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Articles

On "Dumping" and the Competition Act of South Africa: No "double remedy"

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SUMMARY

In "'Dumping' and the Competition Act of South Africa", Vinti espouses that the Competition Commission has jurisdiction over the actions of extra-territorial parties insofar as such actions involve "prohibited price discrimination" or "price dumping". He finds that the Competition Act and the International Trade Administration Act both bestow jurisdiction over the matter and hence argues that this would constitute an unfair double remedy if both authorities were to take action. He therefore proposes, on the basis of a Memorandum of Agreement that has been concluded between the Competition Commission and the International Trade Administration Commission, that either of the Acts should be amended to ensure that no such double remedies are imposed. Although it is agreed that such "double remedy", if applied, would indeed be unfair for several reasons, this article argues that no such double remedy exists and that, despite the provisions of the Competition Act, the Competition Commission has no jurisdiction in matters related to dumping.

1 Introduction

Vinti argues that there is dual jurisdiction in cases where dumping causes injury to a domestic industry, as the Competition Commission and the International Trade Administration Commission (ITAC) could have concurrent jurisdiction and that this could result in "double remedies" being imposed against dumped imports.[1] While it is recognised that such double remedies would be unfair to the affected parties, it is submitted that, regardless the wording of the Competition Act, as a result of South Africa's international obligations, the Competition Commission does not have any jurisdiction in these matters and that no double remedies exist. It is further argued that there are significant differences between the like provisions in the competition and anti-dumping legislation, respectively, so that even if the Competition Commission did have jurisdiction, it could never apply the relevant provisions to exporters.

To illustrate this, this paper is divided into four parts: the first part of the paper provides a brief overview of the issues at stake and defines the relevant terms. Part two considers the relevant anti-dumping and

1 Vinti "'Dumping' and the Competition Act of South Africa" (2019) *De Rebus* 207.

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competition legislation, and evaluates whether the corresponding legal provisions, specifically those relating to price discrimination and sales below cost, have the same meaning; part three considers South Africa's international obligations and international jurisprudence in this regard; and the final part of the paper offers a conclusion.

As Vinti has correctly indicated,[2] South Africa is a founding Member of the World Trade Organization (WTO). Therefore it is bound, at least at international level, by the WTO Agreement and all its covered agreements, including Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement).[3] With the exception of GATT,[4] these agreements have not been promulgated as part of South Africa's municipal law and therefore only finds external application.[5] However, South Africa has promulgated the International Trade Administration Act 71 of 2002 (ITA Act) and its accompanying Anti-Dumping Regulations (ADR),[6] as well as chapter VI of the Customs and Excise Act 91 of 1964, to give domestic effect to its international obligations in this regard.[7]

Conceptually, there is only one form of dumping.[8] Dumping takes place when the export price from a country[9] is less than the normal value of that product.[10] The normal value is usually determined with reference to the domestic selling price of the product in the exporting country.[11]

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2 Vinti (2019) 208-209.

3 See *Chairman Board on Tariffs and Trade v Brenco* 2001 (4) SA 511 (SCA) 28-29; *Progress Office Machines v SARS* [2007] SCA 118 (RSA), para 6; *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* (Case 98/6589 T) 29; Eisenberg 'The GATT and the WTO Agreements: Comments on their legal applicability to the Republic of South Africa' (1993) 19 *South African Yearbook of International Law* 127.

4 See Geneva General Agreement on Tariffs and Trade Act, 29 of 1948. See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) note 1.

5 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

6 Anti-Dumping Regulations, GN3197 in GG25684 of 14 November 2003.

7 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) para 2.

8 Note that Vinti argues that "[t]here 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'. The second form is 'cost dumping', which occurs when an exporter sells products in an importing country at below the cost of production." (footnotes omitted) Vinti (2019) 207.

9 For purposes of this article, "country" includes customs territories and customs unions.

10 Art VI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994); Art 2.1 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement); s 1 of the International Trade Administration Act (ITA Act) 71 of 2002.

11 Art 2.1 of the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement); s 1 of the International Trade Administration Act (ITA Act) 71 of 2002.

This is why dumping is also referred to as international price discrimination.[12] However, when this price cannot be used,[13] the normal value may be determined, in any order,[14] either on the basis of the comparable export price of the product to an appropriate third country or on the basis of a constructed value.[15] It is this final methodology, the constructed normal value, that Vinti refers to as "cost dumping"[16] and that he equates to certain prohibited practices under the Competition Act.[17]

2 Legislative provisions and jurisdiction

2 1 Anti-dumping legislation

The ITA Act defines dumping as "the introduction of goods into the commerce of the Republic or the Common Customs Area [of the Southern African Customs Union] at an export price contemplated in section 32(2)(a) that is less than the normal value, as defined in section 32(2), of those goods". Section 32(2)(b) then defines normal value as

> i 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; or
> ii in the absence of information on a price contemplated in subparagraph (i), either-
>
> (aa) the constructed cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or
> (bb) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.

It must be noted that dumping is neither illegal, nor prohibited.[18] However, if dumping causes injury, as defined in the Anti-Dumping Agreement and the ADR, to a domestic industry producing the like

12 See e.g. Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513 (Appellate Body Report, *US – Stainless Steel (Mexico)*), paras. 87, 88, 90, 91, 94, 95, and n 208; Panel Report, *Australia – Anti-Dumping Measures on A4 Copy Paper*, WT/DS529/R, adopted 27 January 2020 (*Australia – A4 Copy Paper)*, para 7.64.

13 See Art 2.2 of the ADA and its sub-paragraphs, and Anti-Dumping Regulations (ADR) 8.2 and 8.3 for reasons not to rely on the domestic selling price. See also Brink *Anti-dumping and countervailing investigations in South Africa* (2002) 43-45; Brink *A theoretical framework for South African anti-dumping law* (LLD thesis 2004 UP) 773-774.

14 GATT *Report of the Group of Experts on Anti-Dumping and Countervailing*, para. 148; GATT Panel *US – Atlantic Salmon AD*, paras. 392-393; GATT Panel, *EC – Cotton Yarn*, para. 482; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 93-95; Panel Report, *US – OCTG (Korea)*, para 7.15-7.16.

15 Art VI:1(b) of GATT 1994; Art 2.2 of the Anti-Dumping Agreement, s 32(2)(b)(ii) of the ITA Act.

16 Vinti (2019) 210.

17 S 8(d)(iv) of the Competition Act 89 of 1998

product, then an anti-dumping duty equivalent to, or lower than, the margin of dumping, that is, the difference between the normal value and the export price, may be imposed to level the playing fields and protect the domestic industry from the unfair trade.[19]

South Africa is also a signatory to both the GATT 1994, which has been incorporated into South Africa's domestic legislation,[20] and to the Anti-Dumping Agreement, which has not been incorporated into its domestic legislation.[21]

2 2 Competition legislation

In contrast, the Competition Act 89 of 1998 provides that a dominant firm may not sell goods or services "at predatory prices".[22] The Competition Act regards predatory prices as prices below a company's "average avoidable cost" or "average variable cost".[23] Effectively, this means that a company may not sell a product below its marginal or average variable cost. In addition, the Competition Act provides that prohibited price discrimination exists where a dominant firm "involves in discrimination between … purchasers in terms of the price charged for the goods".[24] However, the latter is not regarded as prohibited price discrimination if it relates to an act "in good faith to meet a price or benefit offered by a competitor",[25] "is in response to changing conditions affecting the market for the goods… concerned",[26] including

18 Art VI:1 of GATT 1994 provides that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party…" (own underlining). Art VI of GATT 1994 and the Anti-Dumping Agreement do not contain any provisions on limiting dumping, but contain provisions on how to apply anti-dumping measures. Thus, it prescribes how investigations against dumping should be conducted, rather than to address dumping as such. See also Hailsham, Lord *Halsbury's Laws of England* 4th ed. (Volume 51) (1986) 489; Hudec 'United States Compliance with the 1967 GATT Antidumping Code' in Michigan Yearbook of International Legal Studies (1979) *Volume 1: Antidumping Law: Policy and Implementation* 205.

