence of children's rights litigation that began to occur around 2007. She accords a prominent space to *S v M*, and its elegant rendition of the "constitutionally imagined child". This case she describes as the "post constitutional *locus classicus* on the best interests principle".[41]

In the criminal law sphere, she contends that the courts have been unwavering in their recognition that children are different from adults, and that their culpability is affected by their lack of maturity.[42] She avers that the CC has not failed to grasp the nettle in the context of difficult cases involving sexual offences and the overreach of legislation.[43] The chapter reviews the then state of progress of litigation around the constitutionality of the common law rule permitting parents to reasonably chastise their children in *YG v S*,[44] in which a CC ruling is awaited.

In conclusion, the chapter alludes to the overall disappointing results in expounding children's access to socio-economic rights, though the concessions as regards the duties of the state to fulfil these when children are without parental care or are removed from the family environment are acknowledged.[45] It predicts future litigation in the area of migrant children's rights, as well as relating to birth registration and stateless children. Tellingly, the chapter speaks to the high level of strategic and deliberate intention behind the children's litigation of the last decade, including in relation to cases that were brought to court, as well as to those that were not.

37 Sloth-Nielsen "Chicken Soup or Chain Saws: Some implications of the constitutionalisation of children's rights in South Africa" 1996 *Acta Juridica* 6, based on a throwaway remark made by erstwhile opposition leader Tony Leon at the time that children's rights were debated in the Constitutional Assembly.
38 Skelton "Children's Rights" 258.
39 *S v Williams* 1995 3 SA 632 (CC) in which juvenile whipping as a sentence was ruled unconstitutional.
40 *Minister of Health v Treatment Action Campaign* 2002 6 SA 121 (CC).
41 Skelton "Children's Rights" 269.
42 Skelton "Children's Rights" 271.
43 *Teddy Bear Clinic v Minister of Justice and Constitutional Development, supra*, and *J v National Director of Public Prosecutions and Another* 2014 (2) SACR 1 (CC).
44 2018 1 SACR 64 (GJ).
45 *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T).

4 The education terrain

The education terrain presents an obvious site for contestation about children's rights. In previous work, reference was made to Juma Musjid[46] (confirming that the right to education is immediately enforceable and not subject to progressive realisation) and Western Cape Forum for Intellectual Disability,[47] but a veritable flood of litigation has been brought since then to attempt to raise education standards and to improve service delivery. This frontier has been attacked by Equal Education, Section 27, Lawyers for Human Rights, the Centre for Child Law, and the Legal Resources Centre.[48] The well known "mud schools" cases represented the first real foray in the endeavour to compel the Eastern Cape provincial government to provide facilities conducive to teaching and learning and resulted in a settlement with government committing to addressing the infrastructure backlog.[49] As Kamga notes, the "courts have been unambiguous in holding that education cannot be considered available if learners are not provided with textbooks".[50] The Supreme Court of Appeal has confirmed that the Constitution entitles every learner at a public school to be provided with a textbook prescribed for his or her grade before commencement of teaching for the course for which that textbook is prescribed.[51] The duty to fulfil this right rests on the State.

Madzodzo v Minister of Basic Education[52] dealt with desks and chairs for reading and writing, also as part of the immediately realisable right to basic education; post provisioning for both teaching and non-teaching staff was the subject matter of *Centre for Child Law v Minister for Basic Education*;[53] physical accessibility of schools through the provision of free transport where learners could not otherwise access their schools has been addressed;[54] and in the Linkside cases discussed by Kamga,[55] the court ordered that the affected schools be refunded for teacher costs they had had to bear themselves, and that the educators concerned be properly appointed. According to Kamga, this was South Africa's first

46 *Governing Body of the Juma Musjid Primary School v Essay* 2011 (8) BCLR 761 (CC). This was the first time that the Constitutional Court directly considered the content of the right to education.
47 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).
48 See MacConachie and Breener "Litigating the Right to Basic Education" in J Brickhill (ed) *Public Interest Litigation in South Africa* Juta 2018.
49 Kamga "The right to a basic education" in Boezaart (ed) *Child Law in South Africa* 526.
50 Kamga "The right to a basic education" 527.
51 *Section 27 v Minister for Education* 2016 4 SA 63 (SCA).
52 2014 3 SA 441 (ECM).
53 2013 3 SA 183 (ECG)
54 See the cases discussed by Kamga "The right to a basic education" 531-532.
55 *Linkside v Minister of Basic Education* 2014 ZAECGHC 111; *Linkside v Minister of Basic Education* 2015 ZAECGHC 36; Kamga "The right to a basic education" 530.

"opt in" class action, with approximately 80 schools "opting in" as applicants.

McConnachie and Breener note that the school infrastructure (and textbook) cases were accompanied by "an extensive mobilisation campaign".[56] This included community activism, You Tube videos, camping outside the High Court during hearings, engaging print media, and the organisation of mass marches. They ascribe the eventual adoption of the *Norms and Standards for Public School Infrastructure* which detail the requirements for water and sanitation, electricity, safe classrooms accommodating a maximum of 40 learners, and eventually, internet connectivity, libraries, laboratories and sports facilities, as illustrative of the combined power of social movements coupled with legal intervention.[57] It is important to reflect that the *Norms and Standards* were released only after successful further litigation to compel the Minister to produce these.[58]

The most recent judgments on the Norms and Standards bear noting: in Equal Education v Minister of Basic Education, AJ Mziza noted that the parties agreed that the right to education was of the "highest order" of socio economic rights. The application sought to declare unconstitutional those subparts of the Regulations that subjected the implementation of the *Norms and Standards* to available resources and to the co-operation from other government agencies and entities responsible for infrastructure in general, and their making available such infrastructure.[59] The basis for this claim of unconstitutionality was that it gives Government a means of escaping the obligation to provide adequate school infrastructure due to the "clawback" provisions.

> "As I understand the argument put forward by the Minister, her hands are tied. To me, this means that she is at the mercy of the other departments and organs of State. This simply compromises the constitutional value of accountability. There is no way that the Government can be held accountable for the discharge of its duty to provide basic basic school infrastructure. Therefore, because the provision of basic infrastructure is indisputably an integral component of the right to basic education, it means Government cannot be held to account ..."[60]

The prioritisation in the Norms of eliminating schools built "entirely" (rather than partly) of hazardous materials or which were unsafe was, moreover, found to be irrational: an unsafe structure poses the same risk to learners and teachers whether there are also some safe structures at the school. [61] And school infrastructure already planned for could not be

56 McConnachie and Breener "Litigating the Right to Basic Education" 289 and 292.
57 McConnachie and Breener "Litigating the Right to Basic Education" 290.
58 *Equal Education v Minister of Basic Education* 2018 9 BCLR 1130 (ECB) par 14; See too *Minister of Basic Education v Basic Education For All* 2016 4 SA 63 (SCA).
59 Par 61.
60 Par 182.

excluded from the Norms altogether on any rational basis, as they would then remain outside of the purview of the Norms indefinitely. The Minister's claim that she was hamstrung to allocate resources for infrastructure should have been justified in terms of the Constitution, which was not done.[62] In what may be a high water mark in this particular litigation trajectory, the CC dismissed the Minister's application for leave to appeal – it bore no prospects of success.

Considering that children spend at least 9 years of their lives – half their childhood – in school, it is not unexpected that school governance has been a challenging arena, especially given the context of past discrimination and inequality in the school system. The powers of school governing bodies have been the subject of not inconsiderable contestation, and the distribution of power between parents, the executive, learners and educators has reached the CC on a number of occasions.[63] School feeder zones, which entrench spatial inequality, and language policy have been core themes. Religion and schooling has also been a notable topic, not limited to the corporal punishment issue in the Christian schools case, or to apparel and insignia.[64]

5 Some key features of 20 years of child rights jurisprudence in South Africa

5 1 Reach and scope

My previous articles have highlighted the broad church of issues that have been brought to the attention of courts in which children's rights have surfaced. As was held in *S v M (Centre for Child Law as Amicus Curiae)*, the language of s 28 of the Constitution is "comprehensive and emphatic" and it has indeed come to pass that "statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children".[65] This has continued to occur, in fields as diverse as striking down provisions which enshrined

61 Par 192.
62 Par 195.
63 McConnachie and Breener "Litigating the Right to Basic Education" 286-7. See in particular Head of Department, Department of Education, Free State Province v Welkom High School 2014 2 SA 228 CC, MEC for Education Gauteng Province and others v Rivonia Primary school and others 2013 ZACC 34, and Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng and Another 2016 ZACC 14.
64 See Kruger and McConnachie "The impact of the Constitution on learners rights" in Boezaart (ed) *Child Law in South Africa* Juta, discussing *inter alia Organisasie Vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* 2017 3 All SA 943 (GJ) in which it was ruled that it was "unlawful for a school to promote or allow its staff to promote that it, as a public school, adheres to only one or predominantly one religion to the exclusion of others."
65 Par 15.

the prescription of sexual offences committed against children,[66] upholding the genetic link requirement for confirmation of a valid surrogacy agreement on children's rights grounds (on behalf of yet-to-be-born children),[67] and confirming the hopelessness of an appeal to overturn the schools *Norms and Standards* judgment. As has been noted, children's rights litigation has become socially accepted and legitimated – it is no longer necessary to first argue the virtues of children's rights, or claim them on a basis of good morals: their legal function is now "self executing". They demand accountability on the part of the state.

South African children's rights jurisprudence is consequently arguably the most far reaching currently in the world in having expanded the locus of its application far beyond the family law terrain. Indeed, this retrospective has for the most part eschewed discussing all the many family law cases that have been reported, in favour of focussing on those with a public law dimension.

5 2 Judicial and litigator familiarity with children's rights

In the 2008 article, an allusion was made to the specialised children's rights knowledge of some of the key judges, emanating from the pre-democracy era. It was averred that they had (at times *mero motu*) flagged children's rights issues where these had not been argued by counsel. 20 years into democracy, I would argue that that conclusion continues to bear relevance, despite the fact that scores of newer judges now populate the bench. YG, penned by Judge Raylene Keightley,[68] provides no better example; also, the judgment in the High Court of Judge Joseph Raulinga (formerly of the National Children's Rights Committee) in *Media 24 v National Prosecuting Authority*[69] concerning the expansive measures put in place (in a criminal trial of extreme public interest in which one accused was a minor) to balance open access to justice with the right to privacy of the child defendant is worthy of note. Furthermore, the case that ended as *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*[70] emanated from Judge Eberhard Bertelsman's decision in the High Court when he raised constitutional questions pertaining to child victims and witnesses - he has long been an aficionado of the children's rights community. Ballast can also be sought in the fact that at least in the Gauteng divisions, judges alert children's rights litigators to cases where a child rights issue may be at stake, and invite them to enter as *amicus*. An example is in the string of surrogacy cases that have been litigated in these courts,[71] the

66 *Levenstein v Estate Late Sidney Frankel* 2018 ZACC 16, although the case was won on behalf of all victims (adults as well).
67 *AB v Minister of Social Development* 2017 BCLR 267 (CC).
68 Keightley *Children Rights* Juta was edited by her in 1996 in her position as a former academic.
69 2011 2 SACR 321 (GNP).
70 2009 2 SACR 130 (CC).
71 Sloth-Nielsen "Surrogacy in South Africa" in Scherpe, Fenton Glyn and Kaan (eds) *Surrogacy around the World* Cambridge University Press, 2019 185.

invitation to act in the swopped babies and customary adoption case,[72] and indeed in YG itself.

Added to this is the fact that there is now a generation of litigators now schooled in and comfortable with 20 years of children's rights litigation, unafraid to raise these arguments when they may advance children's rights. This stands in quite stark contrast to the period after *Grootboom* in 2000, when some litigators feared that the CC's reference to children being "loved for who they are", and "not being stepping stones to resources", weighed against using children's rights arguments, especially if women's rights claims stood a chance.[73]

5 3 Protection and autonomy

Recognition of children's evolving maturity warranting their need for protection and simultaneous awareness of their autonomy has been a key theme identified in the construction of the "constitutional child". This has been identified in relation to cases already mentioned, such as *Centre for Child Law v Minister of Justice* (on life imprisonment as a sentence for children)[74] and *S v M (Centre for Child Law as Amicus Curiae)* .

But the pendulum does sometimes swing between these policy values, illustrating that they embody as much tension as they do coherence.[75] Two examples support this point.

It has been alleged that *Teddy Bear Clinic* is an extraordinary judgment,[76] recognising as supreme children's right to privacy and to dignity, which triumph over conservative moral judgments enforced through the blunt instrument of criminal law.

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72 Case no 32053/2014 Gauteng Division Pretoria. The cases concerned two children swapped at birth, and who were thereafter raised by families who were not biologically related to them. This was discovered only when paternity tests were performed as an adjunct to a later application for child maintenance when one ot the family's relationship ended,

73 See the mutedness of the children's rights argument in *TAC v Minister of Health and Others*. The author was at the time attached to the Community Law Centre (now Dullah Omar Institute) prepared the *amicus* briefs for this case, and was appraised of the decision to avoid children's rights arguments in the papers (even though the subject, the availability of anti-retrovirals to prevent mother to child transmission of HIV, concerned babies).

74 2009 6 SA 632 (CC).

75 See the argument by Skelton ("Balancing autonomy and protection in children's rights: a South African account" 2016 *Temple Law Review* 887) as to why litigators opted not to use neuroscience research on the (delayed) development of adolescent brain in *Teddy Bear Clinic*, as overly protectionist. This position might have undermined the arguments privileging sexual autonomy and freedom of choice of those same adolescents.

76 Witting "Regulating bodies: the moral panic of child sexuality in the digital era" 2019 *Critical Quarterly for Legislation and Law* (forthcoming).

The CC held that giving expression to our sexuality is at the core of the area of private intimacy: if in expressing our sexuality we act consensually and without harming one another, invasion of that space constitutes breach of privacy.[77] This applies in equal force to consensual sexual conduct of adolescents (and this breach was exacerbated by the mandatory reporting requirements). Striking down as unconstitutional the offending criminal provisions which penalised consensual teenage sexual intimacy, the CC gave primacy to the autonomy side of the scale.

But protectionism has held sway in other cases. In *Du Toit v Ntshinghila and others*[78] the need to protect the reasonable privacy interests of the children who are depicted in pornographic images, the significant public interest in ensuring that no duplication or distribution of images of child pornography occurs in the disclosure process, and the prevention of sexual exploitation of children, were all adduced to resist a claim that an accused be given copies of child pornography images prior to prosecution.

But *Centre for Child Law v Media 24 Ltd*[79] reveals further dimensions of the tension alluded to above. The case was portrayed in public as a victory for children's rights.[80] To the extent that the cross appeal was partially successful, and the SCA declared that the provisions of s 154 (3) of the Criminal Procedure Act 51 of 1977 were constitutionally invalid to the extent that they did not protect the anonymity of child victims of crimes who did not testify at criminal proceedings,[81] this is true. However, the greater portion of the judgment deals with what the bench called "the adult extension", namely whether the protection afforded children regarding disclosure of their identities whilst under 18 would extend into adulthood. According to the appellants, an interpretation that ensured ongoing protection, better promoted section 28(2) and protected child victims, witnesses, accused and offenders from the severe harm of identification.[82] The respondents denied that there was any legal basis for the so-called "principle of ongoing protection".

The SCA was of the view that "[i]t is clear that the adult extension severely restricts the right of the media to impart information and infringes the open justice principle. In the absence of any legislation on

77 *Teddy Bear Clinic* par 59 and 60.
78 2016 2 All SA 328 (SCA)
79 2018 ZASCA 140. At the time of writing, the case has been appealed to the Constitutional Court. Judgment is awaited.
80 By a spokesperson for the Centre for Child Law on national television.
81 The existing section afforded protection to child accused and child witnesses below the age of 18 years, but not to child victims who did not testify. The case was occasioned by a prior application to protect the identity of "Zoe Nurse", kidnapped as a 2 day old baby and rediscovered shortly before her 18th birthday by her biological parents. She did not testify at the criminal trial of the woman who raised her. Once she turned 18, the media threatened to reveal her identity to the public in the sensational and tragic case.
82 Par 10.

the nature and extent of the adult extension, the relief sought by the appellants is overbroad and does not strike an appropriate balance between the rights and interests involved." Accordingly, the proposed limitation asked for by the appellants on the right of the media to impart information was neither reasonable nor justifiable, in terms of s 36 of the Constitution.[83]

In a minority judgment, the opposite was argued: that

> "At first blush, it may seem that the difference between Swain JA and me is finely calibrated. Regrettably, we are separated by a philosophical ocean. In my opinion, when it comes to the disclosure of the identity of childhood victims of crime, logic, common sense and ordinary, everyday morality generate a constitutional imperative. It is that the relevant time, which is determinative of the issue, is the time that the person was a child and not the time from which the child has become an adult. In my opinion it is obvious that if, in balancing the competing interests at stake in this matter, the fulcrum is the question of onus, the scales must tilt in favour of those who have become adults but were the victims of crime at a time when they were children."[84]

In a carefully crafted judgment, Willis JA for the minority held that "[a] default position in law that allows for a retrospective intrusion into a person's victimhood of crime as a child would, in my opinion, violate that person's constitutional right to dignity. The knowledge, as a child, that one's identity as a victim of crime may be revealed upon the attaining of one's majority, may haunt that child, causing her considerable emotional stress. In my opinion, it verges on cruelty to sanction torment such as this."[85]

The minority therefore held that the preservation of the anonymity of the child should be the default position absent consent to reveal the identity subsequent to reaching the age of 18 years. This door is not yet closed, as the matter has been appealed to the CC, which has previously granted extended life-long protection to child victims' identities (in a case involving a claim for delictual damages).[86]

My assessment, therefore, does not discount that there may thus be deep differences regarding the substance and normative requirements of a child rights approach that will continue to prevail in some areas: substantiating this claim are the cases in which lengthy minority

83 Par 27.
84 Par 97.
85 Par 83.
86 "This is in the best interests of the child, not merely in light of the child's right to privacy, but because when the child 'becomes an adult the many physical disabilities suffered by the [child] will result in vulnerability. If the sums of money at the [child's] disposal as a result of this [judgment] are readily to be found out on the internet, there will be a risk of the [child] losing that money to inappropriate friends, fortune hunters or even thieves.'" *MEC, Health and Social Development, Gauteng v DZ* 2017 ZACC 37 at fn 1.

judgments have been written. *C v Minister of Health and Welfare Gauteng,*[87] concerning whether the failure of the Children's Act to provide for an automatic judicial review of a removal of children effected without a warrant was constitutional, produced two substantial minority judgments; the SCA judgment in the Media 24 case is also emblematic of this, as the quoted excerpt shows. *AB v Minister of Social Development* (concerning the genetic link requirement for surrogacy) gave birth to such a lengthy minority judgement that it could have been mistaken for a majority judgment: obviously, the differences touched a deep core amongst the Justices. Who can predict how YG and the common law defence of reasonable chastisement will fare in the CC?

The potential divergence between protection of children and giving effect to their autonomy is impossible to dissect or expand any further, in the absence of concrete and real life situations in which to situate such a debate. But in a cautionary vein, the lesson of *Le Roux v Dey*[88] (holding schoolboys liable in delict for defamatory material circulated about their deputy headmaster)[89] shows that, sometimes, recognising children as autonomous rights bearers can cause claimants to "fall on their sword".[90]

5 4 Innovative remedies

A selection of the array of remedies that have been brought about in children's rights constitutional litigation has already been alluded to: striking down legislation, reading in, structural interdicts, intervention in procurement disputes to mitigate the impact on children's rights,[91] and damages have all been the outcome of litigation. The litigation around schools provisioning has undoubtedly seen some of the most inventive remedies being devised. McConnachie and Breener ascribe this to the non-compliance of Departments with prior orders or settlements, prompting applicants to return to court to restructure relief.[92] This even extended to taking measures to attach the motor vehicle of the Minister in order to satisfy the debt for teacher's salaries! And unprecedented was the relief to learners in Limpopo whose textbooks had not materialised, rendering them unable to cover the school curriculum effectively: the

87 2012 ZACC 1.
88 2011 6 BCLR 577 (CC).
89 They superimposed the heads of their two teachers on the picture of two men depicted in a sexually suggestive position.
90 I make this claim even though the majority decision did not consider children's rights. Most discussions of the case privilege discussions of the minority judgments which do traverse children's rights: see Kruger and McConnachie "The impact of the Constitution on learners rights" 560-561 and Couzens "*Le Roux v Dey* and a children's rights approach to judging" 2018 PER 1.
91 Proudlock "Children's socio-economic rights" in Boezaart (ed) *Child Law in South Africa* gives an overview of the relevant cases.
92 McConnachie and Breener 299.

Department was ordered to draft and implement an extensive "catch up" plan to remedy the damage done.[93]

Whilst in South African jurisprudence, the terrain of child law is not alone in innovating remedies, the range of remedies and results cited by the authors reviewed does seem to set a rather high bar for other jurisdictions to follow.

5 5 The spade work of "best interests" and "dignity"

"Best interests" as a constitutional right, rule of procedure, and a principle have been fairly exhaustively analysed thus far.[94] As Gallinetti has previously noted,[95] the approach of the Court "underscores the need to mainstream the best interests principle in all legal arenas where children are involved even where established legal rules or principles have never given regard thereto previously". According to *S v M (Centre for Child Law as Amicus Curiae)*, best interests requires *first*, consideration of the interests of children; *second*, the retention in the inquiry of any competing interests;, *third*, the apportionment of appropriate weight to the interests of the child;[96] and *fourth*, overall, the rights and interests of children must be considered independently of those of their primary care-giver. Section 28(2) mandates courts in particular to play a very active role in raising and securing children's best interests.[97] Where parents or legal representatives do not defend children's best interests, courts must *ex officio* come forward to do so. The need for a best interest inquiry also presupposes that courts have sufficient information at their disposal to understand the impact of their decision upon children.

Inflexible policies[98] may fall foul of section 28(2) because they do not cater to the individualised approach required. "Best interests" safeguards children's rights against arguments based purely on legal technicalities which do not take into account their individual circumstances.[99] "Best interests" has been held to underpin the need for a remedy even where, technically, no violation or breach has been found, as in the requirement that the school review its policy on pregnant learners in the Welkom schools case.[100] And the "nude" best interests principle contained in

93 McConnachie and Breener 300.
94 Bonthuys "The best interests of children in the South African Constitution" 2006 *International Journal of Law, Policy and the Family* 23.
95 Gallinetti "2kul2Btru: What children would say about the jurisprudence of Albie Sachs" 2010 *SAPL* 2010 108 at 115.
96 Par 22, 26 and 32.
97 See too Van den Burgh discussed in South-Nielsen and Kruuse.
98 *Head of Department, Department of Education, Free State Province v Welkom High School* [2013] JOL 30547 (CC).
99 Sloth-Nielsen and Mezmur "Illicit Transfer by De Gree" 2007 *Law, Democracy and Development* 1.
100 Couzens "The South African Constitutional Court and the Best interests of the Child" in Diduck, Peleg and Reece (eds) *Law in Society: Reflections on Children, Culture, Family and Society* Brill 2015 534. At 535 she notes: "Thus section 28(2) justified the crafting of a remedy in somewhat unusual

section 28(2) was used to fashion a solution to order *de facto*[101] adoptions in the "baby swap" cases – even in a situation where adoption was not part of the common law (and could therefore not be developed), nor did the provisions of the Children's Act have any bearing because both babies (now children) were not orphaned or abandoned or in need of permanent alternative care, and were therefor ineligible for statutory adoption.

Finally, although the courts have repeatedly stated that "best interest" is not a trump over all rights, it remains a right which is accorded a degree of privilege in the balancing of rights.[102]

It can be concluded – as Couzens[103] has done – that "best interests" is hardly an empty vessel any longer, into which the whims of the decision maker can be poured, with indeterminate outcomes, an uncertain reach and an unpredictable result. It has indeed served as a "multifunctional tool".[104] That there is plenty of scope for further clarity on the normative content of this right in specific situations seems obvious: the next twenty years of children's rights constitutional litigation will tell.

Dignity has continued to form the bedrock of many judicial pronouncements on children. Thus in De Reuck, it was said that

> "[c]hildren's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. Society has recognised that childhood is a special stage in life which is to be both treasured and guarded."[105]

And in YG, Judge Keightley reiterated that "[u]nder the Constitution the child enjoys the general right to dignity under section 10. In addition, children enjoy special protection under section 28(1)(d) to be protected from, among other things, degradation. Human dignity lies at the heart of this latter protection. In turn, the right to dignity is foundational to our

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circumstances, when a human rights violation has not been fully established. Such a drastic remedy was nonetheless necessary because of the serious impact of children of the school policies. The remedy was envisaged to have a pre-emptive effect- rather than an ex post facto remedial impact."

101 Case no 32053/2014 Gauteng Division Pretoria. See further note 74 above.

102 Couzens note 102 538.

103 Couzens note 102 538. "Section 28(2) has been used by the Court to create obligations which make the law more responsive to children's needs as rights holders …. It is perhaps symbolic that the Court rather than grounding this jurisprudence in the right to equal protection of the law (section 9(1) of the Constitution) or the right to an appropriate remedy (section 38 of the Constitution), the Court often relied on section 28(2). It seems that for the Court this section is quintessential for giving children the legal protection which is due to them."

104 Couzens note 102 545.

105 Par 63.

constitutional dispensation."[106] Noting that dignity plays a twofold role in the consideration of the constitutionality of the defence of reasonable chastisement,[107] she explains that whereas adults who are victims of assault enjoy the protection of the law to vindicate their rights, the child, by virtue of the potential of the reasonable chastisement defence to block such vindication, is "treated with a lesser level of concern"[108] and the state is given less power to protect his or her rights. The effect is to deny the child's independent right to dignity and to subsume his or her dignity interests under that of his or her parents – in direct contrast to *S v M*.[109]

In 2013, Kruuse and I wrote of dignity as follows:

> "we contend that the elaboration of a children's right to dignity holds considerable promise as a tool for future legal interpretation. In our view, it provides a more concrete and authoritative (sophisticated) basis for adjudicating the complex interplay of competing rights where children are concerned by comparison to the more simplistic and a-contextual so-called 'balancing' of rights that courts allude to practicing."[110]

Has this promise been true? At this stage, I do not believe that many noteworthy advances have been made in support of that contention. Dignity, generally, has surfaced rather tangentially, for instance in relation to core principles of privacy and autonomy in the Teddy Bear Clinic case, rather than as a standalone embodiment of children's rights as human beings. Its contours, how it can assist to resolve tensions between competing interests, and to which fields of inquiry children's dignity must be brought in, remain rather opaque. Therefore, unless the CC develops a more focussed understanding of children's dignity (within a rights based approach) – as it may well yet do in YG – dignity remains rather subordinate to "best interests" as a tool for developing our conception of constitutional children's rights.

5 6 Engagement with international law

Quite a few commentators have previously embarked on the study of the court's use of international and regional law in bolstering its jurisprudence.[111] Meda Couzens' as yet unpublished work is particularly interesting; it seeks to describe how the CC and the SCA have engaged

106 Par 71.
107 The first is in the breach inherent in the breach of the child's right to physical integrity.
108 Par 72.
109 Par 74.
110 Sloth-Nielsen and Kruuse 669.
111 See my own publications of 2008 and 2013, as well as Skelton "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments" 2009 *AHRLJ* 482; Ngidi "'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in Killander (ed) *International law and domestic human rights litigation in Africa* (PULP, 2010) 173; Skelton "Child Justice in South Africa: Application of International Instruments in the Constitutional Court" 2018 *IJCR* 391.

with the Convention on the Rights of the Child (CRC), in an attempt to uncover its "jurisprudential value added" (alongside the provisions of section 28 of the Constitution itself). She notes that as at December 2017, there had been 16 cases in each of these courts in which the CRC was referred to or relied upon. She suggests that

> "The courts have been receptive to the CRC, a receptiveness which extends to soft-law instruments, such as general comments of the CRC and other UN documents. While the courts do not always give close attention to the standards of the CRC or sometimes plainly ignore it, apart from Jafta J's rejection of the CRC in C v Department of Health on grounds that it was not incorporated domestically, the legitimacy of references to the CRC has not been contested. As a consequence, there is little judicial preoccupation with the domestic legal status of the CRC. Whether this indicates an unconditional embracing of the CRC is a matter of some uncertainty, as the CRC has generally been invoked to obtain outcomes also supported by the Constitution, and the state has not opposed its application by courts." [112]

She affirms that "the use of the CRC as a reference framework can be found in those cases where courts make statements as to the compatibility between domestic standards and the CRC"[113] which strengthen the weight and legitimacy of the constitutional norm at stake. There are also cases she discusses (some of which I have discussed in this article) in which reliance is placed on the CRC as a guide to judicial discretion. This involves courts using the CRC as an aid in making a choice between legitimate solutions, with children's rights weighing in the balancing act.