19 Art VI:1 of GATT 1994; Art 9.1 of the Anti-Dumping Agreement; ADR 1, 12 and 65.

20 Geneva General Agreement on Tariffs and Trade Act 29 of 1948. Technically, this incorporated GATT 1947 into South African legislation, but as regards anti-dumping, there have been no changes between Art VI of GATT 1947 and GATT 1994.

21 See the references in n 4.

22 S 8(d)(iv) of the Competition Act 89 of 1998.

23 S 1 of the Competition Act 89 of 1998. "Average avoidable cost", in turn, is defined as "the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output", while "average variable cost" is defined as "the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product". *Idem*.

24 S 9(1)(c)(i) of the Competition Act 89 of 1998.

25 S 9(2)(b) of the Competition Act 89 of 1998.

26 S 9(2)(c) of the Competition Act 89 of 1998.

because of "any action in response to the actual or imminent deterioration of perishable goods"[27] and "any action in response to the obsolescence of goods".[28]

Vinti argues that:

> "a foreign 'dominant firm', which has engaged in prohibited price discrimination or cost dumping, will have simultaneously violated the [Competition] 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."

2 3 Prohibited price discrimination

Under the ADA and the ITA Act, any exporter can dump, that is, engage in price discrimination, and an anti-dumping duty may be imposed, provided the margin of dumping exceeds two per cent.[29] Furthermore, the dumped imports must have caused injury.[30] Under the Competition Act, only a "dominant" supplier can engage in the prohibited activity of price discrimination. While there are virtually no provisions in anti-dumping law regarding the size of the company practicing dumping, that is, price discrimination,[31] under the Competition Act a firm is only dominant if it has acquired at least 35 per cent market share.[32]

More often than not, in anti-dumping investigations the exporter is not a dominant supplier. For instance, an analysis of the five most recently completed original[33] anti-dumping investigations shows the following:

In the *Frozen Bone-in Portions* investigation, anti-dumping duties were separately imposed on ten exporters, while a further three exporters were found not to be dumping, and a residual anti-dumping duty was also imposed against non-cooperating exporters in each of the three

27 S 9(2)(c)(i) of the Competition Act 89 of 1998.
28 S 9(2)(c)(ii) of the Competition Act 89 of 1998.
29 Art 5.8 of the Anti-Dumping Agreement; ADR 12.3
30 Art 3 of the Anti-Dumping Agreement; ADR 13 and 16.
31 Art 5.8 of the Anti-Dumping Agreement provides that dumped imports would be negligible, and that an investigation would have to be terminated immediately without any anti-dumping measures imposed, where dumped imports from the *country* represent less than three per cent of the total volume of imports of that product in the importing country. Thus, negligibility applies on a country-wide basis, rather than on a company-basis. The same provision has been incorporated into South African municipal law through ADR 16.2.
32 S 7 of the Competition Act. Note that above 45%, this is irrefutable, while it is refutable between 35% and 45%. See e.g. Vinti 211.
33 This relates to the original investigations, that led to the imposition of anti-dumping measures, as opposed to any later reviews of such measures.

countries subject to investigation.[34] Bearing in mind that, worst case scenario, all the exporters combined represented less than twenty per cent of the total SACU market for bone-in chicken,[35] it is clear that none of the exporters could be regarded as a "dominant supplier". Accordingly, the Competition Act would not have found application in this investigation.

In *Wheelbarrows*, the report identifies two exporters that cooperated fully in the investigation, while there were other non-cooperating exporters.[36] However, imports increased from 165,410 units in the first year under review to 540,710 units in the final year under review,[37] and although the domestic industry's market share decreased as a result,[38] the domestic industry's actual sales volume increased by between seven per cent[39] and 31 per cent[40] over the same period, again confirming that none of the exporters was a "dominant supplier".

In *Cement*, the report identifies four exporters that cooperated fully in the investigation, while there were other non-cooperating exporters.[41] Imports had increased from 142,806 kg in the first year under review to 1,091,235 kg in the final year under review,[42] but this led to a decrease of only nine per cent in the domestic industry's market share[43] as the industry increased its sales over the investigation period.[44] This confirmed that none of the exporters was a "dominant supplier".

In *Float glass*, the report identified four exporters, although only three of them submitted proper responses that were taken into consideration.[45] The report separately provides import data for the four products that form the product under investigation, but failed to provide a consolidated set of data. Although this does not provide an accurate analysis, the author has simply added the volume of imports for each of

34 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK*), 85, Table 8.3.

35 This is based on allegations by the South African Poultry Association, the applicant in the investigation, as is evident from the public file in the investigation. Note that ITAC Report 502 Table 5.5.4 indicates that the applicant's market share *increased* by 5% over the investigation period, despite dumped imports growing 38-fold and its market share growing 33-fold (whereas other imports had decreased by 63%).

36 ITAC Report 502 – *Wheelbarrows (China*), para 1.7.2. The fact that a residual anti-dumping duty was imposed on other exporters from China indicates that there were other exporters from that country.

37 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.1.

38 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.3.4.

39 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.3.1, Table 5.2.3.1(a).

40 ITAC Report 502 – *Wheelbarrows (China*), para 5.2.3.1, Table 5.2.3.1(b).

41 ITAC Report 512 – *Cement (Pakistan*), para 1.8.2. The fact that a residual anti-dumping duty was imposed on other exporters from Pakistan indicates that there were other exporters from that country.

42 ITAC Report 512 – *Cement (Pakistan*), para 5.3.1.

43 ITAC Report 512 – *Cement (Pakistan*), para 5.3.3.4, Table 5.3.3.4(c).

44 ITAC Report 512 – *Cement (Pakistan*), para 5.3.3.2, Table 5.3.3.2(c).

45 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates*), para 1.8.2.

the four products to determine the total volume of float glass imports in square metres.[46] On this basis, the alleged dumped imports increased from 3,022,146 m^2 in 2016 to 3,630,256 m^2 in 2018. In 2018, there a total of 475,874 m^2 were also imported from other sources.[47] The domestic industry consisted of a single producer, and its indexed sales for three of the four products decreased by nine, thirteen and four per cent, respectively, while sales increased by eighteen per cent for the fourth product.[48] For the first product, which accounted for 62 per cent of all dumped imports by surface area, the alleged dumped imports had increased by 28 per cent, yet the decrease in the industry's market share was only nine per cent, indicating that the single domestic producer was still at least three times as big as all the exporters combined. This again shows that there was no "dominant supplier".

In *PET*, the report identifies six exporters from China,[49] while there were also imports from other countries.[50] On the one hand the report indicates only a single domestic producer,[51] but on the other it indicates that the rest of the industry's market share increased.[52] There is no indication of the relative size of the applicant and other producers. While the applicant's market share decreased by nearly 50 per cent over the period,[53] the market share of the dumped imports increased by 33 per cent. However, the market share of non-dumped imports increased by more than 200 per cent, and non-dumped imports amounted to 88 per cent of the volume of dumped imports, thus indicating that dumped imports only constituted only 53.3 per cent of total imports.[54] Accordingly, with several producers from several countries combined gaining less than 50 per cent of the applicant's market share (and bearing in mind that there were other producers in South Africa as well), and that nearly half of the exporters were either not accused of dumping or found not to be dumping,[55] it is clear that there were also no dominant exporters in this investigation and that the Competition Act would not find application.

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46 This is not an accurate way to determine the volume of imports, as the industry's capacity is measured by weight, rather than surface area. The report does not indicate the conversion rates for the different products, which are differentiated by thickness, from surface area to weight.

47 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates*), para 5.3.1. Bearing in mind that "other imports had decreased from 782,134 m^2 in 2016 to 475,874 m^2 in 2018, a decrease of 306,620 m^2, while the dumped imports increased by 608,110 m^2, it follows that the dumped imports to a large extent replaced other imports rather than take market share away from the domestic industry.

48 ITAC Report 615 – *Float glass (Saudi Arabia, United Arab Emirates*), para 5.4.1.

49 ITAC Report 621 – *PET (China)*, para 1.7.2.

50 ITAC Report 621 – *PET (China)*, paras 5.3.1 and 5.4.3.

51 ITAC Report 621 – *PET (China)*, para 1.7.1.

52 ITAC Report 621 – *PET (China)*, para 5.4.4.

53 ITAC Report 621 – *PET (China)*, para 5.4.4.

54 ITAC Report 621 – *PET (China)*, para 5.3.1.

55 ITAC Report 621 – *PET (China)*, para 4.3.4.

In view of the above, it is submitted that there would be very few, if any, instances where an exporter that dumps could be regarded as a "dominant supplier" as defined by the Competition Act. Accordingly, even if an exporter's actions fell foul of what would constitute prohibited actions if it were a dominant supplier, its actions would not fall within the ambit of the Competition Commission.

In addition, the Competition Act provides that price discrimination is not regarded as prohibited price discrimination if it relates to an act "in good faith to meet a price or benefit offered by a competitor".[56] Although no tangible proof exists, anecdotal evidence suggests that in many instances, dumping to South Africa takes place where an importer approaches an exporter with a purchase order at a price that would meet the price of either the domestic producer(s) or other importers.[57]

2 4 Sales below cost

In terms of the Competition Act, a dominant firm may not sell goods at predatory prices,[58] that is, below their "average avoidable cost" or "average variable cost".[59] Under anti-dumping legislation,

> "Domestic sales or export sales to a third country may be considered to be not in the ordinary course of trade if the Commission determines that such sales–
>
> a took place at prices below total costs, including cost of production and administrative, selling, general and packaging costs, provided such sales took place –
> i in substantial quantities equalling at least 20 per cent by volume of total domestic sales during the investigation period; and
> ii over an extended period of time, which period shall normally be a year, but in no case less than 6 months."[60]

There is a clear distinction between these provisions. The average avoidable or variable cost in the Competition Act refers to the additional cost incurred to produce one more unit.[61] This includes the bill of materials, that is, the volume and price of the different raw materials, as well as any additional direct (variable) costs, such as additional consumables, labour, energy and packaging material. However, this does not extend to indirect or fixed costs, such as fixed labour costs, depreciation, maintenance, rent and insurance, administration costs or any costs related to the sales of the product. Under anti-dumping law, however, the costs refer to the total costs to produce and sell a product. This means that it not only includes the variable cost of production, but

56 S 9(2)(b) of the Competition Act 89 of 1998.
57 This is evident from the comments of various importers in anti-dumping investigations.
58 S 8(d)(iv) of the Competition Act 89 of 1998.
59 S 1 of the Competition Act 89 of 1998.
60 ADR 8.2. See also Art 2.2 of the Anti-Dumping Agreement, where the provisions are slightly different.
61 Vinti (2019) 213.

also the fixed costs, the general office overheads and all costs incurred in selling the product. Therefore, there is a very significant difference in when a product will be regarded as being sold below cost under competition law and under anti-dumping law.

In addition, under anti-dumping law, where an exporter sells products on its domestic market at below the total cost thereof, it has to be determined whether such sales took place in significant quantities, such quantities being at least 20 per cent of the total sales on a product-by-product basis.[62] If fewer than 20 per cent of sales, on a product-by-product basis, were sold below cost, those sales must, by law, still be included in the determination of the normal value that is used to determine whether dumping is taking place. Thus, not all sales at a loss are deemed to be unfair or "prohibited".[63] Furthermore, such sales at a loss must also be made over an extended period of time, normally a year, but not less than six months, and must not provide for the recovery of all costs within a reasonable period of time before they may be rejected.[64] On the other hand, where there are targeted sales to South Africa below the price at which the same product is exported to other importers in South Africa, the ITAC may use a different methodology to determine the margin of dumping.[65] Therefore, rather than using the usual weighted average normal value-to-weighted average export price to determine the margin of dumping,[66] or even the alternative transaction-to-transaction methodology,[67] it may compare a "normal value established on a weighted average basis … to prices of individual export transactions if [ITAC] finds a pattern of export prices which differ significantly among different purchasers".[68]

In the *Frozen Bone-in Portions* investigation,[69] the ITAC found that one of the German producers sold some products on its domestic market at less than the full cost of that product. However, it found that such "sales were found to be less than 20 percent by volume of domestic sales and therefore all domestic sales for this model … were used for normal value determination."[70] As regards one of the Dutch exporters in the same investigation, it "made a final determination to disregard sales at a loss, by volume exceeding 20 percent of total domestic sales during the period

62 Footnote 5 to the Anti-Dumping Agreement; ADR 8.2(a)(i); Brink (2004) 765.
63 Footnote 5 to the Anti-Dumping Agreement; ADR 8.2(a)(i); Brink (2004) 765.
64 ADR 8.2. See also, Art 2.2 of the Anti-Dumping Agreement.
65 Art 2.4, last sentence, of the Anti-Dumping Agreement; ADR 11.6; Board Report 4054 – *Sutures (Germany)*; Brink (2004) 832-833.
66 ADR 11.5, first part of the sentence.
67 ADR 11.5, second part of the sentence.
68 ADR 11.6, read with ADR 11.7.
69 Note that there is no reference to below cost sales in ITAC Reports 502 – *Wheelbarrows (China*), 512 – *Cement (Pakistan*), or 615 – *Float glass (Saudi Arabia, United Arab Emirates*).
70 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK*), 31, para 4.1.4(a).

of investigation for dumping in accordance with ADR 8.2."[71] For yet another producer, the ITAC found that

> "Some of the sales of the two comparable models sold in the Netherlands were sold below cost. For model legs, [sic] sales made at a loss were found to be less than 20 percent by volume of domestic sales and therefore all domestic sales for this model were used for normal value determination. For wings A-grade, sales made at a loss were found to be more than 20 percent by volume of domestic sales. [ITAC] made a final determination to disregard the sales made at a loss, by volume exceeding 20 percent of total domestic sales during the period of investigation for dumping…"[72]

Of significance from these findings is the different treatment accorded by the Competition Commission and the ITAC to sales below cost. For the Competition Commission, the relevance of sales below cost are those sales that were made below cost on the South African market. These sales are deemed to be prohibited, if made by a dominant supplier. For the ITAC, the question is whether the exporter makes sales at prices below cost *on its own domestic market*, that is, not in South Africa. If the volume of those below-cost sales are below the 20 per cent threshold, even these below-cost sales are included in the determination of the normal value. However, where below-cost sales reach the threshold, the ITAC will exclude these sales from the normal value determination. This has the effect of excluding low-priced sales from the calculation, thereby increasing the average normal value. Since the export price to SACU is compared to this weighted average normal value,[73] this has the effect of increasing the margin of dumping and, consequently, the anti-dumping duty that ITAC may recommend. Accordingly, ITAC may indirectly penalise an exporter, whether dominant or not, for selling products below costs on its own market, rather than on the SACU market, even where such sales were not made at prices below average avoidable or average variable cost.

3 International law and South Africa's international obligations regarding protective measures against dumping

3 1 Restriction on remedies that may be used against dumping

In view of the above analyses, it is already clear that notwithstanding the provisions of the Competition Act and the ITA Act, there is little, if any, practical overlap between the jurisdiction exercised by the Competition

71 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 35, para 4.3(a).
72 ITAC Report 492 – *Frozen Bone-in Portions (Germany, Netherlands, UK)*, 38, para 4.4.1(a).
73 ADR 11.5.

Commission and that exercised by the ITAC. However, it is also necessary to consider South Africa's international obligations in this regard, which completely remove any possible jurisdiction the Competition Commission might have wanted to exercise in respect of international trade.