She also refers to the "less tangible influences" of the CRC (seen in combination with the Constitution), including by "changing hearts and minds over time".[114] She opines that these strengthen the legitimacy of the CRC as a habitual presence in the judicial discourse. These remarks apply, with the changes required by the context, to constitutional children's rights.

6 Conclusion

It is tempting to be rather self-congratulatory about the ongoing constitutional enterprise to advance children's rights. This reflective overview indicates that the past twenty years have yielded a rich and remarkably interesting array of cases – and that more are yet to come. Although I do not believe that I have raised any particularly new or surprising insights that have not already been said before, final comments on the significance of the constitutional children's rights journey are apposite.

112 Couzens "The application of the United Nations Convention on the Rights of the Child by national courts" LLD thesis University of Leiden, 2019 175.
113 Couzens 179.
114 Quoting Sloth-Nielsen 2001.

First, constitutionalising children's rights has the advantage of elevating their status to the highest point in a legal system. This brings the twin advantages of entrenchment (making them harder to erode) and supremacy (making it possible to enforce children's rights in the face of conflicting lower laws and policies).[115] As O'Mahony noted,[116] this effect can be magnified when the best interests principle is constitutionalised and can ensure that court cases are framed in a child-centred manner rather than be dominated by the constitutional rights of adults.

Second, Federle speaks of rights having the capacity to shift the balance of power.[117]

> "An understanding of power is central to any effort to reconstruct rights for children ... Because of the nature and fluidity of power, it structures and shapes our personal interactions and relationships in ways that permit us to assert dominance or engage in submissiveness. But political, legal and social frameworks limit the ways in which individuals may negotiate for or assert power; whilst such limitations provide some certainty and stability in our interactions, they also create opportunities for the accretion of power and the subordination of other interests ... . Rights claims command the respect of others in our society and demand that one be taken seriously, whilst recognising the claimant's independent value as a human being. For children, rights talk does have a place in their lives by offering an alternative approach to paternalistic practices."[118]

This, I believe, is the central lesson that 20 years of constitutional children's rights litigation has taught: that the paternalism so characteristic of the welfarist approaches that used to occupy centre stage in the law's construction of children has been pushed aside in the face of the swell of constitutionalism.

115 O'Mahony 3.
116 O'Mahony 4.
117 Federle "Do Rights Still Flow Downhill?" 2017 *IJCR* 273.
118 Federle 281-2.

Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa

Ursula Kilkelly
Ton Liefaard

SUMMARY

The UN Convention on the Rights of the Child ("CRC") is the leading international instrument recognising the human rights of children across all areas of their lives. Amid measures of legal incorporation, giving constitutional expression to children's rights represents a high watermark of legal protection. South Africa was an early mover in this space adopting a strong children's rights provision in the 1996 South Africa Constitution which made children's rights justiciable as part of a Bill of Rights. Over the last two decades, an empowered judiciary and an active community of legal advocates have combined to enable the South African Constitutional Court to create a body of case-law that has provided leadership globally in the recognition and enforcement of the constitutional rights of children.

Against the backdrop of the Convention's 30th anniversary and increased emphasis on the legal implementation of children's rights, this article reflects on the South African experience of using its Constitution to advance children's rights. Using South Africa as a case study, it considers how the potential associated with giving children's rights the highest status in a country's legal system can be maximised. It identifies the lessons to be learned from the South African experience before concluding with a reminder that however dynamic the development of children's rights law, the effectiveness of the CRC's implementation can only ever be measured by the extent to which it improves children's enjoyment of their rights.

1 Introduction

The UN Convention on the Rights of the Child ("CRC") is the leading international instrument recognising the human rights of children across all areas of their lives. Thirty years after the CRC's adoption, legal, political and societal change in the way children are treated continues to be a challenge.[1] At the same time, as states parties continue to take steps incorporate the CRC's provisions into national law,[2] there is some

1 Multiple edited collections have been published providing a wealth of analysis on the Convention's implementation. See for example, Tobin, J. (ed.) *The UN Convention on the Rights of the Child. A Commentary.* OUP, 2019; Kilkelly, U. and Liefaard, T. (eds) *International Human Rights of Children*, Springer, 2018; Ruck, M, Peterson-Badali, M. and Freeman M. (eds). *Handbook of Children's Rights*: *Global and Multidisciplinary Perspectives*, Routledge, 2017 and Vandenhole, W, Desmet, E. Reynaert, D. Lembrechts, S. (eds) *The Routledge International Handbook of Children's Rights Studies*, Routledge, 2015;

2 Kilkelly, U. "The UN convention on the rights of the child: incremental and transformative approaches to legal implementation" 23 (2019) *The International Journal of Human Rights* 323-337.

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evidence that legal and non-legal measures of implementation have begun to improve children's lived experience of their rights.[3]

Giving constitutional expression to children's rights represents a high watermark of legal protection even if, around the world, practice varies from instruments that include limited references to the needs of children to those that recognise children as fully fledged rights holders.[4] The process of constitutionalising children's rights is complex and dynamic; it starts with the insertion of children's rights into the Constitution and then requires further associated actions to give real meaning to that change.[5] These include measures to promote children's access to the courts, provide effective remedies where rights have been violated and enable the judiciary and the legal profession to interpret and apply these rights in a progressive manner.[6] In truth, there are few examples of where such approaches have been a success.

South Africa was an early mover in the domestic incorporation of children's rights.[7] Building on previous instruments, the 1996 South Africa Constitution contains a strong children's rights provision – Section 28 – the adoption of which represented a "ground-breaking moment in the advancement of children's rights" when for the first time, children's rights were "robustly and comprehensively recognized in the express language of a nation's constitution".[8] Children's rights were made justiciable under the Constitution, making the courts pivotal in the enforcement of the Bill of Rights.[9] While there was scepticism that the rhetoric would not translate into tangible legal progress for children's rights in South Africa,[10] early political measures led by President

3 Lundy, L., Kilkelly, U., Byrne, B and Kang, J. *The UN Convention on the Rights of the Child: A study of Legal Implementation in 12 Countries*, UNICEF UK, 2012.

4 See in particular, Tobin, J. "Increasingly seen and heard: the constitutional recognition of children's rights", 21 *South African Journal on Human Rights* (2005) 86-126; European Commission for Democracy through Law (Venice Commission) *Report on the Protection of Children's Rights: International Standards and Domestic Constitutions* (2014), Opinion n°713 / 2013, para 146, available at www.venice.coe.int and O'Mahony, C. "Constitutional Protection of Children's Rights: Visibility, Agency and Enforceability" (2019) 19(3) *Human Rights Law Review 1-34.*

5 O'Mahony, C. "The Promises and Pitfalls of constitutionalising Children's Rights" in Dwyer (ed), *Oxford Handbook of Children and the Law* (Oxford: Oxford University Press, 2019) 869-864.

6 Committee on the Rights of the Child, General Comment No. 5 (2003), *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6),* 27 November 2003, CRC/GC/2003/5.

7 Binford, W. (2015) "The Constitutionalization of Children's Rights in South Africa", 60 *New York Law School Law Review* 333-364, 342.

8 Binford, W., 334.

9 Cameron, E and Taylor, M "The untapped potential of the Mandela Constitution" *Public Law* (2017) 382-407, at 386.

10 See Sloth-Nielsen, J. "The Contribution of children's rights to the reconstruction of society: some implications of the constitutionalisation of children's rights in South Africa" 4 *International Journal of Children's Rights* (1996) 323-344, at 324.

Mandela resulted in "substantial and measurable gains".[11] Over the last two decades, an empowered judiciary and an active community of legal advocates have combined to enable the South African Constitutional Court to create a body of case-law[12] that "leads the way in recognizing and enforcing the constitutional rights of children.[13] While progress has not always been smooth, nonetheless South Africa stands out internationally as an exemplar of how constitutional law can be used to advance children's rights.

Against the backdrop of the Convention's 30th anniversary and increased emphasis on the legal implementation of children's rights, this article reflects on the South African experience of using its Constitution to advance children's rights. Using South Africa as a case study, it considers how the potential associated with giving children's rights the highest status in a country's legal system can be maximised. The first part of the article begins by exploring the legal obligations on states parties to implement the Convention, with specific reference to legal and constitutional measures. In the second part, the article introduces the South African case study – the terms of the Constitution and a summary of the case-law of the South Africa Constitutional Court – in an evaluation of the extent to which the standards of the Convention and the recommendations of the Committee on the Rights of the Child have been given effect. The final part identifies the additional lessons to be learned from the unique South African experience before concluding with a reminder that however dynamic the development of children's rights law, the effectiveness of the CRC's implementation can only ever be measured by the extent to which it improves children's enjoyment of their rights. In this respect, South Africa – like many other states parties - still has some distance to travel.

2 Implementation and Enforcement of the Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child was adopted by the General Assembly of the United Nations in November 1989.[14] Renowned for its comprehensive recognition of the rights of the child,

11 Sloth-Nielsen, J. (1996) "Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa" *Acta Juridica* 6-27, at 7.

12 See Skelton, A (2015) "South Africa" in Liefaard, T. and Doek, J.E. (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence.* Springer, 15; Sloth-Nielsen, J. and Kruuse, H. (2013) "A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007-2012" 21(4) *The International Journal of Children's Rights* 646-678; see also Sloth-Nielsen, J. in this volume (TBC) and her references to various relevant sources.

13 O'Mahony, C. (2019), at 872.

14 Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. The Convention entered into force on 2 September 1990, in accordance with article 49.

the CRC provides minimum legal obligations on states parties with respect to children's enjoyment of their rights in all areas of their lives.[15] The Convention is based on a contemporary view of childhood, where beyond welfare and paternalism, children are considered to be fully fledged owners of human rights.[16] In line with other instruments of international human rights law, the CRC shifted the treatment of children from an approach based on pity or charity, to one which imposed clear and enforceable legal duties on states parties to vindicate CRC rights. This is reinforced by Article 4 of the Convention which requires states parties to take all appropriate legislative, administrative and other measures to implement the Convention[17] and the importance attached by the Committee on the Rights of the Child to making Convention rights enforceable in the national legal system. [18] According to the Committee:

> "Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental."[19]

The Committee has highlighted the value of including children's rights in national constitutions, while explaining that full implementation of these rights may require the adoption of legislative and other measures.[20] Tobin describes this as a "climate of expectation" that children's rights be given constitutional expression,[21] rather than anything more prescriptive and in line with this approach, the Committee has welcomed (e.g. South Africa)[22] and at times strongly encouraged states (e.g. Ireland) to take such action.[23] At the same time, it is difficult to argue that giving constitutional status to children's rights is not an "appropriate" measure of implementation under Article 4.[24] When the Committee has addressed giving constitutional expression to children's rights, it has advocated both a rights-based approach and the inclusion of the general principles (Article 2 on non-discrimination; Article 3 on best interests;

15 Doek, J.E., "The Human Rights of Children: An Introduction" in Kilkelly, U. and Liefaard, T. (eds). *International Human Rights of Children*. Springer, 2019, 3-29.
16 Verhellen, E. "The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective", in Vanderhole et al, 43-59.
17 Sloth-Nielsen, J. (2019), "Monitoring and Implementation of Children's Rights" in: Kilkelly, U. and Liefaard, T., 31-64.
18 UN Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 19.
19 UN Committee on the Rights of the Child, 2003, para 1.
20 UN Committee on the Rights of the Child, 2003, para 21.
21 Tobin, J., 90-91.
22 Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: South Africa*, CRC/C/15/Add.122, para 3.
23 See UN Committee on the Rights of the Child, *Concluding Observations: Ireland* CRC/C/15/Add. 85 February 4, 1998, para.25 and UN Committee on the Rights of the Child, *Concluding Observations: Ireland*, CRC/ C/IRL/CO/2, September 29, 2006, para.25.
24 Tobin, J. at 89.

Article 6 on life, survival and development and Article 12 on the right to be heard).[25]

Similarly, in an analysis of European constitutions, the Council of Europe's Venice Commission found that:

> "constitutions that express children's rights in a manner reflecting the indivisibility of rights, enshrining the general principles of the CRC, recognising the status of children as rights holders with an entitlement to have those rights vindicated against the state express the highest forms of compliance with international norms."[26]

Freeman notes that "[r]ights without remedies are of symbolic importance, no more"[27] and for this reason the Committee on the Rights of the Child has placed significant emphasis on the enforceability of children's rights.[28] According to the Committee: "[f]or rights to have meaning, effective remedies must be available to redress violations".[29] Children are thus entitled to appropriate reparation where breaches of their rights have been found,[30] including compensation and, where appropriate, measures that promote the child's "physical and psychological recovery, rehabilitation and reintegration".[31] Because children's "special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights", "effective, child-sensitive procedures" must be made available to children and their representatives.[32] According to the Committee, these must include "child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance".[33]

While legal measures are integral to the implementation of the CRC, the Committee has also stressed the importance of non-legal measures, like those that develop a "children's rights perspective throughout Government, parliament and the judiciary".[34] To this end, it has repeatedly reminded that training and capacity building on children's rights for those who work with and for children is integral to the

25 UN Committee on the Rights of the Child, *Concluding Observations: Ireland*, CRC/C/15/Add. 85 February 4, 1998, para 21.
26 Venice Commission, para 139.
27 Freeman, M. "Why It Remains Important to Take Children's Rights Seriously" *International Journal of Children's Rights* 15 (2007) 5–23, at 8.
28 See also Tobin, J., at 91
29 UN Committee on the Rights of the Child, (2003), para 24.
30 Liefaard, T. (2019) "Access to Justice for Children: Towards a Specific Research and Implementation Agenda". 27(2) *The International Journal of Children's Rights* 195-227.
31 UN Committee on the Rights of the Child, (2003), para 24.
32 UN Committee on the Rights of the Child, (2003), para 24.
33 UN Committee on the Rights of the Child, (2003), para 24.
34 UN Committee on the Rights of the Child, (2003), para 12.

Convention's effective implementation.[35] Such training must be "systematic and ongoing" and designed to "increase knowledge and understanding of the Convention."[36] The Committee has singled out the "judiciary"[37] in this context in an important reminder of the essential role played by the courts in the enforcement of Convention rights.[38]

In summary, then, the Committee promotes legal implementation of the CRC in three core ways: incorporation of the CRC into domestic law, at constitutional level where possible; making such rights enforceable, providing remedies where rights are breached, and providing systematic children's rights training to those who work in the legal system to promote the advancement of children's rights and access to justice. The next part of this article will examine the extent to which these requirements have been fulfilled in the South African approach. First, section 28 of the South African constitution will be introduced.

3 Section 28 of the South African Constitution: meeting the expectations of the CRC

Following South Africa's ratification of the CRC on 16 June 1995,[39] the new Constitution of the Republic of South Africa was adopted in 1996, with a dedicated and detailed section on children's rights (section 28).[40] Situated in Chapter 2 of the Constitution, within a comprehensive Bill of Rights, the children's rights provision sits alongside a number of other provisions – including section 26 on housing, section 27 on healthcare and section 29 on education – which also apply to children.[41] Section 28 on children's rights is a unique constitutional provision, impressive in its

35 See for example, UN Committee on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system, 18 September 2019, CRC/C/GC/24, para 39; , UN Committee on the Rights of the Child, General comment No. 21 (2017) on children in street situations, 21 June 2017 CRC/C/GC/21, paras 18, 40 and UN Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, 17 April 2013, CRC/C/CGC/16, para 61.

36 UN Committee on the Rights of the Child (2003), para 53.

37 UN Committee on the Rights of the Child (2003), para 53

38 Stalford, H. and Hollingsworth, K. (2017). Judging Children's Rights. in: Stalford, H., Hollingsworth, K. and Gilmore, S. (eds), *Rewriting Children's Rights Judgments. From Academic Vision to New Practice*, Bloomsbury, p. 21ff.

39 See the United Nations Treaty Database, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited 17 June 2019). Skelton, A. (2015) in Liefaard, T. and Doek, J.E, 14.

40 As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. For a brief drafting history see Sloth Nielsen, J. (1996), 325-328.

41 Skelton, A. (2015), In Liefaard, T. and Doek, J.E. 14 with reference to Friedman, A. Pantazis A., and Skelton, A. (2009). Children's Rights. In: Woolman, S., Roux, T. and Bishop, M. (eds). *Constitutional law of South Africa*, Cape Town: Juta, pp. 41.1-36).

simplicity and its scope. It recognises the child's rights: to name and nationality (section 28(1)(a)), family and alternative care (section 28(1)(b)), basic nutrition and healthcare (section 28(1)(c), protection from exploitation and abuse (section 28(1)(e)-(f)) and protection from the arbitrary detention (section 28(1)(g)). In line with Article 1 of the CRC, section 28(3) defines a child as a person under 18 years and in requiring that a child's best interests are of "paramount importance in every matter concerning the child", section 28(2) of the Constitution goes beyond the CRC standard (article 3(1) of which requires that a child's best interests are "a primary consideration").[42] Significantly, Section 28(1)(h) provides children with the additional safeguard of the right to be assigned a legal practitioner at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result". This is a unique provision which reinforces the child as a legal actor and in contemplating the child's participation in civil proceedings, reflects an early and progressive understanding of children's access to justice.[43]

By any measure, the content of section 28 is impressive. Judged against the standards of the CRC, and the Committee's recommendation that such provision must be right-based, Tobin notes that the entitlements in the provision "are canvassed in the language of rights and clearly draw their inspiration from the Convention".[44] In terms of substantive content, the breadth of section 28 is strong insofar as it gives expression to a number of socio-economic and civil and political rights, without caveat or condition, reflecting the political consensus that surrounded the adoption of section 28.[45] The choice of rights appears firmly rooted in the South Africa experience – with emphasis on the child's survival rights of nutrition and shelter for example and more detailed references to the child's right to protection from the harms of economic exploitation and armed conflict.[46] It is with respect to the Committee's recommendation, that states parties incorporate the Convention's general principles in their national constitutions, that the provision falls short however. The key elements of the Convention's principles in Article 2 (non-discrimination) and Article 6 (right to life, survival and development) can be found elsewhere in the Bill of Rights (e.g. section 9 on equality and section 11 on the right to life as well as in the references in sections 28 and 29 to the cornerstones of the child's development). Thus, the only CRC principle given explicit protection in the Bill of Rights is the best interests of the child. As noted above, section

42 See Bonthuys, E. "The Best Interests of the Child in the South African Constitution" (2006) 20(1) *International Journal of Law, Policy and the Family* 23-43, 32-33.

43 See generally Liefaard, T. (2019) "Access to Justice for Children: Towards a Specific Research and Implementation Agenda". 27(2) *The International Journal of Children's Rights* 195-227.

44 Tobin, J., at 112.

45 Sloth-Nielsen, J., (1996), at 326.

46 These provisions also reflected the emphasis in the African Charter on the Rights and Welfare of the Child ratified by South Africa in 2000. See further Binford, at 344-347.

28(2) requires that the child's best interests are of "paramount importance in every matter concerning the child", representing a stronger formulation than the "primary consideration" approach set out in Article 3 of the CRC. While it is positive that section 28 gives constitutional expression to the best interests principle, there have been concerns, evident in the case-law, about its interplay with the other provisions.[47] Moreover, the absence of the child's participation rights is a significant omission from section 28, which makes no reference to the child's right to be heard in all matters that affect him/her as required by Article 12(1) of the CRC. It is very welcome that section 28(1)(h) recognises that the child has a right to legal representation in civil proceedings, if "substantial injustice" would otherwise result.[48] This echoes the reference to legal representation in Article 12(2) of the Convention. At the same time, the absence of the substantive right of participation means that section 28 falls short of the Committee's recommendations in this area. The articulation of civil rights (unspecified), that apply to children in the other provisions of the Bill of Rights, has been said to create an expectation for the participation of children in political decision-making.[49] However true, this is a poor substitute for including in the Constitution a child specific right to participation along the lines of 12. Perhaps, a more substantive amelioration of this deficit can be found in section 39(1)(b) of the Constitution, which requires the courts to take account of international law in its interpretation of the Bill of Rights. This gives ample scope to the Constitutional Court to draw on the provisions of the CRC and indeed other instruments such as the African Charter on the Rights and Welfare of the Child to strengthen section 28.[50] The impact of this provision is considered further below.

The Committee on the Rights of the Child has made clear that constitutional expression of children's rights is of little value without effective mechanisms in place to provide for their enforcement and it is here that the South African Constitution hits the higher water mark of international comparison. In particular, section 7(2) of the South Africa Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights and section 38 secures the enforcement of these rights before a court, with an entitlement to secure appropriate relief from a court where rights have been breached. [51] The justiciability

47 See Bonthuys, E. (2006); Skelton, A. (2018). "Child Justice in South Africa: Application of International Instruments in the Constitutional Court". 26(3) *The International Journal of Children's Rights* 391-422.

48 On aspects of its implementation see Stewart, L. "Resource constraints and a child's right to legal representation in civil matters at state expense in South Africa" 19 *The International Journal of Children's Rights* (2011) 295-320.

49 Viviers, (2012) A. and Lombard, A. "The ethics of children's participation: Fundamental to children's realisation in Africa" 56(1) *International Social Work* 7-21

50 On the use of this provision, see further Skelton, A. (2018).

51 Skelton, A. (2015), at 13.

and remedy provisions mean that the South Africa Constitution clearly meets the Committee's expectations in this respect.[52] It also appears to meet the standards set by the Venice Commission which has recommended that Council of Europe member states put in place efficient mechanisms, judicial and non-judicial, to remedy possible violations of children's rights.[53]

Compared internationally, the children's rights provisions in the South African Constitution are impressive in both substance and enforceability. Tobin's analysis of the world's constitutions concludes, with respect to South Africa, that there are few jurisdictions where children's rights enjoy such explicit protection and fewer still where such rights are justiciable.[54] O'Mahony, whose assessment of the children's rights provisions of the world's constitutions according to a typology of visibility, agency and enforceability, concludes that "South Africa offers the clearest example internationally of a constitution that scores highly on all three spectrums".[55] On paper, in almost every material respect, therefore, the South Africa model of constitutional incorporation of children's rights sets the bar high, and thus explicitly echoes the Committee's recommendations on giving constitutional expression to children's rights at national level and doing so on an enforceable rights-basis. The next section of this paper goes on to consider the extent to which this potential has been realised with respect to the development of children's rights jurisprudence by the Constitutional Court and considers in addition what additional lessons can be learned from the South African experience.

4 Realising the potential of section 28 from a children's rights perspective: the case-law of the Constitutional Court

There is now extensive case-law from the South Africa Constitutional Court on children's rights matters, with equally comprehensive academic analysis of its merits and scope.[56] Rather than repeating this analysis

52 Tobin, J. at 119.
53 Venice Commission, para 146.
54 Venice Commission.
55 O'Mahony, C. (2019) (in press).
56 See, for example, Sloth-Nielsen, J, in this volume. (TBC); Centre for Child Law (2018). *20 Years of Imagining Children Constitutionally – Strategic Litigation and Advocacy for Children's Rights in South Africa*. Pretoria; Skelton, A. (2018); Skelton, A. (2015); Sloth-Nielsen, J. and Kruuse, H.; Sloth-Nielsen, J. and Mezmur, B., "2 = 2 = 5: Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)". 16(1) *The International Journal of Children's Rights* (2008) 1-28; Robinson, JA, "Children's Rights in the South-African Constitution *6(1) Potchefstroom Electronic Law Journal* (2003) 1-58; and Sloth-Nielsen, J. (2002). "Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child". 10(2) *The International Journal of Children's Rights*, 137-156.

here, this article seeks to draw on the literature to review the children's rights case-law from the perspective of the Committee's guidance on Convention implementation.

The first question to address is whether the South Africa case-law reflects a rights-based approach to the determination of children's issues. By all accounts, the first decade of South African constitutional jurisprudence was disappointing in this respect. According to Sloth-Nielsen, claims under section 28 in the early years of the Constitutional Court focused mainly on the rights of parents.[57] She observes that, in the initial constitutional litigation, children were largely invisible and their constitutional rights were "largely … harnessed by adults in pursuit of their own claims" whereas "children's individual interests" did not take "centre stage".[58] Identifying one reason for this emphasis, Justice Albie Sachs criticized the practice of failing to hear the voices of the child. In his postscript to the 2000 case *Christian Education South Africa v Minister of Education* Justice Sachs posited that although the state and the parents were in a position to speak on behalf of children, "neither was able to speak in their name". Denying the children a *curator ad litem*, who could have made sensitive enquiries, children voices were not heard. Had they been included, Justice Sachs observed, "[children's] actual experiences and opinions … would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure".[59] The absence of the participation principle (article 12) from section 28 was arguably being keenly felt here.

There were also substantive outcomes that were regarded as disappointing from a children's rights perspective. Principal among these was the *Grootboom* case in which the Constitutional Court took a restrictive approach to the justiciability of the child's rights under section 28(1)(c) of the Constitution (to basic nutrition, shelter, basic health care services and social services).[60] Here, the Court held that section 28 does not create "any primary obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families".[61] Accordingly, the Court ruled that "there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of section 28(1)(c)".[62] This ruling was heavily criticised for denying children "a preferential

57 Sloth-Nielsen, J, in this volume. (TBC) with reference to *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051.
58 Sloth-Nielsen, J. in volume (TBC); see also Sloth-Nielsen, J. (2002).
59 *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 at 53.
60 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
61 *Grootboom,* at 77.
62 *Grootboom*, at 79.

claim to resources" which some suggested represented the true meaning of section 28(1)(c).[63]

As the first decade of the 1996 Constitution came to an end, however, the jurisprudence of the Constitutional Court began increasingly to recognise children's interests as self-standing, requiring independent consideration.[64] Cases such as *Centre for Child Law v Minister for Home Affairs*[65] on the interests of migrant children in detention, *AD v DW,*[66] on intercountry adoption, *De Reuck v DPP*, [67] which upheld the ban on possession of child pornography in children's best interests, and *Brandt v S,*[68] which concerned sentencing of children and the (restrictive) use of deprivation of liberty in this regard, all pointed to a shift in the Court's approach towards a recognition of the child's status as an autonomous rights holder.[69] At the same time, there was an ongoing tension evident in the case-law of the Constitutional Court between the desire to offer children protection on the one hand and to recognize their autonomy on the other.[70]

Importantly, especially in light of the above critique of section 28 in this respect, Sloth-Nielsen and Mezmur noted that the Court's shift towards a more rights-based approach was accompanied by children's views being taken into account.[71] Legal representation for children and the appointment of curators (*ad litem*) or *amicus curiae* to represent the interests of children during the legal proceedings played a significant role in the promotion of a greater child-rights approach in the litigation.[72] A notable increase in public interest litigation, especially under the leadership of the Centre for Child Law,[73] sometimes including children's

63 Sloth-Nielsen, J. in volume (TBC); see also Nolan, A. (2017). "Commentary on *Government of the Republic of South Africa and Others v Grootboom*" in: Stalford, H., Hollingsworth, K. and Gilmore, S. (eds), *Rewriting Children's Rights Judgments. From Academic Vision to New Practice*, Bloomsbury, 311-318.

64 Sloth-Nielsen, J. and Mezmur, B. (2008)..

65 Centre for Child law and Another v Minister of Home Affairs and Others 2005 (6) SA 50 (T).

66 AD and Another v DW and Others (CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC).

67 De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

68 Brandt v S 2004 JOL 1322 (SCA).

69 Sloth-Nielsen, J. in volume (TBC).

70 See Sloth-Nielsen, J. in volume (TBC); see also later *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC).

71 Sloth-Nielsen, J. and Mezmur, B. (2008).

72 Jonas highlights in this respect how "practices and experiences of South Africa where *amicus* participation has resulted in the phenomenal growth of constitutional jurisprudence." See Jonas, O. "The participation of the amicus curiae institution in human rights litigation in Botswana and South Africa: a tale of two jurisdictions" 59(2) *Journal of African Law* (2015) 329-354.

direct involvement,[74] has over the years had a transformative effect on the substance, as well as the outcome of constitutional jurisprudence on children's rights issues. This is perhaps best illustrated by the landmark case of *S v. M (Centre for Child Law as Amicus Curiae)*[75] and the following dictum of Justice Albie Sachs:

> "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, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."[76]

Another strong example, highlighting the potent nature of section 28, is reflected in the following statement from Justice Cameron in *Centre for Child Law v Minister for Justice and Constitutional Development and Others*:

> "The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children."[77]

Sloth-Nielsen and Kruuse note, with reference to both Justice Sachs' and Justice Cameron's dicta, that "South African courts had begun to construct an image of the "constitutional child", which no longer only focused on children's protection, but included emancipatory elements and a recognition of autonomy rights.[78] Skelton suggests that this case-law achieved a balance in "[t]he approach to children in (South Africa) litigation encompasses both the need to protect children and advance their [autonomy] rights"[79] while Sloth-Nielsen similarly concluded that that in the South Africa case-law, "[c]hildren's rights had been employed both as a sword (…) and as a shield".[80]

Despite this progress, however, the Constitutional Court has continued to be criticised for reaching for the best interests principle under section

73 See Centre for Child Law (2018).
74 See e.g. *Centre for Child Law* v *Hoerskool Fochville* 2016 2 SA 121 (SCA), as cited in Sloth-Nielsen, J. in volume (TBC).
75 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).
76 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC), para. 19.
77 Centre for Child Law v Minister for Justice and Constitutional Development and Others (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC), para. 25.
78 Sloth-Nielsen, J. and Kruuse, H, at 671ff.
79 Skelton, A. (2017) Chapter 11: Constitutional protection of Children's Rights. In: Boezaart, T. (ed) *Child Law in South* Africa, Juta, at 358, as cited by Sloth-Nielsen, J. in volume (TBC).
80 Sloth-Nielsen, J. in volume (TBC).

28(2) when substantive rights would be more consistent with a rights-based Convention-compliant view.[81] Apart from the concern that the courts prefer the more woolly, paternalistic "best interests" principle to an approach that underscores children as the holders of rights, Skelton highlights that this approach deprives children's rights under the Constitution of more explicit consideration and elaboration from the courts.[82] Perhaps this reflects the tension evident in the children's rights literature between "interests" and "rights",[83] which the Committee on the Rights of the Child has also tried to address.[84] At the same time, Sloth-Nielsen remarks that the best interests principle has been developed into "a constitutional right, rule of procedure, and a principle" under section 28, meaning that it is "hardly an empty vessel any longer".[85] This is a very good illustration of how working through children's rights issues in the national courts can help to further theoretical thinking about the implementation of children's rights principles. Here, as in other areas, the Constitutional Court has shone a light on how a balance can be struck between protection and welfarism on the one hand, and autonomy, emancipation and participation on the other.[86]

Reflective of the comprehensive nature of the Convention, which recognises children's rights in all areas of their lives, academic analyses of the case-law also highlight the breadth of children's rights issues considered by the Constitutional Court over the years. In their analysis of the Court's jurisprudence, Sloth-Nielsen and Kruuse observe that during 2008 and 2013 the case-law tended to be dominated by issues, among others, on the right to dignity of the child,[87] the right to education[88] and

81 Skelton, A. (2018); cf. Couzens, M.M. (forthcoming), *The application of the United Nations Convention on the Rights of the Child by national courts*, PhD dissertation Leiden University; see also Vandenhole, W. (2015). Belgium. In: Liefaard, T. and Doek, J.E. (eds)., 105-122, who shows that this is an issue of concern elsewhere as well.

82 Skelton, A. (2018).

83 See for example, Kilkelly, U. "The Best interests of the Child: A Gateway to Children's Rights", in Sutherland, E. and Barnes Macfarlane, LA, *Implementing Article 3 of the United Nations Convention on the Rights of the Child*, Cambridge University Press, 2016, 51-66.

84 Committee on the Rights of the Child, 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, 29 May 2013.

85 Sloth-Nielsen, J. in volume (TBC) with reference to Couzens, M.M. (forthcoming),

86 See e.g. the closing remarks of Sloth-Nielsen in Sloth-Nielsen, J. in volume (TBC).

87 See e.g. *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC), para. 18 in which the court held that "[e]very child has his or her own dignity" and that "[i]f a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them".

88 *Governing Body of the Juma Musjid Primary School v Essay* 2011 8 BCLR 761 (CC).

the availability of the required resources for children's implementation and remedies in this regard.[89] Throughout its history, however, the South African Constitutional Court has considered an impressive range of important children's rights issues. For instance, it has considered children's rights in the family, including the right to parental or family care,[90] the court review of decisions to remove children from their families,[91] international child abduction,[92] intercountry adoption[93] and surrogacy.[94] Very recently, the Constitutional Court declared the common law defence of reasonable chastisement unconstitutional[95] but it has also considered the child's right to protection from harm in cases concerning child pornography,[96] the right to be protected against corporal punishment[97] and against abuse,[98] the right to dignity of the child[99] and the protection of child victims.[100] The Court has also developed jurisprudence on sensitive issues, such as the rights of children accused of criminal offences, including the prosecution of children for consensual sexual activity[101] and the right of child sex offenders to be protected from automatic placement on the sex offenders register.[102] While not limited to children's rights, the Court has

89 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC). See further Sloth-Nielsen, J. and Kruuse, H. (2013); see also Sloth-Nielsen, J. in volume (TBC).

90 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

91 *C and Others v Department of Health and Social Development, Gauteng and Others* (CCT 55/11) [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC).

92 *Sonderup v Tondelli and Another* (CCT53/00) [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171.

93 *AD and Another v DW and Others* (CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC)

94 See e.g. *AB and Another v Minister of Social Development* [2016] ZACC 43.

95 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.

96 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC).

97 *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000).

98 *Geldenhuys v National Director of Public Prosecutions and Others* (CCT 26/08) [2008] ZACC 21; 2009 (2) SA 310 (CC); 2009 (1) SACR 231 (CC); 2009 (5) BCLR 435 (CC).

99 *Centre for Child Law v Minister for Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

100 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC).

101 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC).

102 *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; see also Zita Hansungule, Protecting Child Offenders' Rights. Testing the

developed extensive jurisprudence on the Constitution's socio-economic provisions addressing the child's rights to housing, healthcare and education and rights to social assistance and inheritance have also been litigated during this time.[103]

Case-law by its nature is incremental and it is evident that the Constitutional Court has been growing in stature and reach since its establishment under the 1996 Constitution. While not necessarily limited to the Constitutional Court (the focus of this present analysis), Sloth-Nielsen concludes that, over the years, children's rights scholars have detected a "growing insertion of children's rights considerations in increasingly diverse areas of legal interaction", reflecting the increased attention to children's rights in areas to which they were perhaps not previously considered relevant.[104] It is evident that the role of amicus curiae, especially South Africa's Centre for Child Law, had the effect of shining a children's rights light on cases involving and affecting children so that the Constitutional and indeed other courts could better see them from this perspective.

The scope of South Africa's children's rights jurisprudence is impressive, especially insofar as it extends way beyond traditional family and child law matters, into complex and sensitive areas of children's rights such as those highlighted above. Although no one factor has enabled this success, the expression of children's rights in the South Africa Constitution and the establishment of the Constitutional Court with a powerful mandate to enforce those rights have been essential ingredients. Requiring the Court to draw on international instruments like the Convention on the Rights of the Child has been instrumental at times in ensuring that the jurisprudence aligned with South Africa's international obligations. Skelton and others note that the CRC and the ACRWC have been key influences on the Court where they have informed the South African jurisprudence in line with the Bill of Rights' interpretive clause (section 39).[105]

It is also clear that the power to interpret and apply the national constitution has led to children's rights becoming embedded in the domestic legal system. These observations reflect the findings of other international research that has highlighted the benefits to children of "bringing rights home".[106] In this way, the South African example

constitutionality of the National Register for sex offenders, SA Crime Quarterly, December 2014 (http://dx.doi.org/10.4314/sacq.v50i1.3).

103 For examples see the *Grootboom* case referred to earlier; see also Sloth-Nielsen, J. in volume (TBC) on the case law (also from other courts than the constitutional court) regarding education; see furthermore Skelton, A. (2017), at 346-347, as cited by Sloth-Nielsen, J. in volume (TBC).

104 Sloth-Nielsen, J. in volume (TBC).

105 Skelton, A. (2015).

106 See Lundy, L., Kilkelly, U., Byrne, B and Kang, J.; Sandberg, K. (2014). "The Role of National Courts in Promoting Children's Rights: The Case of Norway" 22(1) *The International Journal of Children's Rights* 1-20 and Couzens, M.M. (forthcoming),

illustrates the value of permitting, if not requiring, the courts to draw on international and regional law in their interpretation of domestic children's rights provisions showing how such approaches can bring a different perspective or a different frame of reference at times.[107] A strong feature of the South Africa experience is that these approaches can be stimulated by strategies of public interest litigation, such as that conducted by the Centre for Child Law, which test the boundaries of legal standing and *amicus curiae* participation to promote greater access to justice for children. But regardless of the strength of the legal provision and the determination of the litigating parties, it is only with a responsive and informed judiciary, willing to explore new avenues, that real change in children's rights protections can come about. For over two decades now, the South African Constitutional Court has led the development of a "climate" favourable to children's rights and children's rights litigation.[108] This has not only contributed to specific case-law to advance children's rights at a domestic level, [109] it has also influenced and inspired the promotion of children's rights and children's rights litigation internationally.[110] The South African experience clearly highlights that those who litigate, advocate and campaign for children's rights, individually or collectively, play a vital supportive role in the Convention's implementation.[111]

5 Lessons from the South Africa Constitutional experience

The preceding analysis shows that South Africa is an exemplar of constitutional incorporation of children's rights, in line with the requirements of the Convention and the guidance of the Committee on the Rights of the Child. The final section of this article reflects on what lessons can be learned from South Africa's constitutional history in order to better protect children's rights in other jurisdictions.

Strength of constitutional expression

As noted above, the Committee on the Rights of the Child has recommended that where children's rights are given constitutional expression, this should include references to the Convention's general

107 See section 38 of the Constitution; Skelton, 2015, pp. 15-17, with reference to Sloth-Nielsen, J. and Mezmur, B. (2008)., among others.
108 Skelton, A. (2015), at 13.
109 See Sloth-Nielsen, J, in this volume. (TBC); Centre for Child Law (2018); Skelton, A. (2015).
110 See Skelton, A. (2015), at 14 with reference to Alston, P. and Tobin, J. (2005). *Laying the Foundations for Children's Rights*. Florence: UNICEF Innocenti Research Centre.
111 See generally Liefaard, T. and Doek, J.E. (eds) (2015). *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, Springer; Kilkelly, U. (2011) "The CRC at 21: Assessing the Legal Impact". *Northern Ireland Legal Quarterly*, 62 (2):143-152.

principles. Despite the absence of the CRC's participation principle, section 28 nonetheless stands out, in international terms, as a weighty constitutional provision whose detail goes far beyond what the Committee has recommended in other ways.[112] O'Mahony notes for instance there are few, if any, national constitutions that contain the level of detail found in the Constitution of South Africa.[113]

With respect to the Committee's recommendation that constitutional expression of children's rights must be rights-based, it is significant that, compared with other constitutions, the South African provision is framed unequivocally in rights language. Section 28(1) begins with the phrase: "every child has the right to …" and thereafter the provision mirrors the approach of the Convention by reinforcing the child's status as an autonomous rights-holder.[114] It is significant too that this appears to have played an important role in the Court's interpretation and application of section 28 where it draws on the unequivocal rights language in the provision to impose clear obligations on national authorities to vindicate the rights of the child. The fact that the Constitution includes both socio-economic rights (see the references to nutrition, shelter and health care) and civil and political rights (see the right to name and nationality), reflecting the commitment in the Convention to a comprehensive and holistic view of the rights of the child has also been significant in scaffolding the development of a comprehensive body of jurisprudence. By any analysis, then, the breadth of children's rights jurisprudence from the Constitutional Court has been enabled, in the first instance, by the Constitution's detailed, comprehensive and rights-based children's rights provision.

Enforceability and remedies for the breach of children's rights

The second notable element of the South Africa experience is the power that the South African Constitutional Court has to enforce section 28, using a range of remedies when children's rights are breached. As noted above, the Committee on the Rights of the Child has recommended that enforcement is key to the meaningful protection of children's rights at national level, noting that reparation is key to the vindication of these rights. As considered here and elsewhere, the case-law of the Constitutional Court is wide-ranging and dynamic, addressing a multitude of children's rights issues. In one sense, there can be no better evidence of the fact that section 28 did indeed provide the Court with solid platform on which to build the constitutional law on children's rights. Crucially, however, this case-law goes beyond theoretically interesting or erudite analyses of the law. The Court also, in numerous

112 Tobin, J. (2005); Habashi et al., (2010) "Constitutional Analysis: A Proclamation of Children's Right to Protection, Provision, and Participation", 18 *International Journal of Children's Rights* 267.
113 See O'Mahony, C. (2019) (in press).
114 Doek, J.E. (2019), The Human Rights of Children: An Introduction, in: Kilkelly, U. and Liefaard, T. (eds). *International Human Rights of Children*. Springer, pp. 3-29.

cases provided remedies for children – individually and collectively – whose rights were breached, going beyond providing reparation to individual children to the choice of remedies that go to the heart of children's enjoyment of their rights. Remedies have included the striking down of legislation and ordering compensation for wrongful detention, while also including more creative measures such as requiring child-friendly interpretation of national law, not to mention the substantial gains achieved through out of court settlements and agreements.[115] This flexible approach to remedies for the breach of children's rights demonstrates how litigating children's rights can be used to benefit children beyond those participating in the litigation, to the advantage of children more generally, all the time staying true to the ultimate goal of vindicating children's rights, meeting children where they are in this process.

Legal training and the awareness of children's rights

The third important element of the South Africa experience, again drawing on the recommendations of the Committee on the Rights of the Child, has been the existence among the senior judiciary of those with knowledge and awareness of children's rights. As noted above, the Committee has identified that children's rights training for judges is vital for the implementation of the Convention and frequently reminds states parties of the importance of building capacity and raising awareness of those who work with and for children in the legal system. International studies have illustrated the importance of judicial training in the successful implementation of the Convention[116] and significantly, when the Committee examined the first periodic report of South Africa under Article 44 of the Convention, it welcomed the integration of human rights into the training curriculum for magistrates, and other officials concerned with the administration of justice.[117] In 2016, when it next considered South Africa implementation, it specifically welcomed "the progressive application by the judiciary, in the state party's jurisprudence, of the rights and principles stipulated in the Convention".[118] While the role of skilled lawyers has been instrumental in the development in South Africa of an innovative body of children's rights law, it is the combination of this expertise with the demonstrated awareness of and commitment to children's rights by the Constitutional Court that allowed the development of such progressive and expansive children's rights jurisprudence in South Africa. In this respect, South Africa offers a very important illustration of the impact of judicial training

115 Sloth-Nielsen, J. in this volume.
116 See Lundy, L. Kilkelly, U., Byrne, B and Kang, J. (2012); See also Liefaard, T. and Doek, J.E. (eds) (2015).
117 Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: South Africa*, CRC/C/15/Add.122, (2000) para 5.
118 Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: South Africa*, CRC/C/ZAF/CO/2, (2016) para 5.

– a specific recommendation of the Committee on the Rights of the Child – on the legal advancement of children's rights at national level.

6 Conclusion

From the perspective of the expression and enforcement of children's rights, the South African story is overwhelmingly positive – a strongly worded constitutional provision, whose justiciability has been exploited by skilled lawyers before a progressive judiciary willing to use all the powers of the Constitutional Court to make a difference, where possible, in the protection of children's rights. While the historical context to this development is perhaps unique, there are many lessons for other jurisdictions to learn as to how to give greater constitutional effect to children's rights.

What remains challenging – in South Africa as elsewhere - is the translation of these constitutional children's rights principles into the reality of children's lives. As the 2016 Concluding Observations on South Africa's state party report shows, South Africa's record in the implementation of the Convention is poor, with substantial gaps in the protection and promotion of children's rights across many aspects of their lives.[119] The Committee's Observations draw attention to the fundamental breaches of children's substantive rights in South Africa, while its recommendations highlight the need for widespread structural and institutional reform designed to secure better protection and promotion of children's rights across the state party. It is difficult not to despair that such inequality and injustice continues to exist in a country with such an impressive and long record in the constitutionalisation of children's rights. Here it is important to remember that the constitutionalising children's rights is the beginning not the end of the journey of giving effect to children's rights and even where the Constitution sets a high watermark, law and policy must also align with the Convention's comprehensive, inclusive and rights-based approach to children's rights if rights are to be translated into the kind of political action that enriches the lives of children in their families and communities. Research has highlighted the value of adopting non-legal measures of implementation, including children's rights budgeting, the allocation of resources, national plans for children and the creation of national human rights institutions as measures capable of building a culture of respect for children's rights that is meaningful and lasting.[120] Only when political and constitutional change combine, therefore, can respect for children's rights be truly transformative. In South Africa, as elsewhere, this is an ongoing process.

119 See Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: South Africa*, CRC/C/ZAF/CO/2, (2016).
120 Kilkelly, U. (2019).

The legal battle for the universal access to primary education in Swaziland[1]

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SUMMARY

This article examines the extent to which Swaziland complies with its obligation under international law and section 29 of its Constitution to implement the right to primary education. To this end, it examines two court decisions by the same name in different years, related to the same set of facts, but with different outcome. The case name is, *Swaziland National Ex-Miners Workers Association v The Minister of Education* (2009), which epitomises the legal battle for universal access to primary education. In its analysis of the Ex-Miners Workers Association case, the article seeks to draw lessons from the 20 years of the Centre for Child Law's (CCL) education litigation in South Africa. From the CCL's litigation experience, the Swaziland courts should learn how to craft structural interdicts that can enable them not only to comply with the law, but to also consider the broad socio economic and political environment.

1 Introduction

The right to primary education is indispensable for human development. It is an enabling right as it empowers the beneficiary not only to develop himself or herself, but to contribute to the development of their community.[2] The prominence of this right is highlighted by its recognition in various human rights instruments at the global[3] and regional[4] levels as well as in most national constitutions including the 2005 constitution of Swaziland. It is worth noting that Swaziland is party to these international and regional agreements seeking to foster the right to education. Under article 29(6) of this Constitution,

1 Aspects of this article build on Skelton and Kamga "Broken promises: constitutional litigation for free primary education in Swaziland" *Journal of African Law* vol 61, No 3 (2017) 419–442.

2 *Brown v Board of Education of Topeka* (1954) 347 US 483 at 493; Skelton "Strategic litigation impacts: Equal access to quality education" Open Society Justice Initiative, Open Society Foundations Education Support Program (2017) 22;

3 The International Covenant on Economic, Social and Cultural Rights, (General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, arts 13(2)(a) and 14); The Convention on the Rights of the Child (Art 28), and the 1960 United Nations Educational and Cultural Organisation (UNESCO, art 4 a).

4 Art 17 African Charter on Human and Peoples' Rights, adopted on 27 June 1981 by the OAU Assembly, OAU Doc CAB/LEG/67/3 Rev 5 (1982); Art 11 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force on 2 November 1999.

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> "[e]very Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade".

However, this global recognition of the universal right to primary education does not always translate into reality on the ground. Kishore Singh, the special rapporteur on the right to education explains as follows: "the enjoyment of the right to education is often least accessible to those who need it most – disadvantaged and marginalized groups and, above all, children from poor families". [5]

It is in this context that this article examines the extent to which the constitutional "promises"[6] of Swaziland on the right to universal access to primary education is given effect to. The article argues that these promises are not respected. To this end, it examines two court decisions by the same name in different years, related to the same set of facts, but with different outcome. The case name is, *Swaziland National Ex-Miners Workers Association v The Minister of Education* (2009), which epitomises the legal battle for universal access to primary education.[7] Swaziland is a fascinating case study because as indicated above, its constitution provides for universal primary education with a timeline from its commencement, and this is unique.

In its analysis of the legal battle for universal access to primary education, the article relies on three related factors namely the case study, constitutionalism and remedies. Through the examination of case law, the article demonstrates that when a core principle of constitutionalism such as the separation of power is lacking, it is almost impossible to protect the right to primary education because the judge is likely disregard normative correctness to the benefit of pragmatism, or is likely to "balance interest" to detriment of "right maximising approach".[8] Nonetheless, it also shows that the quality of remedies, especially structural interdicts can lead to an effective protection of the right as they enable the court to reconcile normative correctness and pragmatism.

In its analysis of the Ex-Miners Workers Association case, the article seeks to draw lessons from the 20 years of the Centre for Child Law's (CCL) education litigation in South Africa. From the CCL's litigation experience, the Swaziland courts should learn how to craft structural interdicts that can enable them not only to comply with the law, but to also consider the broad socio economic and political environment. In making its case, the article relies on the doctrinal and normative method.

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5 Singh "Justiciability of the right to education" Report of the Special Rapporteur on the Right to Education (2013) UN GA A/HRC/23/35, 3.

6 Skelton and Kamga (2017)419.

7 *Swaziland National Ex-Miners Workers Association and Another v The Minister of Education and Others* [2009] civil case no 335/09 (16 March 2009). *Swaziland National Ex-Miners Workers Association v The Minister of Education and Others*, [2010] civil case no 2168/09 (19 January 2010

8 Gerwitz "Remedies and Resistance" *Yale Law Journal* vol No 92(1983) 591.

This approach entails an analysis of the case law and normative argument about its implications for strategic litigation.

The article will be divided into five parts including this introduction. The second parts will unpack the cases that give rise to ligation on the right primary education to understand the courts approaches *vis a vis* the international regime of the right under discussion. The third part of the article will analyse the constitutional landscape which informs the ultimate decision of the courts. It argues that in the context of "Constitution without constitutionalism" or a futile constitutionalism, the enjoyment of human rights and the right to primary education is an illusion. The fourth part of the article examines possible remedies that could have been offered with consideration of the separation of powers doctrine. Drawing from the CCL's experience, it demonstrates that the court through structural interdicts or supervision can ensure the protection of the right to primary education without violating the law and remain pragmatic. The final part of the article provides concluding remarks.

2 *Swaziland National Ex-miners Workers Association v the Minister of Education*: Facts and decisions

In total disregard of section 29(6) of the Constitution that compels the government to ensure free universal access to primary education within 3 years of the commencement of the Constitution, many learners did not enjoy the right after the stated timeline has passed. Consequently, in 2009, affiliates of the Swaziland National Ex-Miners Workers' Association decided to take the state to court to claim the right to education for their children and grandchildren. In court, the association requested a declaratory order recognising that the right to education is free and subject to immediate realisation. To substantiate their arguments, the applicants requested a combined reading of article 29(6) and section 60(8) of the 2005 Constitution which further strengthens the state's obligation on the right to education in these terms: "[w]ithout compromising quality, the State shall promote free and compulsory basic education for all and shall take all practical measures to ensure the provision of basic health care services to the population".[9] In addition, the applicants highlighted the fact that the 3 years timeline had elapsed and many children still did not have access, and this was constituted in itself a violation of the Constitution.[10]

The respondents comprising the minister of education, the prime minister, the Swaziland government and the attorney general argued

9 2005 Constitution, sec 60(8) is a principle of state policy and, as such, non-justiciable.

10 *Swaziland National Ex-Miners Workers Association* (2009), at 16

that there was no violation of the right at issue. In their view, the right to primary education did not amount to "the provision of primary education free of charge to the parents of children",[11] but instead the adoption of a comprehensive programme seeking to establish an enabling context in which the quality of education is not compromised.[12] According to the respondents, the provision of textbooks, stationery, schoolbooks, competent teachers, classrooms and other infrastructure was an indication that the government was ensuring the right to universal primary education.[13] Furthermore, not only the respondents indicated that in their efforts to ensure free universal primary education, they paid school fees for the orphans and other vulnerable learners, they also noted that the right to primary education should be submitted to the regime of progressive realisation and availability of resources as other socio-economic rights.[14]

Rejecting this view, the court cautioned against a reading of free education that "will only do violence to the language, be artificial and in reality be absurd",[15] and ultimately distort the spirit of the Constitution.[16] Consequently, the court found for the applicants these terms:

> "I make a declaration that every Swazi child of whatever grade attending primary school is entitled to education free of charge, at no cost and not requiring any contribution from any such child regarding tuition, supply of textbooks, and all inputs that ensure access to education and that the said right accrued during the course of the period of three years following the coming into force of the Constitution. I make a further declaration that the third respondent being the Government of Swaziland has the obligation to provide education free of charge, at no cost, to every child so entitled."[17]

As correctly argued by Skelton and Kamga, this decision complied with the international regime of the right to primary education[18] which makes primary education "compulsory and available free to all".[19] If this is not applicable in the country at the time it becomes party to the Covenant, the States has two years "to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all".[20] It is important to note that Swaziland became party to the ICESCR on 26 March 2004 and the proceedings take place in 2019 or 5 years after the ratification of the ICESCR, and failed to comply

11 *Swaziland National Ex-Miners Workers Association* (2009), at 8
12 *Idem* 4.
13 *Ibid*.
14 *Idem*, at 9.
15 *Idem*, 22
16 *Idem*, 17
17 *Idem*, 27–28
18 Skelton and Kamga (2017) 428.
19 ICESCR, art 13 (2).
20 *Idem*, art 14. Also Committee on Economic, Social & Cultural Rights, General Comment 11 of 1999 on 'the Plans of action for primary education'

with its obligation to at least adopt a "detailed plan" to give effect to make "primary education compulsory and available free to all".

The decision is also in line with the international regime of the right to primary education because it does no submit primary education to "progressive realisation" which applies to secondary education, but exclusively to primary education to be made available, accessible, acceptable and adaptable.[21] More importantly, it should be made "compulsory" and "available free to all".[22]

Nonetheless, although important in entrenching the role of the court within the three branches of government,[23] the declaration is not strong enough, as it does not address the situation on the ground. According to Bishop a declaration is "often perceived as a weak remedy because it creates no direct legal consequences".[24] The Declaration is not and interdict or order that prescribes enforcement, but a mere recognition of the right. Mindful of the weakness of the remedy, in 2010, the Swaziland National Ex-Miners Workers Association brought a second High Court application.[25] In this application, they requested a mandatory order forcing the government to deliver the declared right without delay.

Unfortunately, the second application was thrown out of court as the judge was of the view that the government's programme for free education was "reasonable and satisfactory in view of the limited resources at the disposal of the respondents".[26] For the purpose of this decision, the court highlighted that the right to basic education as located in article 60(8) of the Constitution was a mere principle of state policy and, as such, was non-binding.[27] In reality, the court made a reversal and surprisingly moved the right to primary education within the realm of progressive realisation and availability of resources. In this regard, it held: "steps taken by the Respondents are in the circumstances reasonable and satisfactory in view of the limited resources at the disposal of the Respondents".[28] Interestingly, this uncanny decision was upheld by the Supreme Court of Appeal,[29]that also submitted the right to primary education to the progressive realisation and availability of resources regime.[30] If this approach were to be used, it was imperative for the court to scrutinise the state's plan of action aiming to secure "the

21 ICESCR, art 13 (2).
22 Id, art 13 (2)(a).
23 Bishop "Remedies" in Woolman *et al Constitutional Law of South Africa* (2012) 9-176 also *Eldridge v British Columbia* (1997) 151 DLR (4th) 577 (SCC) at para 96 quoted in Bishop, 9-176
24 *Ibid*.
25 *Swaziland National Ex-Miners Workers Association* (2010),
26 *Id*, para 52
27 *Id*, para 17.
28 *Swaziland National Ex-Miners Workers Association* (2010), above at note 7, para 52. y
29 *Swaziland National Ex-Miners Workers Association* (2010 appeal), above at note 18.
30 *Id*, paras 16 and 18.

progressive implementation of the right to compulsory primary education, free of charge" with attention to 'the number of years" for its implantation as well as its "time frame".[31] Unfortunately, the court failed to examine these international law standards related to the right to primary education. Not only this violates, international law, it also violates the Constitution of Swaziland which provides that "[e]very Swazi child shall within three years of the commencement of this Constitution have the right to free education in public schools at least up to the end of primary school, beginning with the first grade" The Constitution is progressive with explicit timeline that was not respected by the state given that the case was brought to court four years after the commencement of the Constitution. While this decision was a clear violation of international law, it is imperative to understand the possible reasons behind this blatant overlook of international norms.