Article VI of GATT 1994 and the Anti-Dumping Agreement only provide for provisional anti-dumping duties,[74] definitive anti-dumping duties[75] and price undertakings[76] as measures against the unfair trade. This limitation is further expressly limited by Article 18 of the Anti-Dumping Agreement, which provides that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[77] A panel has interpreted this to mean that "a measure will only constitute 'specific action against dumping' if (1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping, and (2) it acts 'against' dumping, in the sense that it has an adverse bearing on dumping."[78]

This has been confirmed by the Appellate Body, which indicated that there are only three "permissible responses to dumping" available to WTO Members, being definitive anti-dumping duties, provisional duties, and price undertakings.[79]

74 Add Note 1 to Art VI:2 of GATT 1994; Art 7 of the Anti-Dumping Agreement.
75 Art VI:2 of GATT 1994; Art 9 of the Anti-Dumping Agreement.
76 Art 8 of the Anti-Dumping Agreement.
77 Art 18.1 of the Anti-Dumping Agreement; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767 (Appellate Body Report, *Guatemala – Cement I*), paras 79-80.
78 Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489 (Panel Report, *US – Continued Offset (Byrd Amendment)*), para 7.18.
79 Appellate Body Report, United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793 (Appellate Body Report, *US – 1916 Act*), para. 137. See also Panel Report, *US – Continued Offset (Byrd Amendment)*, para 7.8. The panel in *US – 1916 Act (Japan)* also remarked that "[e]xcept for provisional measures and price undertakings, the only type of remedies foreseen by the AntiDumping Agreement is the imposition of duties. Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831 (Panel Report, *US – 1916 Act (Japan)*), para 6.216.

The WTO's Dispute Settlement Body has interpreted the possible actions that may be taken against dumping in two separate disputes. The first related the United States of America's pre-existing legislation, dating back to 1916,[80] which criminalised dumping and made provision for punitive damages to be awarded to an affected domestic industry under certain conditions.[81] After a long analysis, the panel found that

> "Article VI:2 of the GATT 1994 provides that only measures in the form of antidumping duties may be applied to counteract dumping as such and that, by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994"[82] and "conclude[d] that the 1916 Act, because it violates Article VI:2 of the GATT 1994 by providing for other remedies than antidumping duties, is not 'in accordance with the provisions of GATT 1994 as interpreted by [the AntiDumping Agreement]', within the meaning of Article 18.1. As a result, the 1916 Act also violates Article 18.1 of the AntiDumping Agreement."[83]

This was confirmed on appeal,[84] with the result that the United States of America was required to bring its Act into conformity with its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.[85] It follows, therefore, that no criminal action can be brought against dumping and that damages may not be awarded to a domestic industry injured by dumping.

The second dispute in which the WTO's Dispute Settlement Body considered "other" actions against dumping, was *US – Offset Act (Byrd Amendment)*.[86] In this Act, the US adopted legislation in terms of which "offset" payments were (a) "made only and exclusively to US producers that supported an application for an anti-dumping investigation"; (b) "made only and exclusively to US producers 'affected' by an instance of dumping which is the subject of an anti-dumping order"; (c) "paid for 'qualifying expenses' incurred by the affected domestic producers 'after' the issuance of anti-dumping order"; and (d) the 'qualifying expenses'

80 See Title VIII of the United States Revenue Act of 1916, Act of 8 September 1916, 39 Stat. 756 (1916); 15 U.S.C. § 72, with the relevant portions also quoted in Appellate Body Report, *US – 1916 Act*, para 129.

81 See Panel Reports, *US – 1916 Act (Japan)*; *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593 (*US – 1916 Act (EC)*); Appellate Body Report, *US – 1916 Act*.

82 Panel Report, *US – 1916 Act (Japan)*, para 6.230 (footnote omitted).

83 Panel Report, *US – 1916 Act (Japan)*, para 6.231.

84 Appellate Body Report, *US – 1916 Act*, para 138.

85 Appellate Body Report, *US – 1916 Act*, para 156.

86 Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375 (Appellate Body Report, *US – Offset Act (Byrd Amendment)*; Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, p. 489 (Panel Report, *US – Offset Act (Byrd Amendment)*.

must be related to the production of a product that is the subject of an anti-dumping order."[87] In this regard, the panel noted that:

> "… at first sight, the [Continued Dumping and Subsidies Offset Act] CDSOA contains no reference to the constituent elements of dumping. Nor are the constituent elements of dumping explicitly built into the essential elements of eligibility for offset payment subsidies. Nevertheless it is clear that CDSOA payments may only be made in situations where the constituent elements of dumping are present. Specifically, CDSOA offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation). Thus there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments. For domestic producers who have qualified for CDSOA payments by having supported the petition for an anti-dumping investigation, and having incurred qualifying expenses in the production of like products, the CDSOA offset payments flow as automatically from the presence of the constituent elements of dumping as do the anti-dumping duties themselves. For this reason, we find that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping. Indeed, this conclusion is even suggested by the reference to 'dumping' in the title of the CDSOA.
>
> In order to avoid any misunderstanding, we wish to emphasise that our finding that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping is in no way based on the fact that offset payments are funded from collected anti-dumping duties. Even if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion – for the reasons set forth in the preceding paragraph – that offset payments may be made only in situations presenting the constituent elements of dumping."[88]

The panel then evaluated whether the payments to domestic companies that supported action against dumping qualified as action taken "against" dumping, and found that there was "no express requirement that the measure must act against the imported dumped product, or entities connected to, or responsible for, the dumped good such as the importer, exporter, or foreign producer". The panel also noted that there was also no requirement that the action must act "directly" against dumping, but that any indirect action would be included within the scope of Article 18.1 of the Anti-Dumping Agreement.[89] Therefore, the panel concluded that the CDSOA had "an adverse bearing on dumping"[90] as it distorted competition between dumped and domestic products,[91] and as it provided domestic producers with an incentive to lodge or support anti-dumping applications.[92] Accordingly, the US government could not

87 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.19.
88 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.21-7.22.
89 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.33.
90 Panel Report, *US – Offset Act (Byrd Amendment)*, para 7.34.
91 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.35-7.41.
92 Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.42-746.

"reward" US producers that had been affected by dumping, as this was a violation of the only permissible remedies against injurious dumping.

In view of the above, it is submitted that the remedies available under the Competition Act, in response to prohibited price discrimination by dominant suppliers and sales below costs by a dominant supplier, would violate South Africa's obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement if they were used in response to dumping. As a result, they cannot be applied in this way and, consequently, there cannot be any double remedies against dumping.

3 2 Requirement to treat imported and domestic products the same

Article III of the GATT 1994 provides for national treatment. In essence, this means that an imported and domestic like product must be treated equally and be subject to the same taxes and regulations. No measures may be introduced, other than normal customs duties, to "afford protection to domestic production".[93]

Although there are several paragraphs to Article III of the GATT 1994, two paragraphs are of particular importance: (a) paragraph 2, which provides that the imported product "shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products"; and (b) paragraph 4, which provides that the imported product "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Vinti argues that as the anti-dumping law does not apply to domestic firms in the sense that a domestic firm would only be subject to the Competition Act, as opposed to an exporter that would be subject to both the Competition Act and the anti-dumping provisions of the ITA Act and the Anti-Dumping Regulations, this would violate Article III:2 of the GATT 1994.[94] I concur. The same would apply as regards the imposition of measures by the Competition Commission, as these would violate Article III:4 of the GATT 1994.

4 Conclusion

Should a situation arise in which the provisions of the Competition Act on price discrimination or sales below cost are applied against an exporter that is dumping, this would result in a double remedy, which

93 Art III.1 of the GATT 1994.
94 Vinti (2019) 208.

would be unfair.[95] However, there are a number of reasons why it is not foreseen that such a double remedy would ever be applied.

Firstly, the Competition Act refers to price discrimination by a dominant firm, that is, a firm with at least 35 per cent market share. It has been shown that in South Africa's five most recently completed anti-dumping investigations, imports in total seldom met that threshold and that such imports were shared between several exporters. Therefore, there are seldom, if ever, a dominant foreign supplier, with the result that this provision in the Competition Act would not find application.

Secondly, there is a distinct difference in the meaning of "sales below cost" in the Competition Act and in the ITA Act. In the Competition Act, this is restricted to sales below average avoidable or average variable (marginal) costs, whereas under the ITA Act it relates to sales below total cost of production and sale. However, sales at a loss under the ITA Act and the Anti-Dumping Agreement must meet several tests before they may be excluded from the margin of dumping determination. Additionally, as with the price discrimination test, under the Competition Act, this provision only finds application if such sales are made by a dominant firm.

Thirdly, South Africa has incurred international and domestic obligations under Article VI of GATT 1994, and international obligations under the Anti-Dumping Agreement. These obligations include that no remedy other than a provisional duty, a definitive duty and a price undertaking may be imposed "against" dumping. Accordingly, even if a dominant foreign supplier were to practice price discrimination (dumping) in respect of sales to South Africa, the Competition Act would still not find application. Alternatively, if a double remedy were applied, South Africa's trading partners would have recourse to dispute settlement and arbitration under the WTO. Finally, the application of both the Competition Act and anti-dumping legislation to an exporter, but not to a domestic producer, would also be a violation of South Africa's obligations under Article III of GATT 1994, which is part of our domestic legislation.

95 Vinti (2019) 208.

Giant leaps or baby steps? A preliminary review of the development of children's rights jurisprudence in Zimbabwe

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SUMMARY

This contribution provides an overview of children's rights adjudication in Zimbabwe with a specific focus on emerging jurisprudence under the 2013 Constitution. After a summary of Zimbabwe's performance in implementing children's rights under both international and African regional law, the authors examine how Zimbabwean superior courts have dealt with the protection of children's rights. In order to give a fair assessment, we begin by reflecting on the Lancaster House (LH) Constitution (1980) and the resultant jurisprudence thus shedding light on how courts conceptualised children's rights in the absence of a specific child rights provision in the Constitution. This is followed by an analysis of the emerging jurisprudence under the 2013 Constitution which specifically entrenches children's rights. We focus specifically on cases decided between 2013-2019. A focus on seminal court judgements and how courts adjudicated children's rights will guide the authors in ultimately deciding whether or not Zimbabwean courts have made giant leaps or baby steps in the protection and promotion of children's rights under the 2013 Constitution.

1 Introduction

In 2013, Zimbabwe adopted a new Constitution and one of the distinctive features of the Declaration of Rights (DoR) is the unique protection awarded to children.[1] The aim of this contribution is to review and demonstrate the implications of constitutionalising children's rights in Zimbabwe and assess progress made by the courts in the first five

1 S 81 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (Constitution) is the children's rights clause, and it does not preclude children from claiming all the other rights in the DoR.

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years of the Constitution (2013-2019). Given children's particular vulnerabilities and welfarism which dominates children's rights in general, the constitutional protection of children's rights in Zimbabwe cannot be gainsaid. The inclusion of a children's rights clause in the 2013 Constitution is revolutionary for a number of reasons. Firstly, it underscores the status of Zimbabwean children as individual rights holders signalling "a commitment to the recognition of children's rights at the highest level".[2] Secondly, it is opens the door to "an undeniable claim of access to justice for children"[3] and more importantly constitutionalisation sets up children's interests to take centre stage in litigation. In cases of rights violations, constitutionally entrenched children's rights are difficult to ignore and in cases where these rights are in conflict with national laws, entrenched rights enjoy a special status over the other laws.[4] Thus section 81 stands as a powerful legal tool for vindicating children's rights in domestic courts.

The year 2019 marked a five-year milestone after the adoption of the 2013 Constitution, thereby presenting an opportunity to critically reflect on the extent to which the children's rights clause has impacted on the adjudication of children's rights by Zimbabwean courts. This five-year milestone provides an opportunity to advance our understanding of how the courts are engaging with children's constitutional rights. For the child rights movement in Zimbabwe, reviewing the court's performance in the first five years of the 2013 Constitution provides a benchmark from which to measure the court's and the country's progress in advancing children's rights going forward. This milestone is an opportune time to reflect on achievements and address any identified challenges. However, this review is by no means an exhaustive account of the children's rights jurisprudence in Zimbabwe but rather seeks to give a bird's eye view of the development of children's rights through courts with a specific focus on the 2013 Constitution.

This article is organised as follows: in order to paint a holistic picture, the first part begins by looking at Zimbabwe's performance in implementing children's rights under both international and regional law.[5] The objective is to shed light on key child rights issues that Zimbabwe is grappling with. The second part reflects on the old constitutional order – the Lancaster House (LH) Constitution (1980) and the resultant jurisprudence, thus revealing how superior courts conceptualised children's rights in the absence of a constitutional

2 Kilkelly "The UN Convention on the Rights of the Child: Incremental and transformative approaches to legal implementation"2019 *International Journal of Human Rights* 5.

3 Fambasayi "The constitutional protection of child witnesses in Zimbabwe's criminal justice system" 2019 *South African Journal of Criminal Justice* 58.

4 Sloth-Nielsen & Oliel Constitutionalising "Children's Rights and Domestic Courts of Member States of the Council of Europe" (2019) 6.

5 Zimbabwe ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1990 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1995.

children's rights clause. This is followed by an analysis of the emerging jurisprudence under the 2013 Constitution, reviewing cases between 2013-2019. Lastly, in order to ascertain progress in advancing children's rights, a comparison of case law under the two Constitutions is made and the authors will determine whether Zimbabwean courts, in the period under review, have made giant leaps or baby steps in the protection and promotion of children's rights under the 2013 Constitution.

2 International law and children's rights in Zimbabwe

2 1 The place of international human rights in domestic spheres

The domestic application of international law in Zimbabwe is guided by two principles: the monist approach which allows automatic application of international law into municipal law and the dualist approach which provides that international law requires national legislation to be applicable domestically. Zimbabwe follows both a monist and a dualist approach to international law which means customary international law is part of domestic law unless it is inconsistent with the Constitution.[6] However, international conventions, treaties and agreements only have domestic application once transformed into municipal law, approved and incorporated into law by Parliament.[7]

When interpreting the DoR, courts are constitutionally mandated to take into account international law to which Zimbabwe is a party to.[8] Of relevance to this contribution, Zimbabwe is party to the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), as well as other international legal instruments which have a bearing on children rights.[9] Although the UNCRC and the ACRWC have not been domesticated at national level, principles of children's rights laid down in both instruments have found constitutional expression in section 81 of the

6 S 326(1) of the Constitution.

7 S 327(2) of the Constitution. For a general discussion also see Feldman "Monism, dualism and constitutional legitimacy" 1999 *Australian Year Book of International Law* 105.

8 S 46 of the Constitution.

9 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (May 2013); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (February 2012); the Convention on the Rights of Persons with Disabilities and its Optional Protocol (September 2013); the ILO Convention No. 182 on the Worst Forms of Child Labour (1999); the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (October 2009); the SADC Protocol on Gender and Development (August 2008); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (November 2003).

2013 Constitution. It is therefore encouraging to learn that internationally recognised children's rights commitments are to some extent reflected in the 2013 Constitution thereby providing fertile ground for the emergence of a progressive children's rights jurisprudence.

2 2 Treaty monitoring bodies and Zimbabwe's children's rights scorecards

Ratification of international treaties means that Zimbabwe has to periodically report to experts from relevant treaty bodies. Reporting is often followed by the issuing of recommendations on necessary steps that the State party needs to take in order to meet its international and regional obligations laid out in the treaties.