3 The ineffectiveness of enforcing the right to primary education where the basics of constitutionalism are lacking

3 1 The notion of constitutionalism: A snapshot

Constitutionalism suggests a system of government in which the separation of powers between the executive, the legislature and the judiciary as well as judicial review are a reality. It is a system where the affairs of the state are characterised by respect for the rule of law, human rights, good governance, accountability and free and fair elections. Fombad writes that constitutionalism includes the

> "idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations."[32]

Accordingly, constitutionalism pointers include explicit provisions of freedom and fundamental rights in a bill of rights, the separation of powers, an independent judiciary, the judicial review and the presence of independent institutions to monitor democracy.[33] In other words, constitutionalism provides an enabling environment in which the independent courts can read the law without fear or favour. It offers an environment in which judicial deference (when it happens), is not

31 Committee on ESCR, General Comment, 11 para 10.

32 Fombad "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from southern Africa" 2007, vol 55, No 1 *The American Journal of Comparative Law* 14.

33 Fombad (2007); Kamga and Heleba, "Can economic growth translate into access to rights? Challenges faced by institutions in south Africa in ensuring that growth leads to better living standards" *Sur International Journal* (2013) 86

informed by the subordination of the judiciary to the executive or the legislative, but by the rule of law which compels the judge to avoid getting into the sphere of other powers.

Put differently constitutionalism captures the notion that the government is to be organises through and constrained by a set of constitutional rules. This notion rejects dictatorship or absolutism. [34] According to Waldron, central to the concept of constitutionalism are the notions of "control", "restraint" and "limit" the government coined under the notion of rule of law.[35]

But even dictatorship have their constitutions in which the rules that distance themselves from check and balances found in liberal constitutions are not necessarily respected in their context.[36] In the kingdom of Swaziland, the rule of law may well mean the supremacy of the king within the specific context of the kingdom.

Given that Swaziland is administered by law as well as the custom, people have the right to rely on their custom which enables them to have a constitution in which the King is paramount. This is in line with the idea of a "people having a right to establish their own form of government [that] is logically compatible with their establishment of a non-democratic constitution or a heavily compromised or truncated form of democracy".[37]

However, when a country such as Swaziland ratifies international treaties which foster liberal democracy and commits to comply with them, it cannot refuse to abide by them based on the local context. While local context matters, it cannot be used as a justification to violate ratified treaties, but should be use to give effect to them. Failure to comply with these treaties turns a country constitutionalism into a futile one because such constitutionalism supposed to comply with international norms that the country is party to. Put differently agreeing to a specific form of normative standards and their monitoring mechanisms and later rely on a "hybrid system" that negates the principles affirmed in ratified global standards transform that constitutionalism into a futile one.

In south Africa the apartheid system widely condemned took place under constitutional arrangements. The latter could not legitimise apartheid which was a crime against humanity. This is to say that the consideration of local context cannot trump global standards of human rights. In Swaziland, it does not help to provide for the separation of powers in a constitution if in reality there is none or else the fundamental

34 Waldon "Constitutionalism – A Skeptical View" (2010) 4-5 available at http://scholarship.law.georgetown.edu/hartlecture/4 (accessed 2019-08-18); also Waluchow "Constitutionalism" in the Stanford Encyclopedia of Philosophy available at https://plato.stanford.edu/entries/constitutionalism/.
35 *Idem*, 18
36 *Idem.*
37 *Idem*, 30.

law symbolises dishonesty for its unethical feature, and this become a futile law.

3 2 The futility of Swaziland's constitutionalism and its impact on the enforcement of the right to primary education

3 2 1 The futility of Swaziland constitutionalism

Similar to the 1968 Swaziland Constitution characterised by the supremacy of the executive in which the King could appoint members of the executive, legislative and the judiciary,[38] the 2005 Constitution gives incredible powers to the King. During the constitutional review process, which led to the adoption of the 2005 Constitution, King Mswati III singlehandedly appointed his brother to lead a commission without consultation of the masses.[39] So, the current recognition of the rule of law and judicial independence is a fallacy because in reality, the king is the alpha and omega of the Swaziland government. He is mandated by the Constitution to act as the head of state, [40] who may only rely on his cabinet and has no obligation to consider advice or opinion from any advisory authority after a possible consultation.[41] Moreover, the king has a say on the appointment of members of all states institutions. In addition and interestingly, all his acts under customary function are not open to judicial review.[42] This prominence of the King is an indication that there is no separation of powers.

As for the appointment of judges, in spite of their normative independence,[43] and the involvement of the Judicial Service Commission (JSC) on their appointment by the King, the latter is not obliged to

38 For example, under sec 98(1) of the Independence Constitution, "The holder of the office of Chief Justice or any office of judge of the High Court shall be appointed by the King, acting in accordance with the advice of the Judicial Service Commission". The Senate comprised 12 members, six of whom were elected by the House of Assembly, the remaining six being appointed by the king as he wished (Independence Constitution, sec 38(4)).

39 Maseko "The drafting of the Constitution of Swaziland, 2005" 2008 *African Human Rights Law Journal* 324 - 325.

40 2005 Constitution, section 64(1)

41 *Id*, sec 66(3) and (4).

42 2005 Constitution, sec 151(8) provides: "Notwithstanding subsection (2), the High Court has no original jurisdiction or appellate jurisdiction in matters relating to the office of ingwenyama [chief]; the office of indlovukazi [the Queen Mother]; the authorization of a person to perform the functions of the Regent in terms of section 8; the appointment, revocation and suspension of a Chief; the composition of the Swazi National Council, the appointment and revocation of appointment of the Council and the procedure of the Council; and the libutfo [regimental] system, which matters shall continue to be governed by Swazi law and custom."

43 Constitution of 2005, section 140.

consider the views of the JSC as he "enjoys discretionary powers on whom to appoint".[44] In addition, as correctly observed by Skelton and Kamga, "the king enjoys immunity from prosecution and, whenever he obstructs judicial independence, the constitution is silent on what should be done to protect the judiciary from such violation".[45] The domination of the executive on the judiciary is palpable. The International Commission of Jurists (ICJ) writes:

> "Swaziland's Constitution, while providing for judicial independence in principle, does not contain the necessary safeguards to guarantee it. Overall, the legislative and regulatory framework falls short of international law and standards, including African regional standards."[46]

The power of the king over the judiciary was exposed in 2011 when the JSC dismissed a former High Court judge (Thomas Masuku) for allegedly criticizing the king.[47] In addition, in the same year a practice directive from the former Chief Justice was unambiguous in prohibiting the registration of lawsuits against the king "directly or indirectly".[48] This specific directive was useful in protecting companies in which the king owns shares or interest against litigations.[49] A similar practice directive enabled the Chief Justice to oversee "sensitive political cases so as to shield the king and his cronies from facing the might of the law".[50] Nonetheless, it is important to note that in 2000, many judges resigned in protest against a statement of the prime minister that rejected a court decision finding against the king's brother.[51] However, judges have not always been resilient in Swaziland. Langwenya writes:

> "the judiciary seems to have been subdued through the purging of non-compliant judges and the rewarding of those who can and do toe the executive's line. With respect to the doctrine of separation of powers, Swaziland seems to have retrogressed despite a constitutional dispensation that provides a sound normative framework for the doctrine."[52]

Overall, it could be argued that although Swaziland has a constitution, it does not have constitutionalism or the latter is simply futile.

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44 Kamga and Skelton (2017) 424 also 2005 Constitution, sec 64(3) and (4).
45 *Ibid*; also see the 2005 Constitution, sec 228(1) and (2).
46 ICJ "Justice locked out: Swaziland rule of law crisis" (international fact finding mission report 2016) 5.
47 See UN Human Rights Council "ICJ oral intervention on the adoption of the outcome document of the universal periodic review of Swaziland" (15 March 2012) as quoted by Skelton and Kamga, 424
48 ICJ "Justice locked out: Swaziland rule of law crisis" (international fact finding mission report 2016) at 11.
49 Skelton & Kamga, 424.
50 ICJ "Justice locked out: Swaziland rule of law crisis" (international fact finding mission report 2016) at 11; also Skelton & Kamga, 424.
51 *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government* (NULL) [2000] SZHC 82 (5 September 2000).
52 Langwenya "Swaziland: Justice sector and the rule of law" (March 2013) AfriMAP and Open Society Initiative for Southern Africa at 91, available at: http://www.osisa.org/sites/default/files/afrimap_swz_justice_sector_main_text_web.pdf (last accessed 2019-03-21).

3 2 2 The impact of a futile constitutionalism on the enforcement of the right primary education: Judicial deference or judicial pragmatism?

Judicial deference is a core principle of the separation of powers. It posits that judges should not interfere with the domain of the executive or the legislature, but rather defer to them.[53] According to Mclean, "[d]eference is the court's understanding of its role and the role of other branches of government in adjudication".[54] For instance, judges should stay away from dealing with diplomatic matters or matters related to national security as they do not have expertise on these issues that are squarely within the domain of the executive. Clarifying the meaning of judicial deference, the Constitutional Court of South Africa underlines the need for courts to be mindful of their proficiency in a context of separation of powers where it is important not to venture into unknown spheres as doing so can be as detrimental as judicial timidity.[55] In highlighting the difference between justiciability which "determine[s] whether the court will make a ruling on a matter or not"[56] and deference, Mclean explains that "constitutional deference is a more subtle balance within the adjudication process determining the weight to be given to the decision-making process of other branches of government".[57] Shedding more light on the necessity for judicial deference, former Chief Justice Langa writes that "overly activist judges can be as dangerous for the fulfilment of the constitutional dream as unduly passive judges".[58] This is to say that the judiciary in the exercise of its function should definitely stay away from the areas of competence of other branches of government. Judicial deference is essential to ensure that the executive or legislature are not bogged down by unnecessary prescription by the judiciary.

While the deconstruction of judicial deference seems to suggest that the Swaziland judges deferred the implementation of the right to primary education to the executive that is competent on the matter, the country constitutional context characterised by the supremacy of the king suggests the contrary. This is so because as alluded to early, the king is powerful and enjoys a discretionary power over who becomes judge or not. This huge influence of the king hinders the independence of the judiciary that becomes reluctant to take any decision against him and therefore simply avoids dealing with some matters and defers them to his majesty. In this respect, in the first *Ex-miner Association's* application where the remedy sought in the form of declaration was weak and almost inconsequent, the court declared the right to primary education

53 For more, on deference, see McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009).
54 *Idem*, 62.
55 *Prins v President of the Cape Law Society of the Cape of Good Hope* (2002) 1 SACR 431 (CC).
56 Mclean (2009) 26.
57 *Ibid*.
58 Langa "Transformative constitutionalism" (2006) vol 17, No 3 *Stellenbosch Law Review* 358.

as immediately realisable. However, when it was time to call on the king to immediately give effect to the right to primary education as prescribed under international law, the courts displayed their reverence to the king and deferred to him. In this instance the courts use deference as an avoidance strategy or an "avoidance technique"[59] to shun from substantive engagement with the right. According to Ryan,[60]

> "avoidance techniques encompass a strong preference for relying on legislative and executive measures to define the substance of these rights; creating or expanding procedural remedies (especially remedies that emphasise expanding political access); interpreting the socio-economic rights either at a highly abstract or factually specific level; and limiting direct interventions to cases featuring clearly unconstitutional conduct."

This avoidance gives the impression that deference is problematic. Yet, it is more properly an aspect of the court's stance vis-à-vis the other branches of government and therefore encompasses important positive aspects, such as judicial responsiveness to institutional constraints of competence and legitimacy. According to Hoxter, deference "might sometimes be a desirable judicial stance".[61] This was also the position of the court in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*[62] where Justice O'regan held that "the Court should take care not to usurp the functions of administrative agencies"[63] and "should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government".[64] To substantiate this view, Justice Ngcobo held that even in a context where it is imperative to ensure transformation of the South African economy by giving fair share to black owned companies, "[t]he duty of the courts in this regard, … does not extend to telling the functionaries how to implement transformation. That must be left to the functionaries concerned [as] [t]he transformation can take place in various ways".[65]

Nevertheless, as mentioned earlier, the Swaziland context, deference was used as an avoidance strategy not confront the "almighty" king. In avoiding to engage with the substantive right to primary education, the court violated the international regime of the right to primary education as this was submitted to progressive realisation based on the availability of resource.

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59 Ray "Evictions, aspirations and avoidance" 2015 *constitutional court review* 174.
60 *Idem*.
61 Hoxter "The future of judicial review in South African administrative law" (2000) vol 117 No3 South African Law Journal 117(3) 448. For more, also see 449-519.
62 *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).
63 *Idem*, para 45.
64 *Idem*, para 48.
65 *Idem*, para 104.

Nonetheless, it could be argued that far from showing reverence to the king, the courts were simply pragmatic or realistic. In other words, they were applying the theory of "interest balancing"[66] which entails a broad consideration of the social economic as well as legal contexts. In this perspective, the judge was cautious and decided to take into account the local reality which is not conducive to "rights maximising"[67] approach which is rigorous in seeking normative correctness with a strong focus on the victim and trying to "vindicate the right in the most effective way possible".[68] In this perspective, as correctly observed by Gewirtzt Judges often have to "accept the reality of ... limits and compromise [their] original objective in order to obtain as much relief as possible"; they have "to enter the world of politics" and, in the end, "to surrender some of their independence". [69]

Put differently, instead of depending on normative correctness, the judges must also ensure the enforceability of their judgements as failure to do so may weaken the judiciary.[70] In the Swaziland case study, having examined all factors and especially the availability of resources and the possibility of immediate realisation of the right to primary education, the courts were of the view that it was practically impossible for the state to give effect to the right as prescribed under international and the Swaziland Constitution. Therefore, they became pragmatic in their judgements as they had to balance interest.

Nonetheless, it could be observed that pragmatism should not be synonymous with complete normative incorrectness, but rather secured in the nature of remedies, which while complying with normative standard, also enables the state to deliver on its promise in a fair and comprehensive manner. In other words, remedies can be designed to accommodate the rights maximising approach and still balance interest. Essentially the need to balance interest cannot trump or negate the right. In this vein, the purposive approach that seeks "to give effect to the purpose of the right, interpreted in light of the whole Bill of Rights"[71] can be considered. In the Canadian context and particularly in the case of *Osborne v Canada (Treasury Board)* Sopinka J wrote:

> "In selecting an appropriate remedy under the Charter, the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective."[72]

66 Gerwitz (1983) 591.
67 *Idem.*
68 Bishop (2012) 9-59.
69 Gerwitz (1983) 678.
70 Singer "Property and coercion in federal Indian law: The conflict between critical and complacent pragmatism" (1990) 63 *Southern California Law Review* 1822; Easterbrook "Originalism and pragmatism: Pragmatism's role in interpretation" (2008) 31 *Harvard Journal of Law and Public Policy* 901.
71 Bishop (2012) 9-63.
72 *Osborne v Canada (Treasury Board* [1991] 2 SCR 170, 346 as quoted in Bishop p 963.

In the south African context, the courts espouse the purposive interpretation of the right. in *Fourie*, Justice Sachs held that it was important "to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable."[73] This is to say that although remedies informed by purposive approach to interpretation the right are not perfect, they can make difference in ensuring the protection of the right.

Besides the purposive approach, the "principled approach"[74] is also an option in some cases. Accordingly, as indicated in *Hoffmann*

> "The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief.
>
> Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, ''we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source."[75]

The principled approach therefore considers several factors. It can be argued that various methods seem to have their limitations. Nevertheless, the following section will examine remedies that can maximise rights without ignoring balance of interest or remedies that can reconcile normative correctness and pragmatism.

4 Remedies that reconcile normative correctness and pragmatism

Under section 35(2) of the 2005 Constitution the courts are empower to "make such orders, issue such writs, and make such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of this [Bill of Rights]". In other words, the court is allowed to take any decision to ensure that the rights in the constitution are given effect to. In this perspective, they can issue supervisory jurisdiction order and mandatory relief. A supervisory order enables the courts to preserve its jurisdiction over a problem as to enable the aggrieved parties to revert back to it in case of non-compliance. Also known as structural order, a supervisory order can also "require specific performance in which the respondent has to report to a party and / or to

73 *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae*) as quoted in Bishop p 963.
74 Bishop (2012) 9-63.
75 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 45 quoted in Bishop (2012) 9-64.

the court itself".[76] It enables the court to intrude in other spheres of government as to ensure that beneficiaries fully enjoyed their rights. Unlike a declaratory order which is a mere recognition of a right, the supervisory order enables the court to monitor the effective implementation of the right.

In the second *Ex-miners Association* case, the court would have strengthened the declaration made in the first application by issuing supervisory order because there was clear evidence that five years has passed since the commencement of the Constitution, and many learners still did not have access to school. This could have been due to the neglect of the issue by the government, the lack of capacity to effectively address the problem or lack of political will. These three criteria identified by Roach and Budlender can trigger supervisory jurisdiction.[77]

From an interest balancing perspective and bearing in mind possible resource challenges confronted by the government, the court should have called on it to table a plan to explain how it intended to address the issue in the long term. In this context, the court should have given for example six months or so to report back to it with steps to be taken including budget consideration to give effect to section 29 of the Constitution.

They should have learned from the South African experience in *Madzodzo and Others v Minister of Basic Education*.[78] In this case, after issuing a declaratory order to the fact that the Provincial Department of Basic Education was in breach of learners' right to a basic education, an additional order was provided. It required the department to carry out an audit of the school furniture needs of schools in the Eastern Cape Province, to be filed with the court by a specific date. It also ordered that within 90 days of that audit report being filed, all schools should receive adequate "age and grade appropriate furniture" to enable each child to have his or her own learning space. The court even anticipated the possibility of failure to deliver by the respondent and added another order as follows: "[i]n the event that the respondents envisage that they will not be able to comply with paragraph 4 above, the respondents must make and [sic] application on notice to the applicants".[79] This order definitely ensures that the respondent reports on progress and challenges faced and more importantly updates the applicant on its activities aiming to comply with the court's decision. In the same register, the court appointed a task team mandated to authenticate schools' furniture needs by visiting each school on the list and to report the results to the court by a set date; by another date, all schools had to have been in possession of their furniture. Importantly the task team co-

76 Skelton & Kamga, 435; also Roach and Budlender "Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?" (2005) 5 *South African Law Journal* 325.
77 Roach and Budlender, 325.
78 *Madzodzo and Others v Minister of Basic Education* 2014 (3) SA 441 (ECM).
79 *Idem*, para 41(5).

ordinator was required to report on a quarterly basis until the process was finalised.[80]

Other South African interesting cases to learn from include *the Tripartite Steering Committee and Another v Minister of Basic Education and Others*[81] in which the Court ordered the Provincial Department of Basic Education to review its policy on pupils' transport and report back to it on progress made.[82] Similarly, after declaring that the failure to deliver textbooks violated the right to education, a court ordered a Provincial Department of Basic Education to deliver the necessary books to learners as a matter of urgency, with a specified commencement date.[83] The court went further by requesting the department to also develop an urgent remedial plan immediately and the court indicated what should be included in it, such as ascertaining the curriculum gaps that had occurred and the extent to which the quality of teaching had been neglected, and then formulating remedial measures and executing by a date to be stated in the plan. The court also requested the plan to be lodged with it by an agreed date and monthly progress reports to be produced subsequently.[84]

These examples from the South African jurisprudence suggest that claiming that the misleading decisions of the Swaziland court was based on pragmatism is not convincing. On the contrary, it could be argued that Swazi judges did not want to face the might of the king who could get them fired or reprimanded and, the only way out was to rely on judicial dereference. So, while subscribing to Currie and de Waal's caution about intensive reliance on supervisory jurisdictions that are likely to violate the separation of powers,[85] judicial deference should not be an indication that the separation of powers is flaw like in the case of Swaziland.

In fact given the context of Swaziland, the court could have relied on Rosch and Budlender criteria.[86] Firstly, this entails the consideration whether there is any reason to believe that the government will not fully comply completely with the order.[87] In this interrogation, it becomes imperative to check the government record of compliance with court orders[88] Secondly, the court has to consider the impact of non-

80 This court order was handed down (by agreement) on 16 January 2016
81 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG).
82 *Ibid.*
83 *Section 27 v Minister of Education* 2013 (3) SA 40 (GNP); *Basic Education for All and Others v Minister of Basic Education and Others* (23949/14) [2014] ZAGPPHC 251, 2014 (4) SA 274 (GP), [2014] 3 All SA 56 (GP), 2014 (9) BCLR 1039 (GP) (5 May 2014); *The Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015).
84 *Ibid*; for more on this see Skelton and Kamga, 439.
85 Currie & de Waal *The Bill of Rights Handbook* (2005) 219.
86 Roach and Budlender 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?' (2005) 122 *SALJ* 325.
87 Bishop (2012) 9-189.
88 *Ibid.*

compliance with the order. Question such as the number of persons affected by non-compliance should be considered, issues related to consequence on the society should be examined.[89]

On the first point, the government does not have a reputation to comply with court order. In fact, it is intransigent as it simply refuses to comply with instructions from the judiciary. This was observed in the case of *Chief Mtfuso and Another v Swaziland Government and Others*.[90] In this case the applicants successfully appealed against an eviction, signed by Prince Sobandla (the king's brother), the minister of home affairs. The appeal court found for the applicants and granted a suspension to enable them time to exercise their traditional appeal to Ngwenyama [the chief].[91] But the Court order was blatantly rejected by the Executive through the prime minister who stated unequivocally that "the government did not recognize the judgment and that it would not be obeyed".[92] This led to the mass resignation of the Court of Appeal judges resigned en masse.[93] In this context, encouraging the parties to negotiate and agree on the remedies as it was the case in the South African case of Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others[94] will not be effective, hence the need for court supervision to ensure compliance

Secondly, the impact or consequence of non-compliance will create systemic problem because many children will not be able to attend primary school, and this is not acceptable. Furthermore, the best interest of the child which is a key principle of the international human rights law will also be disregarded. Another compelling argument for supervision in the case of Swaziland is the fact that three years had elapsed since the commencement of the Constitution and the government simply ignored the deadline which is a key factor in assessing the political will of the state. In this circumstance, it could be argued that the state is inattentive to its commitment, and the structural interdict will remind it of such. But if the problem is in "incompetence"[95] or the lack of know-how, a structural interdict will force the state to seek help from experts. So, supervision should not be considered as punishment but "as a means to help government to comply with its constitutional obligations". [96]

89 *Ibid*.
90 *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government (NULL)* [2000] SZHC 82 (5 September 2000).
91 *Chief Mtfuso II (formerly known as Nkenke Dlamini) and Others v Swaziland Government (NULL)* [2000] SZHC 82 (5 September 2000).
92 Kamga and Skelton 425;
93 *Ibid*.
94 See Bishop (2012) 9-180.
95 *Idem,* 9-189.
96 *Idem,* 9- 193.

5 Concluding remarks

On the backdrop of the constitutional promise on the enjoyment of the right to primary education in Swaziland, the aim of this article was to examine the extent to which this right is a reality in the country. It found that this right had been the subject of a legal battle led by a civil society organisation. This battle is echoed by the *Ex-miner association* case which initially led to a declaration on the right of primary education as a right to be realised immediately and free of cost. Unfortunately, the second application for enforcement of the right was rejected by the High Court and upheld by the Supreme Court in violation of the international regime of the right to primary education that was submitted to the availability of resources and progressive realisation regime in the process.

It was found that this decision was informed by the futility of Swaziland constitutionalism or a constitutionalism in which the king is the alpha and omega and as result weakens the judiciary and other branches of government. Although judicial pragmatism could have justified the judiciary's reluctance to hold the government accountable, it was also found that the paramountcy of the king could not be neglected and was determinant in judges' attitude. In complying with normative correctness as well as pragmatism, these judges could have learned from the South African experience which echoes the CCL's litigation impact where remedies provided in socio economic rights litigation and the right to education in particular relied on structural interdicts or supervisory jurisdiction which enabled the court to secure normative correctness without forgetting to be pragmatic. This approach enables the government to show its good faith at the minimum. Ultimately, it was found that in a context of futile constitutionalism, the enforcement of human rights and the right to primary education in particular is almost impossible. Nonetheless this can be resolved by the court that is willing to use the right maximising approach without neglecting to balance of interest in its remedies, and this possible through structural interdicts.

Too much of a good thing? Best interests of the child in South African jurisprudence

Ann Skelton

SUMMARY

The South African Constitutional Court is often lauded for its application of best interests in its judgments. This article acknowledges the positive aspects of the Court's approach, especially in the earlier cases, but also poses a question – does the Court go too far in applying best interests, in situations where an equally or more appropriate right in the Bill of Rights is available – or where a right can be more fully interpreted through recourse to international law? Two recent cases are analysed to demonstrate the concern. It is argued that the most rights-based approach is achieved with the Court pronounces on a clear rights violation, either in the Constitution or the Convention, and then use best interests to either weigh rights, justify a derogation of a right, to fill in any normative gaps where a particular right is not clearly enunciated in the Constitution or international law, or where it is necessary to show that the impact of an impugned provision would impact on children more heavily than on adults. It is concluded that the flexibility of best interests is useful, but it should not be used so ubiquitously that it prevents normative development of children's rights.

1 Introduction

This article contains a constructive critique of the South African the Constitutional Court's love affair with the best interests principle. As a practitioner, I have often urged the court to apply best interests in a range of matters, and yet in this contribution I am posing the question – is it possible that resort to best interests can be too much of a good thing? The article traces the origins and development of best interests, and analyses several important cases of the Constitutional Court, citing profound and poetic passages of judgments from the Court on best interests. Being charmed by these, the reader may wonder – what's the problem?

Briefly stated, my concern is as follows: While I am deeply appreciative that the Constitutional Court has developed a strong best interests jurisprudence, I will analyse some examples where the Court could just as easily – perhaps more correctly – have based its decision on another substantive right in chapter 2 of the Constitution,[1] or a more substantive right in the Convention on the Rights of the Child. I will observe that the Court risks spreading the right too thinly, an approach which Sachs J warned against in *S v M (Centre for Child Law as Amicus Curiae)*.[2] I argue that what is needed is a rights based approach – viewing children as the bearers of all rights in the Constitution.

1 The Bill of Rights is contained in chapter 2 of the Constitution (Constitution of South Africa Act 105 of 1996).

2 2008 (3) SA 232 (CC).

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In General Comment No 14 on the right of the child to have his or her best interest taken as a primary consideration (2013),[3] the Committee on the Rights of the Child reminded States Parties that there is no hierarchy of rights in the Convention and that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention".[4] The selection of cases discussed here show that the South African Constitutional Court has usually found violations of specific rights, with best interests being invoked alongside these[5] to bolster the decision on the main rights violations, or to cover specific concerns that do not fit neatly under other rights. However, two cases are singled out for attention that show signs of a deviation from that approach.

2 From origin to inclusion in the Constitution

The best interests principle was established in South African law through case law in the early 1900s,[6] and it developed through case law, particularly in family law and in welfare proceedings. It did not reach the level of being a right until its inclusion in the Bill of Rights in the Constitution. Prior to that it was a principle that was applied, primarily in deciding custody disputes.

The process of transition from the end of the apartheid era in South Africa included the drafting of an Interim Constitution, containing a Bill of Rights. This became law in 1993 (before the first democratic elections) and remained in placed while an elected Constitutional Assembly in Parliament drew up a permanent Constitution. This Interim Constitution did include best interests as a paramount consideration. In the final 1996 Constitution, the best interests clause stands on its own in section 28(2): "A child's best interests are of paramount importance in every matter concerning the child". The word paramount is emphatic – considering that the Convention on the Rights of the Child provides only that a child's best interest shall be a primary consideration.[7] The African Charter on the Rights and Welfare of the Child[8] has a slightly higher standard of "the

3 CRC/C/GC/14.

4 The Committee was quoting from its earlier General Comment No.13 on the right to protection from all forms of violence, para 61.

5 See, however, Julia Sloth-Nielsen and Benyam D Mezmur,"2 + 2 = 5? Exploring the Domestication of the *CRC* in South African Jurisprudence (2002–2006)" (2008) *International Journal of Children's Rights*. I agree with Sloth Nielsen and Mezmur's view that in the early cases brought before the Constitutional Court "the main beneficiaries of child rights related cases were in fact adult litigants, who has sought to bolster their claims via children's rights-based arguments". The focus in this article on the post 2000 judgments.

6 Mills has provided a succinct summary of the case law in Mills "Failing children: The Courts' disregard of the best interests of the child in *Le Roux v Dey* (2014) 131 *South African Law Journal* 847. The cases she mentions are *Cronje v Cronje* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033; *Ramsay v Ramsay* 1935 SR 84; *Mathews v Haswari* 1937 WLD 110; *Christian v Christian* 1945 TPD; *Fletcher v Fletcher* 1948 (1) SA 130 (A).

primary consideration". Paramount suggests a yet higher standard, and according to section 28(2), it is to be considered in all matters concerning the child.