It is estimated that children constitute 48% of the 13 million people in Zimbabwe.[10] More than half of these children live in rural areas and lack access to adequate socio-economic rights such as health, education, nutrition, water and sanitation.[11] Therefore, the need for consistent review of Zimbabwe's performance in implementing children's rights, through submitting country reports to the UN Committee on the Rights of the Child (CRC Committee) and African Committee of Experts on the Rights and Welfare of the Child (African Committee) cannot be gainsaid.

2 2 1 The UN Committee on the Rights of the Child

Zimbabwe submitted its initial country report to the CRC Committee, which was due in 1992, sometime in 1995.[12] The second report was submitted 19 years later in 2015. From a procedural perspective on reporting under the UNCRC, Zimbabwe has not been doing as well as it should. This inconsistency in reporting prevents effective monitoring of the implementation of the UNCRC.

In its first Concluding Observations to Zimbabwe, the CRC Committee commended the government on a number of issues, including, the prohibition of gender discrimination; raising awareness of children's rights as well as encouraging child participation by organising a children's parliament and promoting youth councils and child mayors.[13] Furthermore, the CRC Committee welcomed government's commitment

10 UNICEF "Situation of children in Zimbabwe" https://www.unicef.org/ (last accessed 2020-08-18).

11 UNICEF "Situation of children" https://www.unicef.org/zimbabwe/situation-children (last accessed 2020-07-21).

12 See Zimbabwe's initial report to the CRC Committee CRC/C/3/Add.35 12 September 1995 https://tbinternet.ohchr.org/ (last accessed 2020-07-10).

13 CRC Committee "Concluding Observations: Zimbabwe" CRC/C/15/Add.55 7 June 1996 https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZWE/CRC_C_ZWE_CO_2_22991_E.doc (last accessed 2020-07-10) para 3.

to submit annual reports to Cabinet and Parliament on measures taken to implement rights in the UNCRC.[14]

However, the CRC Committee expressed concern over a number of issues, key among them being government's failure to carry out comprehensive legal reforms to align national legislation with the UNCRC; the existence of a dual system of common law and customary law which raised difficulties in implementing the UNCRC;[15] insufficient attention being paid to the best interests of the child in legislation and practice; the exercise of children's rights subject to parental consent; the use of corporal punishment;[16] issues on *juvenile*[17] justice, particularly the lack of a clear legal prohibition of capital punishment, life imprisonment without the possibility of parole and indeterminate sentencing. The CRC Committee recommended, among other things, that Zimbabwe address all the issues mentioned above.

Zimbabwe submitted its second country report to the CRC Committee in 2015 and the Committee issued Concluding Observations and recommendations in 2016.[18] The CRC Committee applauded Zimbabwe's progress in ratifying a significant number of international legal instruments pertaining to children.[19] It welcomed various national plans, policies and strategies adopted by Zimbabwe on thematic areas of children's rights. However, it was concerned that the draft *Child Rights Policy* took too long to finalise.[20] The CRC Committee applauded the constitutionalisation of the best interests of the child and expressed concern that the best interests principle is not reflected in all relevant legislation nor applied in all areas and that its content is not well defined.[21] The Committee then referred to its previous recommendations which, it said, were not sufficiently implemented, especially issues pertaining to law reform,[22] prohibition of the use of corporal punishment,[23] and raising the minimum age of criminal responsibility.[24]

14 CRC Committee *supra* para 4.
15 CRC Committee *supra* para 11.
16 CRC Committee *supra* para 42.
17 The authors use the term 'juvenile' as referred to in court rulings and legal documents in Zimbabwe. However, we are aware of the move away from using such terminology as it paints a negative picture of child offenders, that is why juveniles is in italics.
18 CRC Committee "Concluding observations on the second periodic report of Zimbabwe" CRC/C/ZWE/CO/2 (7 March 2016) https://www.icj.org/wp-content/uploads/2016/01/Concluding-Observations-CRC-Zimbabwe-2016-eng.pdf (last accessed 2020-07-01).
19 See the list in footnote 9 *supra*.
20 CRC Committee "Concluding observations on the second periodic report of Zimbabwe" (29 January 2016) para 10. At the time of writing this article no progress had been made in terms of finalising the draft policy.
21 CRC Committee *supra* para 28.
22 CRC Committee *supra* para 22.
23 CRC Committee *supra* para 31.
24 CRC Committee *supra* para 33.

Arguably, the Concluding Observations do not tell the best of stories. Although Zimbabwe has progressed, to some extent, from 1995 when the first report was submitted to the Committee, a lot of what was recommended by the Committee was also highlighted in the 2016 Concluding Observations as still requiring more action in order to give full effect to children's rights.

2 2 2 The African Committee of Experts on the Rights and Welfare of the Child

Zimbabwe submitted its initial country report to the African Committee in 2014, instead of 2003 and the periodic report was due in 2006. This is very discouraging as the failure to comply with its reporting obligations means that Zimbabwe is depriving the African Committee, ample opportunity to review its implementation of the ACRWC.

In its Concluding Observations, the African Committee, commended Zimbabwe for defining a child as a person below the age of 18 years under the 2013 Constitution. However, the Committee expressed concern with contradictions of the definition of a child in various pieces of legislation[25] and subsequently encouraged the government to ensure harmonisation in all corresponding domestic laws. Furthermore, the African Committee was concerned with the anomaly on the minimum age of marriage. The Marriage Act (Chapter 5:11), for example, sets the minimum age of marriage for girls at 16 while the Customary Marriage Act (Chapter 5:07) does not provide for the minimum age of marriage. The government was strongly urged to set the minimum age of marriage to 18 in all circumstances. Furthermore, the African Committee was concerned that the minimum age of criminal responsibility was set at 7 years and it was recommended that it be raised to at least 12 years of age in line with international standards.[26]

Child participation was another subject of concern for the African Committee. It recommended the government to establish and strengthen child friendly courts as well as procedures for child victims and witnesses.[27] This would allow for children to be heard in judicial proceedings affecting them. Zimbabwe was scheduled to submit its combined fourth and fifth periodic reports, which the Committee considers as the first Periodic Report in December 2018. At the time of writing this contribution, no submission had been made.

In conclusion, Zimbabwe's commitment to children's rights at both international and regional level is laudable. However, the failure to report promptly and regularly to treaty monitoring bodies is a cause of concern.

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25 Public Health Act (Chapter 15:17), and the Marriage Act (Chapter 5:11).

26 Concluding observations and recommendations by the African Committee of Experts on the Rights and Welfare of the child (ACERWC) on the Republic of Zimbabwe on the status of Implementation of the African Charter on the Rights and Welfare of the Child (2016) para 12.

27 African Committee *supra* para 20.

The jurisprudence of the treaty monitoring bodies are a valuable tool which may guide Zimbabwean courts in the interpretation of children's rights. Judicial officers and lawyers often rely on the recommendations and Concluding Observations from the treaty bodies to promote and protect children's rights. In addition, the jurisprudence of the treaty monitoring bodies is useful in putting pressure on the government to comply with its international and regional obligations.

3 Children's rights under the Lancaster House Constitution, 1980

The LH Constitution was a transitional document adopted in 1980 to address the injustices of Zimbabwe's colonial past. The LH Constitution had no express provision dedicated to children's rights, and it can be described as an "invisible child [C]onstitution"[28] where children were neither seen nor heard, and consequently not accorded any special recognition.[29] The DoR entrenched basic and justiciable fundamental human rights and freedoms for everyone, including children. Thus, the protection of children was premised on the understanding that the interpretation of constitutional provisions would ensure that fundamental rights are construed to fully apply to, and also protect, children.[30]

While the LH Constitution protected everyone, there was bias towards the protection of first-generation rights at the expense of second-generation rights.[31] Socio-economic rights were not justiciable, which may be ascribed to the fact that at the time of the enactment of the LH Constitution, globally, the constitutional protection of socio-economic rights was rare.[32] This explains why the majority of notable court cases concerning children's rights dealt with civil and political rights while marginalising socio-economic rights,[33] as evidenced by the jurisprudence discussed below.