The best interests clause in the section 28(2) of the Final Constitution forms part of the children's rights section in the Constitution which deals with a range of children's rights, including the child's right to a name and nationality, to family care or parental care or alternative care if removed from the family environment, immediate access to certain socio economic rights, the right to be protected from abuse and degradation, and from child labour and involvement in armed conflict. There are specific provisions protecting children in the criminal justice system and a right to separate legal representation in civil matters. Of course, beyond section 28 – the children's rights clause – all the other rights in the Constitution apply to children unless they are excluded because such rights only apply to adults, such as the right to vote.

3 The development of best interests under the Convention on the Rights of the Child

As the South African Constitution was influenced by the Convention on the Rights of the Child (CRC or the Convention),[9] it is important to consider how the concept of best interests has developed in international law. Nigel Cantwell, who was deeply involved with the drafting of the Convention, has argued that the drafting history of the Convention shows that the implications of generalising best interests as a primary consideration in all matters concerning the child were not "thought through".[10] It was the first CRC Committee that decided to elevate the best interests of the child to one of the four "general principles of the Convention", which they did in the context of drafting a list of issues for state reporting.[11] Despite the fact that the first and subsequent committees clearly viewed best interests as pivotally important, Cantwell points out that it took twenty years before General Comment No.14 on the right of the child to have his or her best interest taken as a primary consideration (2013)[12] was issued.

7 CRC Article 3(1). However, Art 21 of the Convention requires best interests to be treated as the paramount consideration in the context of adoption.
8 ACRWC Article 4.
9 A Skelton and P Proudlock "Interpretation, objects, application and implementation of the Act" in CJ Davel and AM Skelton *Commentary on the Children's Act* 2nd edition 2013-01-11.
10 N Cantwell "Are 'best interests' a pillar or a problem?" in Liefaard and Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (2017) 61-72.
11 K Hanson and L Lundy "Does exactly what is says on the tin? A critical analysis and alternative conceptualisation of the so-called 'general principles' of the Convention on the Rights of the Child" (2017) 25 (2) *International Journal of Children's Rights* 285-306.
12 CRC/C/GC/14.

General Comment 14 did articulate quite neatly how best interest should be viewed as a threefold concept: First, as a substantive right, namely the child's right to have his or her best interests considered. Secondly as an interpretive principle, to be applied in determining whether a legal provision is the most favourable for a child or children. Third, as a rule of procedure, requiring that decision-making processes about a child or a group of children must include a consideration of the impact of the decision on them.[13]

Cantwell takes issue with the fact that the Committee in General Comment 14 followed an "orthodox" approach, accepting the best interests principle, rather than really examining its proper role. He is concerned that because best interests is basically "paternalistic and charitable" it may be dangerous in a Convention that aims to ensure children's human rights. Adults do not have to receive their rights through the prism of best interests, so why should children, he asks. John Tobin, on the other hand, supports the idea of best interests playing a supporting role in children's rights.[14] He points out that children's rights are not based on a will theory of rights, which would emphasise a child's capacity for making rational choices as a prerequisite for their rights enjoyment, but rather an interests theory of rights, which "are intended to have nexus with their children's best interests". He goes on to explain that this approach will not prevent the child from gaining autonomy in the exercise of their rights as they grow older.[15]

However, Cantwell's concern is about something different. It is about ensuring that children are the bearers of <u>all</u> rights to which they are entitled. He points out that the concept of best interests was developed in an era when children were not recognised as having human rights. In his view there was inadequate debate during drafting of CRC, as to whether the inclusion (and expansion) of the concept was appropriate in a Convention that gave children rights. Cantwell is concerned that the "quasi-obligatory references to 'best interests' can actually impede awareness-raising about the fact that children have human rights as opposed to 'special children's rights'".[16] Best interests become a problem when the concept is invoked pointlessly, that is, when reference to a right would or should suffice. He is calling for an approach that sees children's rights promoted and defended on the same basis as the human rights of adults, "for whom 'best interests' are simply not

13 CRC/C/GC/14, par 6.

14 J Tobin "Judging the judges: Are they adopting the right approach in matters involving children?" (2009) 33(2) *Melbourne University Law Review* 579.

15 Writing shortly after the Convention was adopted, Eekelaar described this as "dynamic self-determinism". See J Eekelaar "The interests of the child and the child's wishes: The role of self-determinism" (1994) 8 *International Journal of Law, Policy and Family* 42-6. See further Freeman, writing while the Convention was in development, who developed a typology which he called "liberal paternalism", see M Freeman *The rights and wrongs of children* (1983).

16 Cantwell (2017) 65.

regarded as pertinent".[17] In my view, this may have been what the CRC Committee was driving at in General Comment 14, when the point was made that there is no hierarchy of rights, and that adults'- determination of best interests cannot override the obligation to respect all of the rights in the Convention.[18]

Nevertheless, Cantwell recognises that "in certain well-defined circumstances the spirit embodied in best interests can be useful for reaching decisions involving children, whether individually or a group".[19] Cantwell suggests that "best interests can be useful in filling a gap – or gaps – in rights provisions rather than underpinning the assurance of the human rights of all children."[20] He has outlined a number of situations in which it is legitimate to apply situations.[21] I have grouped them into three groups. The first group relates to "weighing" – either choosing between two or more potential solutions (all of which should be consistent with the human rights of children), or balancing two or more competing human rights.[22] Also in the weighing group are situations where the rights of others may dominate, for example in custody disputes. The second group relates to a justified derogation from specific rights where this is foreseen by the CRC as being in children's best interests. These are separating children from families, denying contact with parents, envisaging detention of children with adults, excluding parents from judicial proceedings. Another instance that can be grouped with these relates to situations where a temporary decision can be made in emergency situations on the immediate best interests, but subject to a proper assessment of rights at a later date. The third group relates to "broaching issues not covered by existing rights", which he elsewhere describes as "filling gaps".[23] Similar observations have been made by South African author, Meda Couzens

Cantwell asserts that under the Convention, best interests must always be considered within a broader framework of human rights. Meda Couzens has expressed concern that the South African Constitutional Court relies too easily on sections 28(2) capitalizing on "the permissiveness" of the text, and she observes that the Court sometimes fails to construct its reasoning on the more structured requirements of relevant section 28(1) provisions.[24] This article examines the

17 Cantwell (2017) 65.
18 CRC/C/GC/14, par 4.
19 Cantwell (2017) 61-65.
20 Cantwell (2017) 69. Meda Couzens has observed a similar use of best interests as a "gap filler" by the South African Courts, see M Couzens "The best interests of the child and the Constitutional Court: A critical appraisal" (2019) *Constitutional Court Review* (Forthcoming).
21 Cantwell (2017) 70.
22 In South African Constitutional cases, the Court uses the best interests to establish the scope and potential limitations of other constitutional rights, as well as a right in itself, see further A Friedman, A Pantazis and A Skelton "Children's Rights" (2nd ed, 2013 1: 07-09), in S. Woolman and M. Bishop, *Constitutional Law of South Africa* (2nd ed.) 40-47.
23 Cantwell (2017) 69.

jurisprudence of the South African Constitutional Court in the light of this search for a human rights compliant approach to best interests.

4 Development of a best interests jurisprudence in South Africa

The very first case of the Constitutional Court dealing with children's rights was *S v Williams*.[25] This case abolished whipping as a sentence. The court was asked by counsel to consider children's best interests in addition to other rights violations, but the court based its decision on a violation of "cruel, inhuman and degrading treatment"[26] – correctly, in my view. A few years later, the Court had to consider corporal punishment in private religious schools, in *Christian Education South Africa v Minister of Education*.[27] In deciding that the legal ban on corporal punishment was a reasonable and justifiable limitation on the parents' right to religious freedom, the court considered best interests, but again focused on children's right to dignity[28] and to freedom and security of the person.[29] In these early cases, we see the Court applying the other rights in the Constitution, and interestingly, the rights focussed on by the Court are rights that are not included in section 28 (the children's rights clause) but elsewhere in the Bill of Rights, showing that, from the outset, the Court applied all the rights in the Bill of Rights to children.

The case of *Minister of Welfare and Population Development v Fitzpatrick*[30] was about adoption, an area in which one would expect to see best interests dominate, because it is the only article in the Convention that states that best interests is the paramount consideration.[31] The Constitutional Court declared a section of the Child Care Act of 1983 invalid because it prevented foreign persons from being able to adopt a child.[32] The Constitutional Court found that section 28(1), which lists a set of children's rights from name to nationality, through to

24 M Couzens "The Constitutional Court consolidates its child-focused jurisprudence: The case of *C v Department of Health and Social Development, Gauteng*" 2013 (130) *South African Law Journal* 672; M Couzens "*Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* and Children's Rights Approaches to Judging" 2018(21) *Potchefstroom Electronic Law Journal*.

25 *S v Williams and Others* 1995 (3) SA 632 (CC)

26 Section 11(2) of the interim Constitution.

27 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), hereafter *Christian Education*.

28 Section 10 of the Constitution (1996).

29 Section 12 of the Constitution (1996).

30 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC), hereafter *Fitzpatrick*.

31 Article 21 of the CRC (1989).

32 Mr and Mrs Fitzpatrick were British citizens domiciled in South Africa, with whom the child in question had been living in foster care. Subsequently, the Children's Act 38 of 2005 repealed the whole of the Child Care Act and provided a comprehensive legal framework for adoption and intercountry adoption.

legal representation in civil proceedings, is not exhaustive of children's rights. The Court found 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 s 28(2) cannot be limited to the rights enumerated in s 28(1) and 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1)."[33]

This made it clear that the best interests clause in section 28(2) does not only find application in relation to the rights enumerated in section 28(1), but to all other rights. Importantly, it also clarified that section 28(2) is a right in and of itself, and not merely a guiding principle. In addition to being a self-standing right, it also strengthens other rights. Although this approach could be deduced from the Court's earlier cases of *S v Williams* and *Christian Education*, it was positive that the Court set this out clearly so as to guide other courts in this regard.

The case of *De Reuck v Director of Public Prosecutions*[34] gave the opportunity for the Constitutional Court to consider the paramountcy of children's rights in a context where it was pitted against another right in the Bill of Rights. This is part of the South African Constitutional approach to limitations. Put briefly, the court may find that a particular law on conduct, on the face of it, infringes a particular right. However, as all rights may be limited, the limitations analysis must weigh other competing rights and interests to determine whether the infringement is reasonable and justifiable. The Court applies best interests as a weighting factor in the limitations analysis. De Reuck was an adult man facing charges for being in possession of materials that fell within the definition of "child pornography". He argued that his right to freedom of expression was infringed by the law relating to the possession of child pornography, and asked that it be found unconstitutional. The High Court from which this appeal case derived had applied a strong children's best interests approach and found that the law prohibiting possession of such material was compatible with the Constitution because of the paramountcy of children's best interests.[35] However, when the case reached the Constitutional Court, it took a different approach.[36] The Court explained that the weighing of rights was not a balancing act with best interests of the child always in the winning corner. Deputy Chief Justice Langa (as he then was) explained the Court's rationale as follows:

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33 *Fitzpatrick* 2000 (3) SA 422 (CC) para 17.

34 *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC), hereafter *De Reuck*.

35 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division, and Others* 2003 (3) SA 389 (W); 2002 (12) BCLR 1285 (W).

36 The South African Constitutional approach to deciding whether law or conduct violates rights is to first decide which rights are limited by the impugned provision or conduct, and then move on to the second stage of the analysis, which is to determine whether the limitation of the right is reasonable and justifiable.

> "In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution "trumps" other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36."[37]

The Court thus found that the law did limit De Reuck's right to freedom of expression, but that this limitation was reasonable and justifiable given the fact that the possession of child pornography "strikes at" the dignity of children, it is harmful to children who are used in its production and because it creates an attitude that views children as sexual objects, and can be used in the grooming of children to engage in sexual activities.[38] The Court noted that children merit special protection by the state, and referred in this regard to section 28(1)(d) of the Constitution, children's right to be protected from maltreatment, neglect, abuse or degradation In this case the Court consciously decided not to deal with best interests, explained its reasoning in this regard, and considered children's rights to dignity and protection from abuse as weighting factors in the limitations analysis of the right to freedom of expression. The *De Reuck* case therefore strongly fulfils the requirement that the actual right that is breached or at risk is to be preferred, instead. I recollect that the children's rights sector were somewhat disappointed with this decision at the time, but the approach has stood the test of time, and within the current analysis, one can see the wisdom of the approach.

The Court's interpretation of best interests not being "a trump" came up for consideration again in *S v M (Centre for Child Law as Amicus Curiae)*.[39] This case is recognised as a landmark case,[40] not so much because of its subject matter (the rights of children of caregivers facing imprisonment to have their best interests considered by the sentencing court), but because it was in this case that the Constitutional Court comprehensively set out its approach to best interests. Sachs J pointed out that the very expansiveness of the paramountcy principle appears to "promise everything but deliver little in particular".[41] The best interests concept is indeterminate, resulting in various interpretations. Sachs J went on to say that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. The determination of best interests will depend on the circumstances of each case, and this is not a weakness, but a strength. A truly child-centred approach requires an in-depth consideration of the needs and rights of

37 *De Reuck* 2004 (1) SA 406 (CC) para 55.
38 *De Reuck* 2004 (1) SA 406 (CC) para 65
39 2008 (3) SA 232 (CC) (hereafter *S v M*).
40 Tobin (2009) 33(2) *Melbourne University Law Review* 579.
41 Para 23.

the particular child in the "precise real-life situation" he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child.[42]

S v M is the most quoted of all South African child law cases.[43] Partly because it was the first case in which the court comprehensively expressed its approach to best interests. Another reason for its popularity relates perhaps to the language and "poetry" it includes. Here is an example:

> "No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril."[44]

The process of weighing up the best interests of the child received detailed attention in *S v M*, building on the previous jurisprudence.[45] Sachs J also attempted to describe what he called "an operational thrust for the paramountcy principle". *S v M* went further than any previous judgment in explaining paramountcy, though it still defined the principle more by stating what it is not, rather than what it is.[46] It is not an "overbearing and unrealistic trump", and it cannot be interpreted "to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations."[47] Sachs J concluded that "the fact that the best interests of the child are paramount does not mean that they are absolute."[48]

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42 This idea was first articulated in *Minister for Welfare and Population Development v Fitzpatrick and Others* (CCT08/00) [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC), and the Court has re-stated this position subsequent to *S v M* in the judgment of *AD and Another v DW* and Others (CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) para 55, and in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477(CC); 2009(6)SA 632 (CC); 2009 (11) BCLR 1105(CC).

43 Skelton and Courtenay conducted a case law data base search which found this to be the case, the results were reported in A Skelton and M Courtenay "The impact of children's rights on criminal justice: Recent cases" (2012) 25(1) *South African Journal of Criminal Justice* 180-193.

44 Para 20.

45 *Minister for Welfare and Population Development v Fitzpatrick and Others* (CCT08/00)[2000]ZACC 6; 2000(7)BCLR 713; 2000 (3)SA 422 (CC) *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division), and Others* 2003 (3) SA 389 (W); 2002 (12) BCLR 1285 (W).

46 Skelton "Severing the umbilical chord: A subtle jurisprudential shift regarding children and their primary caregivers" 2008 (1) *CCR* 351.

47 *S v M* 2008 (3) SA 232 (CC) para 25.

48 *S v M* 2008 (3) SA 232 (CC) para 26.

The judgment concluded that sentencing officers should pay appropriate attention to the best interests children of a primary caregiver and take reasonable steps to minimise damage.

> "The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned."[49]

This approach focuses on the procedural application of best interests – the Court essentially said that from that moment on, courts were required to consider children's best interests as a discrete issue, when sentencing a primary caregiver.

Although *S v M* related to a criminal matter of a mother, the issue that had to be decided related to whether separation of the primary caregiver from her children by the state would be a violation of the children's rights, if their best interests were not considered at the time of sentencing. The court decided that it would. *S v M* presents an example of best interests being applied in the situation that relates to parental care, a fairly familiar terrain for the application of best interests, albeit that the State was the initiator of the separation, through sentencing.

Criminal justice is an area in which our courts had not, in the pre-constitutional era, been accustomed to applying best interests, although the courts had always viewed youthfulness as a mitigating factor. The two cases that I have chosen to examine in more detail later in this article, about which I have concerns regarding the application of best interests, relate to criminal law. However, they were not the first criminal justice cases. The Constitution ushered in a new era for child justice, and as already demonstrated, the case of *S v Williams* was one of the earliest cases of the Constitutional Court. Another high point was the case of *Centre for Child Law v Minister of Justice*.[50] The case was a constitutional challenge to minimum sentences, linked to certain categories of crime, which applied to 16 and 17 year olds in the same way as it did to adults.

To some extent the Constitutional Court restated what the South African courts already instinctively knew about child offenders, but this time explained it within a constitutional and international child rights framing. This paragraph penned by Cameron J, for the majority, reflects the approach:

> "We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting

49 *S v M* 2008 (3) SA 232 (CC) para 42.

50 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18;2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009(11) BCLR 1105 (CC).

> full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility."

Although the judgment rests mainly on a finding that the provision breached section 28(1)(g), namely "detention as a measure of last resort and for the shortest period of time", the court also based part of its decision on best interests.

One interesting aspect was that the minimum sentencing regime used minimum sentences as the starting point, but allowed the courts some discretion to depart where substantial and compelling circumstances were found to exist. This, the court said, went against best interests which must be determined on an individual basis[51] – and the court cited the *S v M* judgment in this regard – that there should be no pre-determined formula when deciding children's best interests, which was very relevant in the context of a statutory minimum sentence that automatically applied to everyone in the same measure.[52] This is an example of the Court applying best interests to fill in a normative gap. Individualisation in sentencing is not included in the Constitution. The court links individualisation to best interests, through the idea that one can only arrive at the correct decision for a child, if you look at the specific facts and circumstances. It probably did so because there was no other obvious right in the Bill of Rights that was infringed by the "one size fits all" approach of minimum sentences, and in my view this was a permissible application, particularly as this was in addition to finding a clear rights violation in respect of the detention as a measure of last resort principle.

In *Centre for Child Law v Minister of Justice* Cameron J made the point that the constitutional injunction that a "child's best interests are of paramount importance in every matter concerning the child" does not entirely preclude sending child offenders to jail, though this must always be done as a measure of last resort.

> "The constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's interests are 'more important than anything else', but not that everything else is unimportant: the entire

51 For a more detailed discussion of this case and the principle of individuality, see Skelton "Child justice in South Africa: Application of international instruments in the Constitutional Court" 26(3) 2018 *International Journal on Children's Rights* 391.

52 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at para 24: "A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned." The idea was first articulated in *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para 18, and the court has restated this position subsequent to *S v M* in the judgment of *AD v DW* 2008 (3) SA 183 (CC) para 55.

> spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment."

In my view, the Court's use of both the "last resort and shortest appropriate period of time provision in section 28(1)(g)", and the "best interests provision of section 28(2)" was well balanced. The fact that the minimum sentences were a "first resort" and were very long in duration meant that the impugned provision in the law that made them applicable to 16 and 17 year olds was a clear violation of section 28(1)(g), and the judgment is unequivocal about this. The Court also wanted to stress the importance of individualised treatment and greater prospects of rehabilitation for young offenders, but this was not neatly expressed within section 28(1)(g) or any other provision in the Bill of Rights, so the court relied on section 28(2), and the right to have one's best interests determined in all matters, to provide constitutional support for the idea of an individualised approach. In doing so, the Court provided additional support for its finding that the impugned provision was unconstitutional.

Another case where the Court did something similar was *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*.[53] The case concerned the constitutionality of sections in the Criminal Law (Sexual Offences and Related Matters) Amendment Act[54] which criminalised consensual sexual conduct between adolescents. The Court found the impugned provisions were unconstitutional, as they breached the rights to dignity, privacy, and best interests. The court examined adolescents' right to privacy and dignity, finding that these rights are intertwined, and that the "inner sanctum" of personhood is protected from interference by the State, including a person's family life, sexual preferences and home environment.[55]

One of many interesting aspects of this case was that counsel for the Minister of Justice argued that best interests could not be applied in a generalised way – relying on the Constitutional Court's previous jurisprudence that best interests must be determined with a real-life context and that a pre-determined formula would not suffice. The Court gave this argument short shrift:

> "During oral argument counsel for the respondent did not pursue this line of attack with any vigour, and rightly so, for it is at odds with the general principle that section 28(2) exists to protect the interests of children, with common sense and with the jurisprudence of this Court."[56]

It is interesting to note the Court's view that section 28(2) "exists to protect the interests of children". This idea seems to have led to an

53 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Correctional Services and Another* 2014 (2) SA 168 (CC), hereafter *Teddy Bear Clinic*.
54 Act 32 of 2007.
55 *Teddy Bear Clinic* 2014 (2) SA 168 (CC) para [59].
56 Per Khampepe J, *Teddy Bear Clinic* para 67.

interpretation by the court that infringements of rights that are child specific or which affect children disproportionately, engage section 28(2). This approach can be seen in some of the judgments under discussion in this article, where the court applies section 28(2) as a support to show that the infringement of a specified right is particularly acute because it is a child's right that is affected, or because there is no other specific right that is infringed but due to the fact that the victim of the violation is a child, section 28(2) fills that gap. In such cases, had the complainant been an adult, the Court might well not have found a violation. For example, the Court had, prior to the *Centre for Child Law v Minister of Justice*, already upheld the Constitutionality of minimum sentences for adults. The *Teddy Bear Clinic* case dealt with what one might call a "status" offence.[57] Children were being criminalised for consensual sexual activity which, if they were adults, would not have been an offence.

Justice Khampepe, writing for a unanimous court in *Teddy Bear Clinic v Minister of Justice* first dealt with the way that the law infringed privacy and dignity. She then spelled out various ways in which the impugned provisions breach adolescents' best interests. Firstly, the provisions increased harm and risk to adolescents by making it difficult for adolescents to seek support and assistance, because any person they told that they were engaging in unlawful sex would have to report this to police, which would potentially drive adolescent sexual behaviour "underground". Secondly, the Court was concerned that the provisions caused "a rupture" in family life by breaking down the lines of communication between parent and child. Thirdly, the imposition of criminal liability under the impugned provisions may, at worst, lead to imprisonment, and, at best, lead to diversion procedures – and that any of these experiences would be traumatic. Fourthly, the court found that it is "fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices".

Did the court need to apply best interests for these findings? The first problem, of cutting off sexually active adolescents from support and assistance, does not easily fit within the purview of other rights (although arguably it might also be an infringement of dignity, privacy and health rights). The second problem related to the adolescents' need for guidance, and there does seem to be a logic in linking the impugned provision's interruption of this to best interests – the law, in requiring that all sexual offences be reported, meant that adolescents could not ask for advice relating to their consensual sexual activities because they would disclose a crime in doing so. It is perhaps linked also to children's rights to family care and parental care, which is included in the section

57 United Nations Standard Minimum Rules for the Administration of Juvenile Justice Beijing Rules adopted by General Assembly resolution 40/33 of 29 November 1985, commentary to para 3.

28(1)(b) of the Constitution, but it goes beyond that as adolescents may prefer to seek guidance in sexual matters from other people beyond their families.

The Court's emphatic statement that children could be traumatised by being at worst, imprisoned and at best, diverted, indicates that the court wanted to stress that because they were children, this would be particularly grave. The Court was clear that the legislature could not have it both ways – they could not tell adolescents they were too immature to make decisions about sex and in the same breath tell them that they were mature enough to face criminal charges for the same actions. Again, this was not a clear breach of any other right, and that is perhaps the reason why the Court clustered it here, under the rubric of best interests.

However, best interests was not the only right that was found to have been breached – overall, the Court provided strong rationale for its findings that the impugned provisions violated the rights to privacy and dignity, and best interests was used to "gather" other aspects that were less clearly linked to a specific right in the Constitution.

5 Recent cases that may have over-utilised best interests

So up until this point, the Court generally framed best interests carefully, and retained a focus on the other substantive rights that applied. The Court used best interests as a right in cases where it was the obvious right that was breached, to support the findings of violations of other rights, to weigh on the other side of competing rights during the limitations analysis, to emphasise certain traits or vulnerabilities peculiar to children, or to fill in normative "gaps" where there no other right was directly applicable. The approach of the court was thus compatible with the Cantwell approach of a more constrained and carefully targeted approach to the application of best interests. Two more recent cases, however, show the Court applying best interests either to the exclusion of any other rights or as a alternative to other rights, even though breaches of those rights could, and I would argue should, have been found.

It was in *S v M* that Sachs J issued his warning that children's best interests could become so ubiquitous that it would lose it strength. He said that "[i]f the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2)".[58] This article takes that warning as a basis for analysis of the two selected cases showing evidence of this over-utilisation of the best interests.

58 Para 25.

The first case is *J v National Director of Public Prosecution*.[59] There is so much that I like about this judgment, which declared unconstitutional sections that required the automatic placement of child sex offenders on the National Register for Sex Offenders. The judgment was the "swan song" of Justice Skweyiya, it is imbued with a deep consideration for children's rights, and is beautifully written. J was a 14 year old boy who I would not have chosen as test case material. He had raped three much younger children and threatened a 12 year old with a knife. As luck would have it, it was his case that the reviewing High Court judge decided to use as a platform to review the constitutionality of the law. In the Constitutional Court judgment, Skweyiya J, in a truly inspired move, having briefly dealt with the facts of J's cases, shifted the discussion to a hypothetical offender who he referred to throughout as "she". This magically transforms the way that the reader feels about the young sex offender, the importance of treating her as an individual, believing in her reformability. The judgment is redolent with true and beautiful phrases. In this passage we get a clear idea of how Skweyiya J was thinking about best interests:

> "The contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. This Court has emphasised the developmental impetus of the best-interests principle in securing children's right to 'learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood'. In the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender."[60]

Here the Court appears to be linking best interests to the idea of "evolving capacity". Varadan has pointed out that the Committee of the Rights of the Child's General Comment No. 14 on best interests uses "evolving capacities" as an interpretative principle to maintain balance between protection and autonomy.[61] The Court does the same in this case, but also captures the essence that moving from birth to adulthood is a process of development, in which children should be guided but also increasingly permitted to make their own choices. Skweyiya J connects this to what he calls "moral malleability or reformability" – a belief that adolescents are going through a period of rapid development and that their formative experiences can affect their future trajectory. This should lean justice towards solutions for young offenders that do not brutalise, stigmatise or isolate them. Another passage from the judgment fleshes out this idea so well that I prefer to quote it rather than paraphrase:

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59 (CCT 114/13) [2014] ZACC 13; 2014(2) SACR 1 (CC); 2014 (7) BCLR 764 (CC), hereafter *J v NDPP*.

60 *Ibid* para 36.

61 Varadan "The principle of evolving capacities under the UN Convention on the Rights of the Child (2019) 27 *International Journal of Children's Rights* 306-338.

> "Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and abilities to pursue a living. An important factor in realising the reformative aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society. Furthermore, it is undoubted that there is a stigma attached to being listed on the Register even if the Sexual Offences Act closely guards the confidentiality of its contents. Given that a child's moral landscape is still capable of being shaped, the compulsory registration of the child sex offender in all circumstances is an infringement of the best-interests principle."[62]

What was particularly difficult in this case was that the impugned provision applied generally to all convicted sex offenders. It appeared that the legislature had overlooked the need to consider child offenders differently from adults. The aim of the register is to prevent any person who has committed a sexual offence from being employed in positions that would put them in contact with children.[63] The court found this was a valuable aim, but then went on to find that the limitation of child offenders' rights occasioned by the automatic placement on the register was neither reasonable nor justifiable. The reasons were firstly because it was based on a flawed idea that all child sex offenders grow up to become adult sex offenders, and secondly because there were less restrictive means to achieve the same purpose.

So what is the problem with the judgment then? It is important to note that Counsel for the applicant had submitted that having one's particulars entered on the Register infringes that offender's rights to dignity, privacy, fair trial and fair labour practices, as well as freedom of trade, occupation and profession. The applicant argued that actually, all offenders' rights were infringed by the impugned provisions.[64] The a*mici curiae*[65] argued that the case should be restricted to child sex offenders, because J, whose case it was, was a child, and because there had not been full argument about adult sex offenders.

The Court distilled three principles that related to best interests: First, the court found that the law should generally distinguish between adults and children. It was therefore a problem that the provisions in the law on the Sex Offenders Register treated children and adults alike. Secondly, the court found that the law should allow for an individuated approach to

62 *J v NDPP* (CCT 114/13) [2014] ZACC 13; 2014(2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) para 44.