28 Tobin "Increasingly seen and heard: the constitutional recognition of children's rights" 2005 *SAJHR* 100.

29 See Alston and Tobin *Laying the foundation of children's rights* (UNICEF Italy 2005) 21-23.

30 Tobin 2005 *SAJHR* 102-103.

31 Ndulo "Zimbabwe's unfulfilled struggle for a legitimate Constitutional Order" in Miller (Ed) Framing the court in times of transition: Case studies in Constitution making (2010) 184.

32 Ndlovu "*Protection of socio-economic rights in Zimbabwe. A Critical assessment of the domestic framework under the 2013 Constitution of Zimbabwe*" (2016) 2.

33 In *Batsirai Children's Care v The Minister of Local Government, Public Works and Urban Development and others* (unreported case number HC 2566/05) an orphanage was affected by the *Murambatsvina* (Clean-Up Campaign) resulting in the unlawful demolition and eviction of children from the children's home, violating children's rights to dignity, housing, education amongst other socio-economic rights. Legal remedies, by way of spoliation, failed leaving the children homeless and in limbo.

However, courts were alive to the duty to protect the rights and interests of children within the broader context of human rights. Constitutional litigation on children's rights, dealt with matters relating to the use of judicial corporal punishment against *juvenile* (child) offenders, the sentencing of *juvenile* offenders to imprisonment, the right of children to freedom of conscience and religion, amongst others.

The commitment towards children's rights was visible even before Zimbabwe ratified the UNCRC and the ACRWC. In *S v A Juvenile*,[34] the Supreme Court declared that judicial corporal punishment against *juvenile* offenders violated the constitutionally entrenched right not to be subjected to torture or inhuman or degrading punishment.[35] In this matter, an 18-year-old male offender was convicted of assault with the intent to do grievous bodily harm[36] and sentenced to receive four cuts. The Supreme Court declared that the use of "a moderate correction of whipping" in terms of the Criminal Procedure and Evidence Act against male *juvenile* offenders was unconstitutional because it was inhuman and degrading punishment.

Dumbutshena CJ declared judicial corporal punishment to be inherently brutal and cruel, invading the inherent humanity, integrity and dignity of the child offender, equating it to an inhuman and degrading form of punishment - thereby unconstitutional. The same opinion was expressed in relation to corporal punishment meted in schools and homes, as a violation of section 51(1) of the LH Constitution. The Supreme Court described judicial corporal punishment as "institutionalised violence" against children sanctioned under the protection of the law.[37] Gubbay JA, in a separate opinion, noted that the prohibition against inhuman or degrading punishment was couched in absolute and non-derogable terms.[38] Influenced by (the then) contemporary international best practice and standards, the court relied upon international law[39] and persuasive decisions from foreign jurisdictions to reach a well-reasoned conclusion.

In a dissenting judgement, McNally JA disagreed with the conclusion that there is an inevitable brutality and cruelty in the use of corporal punishment. The reasoning behind the dissenting judgement validates a traditional latent welfarist protectionism philosophy which viewed children as mere objects, rather than subjects, of human rights. The judge

34 *S v A Juvenile* 1989 2 ZLR 61 (SC). The Supreme Court decision was delivered on 29 June 1989, whereas the CRC was ratified on 11 September 1990.

35 S 15(1) of the LH Constitution provided that "No person shall be subject to torture or to inhuman or degrading punishment or other such treatment".

36 The conviction for assault with intent to do grievous bodily harm was later set aside on appeal to be substituted by one of common assault. See *S v Harry & A Juvenile* S-146-88 (unreported).

37 *S v A Juvenile supra* 73F-H.

38 *S v A Juvenile supra* 91G-H.

39 For instance, Rule 17(3) of the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules).

pointed out that whipping of children was constructive, correctional and reformatory.[40] Reliance was placed on the lack of alternative sentencing options befitting *juvenile* offenders, thus, corporal punishment saved *juvenile* offenders from imprisonment.[41] Regrettably, the dissenting judgement upheld the constitutionality of corporal punishment because it formed the basis for parliament to amend the Constitution, thereby allowing corporal punishment against children.[42] The reasoning for the minority decision was not supported by empirical research[43] or international human rights law and accordingly was 'out of touch with contemporary thinking' at the time.[44]

On the strength of international law, superior courts were slowly moving away from the incarceration of *juvenile* (child) offenders, save in exceptionally serious offences. In *S v Zaranyika*[45] the High Court declared that 'normally a *juvenile* should never be sent to prison unless the offense is so serious that only a prison sentence can be justified'. The court noted that in determining the appropriate sentence for a *juvenile* offender, 'it is the duty of the court to have regard, not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender, as well as the (best) interests of the juvenile'.[46] Cognisant of the youthfulness and immaturity of *juvenile* offenders, courts placed emphasis on treating *juveniles* in a manner different from adult offenders.[47] Even without any constitutional protection of the right of *juveniles* not to be detained except as a last resort, courts were applying the rights under international law to protect and promote children's rights.

In addition, in *Dzvova v Minister of Education Sports and Culture*[48] the Supreme Court dealt with children's right to freedom of conscience and religion. The applicant, the father of a six-year-old boy, filed a constitutional application in terms of section 24(2) of the LH Constitution on the basis that the actions of the respondents infringed section 19(1)

40 *S v A Juvenile supra* 93G-H.
41 *S v A Juvenile supra* 97F-H.
42 Constitution of Zimbabwe Amendment (No 11) 1990. See Naldi "Constitutional developments in Zimbabwe and their compatibility with international human rights" 1991 *African Journal International & Comparative Law* 376 arguing that "… the revision to S 15(3)(b) of the Zimbabwean Constitution reflects this minority opinion".
43 *S v A Juvenile supra* 94B-C.
44 Hatchard "The fall and rise of the cane in Zimbabwe" 1991 *Journal of African Law* 200.
45 *S v Zaranyika* 1995 (1) ZLR 270H-271A.
46 *S v Zaranyika supra* 271D-E.
47 *S v Mavasa* HH 13-10. See also *S v Hunda* HH 124-10 where the Court held that the sentences on their own were not appropriate for young offenders aged 17 and 18 years respectively. Their pleas of guilty should have been given serious consideration and the rigours of punishment on young offenders should have had the effect of reducing the sentence and the total effective sentence.
48 *Dzvova v Minister of Education Sports and Culture* SC 26-07.

of the LH Constitution which protected the right to freedom of conscience and religion.

The child was enrolled at a Government Primary School, after attending pre-school at the same school. Whilst in pre-school the child's hair was never cut until the child graduated from pre-school and the hair had developed into dread locks. School authorities summoned the father to the school to advise him of the regulation that every child's hair had to be kept short. Pending the resolution of the matter between the school and the parent, the child was denied access to education. The father contended that his child was Rastafarian and cutting his hair was an infringement of his religious rights. Unsettled by that contention, the school issued a letter demanding that should the parent fail to comply, the child would be withdrawn from the school.

Aggrieved by the school's decision, the applicant challenged the regulations as *ultra-vires* section 19(1) of the LH Constitution. The court ruled that every child has a constitutional right to freedom of conscience and religion. Furthermore, the school regulations having been enacted without the authority of any law, infringed the child's enjoyment of his religion or belief through practice and observance. The court stated that attempts by the school to exclude the child was discriminatory and contravened constitutional provisions, as well as the Education Act (Chapter 25:04).[49] This ruling by the Supreme Court affirmed that in the absence of a specific children's rights provision, general constitutional rights could be interpreted to protect and promote children's rights.