63 The provision also prevents them for working with persons with mental disabilities, but for the purposes of this article, I have focused on the aspect of working with children.

64 This was also the approach of the court a quo (*J v S* [2013] ZAWCHC 114; 2013 (2) SACR 599 (WCC). reference is in the CC judgment). Although that case has arisen from the review of J's case and argument was therefore focused on child offenders, the court found, on the basis of *audi alterem partem,* that the provision was unconstitutional vis-à-vis all convicted sex offenders.

65 Childline, Teddy Bear Clinic and NICRO, represented by the Centre for Child Law.

child offender. Here the best-interests standard must always be applied flexibly because individual factors will secure the best interests of a particular child. The court pointed out that proportionality was a factor here, too, because in deciding on the correct approach the criminal court would have to weigh all factors, and the rule of automatic placement on the register made this impossible. Thirdly, the court held that children should be given an opportunity to make submissions before a decision to place them on the register is made. The Court stated that "the child or her representatives must be afforded an adequate opportunity to make representations and to be heard at every stage of the process, giving due weight to the age and maturity of the child".[66] The Court went on to point out that this is accommodated under the guiding principles of the Child Justice Act – that "every child should, as far as possible, be given an opportunity to participate in any proceedings … where decisions affecting him or her might be taken".[67] Here the Court makes underscores the right to participation, adding a footnote[68] setting out article 12(1) of the CRC (although article 12(2) was more relevant) and quoting an entire passage from General Comment no 12 on the right of the child to be heard.[69] The court then went on to explain the significant consequences for children of being placed on the register, that they will be impeded from working, once they become adults. They will be stigmatised, and this stigma will follow them into adulthood. Assessing the Court's application of best interests in *J v NDPP*, it is apparent that there are several aspects that were defensibly included under a best interests rubric. For example, the first principle, that children should be treated differently from adults, is an appropriate issue for application of best interests because it captures the essence, somehow missing or incompletely articulated in the general Constitutional or human rights

66 Para 40 of the judgment.

67 Para 40 of the judgment, referring to s 3(c) of the Child Justice Act, no 75 of 2008

68 Footnote 45 of the judgment, which reads as follows: *C and Others v Department of Health and Social Development, Gauteng, and Others* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at para 27. Section 10 of the Children's Act 38 of 2005 embodies this component of the best-interests principle in requiring 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." See also Article 12 of the Convention on the Rights of the Child, November 20, 1989, 1577 UNTS 3; 28 ILM 1456 (1989), which obliges state parties to ensure that a child who is capable of forming his or her own views enjoys the right to express those views in matters affecting the child and that those views be given due weight. See, in this respect, Committee on the Rights of the Child, "General Comment No 12 (2009): The right of the child to be heard" Fifty-first Session, 20 July 2009, CRC/C/GC/12 at paras 1 and 15. At para 57, the Committee affirmed that the right extends "throughout every stage of the process of juvenile justice." See also Committee on the Rights of the Child, "General Comment No 10 (2007): Children's rights in juvenile justice" Forty-fourth Session, 25 April 2007, CRC/C/GC/10 at paras 12 and 43-5.

69 CRC/C/GC/12, par 27.

framework, that the impact of the law will be greater on children than on adults, and that children are more capable of reform and reintegration. The second principle, about the need for individualisation and proportionality is closely allied to the first, and the application of best interests is equally defensible. The courts have applied best interest in relation to these principles previously in *Centre for Child Law v Minister of Justice*, and in *Teddy Bear Clinic v Minister of Justice*, as discussed above.

It is in respect of the last principle, that the child should have an opportunity to place his or her views before the court, in which best interests may have been spread a little too thinly. The invocation of a child's right to participation in Court judgments is rare, particularly when bolstered with a reference to the Convention and the relevant General Comment, so I feel a sense of regret to criticise this part of the judgment. However, the Court could have strengthened its position by including in the text of the judgment a clear reliance on the right set out in article 12(2) of the Convention – which provides a child "the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". The procedural rules of South African law also embody the fair trial concept of *audi alterem partem* – hear both sides – and there was written and oral argument about this before the Court. To apply article 12(2) of the CRC, in the absence of a clear right in the Constitution, would have been a more rights based approach.

- The Court did not explain why it decided to hook this last issue into best interests. It appears that the Court decided that it had to find a way to restrict its judgment to affect child sex offenders only, and in order to do so, it used the best interests principle as a basket into which all the other rights infringements could be placed. The rationale, I surmise, was that if the Court did not do this, it would be difficult for to avoid making statements that would provide footholds for adult sex offenders to make claims that the law was unconstitutional with regard to them in the future. Thus, encapsulating everything within a best interests basket isolated the Court's findings from easy generalisation, and limited them to child offenders only. Is this another permissible use of best interests? Although it does link to the idea of children being "different from adults", it is preferable for a Court to link the violation to a right in the Constitution, or failing that a right in the Convention such as article 12(2), and spell out why a restrictive law violates the rights of a child, but is justifiable when applied to an adult. I concede though, that this might require a consideration of factors such as individualisation, proportionality and reformability which are difficult to link to anything but best interests. On consideration, I can certainly see a logic to the Court's approach, and in the context of *J v NDPP*, little harm was done. However, in the final case that I am going to consider, one can see a different effect, which raises some cause for concern.

Radhuva v Minister of Safety and Security[70] dealt with a civil claim for damages brought by Michell Radhuva against the police arising from an unlawful arrest and pre-trial detention. The police had been attempting to arrest Michell's mother for disturbing the peace, and 15 year old Michell, trying to prevent the arrest, placed herself between the police officer and the mother. She was arrested for interfering with a police officer in the course of his duties, into the police van along with her mother, and taken to the police station where she was detained for 19 hours. This despite the fact that her father was present at the arrest, and also that he came to the police station and requested that the police release her into his care. The charges were later dropped. Michell launched her claim for damages in the High Court, where she lost because the Court did not accept that her arrest and detention were unlawful, and her appeal to the Supreme Court of Appeal was similarly unsuccessful. She then appealed to the Constitutional Court. Here the Centre for Child Law entered the matter as *amicus curiae* and argued that Michell's arrest and detention was a breach of section 28(1)(g) of the Constitution, namely that "every child has the right not to be detained except as a measure of last resort, and for the shortest appropriate period". Until this case, the Constitutional Court had not been called upon to interpret that provision in the pre-trial context, though it had done so before in relation to sentencing in *Centre for Child Law v Minister of Justice*. It was therefore an important opportunity to extend the application of the principle of last resort and shortest appropriate period to all types of detention, including arrest.

The *amicus* argued that the words "not to be detained" operated from the moment of arrest, and to pre-trial detention, that both should be considered a measure of last resort, but also that official are under a positive obligation to ensure that their actions are based the best interests of the child. The court had no difficulty finding that the police cell detention was a breach of the last resort and shortest period protections in section 28(1)(g) – but declined to find that the arrest breached that right.[71] Instead, the court invoked best interests – and found that the arrest had been a breach of that right, section 28(2).

The Court found that the evidence in the record of the case revealed a lack of knowledge and appreciation by the police officers of "their constitutional obligation when arresting a child to consider her best interests as demanded by section 28(2)."[72] The police should have been cognisant that she was no danger to them; that they could have handled or subdued her with ease; that she did not try to run away; that she was not causing any physical harm to them; that she was at or near her

70 (CCT 151/15) [2016] ZACC.

71 The Court did, however, state (at para 58) that "arrest of a child should be resorted to when the fact are such that there is no other less invasive way of securing the attendance of such a child before a court" – which sounds very similar to a last resort principle, but the Court declined to find a breach of section 28(1)(g).

72 Para X.

parental home and, importantly; that her father was present. The Court found that there was no doubt that the approach they applied to arresting Michell was a breach of her section 28(2) rights. If the police officers had properly considered best interest, the Court opined, there would have been no reason to arrest her. They could have issued a summons or a written notice to appear, and could have left her in the custody of her father with instruction to bring her to court. The Court ultimately found that as the arrest was a violation of section 28(2), it was unlawful.[73]

For Michell, the fact that the arrest was declared unlawful was sufficient, so that her civil claim could succeed. For the development of child law, however, it was really important how the court arrived at this conclusion. In my view, the court erred in not finding that the arrest was a breach of section 28(1)(g). Writing elsewhere,[74] I have commented on several positive aspects of the *Radhuva* case, so as with *J v NDPP*, I am loath to criticize it without also mentioning some of its positive features. One of these is that it viewed the issue of arrest and detention within the context of South Africa's violent and repressive history, in which arrest and detention was used a tool by the Apartheid state. Bosielo J, writing for a unanimous Court, found that "children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them".[75] The judgment hammered home the dangers of detention of children, an atmosphere "not conducive to their normal growth, healthy psycho-emotional development and nurturing as children".[76]

The judgment is, however, weak on its recognition of international law.[77] The Court did not accept arguments before it that Article 37(b) of the Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. However, the wording of section 28(1)(g) is less expansive. It says "every child has the right not to be detained except as a measure of last resort, in which case, …, the child may be detained only for the shortest appropriate period of time". This was thus a perfect opportunity to get to the court to fill in the normative gap through

73 The Court did not do as the *amicus* urged it to, however. It did not find that this was a separate factor that had to be considered, but something similar, though at once vaguer and more all encompassing: when police considered all the other required factors for a lawful arrest, they would additionally have to consider, as a paramount consideration, the best interests of the child.

74 A Skelton "A hiding to somewhere" in W O'Brien and C Foussard *Violence against children in the criminal justice system* (2019) 145-163.

75 Radhuva para 59.

76 Radhuva para 68.

77 Skelton "Child justice in South Africa: Application of international instruments in the Constitutional Court" 26(3) 2018 *International Journal on Children's Rights* 391.

interpreting it with reference to Article 37(b) of the Convention, and this was fully argued by the applicant and the *amicus curiae*.[78] Instead it filled the gap with section 28(2) of the Constitution. This, in my view is an incorrect application of the best interest principle.

It is not clear why the Court decided to go the route that it did. Speculating, I note that in addition to being mentioned in section 28(1)(g), the word "detained" is used in section 35 of the Constitution which is the section that protects all offenders' rights. Perhaps the court was concerned that if it defined detention as including arrest for children, it would open the door to a similar interpretation for adults. To avoid this, the Court used the best interests right instead. If so, then it follows the pattern of the Court's approach in *J v NDPP*, but in this case the result is more egregious because it created a way out for the court to avoid interpreting section 28(1)(g) in line with more directly applicable in international human rights law. Again the court could have broadened the interpretation of sections 28(1)(g) for children to include arrest, and justify why this might not be the case for adults, after all section 28(1)(g) does apply only to children, there is no equivalent right in the Constitution for adults.

Couzens has subjected the South African jurisprudence on best interests to a wide- ranging critique and in a recent article she has analysed *J v NDPP* and *Radhuva*.[79] She points out that in Radhuva it is not clear if the Court is invoking section 28(2) as self standing right, or as an interpretive principle, as the Court does not offer sufficient substantiation. She is of the view that the case advances a "child-sensitive approach" in a matter which, she says, was not covered by another more specific constitutional right. In my view, the Court had another option open to it. There was a normative gap, in that section 28(1)(g) referred only to detention and not expressly to arrest. The South African Constitution requires that when considering a right in the Bill of Rights, the Court must consider international law, and must favour an interpretation that accords with international law.[80] If it had interpreted section 28(1)(g) in the light of article 37(b) of the CRC, a more substantive, rights based outcome would have been achieved. Couzens views these two cases as examples of a positive application of section 28(2) as a having independent normative value, to fill in gaps where there is no specific provision that is directly applicable.[81] She raises the

78 The arguments of the parties and the applicants are available at https://www.concourt.org.za.

79 Couzens (2019) *Constitutional Court Review* (Forthcoming). See also earlier articles: M Couzens "The Constitutional Court consolidates its child-focused jurisprudence: The case of *C v Department of Health and Social Development, Gauteng*" 2013 (130) *South African Law Journal* 672; M Couzens "*Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae*) and Children's Rights Approaches to Judging" 2018(21) *Potchefstroom Electronic Law Journal*.

80 Section 39 (b) and 233 of the Constitution.

81 Couzens (2019) *Constitutional Court Review* (Forthcoming).

question as to whether the approach of the Court in these two cases is the beginning of "a subsidiarity approach to the independent application of 28(2)".[82] In other words, whether the Court from now on will only apply section 28(2) as a self-standing right when more specific constitutional rights are not available to it. That remains to be seen. However, the Court did not clearly articulate that it was filling a normative gap in either of the cases, and it is not clear what theoretical approach to application of best interests the Court is applying. Regrettably, the Court's best interests jurisprudence has become vaguer in recent judgments.

6 Conclusion

The Convention ushered in a new era in which children are rights bearers. Best interests was included, but it was never meant to supplant rights. The South African Constitutional Court's early jurisprudence showed a careful approach to the application of best interests. Even though counsel before it argued best interests in cases such as *S v Williams* and *Christian Education*, the court declined to consider it or paid minimal attention to it, preferring to focus on the direct rights violations regarding "cruel, inhuman or degrading treatment", "dignity" and "protection from violence". Interestingly, all of these rights are found not in the section of the Constitution that deals with children's rights, but in other sections of the Bill of Rights that deals with all human rights. So the court got off to a good start. The case of *Fitzpatrick* was important because it articulated that best interests was both a self-standing right and an interpretive principle. *De Reuck* was the wake-up call that best interests was not a trump, that there was no hierarchy of rights, but that best interests would still weigh heavily as a right when measured against other rights. *S v M* continued in that vein, and gave more guidance on what is meant by paramountcy. It also made it clear that from that point on, judicial officers were required to separately weigh best interests when sentencing a primary caregiver.

In *Centre for Child Law v Minister of Justice* the main violation was to section 28(1)(g) (measure of last resort and shortest appropriate period of time) but the court also used best interests to draw in violations relating to the legislature's denial, through minimum sentencing, of the need to consider each child individually, and to apply proportionality in sentencing. This was done in a balanced way, and demonstrated effectively how best interests can, after a rights violation is found on one ground, be used to add detailed issues that are not included in any other normative standards. *Teddy Bear Clinic v Minister of Justice* shows much the same approach, where the Court found clear rights violations of privacy and dignity, and additionally captured the essence of children being more harshly affected than adults would be, and the concern that

82 Couzens (2019) *Constitutional Court Review* (forthcoming).

making sexual interaction a crime would prevent children from being guided by their parents, under the rubric of best interests.

The case of *J v NDPP* marked a shift in the Court's approach, by placing a number of identifiable rights violations into a best interests basket. The Court might have been wiser to follow the approach in *Centre for Child Law* and *Teddy Bear Clinic*, namely to pronounce on a clear rights violation, either in the Constitution or the Convention, and then use best interests to fill in any normative gaps. *Radhuva* is more problematic – and here the outcome is more disappointing, as an opportunity for norm clarification using the Convention was missed, and was supplanted by the requirement for a best interests determination by police officers at the point of arrest. Stalford and Hollingsworth have pointed out that while best interests offers "a neat shorthand for promoting the best outcomes for children" its ubiquity papers over the cracks of complexity.[83] The South African Constitutional Court has built a powerful jurisprudence on children's best interests, but it is important that ongoing and careful attention is paid to ensuring that children are recognized as rights bearers of all the rights in the Constitution. Without losing its commitment to best interests, and while continuing to provide the kinds of ringing statements that make its child rights jurisprudence bold and memorable, the court must guard against romanticism, the Court must guard against simplification and must avoid papering over the cracks of complexity.

83 Stalford and Hollingsworth "Judging children's right: Tendencies, tensions, constraints and opportunities" in H Stalford, K Hollingsworth and S Gilmore (eds) *Rewriting children's rights judgments: From academic vision to new practice* 64.

Discrimination in education of children in central and eastern Europe in the jurisprudence of the European Court on Human Rights

Velina Todorova

SUMMARY

This contribution discusses the child's right to education in the context of discriminatory practices of its realisation in some Central and Eastern European states. The discussion is driven by three judgments of the European Court on Human Rights pronounced relatively recently – *D.H. and Others v The Czech Republic* (2007), *Orcus and Others v Croatia* (2010) and *Horvath and Kiss v Hungary* (2013). The judgments are reviewed with the view to demonstrate the way the Strasbourg Court develops its concept of indirect discrimination, incl. of *prima facie* evidence of discrimination. Also, the contribution is trying to highlight to evolving reasoning of the Court in applying the concept of indirect discrimination in connection with the ones of margin of appreciation and proportionality. An important finding is that the Court finds out that the segregated manner of educating Roma children is not a proportionate tool to achieve the declared (although) a legitimate aim – to respond to the needs of these children. The contribution also focuses on the way the right of the child to education is protected under the Convention on the Rights of the Child and European Convention on Human Rights and Fundamental Freedoms. It proves that although the two international treaties use different approaches, their aims are similar – to ensure equal access to education but also access to quality education that enhances the life chances of children at adulthood.

1 Introduction

This contribution aims to discuss how the right of the child to education is interpreted in some recent judgements of the European Court on Human Rights, although the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not explicitly protect children's rights. The first reason behind this choice is the nature of this right as a cross cutting right – as a linkage and as a key to the unlocking of other human rights – economic, social and cultural as well as civil and political ones.[1] Another good reason is the specific case of educational discrimination of Roma children in some post-communist countries in Central and Eastern Europe (CEE) that currently are members to the European Union.

In the past the education systems in the CEE region were delivering universal and free education until the age of 18. At the same time the

1 See more on this in: Koch, Ida Elisabeth. The Right to Education for Roma Children under the European Convention on Human Rights. Accessed at: https://rwi.lu.se/app/uploads/2012/04/Right-to-Education-for-Roma-Koch.pdf on 2019-04-29.

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children with specific needs were directed to special schools, for example – helping schools for children with mental impairments.[2] The research suggests though, that many Roma children, were educated in those separate (segregated) schools or classes not because of their needs but because of their ethnic origin,[3] which, after the changes in CEE at the end of the 20th century, was termed as amounting to ethnic or racial discrimination. Litigation before international courts became a powerful tool to combat discrimination in education of children.

The contribution will briefly present the international courts in Europe. Then the way the right of the child to education is protected under the Convention on the Rights of the Child (CRC) and ECHR. Then the evolving jurisprudence of the ECtHR on the educational discrimination of Roma children will be exemplified by three judgments against Czech Republic, Croatia and Hungary. The approach of the ECtHR regarding protection of children's rights will be briefly compared to the one of the Committee on the Rights of the Child.

2 The International Courts in Europe

There are two international Courts in Europe that have jurisdiction recognised by the states in the continent. The European Court of Human Rights[4] oversees the implementation of the European Convention on Human Rights in the 47 Council of Europe member states.[5] The Convention is the first instrument to give effect to certain of the rights, principally civil and political rights, stated in the Universal Declaration of Human Rights and make them binding. Its ratification is a prerequisite for a state to join the Council or Europe. The economic, social and cultural rights of Europeans are enshrined in the European Social Charter. The European Committee on social rights oversees its implementation.

Central and Eastern European states joined the Council of Europe and the Convention after the democratic changes that took place in the region in 1989-1990. The first countries to join were Bulgaria and Hungary in

2 The author have witnessed the reforms in the educational system and have participated in the reforms of the child care and protection system in Bulgaria (1997-2019).

3 See Kanev, K. The first steps: Evaluation of the Desegregation projects of CSOs in 6 Bulgarian towns. Sofia, 2002, at: https://bghelsinki.org/bg/books/malcinstva/2002/prvite-stpki-otsenka-na-nepravitelstvenite-desegregatsion ni-proekti-v-shest-grada-na-blgariia/ in Bulgarian only and Strategic Litigation Impacts Roma School Desegregation. Open Society Justice Initiative. Open Society Foundations, 2016.

4 It is a regional human rights judicial body based in Strasbourg, France, created under the auspices of the Council of Europe. It is an international organisation aiming to uphold human rights, democracy and the rule of law in Europe. Founded in 1949, it has currently 47 member states. See more at: https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf

5 The European Convention on Human Rights and Fundamental Freedoms is the first Council of Europe's convention and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953.

1992, followed by Poland, Slovakia and Slovenia in 1993 and 1994 and Serbia – in 2003.

The European Court, or "Strasbourg Court", has jurisdiction to decide complaints ("applications") submitted by individuals and States concerning violations of the Convention or of its Additional Protocols. Individuals, including children, can bring complaints of human rights violations to the Strasbourg Court once all possibilities of appeal have been exhausted in the member state concerned. The person, group or non-governmental organization submitting the complaint does not have to be a citizen of a State party. However, complaints submitted to the Court must concern violations of the Convention allegedly committed by a State party to the Convention and that directly and significantly affected the applicant. The Court's 47 judges are selected by the Parliamentary Assembly of the Council of Europe from a list of applicants proposed by the Member States. In general the Court's judgments are binding on states and should be executed. The implementation of the judgments is monitored by the Committee of ministers to the Council of Europe.[6]

The Court of Justice of the European Union is created under the Treaties of the European Union – the last one of which is the Treaty of the Functioning of the European Union (Lisbon Treaty) and is based in Luxemburg. It interprets European Union law, settles legal disputes between national governments and European Union institutions, and, in certain circumstances, the court decides cases on alleged violations of human rights as stipulated in the European Union Charter of Fundamental Rights. Both courts make reference to each other case law with regard to cases on violations of human rights.

3 The right to education in CRC and ECHR

The right to education is formulated differently in the CRC and in the ECHR. Notwithstanding that, the jurisprudence of the Committee on the Rights of the Child and of the ECtHR has reached a lot of common interpretations of the respective norms. CRC articulates the right to education as a human right of the child that creates positive obligations on States parties to realise it in a progressive way, to the maximum extent of resources available (article 4 CRC).[7] The Committee on the Rights of the Child interprets the right to education alongside the aims of

6 See Annual reports on the execution of judgments of the ECtHR at: https://www.coe.int/en/web/execution/annual-reports.

7 Article 28, §1 CRC: 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

education (article 29 CRC),[8] underlying that it is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge[9] and encourages the States parties to develop inclusive education as a set of values, principles and practices that seeks meaningful, effective, and quality education for all students, that does justice to the diversity of learning conditions and requirements not only of children with disabilities, but for all students.[10] The effective realisation of this right is thoroughly monitored by the Committee. The still existing discriminatory practices is of particular concern, for example, segregated education of Roma children in CEE states.[11]

The right to education is the only social right protected by the ECHR usually read in conjunction with the prohibition of discrimination (article 14 ECHR). In contrast to the CRC, this right is formulated in a negative way.[12] This is interpreted as not to create positive obligations to the States parties to develop public education systems but rather to secure access to educational institutions existing at a given time.[13] However, in the context of the right to education of members of groups suffering past discrimination in education with continuing effects (e.g. Roma children), the Court enshrines the notion of the positive obligations in order to address these problems, such as active and structured involvement on the part of the relevant social services (see *Oršuš and Others*, § 177) or specific actions to avoid the perpetuation of past discrimination or discriminative practices, or to undo a history of racial segregation in special schools (see *Horvath and Kiss*, § 116, 127).[14] The ECtHR pays

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

8 See General Comment no. 1 (2001) Article 29(1): The Aims of Education. CRC/GC/2001/1.

9 See 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), *§*79.

10 See General comment No. 9 (2006) The rights of children with disabilities (*§*62, 65-69). CRC/C/GC/9.

11 See Concluding Observations to government reports of Hungary (CRC/C/HUN/CO/3-5 of 2014, *§* 52-54) and of Bulgaria (CRC/C/BGR/CO/3-5 of 2016, *§* 48-49).

12 Article 2 of Protocol No. 1: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

13 Council of Europe. Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights. Right to education. Updated on 31 August 2018.

14 See Harris, D., O'Boyle, M. *et al*. Law of the European Convention on Human Rights. Oxford University Press, 2014, pp. 1083-1086. Also: Kilkelly, U. Religion and Education: A Children's Rights Perspective. *A paper delivered at the TCD/IHRC Conference on Religion and Education, Trinity College Dublin, 20 November 2010.*

specific attention to the quality of education, which should increase the life chances of children helping them to integrate into the ordinary schools and to develop the skills that would facilitate life among the majority population (see *Horvath and Kiss*, § 127).

4 Discrimination in education of Roma children

The educational segregation of Roma children in post-communist countries in CEE is a lasting tradition. Research shows that various inter- related mechanisms may lead to the segregation of Roma students such as the so called process of 'white flight', testing of the levels of 'maturity' or of the learning abilities or of language proficiency of young children, residential segregation of Roma families, demographic reasons etc.[15] In Bulgaria, for example, Roma children were overrepresented in the so called 'helping schools' – a type of boarding schools for care and education of children with mild mental impairments.[16] Although the segregation in education is addressed by numerous political documents in the region (presenting mainly the good intentions of the political class), as well as by academic studies and projects implemented by civil society organisations, the outcomes are not satisfactory.[17]

Part of the actions addressing discrimination in education is the successful strategic litigation in some CEE that ended up with cases brought before the ECtHR. Three cases will be presented here that illustrate the evolving jurisprudence of the Strasbourg court concerning attention to the applications claiming discrimination in education on the basis of ethnic origin.

15 See more in: Education: the situation of Roma in 11 EU Member States. Roma survey – Data in focus. (2014) FRA – European Union Agency for Fundamental Rights, pp.43-48. At: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-roma-survey-dif-education-1_en.pdf

16 Kunev, K. The first steps: Evaluation of the Desegregation projects of CSOs in 6 Bulgarian towns. Sofia, 2002, at: https://bghelsinki.org/bg/books/malcinstva/2002/prvite-stpki-otsenka-na-nepravitelstvenite-desegregatsionni-proekti-v-shest-grada-na-blgariia/ in Bulgarian only.

17 See the monitoring reports of civil society on the implementation of the National Roma Integration Strategies in the EU. The First monitoring cycle (2017) reviewed key structural preconditions of successful implementation of the Strategies: fighting discrimination and antigypsyism, governance and overall policy framework (including Roma participation, coordination structures, use of European Structural and Investment Funds) and for the countries with largest Roma communities (Bulgaria, Czech Republic, Hungary, Romania, Slovakia) also the impact of mainstream education policies on Roma. In the Second monitoring cycle (2018), the reports focus on the key policy areas of education, employment, healthcare and housing. At https://cps.ceu.edu/roma-civil-monitor-reports

Two of the cases were reviewed by the Grand Chamber of the ECtHR[18] – *D.H. and Others v The Czech Republic* (2007), and *Orcus and Others v Croatia* (2010). The most recent similar case – *Horvath and Kiss v Hungary* (2013), was decided by the Second section[19] of the Court.

In *D.H. and Others v The Czech Republic,*[20] the applicants – eighteen Roma children, Czech nationals, alleged, *inter alia* that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin. The applicants were placed in special schools in Ostrava, either directly or after a spell in an ordinary primary school. Those schools were intended for children with mental deficiencies[21] who were unable to attend "ordinary" or specialised primary schools.[22] This practice has made it more difficult for Roma children to gain access to other levels of education, thus reducing their chances of integrating in society. Although legislation no longer prevented children from advancing from special to ordinary secondary

18 The Grand Chamber of the Court is a formation of seventeen judges (art. 26/1 of the Convection). The Grand Chamber could consider cases on two occasions. Any Chamber (a composition of seven judges) at any time before it has rendered its judgment, may relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court (art.30 ECHR). Article 43 stipulates that referral to the Grand Chamber may be requested by any party to the case, in exceptional cases, within a period of three months from the date of the judgment of the Chamber. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. The judgment of the Grand Chamber shall be final (art. 44 ECHR).

19 A Section is an administrative entity and a Chamber is a judicial formation of the Court within a given Section. The Court has five Sections in which Chambers are formed. See Rules of Court at: https://www.echr.coe.int/documents/rules_court_eng.pdf

20 Application no. 57325/00.

21 The original language of the Judgment is preserved. In all three discussed here judgments the Court applied terminology not consistent with the Convention on the Rights of Persons with disabilities although it was adopted in 2006.

22 *D.H. v Czech Republic*, *§16*: under the terms of the Schools Act (Law no. 29/1984), the legislation applicable in the present case, special schools were a category of specialised school (*speciální* školy) and were intended for children with mental deficiencies who were unable to attend "ordinary" or specialised primary schools. Under the Act, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology centre and was subject to the consent of the child's legal guardian. The testing, however, was neither compulsory nor automatic. The recommendation for the child to sit the tests was generally made by teachers – either when the child first enrolled at the school or if difficulties were noted in its ordinary primary-school education – or by paediatricians (*§39)*.

schools, the level of education offered by special schools generally did not make it possible to cope with the requirements of secondary schools, with the result that most dropped out of the system (§ 74, 144-145).

The case was first examined by the Second Section of the Court, which found in 2006 no violation of Article 2 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention. The judgment was based on two premises. The state enjoys a margin of appreciation to justify the difference in treatment by differences in otherwise similar situations but also in establishing its policy in the field of education. In this case the Court accepted that the rules governing children's placement in special schools do not refer to the pupils' ethnic origin, but pursue the legitimate aim of adapting the education system to the needs and aptitudes or disabilities of the children. Further on, the Court stated that the States cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs in the difficult exercise to balance the various competing interests. It further pointed out, that it is not its task to assess the overall social context in the respective state (therefore refused to rely on the statistics presented) but rather it is tasked to examine the individual applications before it and to establish on the basis of the relevant facts whether the reason for the applicants' placement in the special schools was their ethnic or racial origin.

On the request of applicants, the case was transferred to the Grand Chamber, which decided in 2010 exactly the opposite. The Court particularly examines the practice of psychological testing of children in place to justify their entry to the special educational system. It is observed that the tests, although regarded for all children, are not culturally and linguistically sensitive, and do not take into account the former (lack) of experience as well as the lack of preschool education of Roma children (§ 40-47). Therefore, the testing results in overrepresentation of children in special needs education designated at that time for children with mental health problems, fact that is supported by various reports.[23] The role and attitudes of the Roma and non-Roma parents were examined too as a factor for educational segregation. The role of teachers to direct children to special educational classes or to encourage parents to agree on that are also considered by the Court (§49).

23 The Advisory Committee on the Framework Convention for the Protection of National Minorities noted in its first report on the Czech Republic (2002), that while these schools were designed for mentally handicapped children it appeared that many Roma children who were not mentally handicapped were placed in them owing to real or perceived language and cultural differences between Roma and the majority. In its second report (2005) this Committee noted with concern that "Roma account for up to 70% of pupils in [special] schools, and this – having regard to the percentage of Roma in the population – raises doubts concerning the tests' validity and the relevant methodology followed in practice". In its report on the Czech Republic (2000), the European Commission against Racism and Intolerance (ECRI) noted that channelling of Roma children to special schools was

The facts and observations makes the Court to accept that this is a case of indirect discrimination: the allegation is not that Roma children are in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them.[24] Accordingly, the issue is whether the manner in which the legislation was applied in practice has resulted in a disproportionate number of Roma children being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage. The Court points that the facts of the case do not ascertain intentional difference in treatment between Roma and non-Roma children in the area of education but rather the difference in treatment takes the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (§129, 185-186). References to additional sources, for instance Council Directives 97/80/EC and 2000/43/EC and the definition provided by ECRI, support the view that such a situation may amount to "indirect

reported to be often quasi-automatic. In his final report on the human rights situation of the Roma, Sinti and Travellers in Europe (2006), the Commissioner for Human Rights observed: "Roma children are frequently placed in classes for children with special needs without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin." In addition the Commissioner points out Being subjected to special schools or classes often means that these children follow a curriculum inferior to those of mainstream classes, which diminishes their opportunities for further education and for finding employment in the future. The automatic placement of Roma children in classes for children with special needs is likely to increase the stigma by labelling the Roma children as less intelligent and less capable. At the same time, segregated education denies both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. It excludes Roma children from mainstream society at the very beginning of their lives, increasing the risk of their being caught in the vicious circle of marginalisation." *D.H. v Czech Republic*, §41-43 and 50.

24 See also Harris, D., O'Boyle, M. et al. Law of the European Convention on Human Rights, pp.976 et seq. The different treatment does not come from the wording of the law. The Government presented several facts of legal and policy changes after the 1990, but these were not convincing to the Court: provision of additional lessons for pupils who had completed their compulsory education in a special school; preparatory classes for children from disadvantaged social backgrounds have been opened in nursery, primary and special schools; an alternative educational curriculum for children of Roma origin who had been placed in special schools; Roma teaching assistants were also assigned to primary and special schools to assist the teachers and facilitate communication with the families. By virtue of amendment no. 19/2000 to the Schools Act, pupils who had completed their compulsory education in a special school were also eligible for admission to secondary schools, provided they satisfied the entrance requirements for their chosen course (*D.H. v Czech Republic*, §16–17). The new Act on school education (No 651 of 2004) no longer provides for special schools in the form that had existed prior to its entry into force. Primary education is now provided by primary schools and specialised primary schools, the latter being intended for pupils with severe mental disability or multiple disabilities and for autistic children (*D.H. v Czech Republic*, §31-33).

discrimination", which does not necessarily require a discriminatory intent (§184).

The Court points out that it is difficult to prove indirect discrimination and a *prima facie* evidence is needed in order the burden of proof to be shifted to the Government (§183). The evidence is needed to make an assessment whether the impact of a measure or practice on an individual or group, constitutes a discrimination. The Court accepts in this case that the statistics suggesting that in 1999 Roma pupils made up between 80 % and 90 % of the total number of pupils in some special schools and that in 2004 "large numbers" of Roma children were still being placed in special schools is such *prima facie* evidence (§192, 196).

The Government has failed to convince the Court that the disproportionately high number of Roma children in special schools could be explained by the results of the intellectual capacity tests or be justified by parental consent[25] nor that the results of the tests are capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention (§197-199). Therefore the Chamber conclude that the facts "of the case indicate that the schooling arrangements for Roma children were not attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class.

The next point is also very important. The Court reiterates its notion that the education should be of such a quality that would allow children to benefit and increase their life chances. The Court notes in this judgment that the education that children received in such a segregated manner compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population" (§ 207). In these circumstances the Court is not satisfied that the difference in treatment between Roma children and non-Roma children is objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. Therefore, the Court finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 as regards each of the applicants (§ 208-209).

In *Orsus and others v Croatia*,[26] the applicants – fourteen Croatian children, attended separate classes, comprising only Roma pupils, at the

25 With regard to parental consent the Chamber stated that: In view of the fundamental importance of the prohibition of racial discrimination the Grand Chamber considers that, even assuming the conditions were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest (§ 204).

26 Application no. 15766/03.

ordinary primary schools in two villages.[27] Some of the applicants attended Roma only classes, others both – Roma only and mixed classes during their schooling. The legitimate ground submitted by the Government, to justify the entry of these children in segregated classes was the insufficient language proficiency.[28] The applicants, however, alleged *inter alia*, that they had been denied the right to education and discriminated against in the enjoyment of that right on account of their race or ethnic origin.

The Grand Chamber points out in this case "that the central question to be addressed is whether adequate steps were taken by the school authorities to ensure the applicants' speedy progress in acquiring an adequate command of Croatian language and, once this was achieved, their immediate integration into mixed classes. In this connection, the curriculum followed by the applicants and the procedures concerning their transfer to mixed classes appear of high importance" (§145). The Chamber also raises the important issue of the necessary "positive measures" to address the failure of children to complete primary education or to attain an adequate level of language proficiency, as well as the high drop-out rate of Roma pupils (§ 177).

Unlike in D.H. case in this case, the Court does not find the statistical data as *prima facie* evidence for discrimination. However, the Court notes that "the measure of placing children in separate classes on the basis of their insufficient command of the Croatian language was applied only in respect of Roma children, which clearly represents a difference in treatment" (§ 153). Therefore, it is concluded again, that the schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group (§ 182). This allows the Chamber to determine a lack of a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued. Finally, the Court finds that the difference in treatment of Roma children amounts to discrimination in violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 (§ 184-185).

In *Horváth and Kiss v Hungary* (2013)[29] the applicants are two young Roma men, who are diagnosed as having mental disabilities. As a result,

27 The Application was initially reviewed by the First Section of the Court, which found in 2008 no discrimination. It held that the applicants had been assigned to Roma-only classes because they lacked sufficient command of the Croatian language and that this measure had been justified (§4, 112). The case was referred to the Grand Chamber on the applicants' request.

28 Like in D.H. case, this case has been reviewed by the First Section of the Court in 2008 found no violation of Article 2 of Protocol No. 1 taken alone or in conjunction with Article 14 of the Convention. It held that the applicants had been assigned to Roma-only classes because they lacked sufficient command of the Croatian language and that this measure had been justified.

29 Application no. 11146/11.

the applicants were educated at a remedial school ("special educational programme" or "special" school) created for children with mental disabilities. The Court finds again (as in D.H. case) that Roma appear to have been overrepresented in the past in remedial schools due to the systematic misdiagnosis of mental disability; that this general policy or measure exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group, even the policy or the testing in question may have had similar effect on other socially disadvantaged groups as well. However, the different, and potentially disadvantageous, treatment applied much more often in the case of Roma than for others (§110). The Court again points out the positive obligation of the state to avoid the perpetuation of past discrimination or discriminative practices and to ensure quality education that supports the integration of students into the society (§116, 127).

The Court accepts that the schooling arrangements for Roma applicants with allegedly mild mental or learning disability have not been attended by adequate safeguards (e.g. needed to avoid the misdiagnosis and misplacement of the Roma applicants) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class. Therefore they have necessarily suffered from the discriminatory treatment, which constitutes a violation in the instant case of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 in respect of each of the applicants (§127-129).

5 The evolving approach of ECtHR and the jurisprudence of the UN Treaty bodies

The judgments in review were pronounced between 2006 and 2013. All the cases are strategic litigation cases[30] that have reached the national highest court instances and in Croatia and Czechia – the Constitutional courts. The litigation have been supported by civil society organisations – mostly by Roma Rights Centre placed in Budapest. All three cases concern a violation of children's right to education, protected by a treaty not explicitly devoted to children. The violations also infringe the UN CRC that as an obvious globally agreed human rights standard for children. The Strasbourg Court, however, has failed to apply the arguments already developed in the jurisprudence of the Committee on the Rights of the Child in particular with regard to the discrimination of Roma children, quality of education that is interconnected with the indirect discrimination as well as inclusive education.[31] The CRC only appears in the 'relevant law' section of the judgments rather than as a source of

30 See more on this in Strategic Litigation Impacts Roma School Desegregation in supra n. 3.

31 See §49 of *D.H. and Others v Czech Republic.*

reference in the reasoning, which diminishes its value.[32] For example, in 2001 the Committee stated that educational discrimination affects primarily children from remote, rural areas, children from low income families; girls; children with disabilities; children with ethnic minority and migrant backgrounds.[33] Discrimination in education both direct and indirect, takes different forms – such as misdiagnosis of mild disability, uneven budgetary support to schools that could attract parents to schools receiving higher subsidies, leaving other schools but also parents and children to operate on unequal basis, differentiation in standards for school enrolment, curriculum, textbooks etc.[34]

The above reviewed judgments demonstrate the way the Strasbourg Court develops its concept of **indirect discrimination**, incl. of *prima facie* evidence and shifting the burden of prove. In all three cases the issue is indirect discrimination on the ground of ethnic origin in the access to but also in relation to the quality of education. This form of discrimination is defined by the Court as: as difference in treatment whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children being educated in a segregated manner out of the mainstream education.

In its reasoning, the Court disagreed with the respective Governments that the placement of Roma children in special primary schools for children with specific educational needs in Czechia (D.H., *§* 15-16), or in separate classes in the mainstream primary school in Croatia (Orsus, *§* 10), or in special (remedial) schools for children with mental disabilities in Hungary (Horvath, *§* 6-8) is justified by a legitimate aim - to respond to the special educational needs of those children (learning deficits – D.H., *§*15; insufficient command of the Croatian language – Orsus, *§* 158; and mental disability, Horvath, *§* 6). The Court rather accepted that the placement has been done on the basis of their ethnic origin proved by various statistical data, reports and other sources. Therefore, the Court concluded that the means of achieving that aim were not appropriate and necessary. The Court pointed out that the children were thereby placed at a significant disadvantage compared to other children. As a result Roma children received an education, which compounded their difficulties and compromised their subsequent personal development, instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Therefore, the Court found that without

32 See Florescu, S., Liefaard, T. & Bruning, M. Children's rights and the European convention on human rights. Accessed at https://openaccess.leidenunivnl/bitstream/handle/1887/39663/000-06-NJCM%202015%20nr%20%204%20Florescu%20Liefaard%20Bruning.pdf?sequence=1.

33 CRC/GC/2001/1, § 10.

34 About the recent trend in Hungary – the state strengthens the religious schools, See Church schools receive three times more funding than state schools and Church schools taking over in Hungary's poorer regions, at: https://budapestbeacon.com/report-church-schools-receive-three-times-funding-state-schools/ accessed on 30.04.19.

objective and reasonable justification, Roma children were treated less favourably than non-Roma children in a comparable situation and that this amounted to indirect discrimination, which was a violation of the Convention rights.

This reasoning leads the Strasbourg court close to the concept of **inclusive education** developed mostly in the Convention of the Rights of Persons with Disabilities (CRPD)[35] but also, gradually, in the jurisprudence of the Committee on the Rights of the Child.[36] Both the CRPD and the related jurisprudence of CRC, were developed during the same period of time – 2000 – 2013 and further.

The ECtHR touches briefly upon the issue of inclusive education in *Horvath and Kiss*. For instance, it was found that in Hungary part of the reason for many children to be considered disabled was that the legal definition of special educational went beyond mental disability and included educational challenge, dyslexia and behavioural problems.[37] Similar legislation existed for years in many states in CEE.[38] In its Concluding observations to states parties, the Committee on the Rights of the Child also recommends that measures should be adopted to monitor and effectively eradicate the educational segregation of Roma children, and ensure that context sensitive procedures based on scientific methods are used in assessing disability by all experts.[39] This view is largely supported by the jurisprudence of the ECtHR, which states that a lack of discriminatory intent in education policies is not sufficient. The States are under a positive obligation to take effective measures against segregation. Measures cannot be regarded as reasonable and proportionate where they result in an education, which compounds the difficulties of Roma children and compromises their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools.

The Committee on the Rights of the Child shares the same opinion that **inclusive education** is the most appropriate means to guarantee the principles of non-discrimination and universality of education. Therefore it recommends the state parties to strengthen efforts to promote inclusive education for all children.[40]

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35 According to article 24, paragraph 1, CRPD, States parties must ensure the realization of the right of persons with disabilities to education through an inclusive education system at all levels, including pre-schools, primary, secondary and tertiary education, vocational training and lifelong learning, extracurricular and social activities, and for all students, including persons with disabilities, without discrimination and on equal terms with others.

36 See CRC/C/GC/9: *§* 62, 65-69.

37 *Horváth and Kiss v Hungary*, *§*9-15.

38 This was the case in Bulgaria where the Education Act, outlawed in 2016, provided for so called 'helping schools' for children with light mental health problems, where Roma children were also overrepresented.

39 See concerns and recommendations to Czechia: CRC/C/CZE/CO/3-4 (2011), § 61-62 and to Hungary: CRC/C/HUN/CO/3-5, (2014), § 52-53.

40 GC N 9 (2006) on the 'Rights of Children with Disabilities'.

In each of the cases though, the Court touches upon the issue of **direct discrimination** too, noting that Article 14 ECHR does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. Thus the ECtHR comes closer to the notion expressed by the Committee on the Rights of Persons with Disabilities[41] that:

> "Equalization of opportunities, as a general principle of the Convention under article 3, marks a significant development from a formal model of equality to a substantive model of equality. Formal equality seeks to combat direct discrimination by treating persons in a similar situation similarly. It may help to combat negative stereotyping and prejudices, but it cannot offer solutions for the "dilemma of difference", as it does not consider and embrace differences among human beings. Substantive equality, by contrast, also seeks to address structural and indirect discrimination and takes into account power relations. It acknowledges that the "dilemma of difference" entails both ignoring and acknowledging differences among human beings in order to achieve equality.
>
> Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality."

Furthermore, considering the fact that an excessive numbers of Roma children in CEE states[42] have been educated separately from other children from the majority population the Court evolves (from the D.H. Second section Judgment of 2006 to Horvath and Kiss Judgment of 2013)[43] its notion that the issue is not only legal but also a public policy issue. Constantly noting the difficulty to prove indirect discrimination due to it taking a form of non-explicitly intentional policy or legislation, the Court invoked non-traditional sources of evidence that in fact supported that view. Those are statistical data, reports of the Council of Europe monitoring bodies (ECRI), reports of the Council of Europe Commissioner on human rights and national and international non-governmental organisations. Historical and scientific evidences were also presented in the judgments.

41 See General comment No. 6 (2018) on equality and non-discrimination. CRPD/C/GC/6, § 10-11.
42 See D.H. §18, 43, 65; Horvath and Kiss: §115, 128.
43 It should be noted that this is not an anonymous position of the Grand Chamber – see dissenting opinions in those judgments.

This type of reasoning as pertaining more to the 'common law' litigation was not accepted unanimously in the Grand Chamber.[44] Several judges were reluctant to accept the educational policy in the related states as a human rights issue but rather as a matter of social policy where the state has a wide margin of appreciation.[45] The majority, however, clearly departed from the strictly legalistic approach probably because was confronted by a serious and common for many CEE states problem – not only legal but also social. The last judgment of *Horvath and Kiss v Hungary* was the only one taken unanimously. Taking this stance the Court calls for a positive actions from the respective Governments to address the issue in a holistic way.

Last but not least, it is noteworthy that the Strasbourg Court and the Committee on the Rights of the Child always make a very strong connection between the right to access to education and its **quality** that should allow the student to benefit later from the education received. This justified the Court's finding that the schooling arrangements for Roma children were not attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class. The statistics also demonstrated that the proportion of Roma children graduated from school has been much lower than the one of children from majority population. The CRC Committee also notes that discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities. While denying a child's access to educational opportunities is primarily a matter, which relates to article 28 of the Convention, there are many

44 See dissenting opinion of Judge Borrego Borrego (*Oršuš and Others*, §9): In contradiction with the role which all judicial bodies assume, the entire judgment is devoted to assessing the overall social context – from the first page ("historical background") to the last paragraph, including a review of the "Council of Europe sources" (fourteen pages), "Community law and practice" (five pages), United Nations materials (seven pages) and "other sources" (three pages, which, curiously, with the exception of the reference to the European Monitoring Centre, are taken exclusively from the Anglo-American system, that is, the House of Lords and the United States Supreme Court). Thus, to cite but one example, the Court states at the start of paragraph 182: "*The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority.*" The judge is also very critical to the majority that named the educational discrimination – as racial discrimination.

45 According to the eight dissenting judges in *Orsus v Croatia*, "it is accepted that decisions pertaining to the methods used to address the special needs of certain pupils belong to the sphere of social policy, in which States enjoy quite a wide margin of appreciation. Therefore, placing the applicants in separate classes as a means of addressing their special needs is not as such contrary to the Convention, either from the standpoint of Article 2 of Protocol No. 1 or from that of Article 14 of the Convention." Therefore, these judges conclude, it is not shown in this case that the applicants were put at a particular disadvantage compared with other pupils by their placement in Roma-only classes at times during their primary education

ways in which failure to comply with the principles contained in article 29 (1) can have a similar effect.

Furthermore, the CRC Committee always links the right to education with its goals as enshrined in Article 29 CRC, which provides the qualitative dimension of the education. The education to which every child has a right, is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture, which is infused by appropriate human rights values. As the Committee states in its GC No1: "Education in this context goes far beyond formal schooling and knowledge transfer to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society. It also insists upon the need for education to be child-centred, child-friendly and empowering."

6 Conclusion

The reviewed jurisprudence demonstrated the position of ECtHR against indirect discrimination in the enjoyment of the right to education of Roma children. It evolved from rejecting violation of the right justified by the margin of appreciation of the state party in the area of education (in the cases D.H. and Orsus reviewed by the sections) to establishing a violation of the right based on indirect discrimination and requesting positive actions to end discrimination. This development could be attributed to various factors as mentioned before. Most importantly it is the activism from the civil society viewing the strategic litigation as valuable tool for social change. The research produced and data collected by the various structures of the Council of Europe have also contributed for the Court to understand the problem. The universal human rights conventions (e.g. CRC and CRPD) and the jurisprudence of their monitoring bodies provide an important back up and potential for the development of the jurisprudence of the ECtHR.

The case law of the ECtHR confirms that the right to education is justiciable right[46], and if subjected to discrimination – should be secured immediately and fully but not considered as a social or cultural right and thus as a subject to progressive realization.[47] The contribution also showed that although of different nature, the international monitoring mechanism interpret the international human rights conventions in a similar vein. There is a lot more, however, to be achieved in mutual awareness, knowledge and application of the arguments of different

46 See Koch, Ida Elisabeth. The Right to Education for Roma Children under the European Convention on Human Rights. And also: Strategic Litigation Impacts Roma School Desegregation. Open Society Justice Initiative. Open Society Foundations, 2016.

47 Statement by the Special Rapporteur on the right to education, Commission on Human Rights, 8 April 1999. Cited according to Koch, supra n.2.

bodies in order to protect and enforce better the human rights of children.

Using the courts to end corporal punishment – The international score card

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SUMMARY

Corporal punishment of children breaches their rights to respect for human dignity and physical integrity and to equal protection under the law. There are a number of rulings and statements by national high-level courts concerning corporal punishment, its constitutionality and/or its non-compliance with international human rights treaties. The majority of these cases clearly condemn corporal punishment in one or more settings. In many cases, the rulings have been followed by law reform to ensure that national legislation prohibits corporal punishment. This article focuses on ten national high-level courts judgments and their impacts on achieving prohibition of corporal punishment of children in one or more settings. It highlights high-level court judgments clearly condemning corporal punishment of children (Bangladesh, Costa Rica, Fiji, India, Israel, Italy and Nepal), as well as judgments, which did not clearly condemn corporal punishment -(Canada, Kenya and Tonga) but had an impact on the legality of corporal punishment in the concerned countries. An analysis of the selected cases reveals that in addition to lobbying governments to achieve law reform, civil society organisations are increasingly promoting prohibition of corporal punishment by challenging the legality of corporal punishment in court. The article also finds judgments of high-level courts can trigger changes in the general perception of the protection and promotion of human rights. In some cases, judges have ruled against the legal defence of "reasonable chastisement" and clearly condemned the use of corporal punishment by parents and caregivers in private spheres. The article concludes on the need for considering strategic litigation as an alternative way of achieving prohibition of corporal punishment.

1 Introduction

Corporal punishment of children breaches their rights to respect for human dignity and physical integrity and to equal protection under the law.[1] It is recognised by the Committee on the Rights of the Child[2] and other treaty bodies,[3] as well as by the UN Secretary General's Study on Violence against Children,[4] as a highly significant issue, both for asserting children's status as rights holders and for the prevention of all

1 According to the Committee on the Rights of the Child, corporal punishment mostly involves hitting ("smacking", "slapping", "spanking") children with the hand or with an implement (a whip, stick, belt, shoe, wooden spoon, or similar) but it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion. It also includes non-physical forms of

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forms of violence. There is accelerating progress now across all regions, challenging this very common form of violence against children. To date, 54 states – including eight in Africa[5] – have achieved prohibition in all settings, including the home. Typically, prohibition of corporal punishment is achieved through the adoption of clear and specific provisions that either amend existing laws or propose new legislations, or both. In countries where governments are refusing to introduce law reform or are actively opposing it, international and regional human rights mechanisms can also be used to "encourage" them to accept their obligations to realise children's rights. For instance, in Africa, pursuant to the African Union (AU) human rights monitoring mechanisms, complaints were made against African States, including Sudan, Senegal and Mauritania. In the case of judicial corporal punishment in Sudan, the African Commission on Human and Peoples' Rights held that there was no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. It requested that the government of Sudan amend the criminal law in question and abolish the penalty of lashes and compensate the victims (*Curtis Francis Doebber v Sudan*, 236/2000). In the same vein, the African Committee on the Rights and Welfare of the child found that the beating of *talibés* (Quranic students) by *marabouts* (Muslim religious teachers) amounted to corporal punishment and violated their rights under article 16; Senegal was found in violation of the Charter as it had not adequately protected *talibés* children from all forms of violence.[6]

Similarly, in Europe, the European Committee of Social Rights has clearly condemned all corporal punishment of children.[7] The 1996 Revised Social Charter requires states to take all appropriate and necessary measures to protect children against violence.[8] In 2003, collective complaints were submitted against Belgium, Greece, Ireland, Italy and Portugal, alleging that the states were in violation of the Charter

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punishment that are cruel and degrading. See General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2, and 37, *inter alia*).

2 General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2, and 37, *inter alia*).

3 Also see the African Committee of Experts on the Rights and Welfare of the Child's General Comment No. 5 (2018): "State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection" (para. 5.3.1, 5.3.2 and 5.3.3).

4 PS Pinheiro *World Report on Violence against Children* (2006).

5 The seven African states are Benin, Cabo Verde, Kenya, Republic of Congo, South Africa, South Sudan, Togo and Tunisia. For further information see www.endcorporalpunishment.org.

6 Decision of 14 April 2014 on communication No. 003/Com/001/2012, *Centre for Human Rights and la Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*.

7 See *World Organisation Against Torture (OMCT) v Portugal*, complaint No. 34/2006, decision on the merits, para. 19-21.

8 See Article 17 of the Revised Social Charter.

since corporal punishment was lawful.[9] The European Committee of Social Rights found violations against Belgium, Greece and Ireland.[10] In 2013, further complaints were submitted and declared admissible against Belgium, Cyprus, the Czech Republic, France, Ireland, Italy and Slovenia.[11] The Committee found that the lack of clear prohibition in law of all corporal punishment of children violates the European Social Charter. The countries responded variably to the Committee's decision, including law reform to achieve full prohibition in the case of Cyprus and Ireland.

In addition to judgments and decisions made by international and regional human rights bodies, there have been a number of rulings and statements by national high-level courts[12] concerning corporal punishment, its constitutionality and/or its non-compliance with international human rights treaties. The majority of these cases clearly condemn corporal punishment in one or more settings, including in Costa Rica, Nepal, India and Israel;[13] a minority of cases were less conclusive. In many cases, the rulings have been followed by law reform to ensure that national legislation prohibits corporal punishment. Overall, it appears that constitutional and legal provisions are increasingly used to challenge corporal punishment in all or some settings, in addition to using the international instruments, which the state has accepted.

In terms of advocacy, taking or threatening legal action can be part of a comprehensive strategy to promote law reform and ultimately achieve full prohibition. With the exception of judgments pronounced by Southern African high courts,[14] this article will focus on ten worldwide national high-level courts judgments and their impacts on achieving

9 Resolution ResChS(2005)1, Collective complaint No. 19/2003 by the World Organisation against Torture (OMCT) against Italy, adopted by the Council of Ministers on 20 April 2005.

10 See *World Organisation against Torture (OMCT) v Belgium* (Collective Complaint No. 21/2003, decision on the merits, 7 December 2004); *World Organisation against Torture ('OMCT') v Greece* case (Collective Complaint No. 17/2003, decision on the merits, 7 December 2004) and *World Organisation against Torture (OMCT) v Ireland* Complaint No 18/2003, decision on the merits of 7 December 2004.

11 Collective complaint No. 94/2013, *Association for the Protection of All Children (APPROACH) Ltd v Italy*

12 For instance, see in South Africa, *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (2019) CC, ZACC34;* in Zambia, *Banda v The People (2002) AHRLR 260 (ZaHC 1999)* and in Israel, Criminal Appeal 4596/98 *Plonit v A. G.* 54(1) P. D.

13 See in Costa Rica: *2005-1062,* Case No. 02-002448-0369-PE-(3); in Nepal: Supreme Court Order, Writ number 57 of the year 2061 (2005), *Ale (CVICT) et al v Government; in India: Parents Forum for Meaningful Education v Union of India and Another,* 1 December 2000 and in Israel: Criminal Appeal 4596/98 Plonit v A. G. 54(1) P. D.

14 Southern African high-level judgments will be analysed in a separate article.

prohibition of corporal punishment of children in one or more settings.[15] It will notably feature the high-level court judgments clearly condemning corporal punishment of children, as well as judgments which did not clearly condemn corporal punishment but had an impact on the legality of corporal punishment in the concerned countries. The article concludes on the need for considering strategic litigation as an alternative way of achieving prohibition of corporal punishment.

2 Judgments clearly condemning corporal punishment of children

In addition to case laws in Southern Africa, there are seven national high-level court judgments worldwide, which clearly condemn the use of corporal punishment against children. These include three cases in South Asia (Nepal, Bangladesh and India) and one respectively in Latin America (Costa Rica), the Middle East (Israel), Europe (Italy) and the Pacific (Fiji).

In Nepal, in 2005, following an application made by the Center for Victims of Torture concerning the constitutionality of section 7 of the *Act relating to Children, 2048(1992),* which provided for "minor beating" of children by family members and teachers, the Supreme Court[16] ruled against corporal punishment inflicted by parents and teachers. Section 7 of the 1992 Children's Act provided that "any act by the mother, father, family member, guardian or teacher to scold the child or give him/her minor beating for the sake of his or her interests shall not be deemed to violate this Section". The Court noted the international human rights treaties to which Nepal is a party, stating "it is not proper and lawful to make laws in a manner contrary to the provisions of those treaties", and drew attention to countries which have prohibited physical punishment of children, adding "there seems no reason for Nepal not to take an initiative in the universal campaign against physical punishment or torture". It struck down the provision for "minor beating" and ordered Ministers to pursue measures to prevent physical punishment of children. The Supreme Court judgment played a significant role in Nepal's path toward full prohibition of corporal punishment of children. One year following the judgment, at the July 2006 meeting of the South Asia Forum, the Government made a commitment to enact prohibition in all settings, including the home. Nepal is member of the South Asia Initiative to End Violence against Children (SAIEVAC) an Apex Body of the South Asian Association for Regional Cooperation (SAARC), which aims to effectively implement measures to end all forms of violence against girls and boys including women in the sub region.[17] In this regard, ending corporal punishment of children was considered as an

15 Southern Africa is the region recording the highest number of high-level court judgments on corporal punishment of children in Africa with eleven cases as at November 2019. This will be addressed in a forthcoming article.

16 Supreme Court Order, Writ number 57 of the year 2061 (2005), *Ale (CVICT) et al v Government*.

essential strategy for reducing and eliminating all other forms of violence against children in South Asia. In September 2018, Nepal became the 54th state worldwide – and the first state in South Asia – to prohibit corporal punishment of children when it adopted the Act Relating to Children 2018, which explicitly prohibits corporal punishment of children in all settings.

In India, a petition brought by the Parents' Forum for Meaningful Education and its President, Kusum Jain, challenged the legality of corporal punishment in schools as provided for in the Delhi School Education Rules 1973, arguing that it violated the Constitution. The Petition succeeded and the Court, in a judgment delivered on 1 December 2000 directed the State to ensure "that children are not subjected to corporal punishment in schools and they receive education in an environment of freedom and dignity, free from fear". The Court concluded that corporal punishment violated the Constitutional right to life (paras. 13 -15 and 21) and held that it was "cruel to subject the child to physical violence in school in the name of discipline or education". It called on the State to ensure that corporal punishment of students is excluded from schools and that "the State and the schools are bound to recognise the right of the children not to be exposed to violence of any kind connected with education". Since the Delhi Supreme Court ruling, the Government has made a commitment to the prohibition of all corporal punishment, and during the Universal Periodic Review of India in 2012 accepted a recommendation to prohibit corporal punishment in all settings. The Right to Free and Compulsory Education Act 2009 explicitly prohibits physical punishment in some schools, and Rules under the Act provide for implementation of the prohibition through awareness raising, monitoring and complaints mechanisms. However, the Act applies only to children aged 6-14; it does not apply to unaided minority schools, Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction, nor does it apply in Jammu and Kashmir. Overall, prohibition is still to be achieved in the home, some alternative care settings, day care, some schools and as a sentence for crime in traditional justice systems.

In Bangladesh, a writ petition was filed as a public interest litigation in July 2010 by Bangladesh Legal Aid and Services Trust and Ain o Salish Kendra with the High Court in Dhaka, following several media reports of corporal punishment being meted out on children in government and non-government schools. The matter was referred to the Supreme Court[18] which found that corporal punishment in schools violated the Constitutional prohibition of torture and cruel, inhuman or degrading punishment or treatment. The Court then confirmed that although the Constitutional prohibition of "cruel, inhuman or degrading punishment

17 A regional initiative involving the following South Asian countries: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

18 13 January 2011, Writ Petition No. 5684 of 2010.

or treatment" is stated in relation to trial and punishment, "it stands to reason that a child shall not be subjected to such punishment for behaviour in school which cannot be termed criminal offence".[19] Reference was made to the harmful effects of corporal punishment, and the current law on corporal punishment in Bangladesh was considered. The Court went on to order that laws relating to disciplinary action against teachers be amended to identify the imposition of corporal punishment as misconduct, that all laws authorising corporal punishment be repealed, and that corporal punishment be prohibited in the home and workplaces.

With regard to achieving full prohibition, Bangladesh has already expressed its commitment to prohibiting all corporal punishment of children, including in the home, at a July 2006 meeting of the South Asia Forum, following the 2005 regional consultation of the UN Study on Violence against Children. Similarly, in 2009 and again in 2018 the Government accepted recommendations to prohibit corporal punishment made during the Universal Periodic Review of Bangladesh. However to date, the Supreme Court ruling against corporal punishment in schools has not led to confirmation in legislation, and prohibition is still to be achieved in the home, alternative care settings, day care, penal institutions and as a sentence for crime.

It should be noted that the Governments of Nepal, India and Bangladesh are all members of the SAIEVAC but their reactions to national judgments against corporal punishment of children differed. Only Nepal confirmed its court judgment by achieving full prohibition in law. India responded by adopting legislation that prohibits corporal punishment in some schools. However the SAIEVAC requires all member states to "have laws in place to ban corporal punishment in all settings including at home, schools, institutions, workplaces- ", by 2015 [20]. This suggests that adherence to international or regional human rights mechanisms and initiatives may not always be the primary reason for Governments to engage in law reform to promote and protect human rights. Rather, Governments' political will may play a greater role in this process.

In Costa Rica, in 2005, the Criminal Court of Cassation of the Second Circuit Court of San Jose condemned corporal punishment inflicted by parents.[21] It dismissed an appeal by a father convicted for punishing his daughter with a belt. The father's argument was that his actions were based on "a custom that has existed for over twenty years" and that he had used a soft belt that did not have a buckle. Based on the Family Code (article 143), the Court recognized the right and duty conferred under parental authority to, "in a moderate way, correct children". However, it argued that "… this can in no way be interpreted as a general

19 13 January 2011, Writ Petition No. 5684 of 2010 (page 18).
20 http://www.techguthi.com/saievac/corporal-punishment/.
21 2005-1062, Case No. 02-002448-0369-PE-(3).

authorization for parents or guardians of minors to hurt them without being punished for that action or simply to dispose of their lives as they please." Shortly after this judgment, Costa Rica reformed its legislation to prohibit corporal punishment of children by their parents and other adults. In June 2008, Parliament enacted the Law No. 8654 on the Rights of Children and Adolescents to Discipline Free from Corporal Punishment and Other Forms of Humiliating Treatment. This amended the Family Code by repealing the parental right to use moderate correction, it also explicitly prohibited corporal punishment in all settings by adding a new article to the Code on Children and Adolescents 1998 (article 24 bis).

The impact of the judiciary in prohibiting all corporal punishment of children has also proven to be noteworthy in Israel. A first judgment concerned corporal punishment in the school setting where the Supreme Court in 1994[22] ruled against corporal punishment in both state and private schools. The Court found that corporal punishment could not constitute a "legitimate tool in the hands of teachers or other educators". The judgment was confirmed in legislation in 2000 when the Students' Rights Law 5761-2000 prohibited corporal punishment in schools (article 10). Secondly, concerning the home setting, in January 2000 Israel's Supreme Court[23] effectively banned all parental corporal punishment, however light. The case concerned a woman convicted in the district court of assault and abuse against her two children. In appealing, she claimed that her actions were acceptable disciplinary measures. The court ruled that the legal defence was outdated and the "Israeli society had moved on from its reliance on English common law". It therefore held that parents should be forbidden to make use of corporal punishments or methods that demean and humiliate the child as an educational system. During the same year, the legal defence of "reasonable force" was repealed in law. It should also be noted that subsequent court rulings have confirmed the unacceptability and illegality of corporal punishment in childrearing.[24]

In Italy, in 1996, the Supreme Court of Cassation[25] issued a decision on a case concerning a man who had been convicted of the crime of abuse of "the means of correction" under article 571 of the Penal Code and, in the appeals court, of ill-treatment under article 572 of the Code, for repeatedly physically punishing his daughter. The Court held that corporal punishment is not a legitimate method of correction and that to regard it as such was anachronistic and not in keeping with the development of Italian family law, the Constitutional provisions on human dignity and the Convention on the Rights of the Child. It also

22 The *State of Israel v Alagani*.
23 Criminal Appeal 4596/98 *Plonit v A. G.* 54(1) P. D. p.145.
24 For example Cr.C 40362/05 *The State of Israel v Onimaya Theodor* (04.07.2006), Cr.A (Be'er-Sheva) 7161/02 *The State of Israel v Z.Y.* (12.2.2003), Cr.C (Ashkelon) 1414/06 *The State of Israel v Zur Yehoshua* (9.9.2007).
25 Cambria, Cass, sez. VI, 18 Marzo 1996, Foro It II 1996, 407-414.

stated that "the harmonious development of a child's personality, which ensures that he/she embraces the values of peace, tolerance and co-existence, cannot be achieved by using violent means which contradict these goals." However, this landmark judgment was not confirmed in legislation. The Italian law continues to provide for a right of correction ("*jus corrigenda*") in the home and all other settings where adults have parental authority.[26]

Finally, in Fiji, a High Court judgment condemned school and judicial corporal punishment in 2002. In the case of *Naushad Ali v State,*[27] concerning an appeal against a judicial sentence of six strokes of corporal punishment, the High Court stated that "punishment and treatment of persons by state institutions that may have been condoned in the past may be offensive for the present". The Court therefore ruled against both corporal punishment in schools and the sentence of six strokes. Following the 2002 judgment, Fiji has reformed its laws to prohibit corporal punishment in the penal system.[28] It adopted Guidelines[29] that banned corporal punishment in schools and has expressed a commitment to reform its laws to prohibit corporal punishment in all settings, including the home. The Fiji High Court was partially conclusive since judicial corporal punishment was prohibited, however corporal punishment is still to be achieved in the home, alternative care settings and day care. There are Guidelines banning corporal punishment in schools but they have not been confirmed in legislation.

As noted above, not all judgments clearly condemning corporal punishment have been confirmed in legislation. Among the seven concerned countries, only two (Nepal and Israel) have prohibited corporal punishment of children in all settings, including in the home. Israel's example is remarkable in the sense that the judgment that ruled against the legal defence was immediately followed by the enactment of a law prohibiting corporal punishment in the home. Moreover subsequent judgments confirmed prohibition in all settings. In this instance, a clear link can be established between the court decisions and law reform processes to achieve prohibition. This was also made possible by the fact that the concerned judgments specifically condemn the use of corporal punishment.

By contrast, there are high-level judgments that do not specifically condemn the use of corporal punishment, which may still have an impact on the legality of corporal punishment of children in countries. It is therefore important to shed light on these case laws and analyse their role in ending legalized violence against children.

26 Article 571 of the Criminal Code 1975.
27 Criminal Appeal No. HAA 0083 of 2001.
28 Prisons and Corrections Act 2006 (article 38).
29 Guidelines of the Permanent Secretary, Education Gazette Vol. III, 2003.

3 Judgments that do not clearly condemn corporal punishment

In Tonga, in the case of *Fangupo v Rex; Fa'aoa v Rex,*[30] in 2010, the Appeal Court overturned sentences of judicial whipping that had been imposed on two 17 year olds, stating that in light of international convention and decisions of the court "it might be argued" that the provisions for whipping are now unconstitutional. In the same year, a private members bill to abolish judicial whipping was under discussion, but this was not enacted. Prohibition is still to be achieved in the home, alternative care settings, day care, as a sentence for crime and possibly in some penal institutions. In the case of Tonga, the Appeal Court judgment has clearly trigged a law reform process to prohibit judicial corporal punishment. However, this was not followed by the adoption of a prohibiting law. The argument as to whether a more explicit judgment would have led to the enactment of a new law is debatable since a law reform process did take place soon as after the judgment was pronounced.

In 2004, in the case of *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General),*[31] the Supreme Court examined the constitutionality of section 43 of the Criminal Code, according to which the use of "reasonable force" against children is not a criminal offence. The court's ruling was peculiar in the sense that it condemned all corporal punishment in schools, but upheld the legality of corporal punishment of children in the home, with certain limitations. The Court found that section 43 justifies only "minor corrective force of a transitory and trifling nature" and that it rules out corporal punishment of children under the age of two years or over the age of 12 years, as well as degrading, inhuman or harmful conduct, discipline using objects such as rulers or belts and blows or slaps to the head. It therefore failed to find that section 43 of the Criminal Code was unconstitutional under the Canadian Charter of Human Rights. Following the ruling, prohibition of corporal punishment in schools has been confirmed in education law in Saskatchewan (2005) and Ontario (2009), not all states have achieved the necessary law reform. In sum, prohibition is still to be achieved in the home, some alternative care settings, day care and some schools.

In Kenya, while not categorically ruling out all corporal punishment, a High Court judgment confirmed that parental "discipline" could constitute cruel, inhuman and degrading treatment and could be a matter for the courts. The case of *Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)*[32] in 2004, concerned a man convicted of

30 *Fangupo v Rex; Fa'aoa v Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (14 7 2010).

31 Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4.

32 *Isaac Mwangi Wachira v Republic High Court of Kenya (Nakura),* Criminal Application No 185 of 2004 (Unreported).

subjecting his 3-year-old daughter to torture under the Children's Act. The defendant made an appeal against the length of his sentence of imprisonment. The High Court rejected the appellant's argument that the fact he was a parent disciplining his child was a mitigating factor. It should be noted that the case concerned the severe and sustained beating and pinching of a young child and the judgment addresses only the level of punishment, which would fall outside what many people would call "reasonable". However, it can be said that this was a landmark decision because it affirms the right of children under the new Act to be protected from torture and cruel, inhuman and degrading treatment and asserts that a parent's behaviour under the guise of discipline can constitute such treatment (traditionally seen to be committed by the state and not private individuals). It also confirmed the power of the courts to examine the status of corporal punishment in the home. It may be argued that the *Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru)* contributed to building the momentum toward prohibition of all corporal punishment of children in Kenya.[33] Indeed, in 2010, Kenya adopted a new Constitution which prohibits corporal punishment of children in all settings.[34]

3 1 Strategic litigation and ending corporal punishment of children

While it is true that prohibition of corporal punishment is mostly achieved through law or constitutional reform process, challenging corporal punishment in all or some settings before the courts can be considered. Legal action would "force" governments that are refusing to introduce law reform or are actively opposing it, to accept their obligations to realise children's rights. The examples of Nepal and Costa Rica and Israel establish a direct link between strategic litigation and prohibition of corporal punishment. While Israel immediately adopted a prohibiting law, in Nepal and Costa Rica the high-level judgments undeniably built momentum towards prohibition and prohibiting laws were ultimately enacted. More importantly, it should be pointed out that in common law countries, based on the national legal system, a high-level judgment condemning the use of corporal punishment can

33 Civil Society Organisation including Save the Children and ANPPCAN Kenya formed a coalition campaigning for law reform to achieve full prohibition of corporal punishment of children. For example, from 2005, ANPPCAN Kenya organised the annual "No Kiboko Day", ("No beating Day") where children and other stakeholders engage in activities regarding non-violent forms of discipline.

34 Article 29 of the Constitution 2010 states that every person "has the right to freedom and security of the person, which includes the right not to be – ... (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; or (f) treated or punished in a cruel, inhuman or degrading manner."

effectively protect children from all corporal punishment.[35] In Bangladesh for instance, the Government reported to the Committee on the Rights of the Child in 2015, that a number of legislative measures were being developed, including a "Ban on Corporal Punishment Policy and Guideline".[36] Similarly in Tonga, a law reform process was initiated soon after the court judgment against judicial corporal punishment.[37]

Another aspect to note is that some of the concerned countries have since officially declared their intention to prohibit in all settings to international human rights mechanisms. The Governments of Bangladesh, India and Fiji accepted recommendations to prohibit corporal punishment made during their respective Universal Periodic Reviews.[38] Italy for its part, has been consistently questioned about its intention to bring legislation into line with the 1996 Supreme Court ruling against corporal punishment by international human rights mechanisms. Based on this, it may be argued that even when national high-level judgments are not confirmed in legislation, they may still be used as a means of pressure at national and international levels, which increasingly promote children's human right to be protected against violence.

Strategic litigation can also foster civil society's pressure in promoting the human right imperative to prohibit corporal punishment of children. For instance, the above-mentioned court cases in Bangladesh, Canada, India and Nepal were filed by civil society organisations. Similarly, in 2003 and 2013, using the collective complaints procedure of the European Social Charter, on two separate occasions non-governmental organisations brought complaints against Italy on the grounds that it failed to take measures to prohibit corporal punishment of children in all settings. These examples show that in addition to promoting law reform and lobbying Governments and Members of Parliaments, civil society organisations can promote prohibition by challenging the legality of corporal punishment. In doing so, they may use national legal systems, as well as international and regional human rights instruments.

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35 See *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (2019) CC, ZACC34;* In this case, the South Africa Constitutional Court ruled that the common law defence of 'reasonable and moderate chastisement' was unconstitutional, effectively banning all corporal punishment of children since there was no similar defence in legislation,

36 12 August 2015, CRC/C/BGD/Q/5/Add.1, Reply to list of issues, paras. 24 and 26

37 *DCI Juvenile Justice Newsletter 2007*, No. 3, 30 June 2007

38 For Bangladesh see 5 October 2009, A/HRC/11/18, Report of the working group, para. 94(16) and 25 May 2018, A/HRC/WG.6/30/L.10 Unedited version, Draft report of the working group, paras. 147(45), 147(52), 147(55), 147(56). For India see 17 September 2012, A/HRC/21/10/Add.1, Report of the working group: Addendum. For Fiji see 17 December 2014, A/HRC/28/8, Report of the working group, para. 100(5) and 8 May 2017, A/HRC/WG.6/27/L.8, Draft report of the working group, unedited version, paras. 5(233), 5(234) and 5(235).

Judgments of high-level court cases can also trigger changes in the general perception of the protection and promotion of human rights. In Kenya, for example, as mentioned earlier, although the judge did not challenge the right of parents and others to administer "reasonable punishment" under article 127 of the Children's Act, it confirmed that judges had the power to examine the status of corporal punishment in the home. With this case, the judge found that parents' actions under the guise of "discipline" could constitute cruel, inhuman and degrading treatment and could be punished as such. The defence of "reasonable punishment" could no longer prevent judges' scrutiny. Equally, in Italy, even though the law provides for a right to correction, the judge was of the view that corporal punishment was obsolete and in breach with international human rights instruments. Finally, in Nepal, before the publication of the 2006 UN Secretary General's Study on Violence against Children which recommended prohibition and elimination of corporal punishment as a matter of priority, in its judgment in 2005, the Supreme court held that "there seems no reason for Nepal not to take an initiative in the universal campaign against physical punishment or torture".

Strategic litigation is also evidence that increasingly, in their judgments, courts are referring to international human rights instruments, especially the Convention on the Rights of the Child and other human rights treaties - in addition to their national constitutions. In Bangladesh, Costa Rica, India, Israel and Italy, the courts explicitly quoted the Convention on the Rights of the Child - (articles 19, 28 and 37). In Bangladesh, the court even used the definition of corporal punishment adopted by the Committee on the Rights of the Child in its General Comment No. 8 on corporal punishment and other cruel or degrading forms of punishment.[39] Likewise, in Costa Rica, the court referred to the recommendations made by the Committee to prohibit corporal punishment in the home. Overall, international and regional human rights instruments and treaty bodies documents seem to guide national high level courts decisions with a view to confirm children's status as rights holders. It should also be noted that in some cases, courts have paid particular attention to other countries' judgments on the issue of corporal punishment. For instance, in the judgment of Bangladesh in 2001, reference was made to the above-mentioned Delhi Supreme Court judgment on school corporal punishment. In Fiji also, the court quoted similar judgments in Namibia (*Ex Parte Attorney General of Namibia: in re Corporal Punishment by Organs of State*) and Zimbabwe (*Ncube and Others v State*).

39 General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2, and 37, *inter alia*).

4 Conclusion

High-level court judgments on the legal and constitutional status of corporal punishment have been published worldwide. A trend that is worth noting is that in some cases judgments condemning corporal punishment (clearly or not), have been precursors of law reform to prohibit corporal punishment in one or all settings (e.g. Costa Rica, Israel and Kenya). In other cases, countries have not confirmed the judgments in legislation, keeping corporal punishment lawful in some or all settings. Be that as it may, it seems that none of the judgments examined have been contradicted by subsequent national judgments. In fact, they are even quoted by other national courts interchangeably. The impact of high-level judgments on corporal punishment therefore cannot be underestimated. First of all, as seen in the above-mentioned South African example,[40] it may lead to the effective ban of corporal punishment. Equally, when a high-level judgment condemning corporal punishment is not sufficient to achieve prohibition as in the selected countries of this chapter, it may still constitute an advocacy tool for civil society in its quest for achieving full prohibition in legislation. It is an important means of pressure for treaty bodies when they assess countries' performance in the protection of children from violence. In sum, the effectiveness of national judgments in achieving prohibition of corporal punishment should be considered in a wider context, in other words, judgments should be seen as a critical step leading to law reform. Governments, civil society and other stakeholders will still have a significant role to play with a view to ensure that the judgments are confirmed into legislation. Finally, it should also be noted that achieving law reform to prohibit corporal punishment is yet another step in the protection of children from violence. Indeed, sensitization campaigns and other educational measures will still need to be carried out to ensure elimination of corporal punishment of children.

40 Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (2019) CC, ZACC 34.

Closing

Children as social justice activists

Tracey Malawana

In a historic ruling that decriminalised peaceful protest, the Constitutional Court declared in its November 2018 judgment: "In particular, it must be emphasised that for children, who cannot vote, assembling, demonstrating and picketing are integral to their involvement in the political process. By virtue of their unique station in life the importance of the section 17 right [the right to protest] has special significance for children who have no other realistic means of expressing their frustrations".

The submissions made by Equal Education, as *amicus curiae* in the case brought by the Social Justice Coalition, argued that the ability to engage in protest action is vital for the democratic project and to the work of Equal Education members in furthering the right to basic education. As we explained to the Constitutional Court, by engaging in protest action as a mechanism of drawing attention to the problems that afflict public education, Equal Education learner members continue on a long history in the South African context of marginalised children and students using protest action as a means of struggle and political self-actualisation.

South Africa has a deep-rooted history of racial oppression and segregation. Among other things, education was used to perpetuate inequalities in the country. In 1953 the Bantu Education Act was enacted, enforcing racially separate educational facilities. The Nationalist government made it clear that this education system was designed to teach African learners to be "hewers of wood and drawers of water" for a white-owned economy and society, regardless of an individual's abilities and aspirations. As then Minister of Native Affairs, Dr Hendrik F. Verwoerd told Parliament: "There is no place for [the Bantu] in the European community above the level of certain forms of labour ... What is the use of teaching the Bantu child mathematics when it cannot use it in practice?"[1]

As a result of these dreadful laws, learners across the country organised to resist and reject Bantu Education. The 1976 Soweto Uprising, which occurred in response to the introduction of Afrikaans as the medium of instruction in schools, started as a series of demonstrations and protests led by black school children on the morning of 16 June 1976.

1 https://en.wikipedia.org/wiki/Bantu_Education_Act,_1953.

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The Soweto Uprising is among the most significant demonstrations of the power of children as social justice activists. The vital role that young people played in the pursuit of liberation gave us a different perspective on resistance – with boycotts as popular strategy, which required intense organising and mobilising.

In democratic South Africa, we have seen many student resistance movements, including #FeesMustFall, #OpenStellenbosch and #RhodesMustFall. #RhodesMustFall was a protest movement that began in March 2015: it called for the removal of the statue of Cecil John Rhodes from the University of Cape Town and led to a wider movement to decolonise education across South Africa. Organising and mobilising was the strategy employed by the student-based political movements, and we witnessed the influence of the Soweto Uprising in setting the paradigm for student protest.

Equal Equation members – who are predominantly high school learners – draw inspiration from all of these students' movements. Equal Education is a youth-led social movement of learners, parents, teachers and community members working for quality and equality in the South African education system, through analysis and activism, as part of a broader democratic struggle for a free, just and equal society. We organise in five provinces – Gauteng, Western Cape, Eastern Cape, KwaZulu-Natal and Limpopo – in rural and urban (township) settings. Youth group meetings, which are held weekly in all provinces, are a platform for Equal Education members to learn and deliberate about inequalities in the education system today, to conduct political education classes, to establish campaigns, to sharpen our understanding of the constitution, and ultimately to develop young activist leaders.

Most Equal Education members are not old enough to cast a vote to elect their government of choice, but they are frustrated by poor service delivery. Rather than drop out of school, learners who must endure school environments that threaten their dignity and safety, instead organise themselves, engage government leaders, take to the streets to protest, and as a last resort turn to the courts.

Multiple times, Equal Education members have been denied their right to protest – despite meeting the requirements of the Gatherings Act. The incidences include:

30 April 2014

Equal Education members were unlawfully denied the right to protest at the Maluti education district offices. Our demand was for teachers to be appointed to vacant posts at Moshesh High School. Despite informing the police and municipality representatives that there was no legal basis for our protest to be suppressed, they would not see reason. There was

reason to believe that the protest would turn violent – as our track record shows, Equal Education does not have a history of violent protest.[2]

6 May 2014

Hundreds of learners, including Equal Education members, from Sizimisele Technical School in Khayelitsha were violently dispersed by the SAPS and the Metro Police while en route to the provincial legislature, to demand that action be taken by the Western Cape Education Department to ensure an end to learners being without teachers for extended periods of time.[3]

11 July 2017

The police and the KwaZulu-Natal Department of Education shut down a peaceful protest held by members of Equal Education, as we attempted to screen our *Long Walk to School* film[4] outside the Pietermaritzburg office of the KZN DoE. The film highlights the years of struggle of Equal Education members to secure safe and reliable scholar transport. We had in fact complied with all the formalities in the Gatherings Act, and our action was peaceful. The right to protest has been crucial as a tool to raise awareness about the inequalities we are faced with in the education system. The right to education and the right to protest are not at odds. Government must protect and fulfil both rights, primarily by fulfilling its Constitutional mandate to reverse the systemic inequality in our society, and by ensuring an end to the unlawful stifling of peaceful organising.[5]

Equal Education uses a range of tools in the struggle for quality education for all – from social mobilisation and community organising, to submissions to the legislative and the executive branches of government, to litigation.

Social mobilisation is the process that engage like-minded group of people like our members who are a combination of learners, teachers and parents and allows them to think and understand their situation and to organize and initiate action for their recovery with their own initiative and creativity. While organising is the establishment of effective relationship amongst our members who then come up with creative ways of petitioning, using social media and staging effective advocacy actions through campaigns and if all these fail without any official accounting, litigation is introduced to keep the momentum and clearly state the obligations that government officials committed to.

2 https://equaleducation.org.za/2014/04/30/equal-education-unlawfully-denied-the-right-to-protest-at-the-maluti-district-office/.
3 https://equaleducation.org.za/2014/05/06/police-violently-disperse-peaceful-high-school-protest-in-cape-town-but-students-secure-a-guarantee-of-teachers/.
4 https://www.youtube.com/watch?v = 2CcM5FhG0O0&t = 603s.
5 https://equaleducation.org.za/2017/07/12/media-statement-kzn-mec-security-officials-embarrassed-call-police-to-disperse-lawful-gathering/.

Through these strategies we have won the adoption of Minimum Norms and Standards for School Infrastructure, the provision of scholar transport to learners in Nquthu in northern KwaZulu-Natal, dramatic improvements to school sanitation, the expansion of school feeder zones in Gauteng, and school safety being prioritised by government. South Africa has witnessed Equal Education members – particularly high school members known as Equalisers – ensure that government officials account for their failures, and raise their voices to change and shape the education system.

Conscientised learners have the power to shape what they want South Africa to be, and what they want the education system to achieve. Our approach has always been to win gains politically – but when for years provincial and national government is unresponsive we end up in the courts. We are however thankful to the judiciary for continuing to play a significant role in the realisation of what is promised to us by the Constitution.

The youth of 1976, of #FeesMustFall, of #RhodesMustFall, of countless other struggles, and of Equal Education is evidence that children continuously play a vital role as social justice activists both in education and in social justice as a whole.