It is commendable to note that, under the LH Constitution, judges were proactive to extend the protection of children's rights using general human rights provisions in the LH Constitution, although it was a slow process. Without legal instruments protecting the rights of children, Couzens argues that courts determine children's rights on a discretionary basis, dependent on the personal openness of individual judges towards the rights of children.[50] It is commendable that when matters were brought to courts, judges utilised the constitutional provisions to promote and protect children's rights.

4 Children's rights under the 2013 Constitution and emerging jurisprudence

4 1 The Constitution of Zimbabwe, 2013

The constitutionalisation of children's rights was a watershed moment in the history of human rights in Zimbabwe. The Constitution contains progressive provisions which protect and promote children's rights in

49 Section 4 of the Education Act.
50 Couzens "*Le Roux v Dey* and children's rights approaches to judging" 2018 *Potchefstroom Electronic Law Journal* 3.

line with the UNCRC and the ACRWC. Firstly, we see children's rights enumerated in section 19 under the heading 'national objectives' which details constitutional obligations of the State *vis-à-vis* the adoption of laws and policies ensuring that the best interests of the child are of paramount importance in all matters concerning children. The national objectives are not justiciable and enforceable in courts, however, their importance lies in the guidance they offer to the when developing laws and policies.

Notably, children's rights are also contained in section 81 in the Declaration of Rights. The inclusion of section 81 signals the primacy of children's rights because rights in the DoR are justiciable and enjoy horizontal and vertical application.[51] Unlike section 19, children's rights in section 81, like all other rights in the DoR, have a built in enforcement mechanism found in section 85 of the Constitution.[52] The insertion of children's rights in the DoR is a significant shift from the position of children's rights under the LH constitutional order which was regulated by a limited DoR.[53] The 2013 Constitution therefore lays fertile ground for litigation and judicial elaboration of children's rights.

The new constitutional era is not only characterised by an expanded DoR but a constitutional dispensation founded on the rule of law, separation of powers, government accountability, good governance and respect for fundamental rights.[54] Section 81 guarantees every child the right to, equality before the law; be heard; protected from economic and sexual exploitation; not to be detained except as a measure of last resort and the paramountcy of a child's best interests in every matter concerning the child amongst others. Furthermore, children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.[55] The 2013 Constitution presents Zimbabwe with an opportunity to change the trajectory of children's rights.

4 2 Emerging children's rights jurisprudence under the 2013 Constitution (2013-2019)

The discussion that follows explores how courts have utilised the children's rights clause found in section 81 to advance the respect, protection and promotion of children's rights.

51 In terms of sections 44 and 45 of the Constitution, rights in the DoR bind all organs of State as well as natural and justic persons.
52 Section 85 provides for the enforcement of fundamental human rights and freedoms.
53 Mavedzenge and Coltart *"A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights"* 2014 1.
54 Mavedzenge and Coltart *supra* 1.
55 S 81(3) of the Constitution.

4 2 1 Equality and non-discrimination: Intestate succession and children born out of wedlock

In *Bhila v Master of the High Court*[56] the High Court held that the common law position excluding children born out of wedlock from inheriting intestate from their father's estate violated children's rights to equality,[57] and non-discrimination.[58] The applicant, a surviving spouse, challenged the Master of the High Court's decision to allow three children born out of wedlock to inherit from her husband and their father's estate. The applicant and the deceased were married in a civil union. Upon the death of her husband, the applicant was appointed executrix of the estate, and whilst processing the estate the applicant realised that her late husband had three children born out of wedlock. The three children sought to inherit from their late father and the Master of the High Court appointed a natural executor, the second respondent who prepared a distribution plan. The issue before the Court, was whether children born out of wedlock can inherit intestate. The High Court ruled that excluding children born out of wedlock from inheriting intestate from their father was discriminatory and could not pass constitutional muster. Acting in terms of section 176 of the Constitution, which empowers the High Court to develop the common law and ensure that it aligns with the Constitution, the Court developed the common law on intestate succession *vis-à-vis* the rights of children born out of wedlock to inherit from their parent.

4 2 2 Detention of child offenders as a measure of last resort

In *S v FM (A Juvenile)*[59] a 17-year-old offender was convicted of eight counts of theft and eight counts of unlawful entry.[60] The accused was labelled as an unrelenting offender and as such the trial court sentenced him to nine years imprisonment. The case was sent on criminal review to the High Court and the judge was taken aback by the lengthy sentence against the young offender. Tsanga J held that, although,

> "the sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency".[61]

56 *Bhila v Master of the High Court* (HC 4396/13) [2015] ZWHHC 549 (27 May 2015).
57 S 81(1)(a) of the Constitution provides for the right to equal treatment before the law.
58 S 56(1) of the Constitution provides that everyone is equal before the law and have the right to equal protection and benefit of the law; S 56(3) lists marital status as one of the prohibited grounds of discrimination.
59 *S v FM (A Juvenile)* 2015 (1) ZLR 56 (H).
60 S 131(1) and 131(1) (a) of the Criminal law (Codification and Reform) Act [Chapter 9:23].
61 *S v FM (A Juvenile) supra* 2.

The Court's approach, based on the Constitution[62] and the UNCRC,[63] was aimed at ensuring that child justice matters are managed in a rights-based manner. The judge defended the proposition that child justice aims to assist children in conflict with the law to turn their lives around and become productive members of society.

Tsanga J was of the view that the sentence by the trial court ran contrary to the letter and spirit of the Constitution, especially given the fact that the offender did not commit a violent crime. Sentencing the child offender for such a lengthy time was described as "removing the child offender from the society by locking him up and throwing away the keys".[64] The judge challenges entrenched sentencing practices in Zimbabwe by holding the view that "[f]rom the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences in prison".[65] Tsanga J's adoption of a children's rights perspective in sentencing must be celebrated. Anchored by the best interests of the child principle, the judge underscored the need to look at a much broader perspective when dealing with child offenders, emphasising the need to look at all the circumstances of the young offender's life and ensure that a child is detained only as a measure of last resort[66].

What is exceptional about this judgement is the judge's emphasis on proportionality of the sentence as guided by the circumstances that fuelled the delinquent behaviour in the young offender. From the facts of the case, the accused grew up in a child-headed household without much adult supervision. Without exonerating the accused, Tsanga J called for a balanced approach by emphasising the role of the State in such cases, opining that;

> "It is the responsibility of the state and its officials who come into contact with cases of need to reduce chances of recidivism by thoroughly examining the range of possible interventions. It is also the responsibility of all officials involved, both judicial and non-judicial, to be thorough in their assessments so as to give each accused child a real chance at being justly treated".[67]

After considering the circumstances of the case and the 16 counts involved, the Court altered the sentence from nine years to the shortest appropriate of three years imprisonment for all counts, of which one year was suspended for five years on condition of good behaviour.[68] Two important rights were upheld in the matter, namely, the best interests of the child and the right not to be detained except as a measure of last

62 S81(h)(i) of the Constitution.
63 Article 37(1)(b) and art 40(1).
64 *S v FM (A Juvenile) supra* 2.
65 *S v FM (A Juvenile) supra* 3.
66 For a detailed discussion, see Fambasayi and Moyo "The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe" 2020 *South African Journal on Human Rights* 44-45.
67 *S v FM (A Juvenile) supra* 4.
68 *S v FM (A Juvenile) supra* 5.

resort for the shortest appropriate period. In reaching its decision, the Court emphasised the State's responsibility towards children in conflict with the law, highlighting the need to ensure the child's rehabilitation instead of a narrow focus on punishment.

4 2 3 Sexual exploitation of children

In *S v Banda; S v Chakamoga,*[69] the High Court invoked section 81(3) of the Constitution, in a matter involving two adult men convicted of having presumably consensual sexual relations and impregnating two girls aged 15 years of age. The first accused subsequently took the young girl as his wife while the other gave the young girl two small sums of money after he had sexually exploited her. In each case, the accused was sentenced to 24 months imprisonment, half of which was suspended. On review, the High Court noted with concern that the sentences handed down by the trial court trivialised the constitutional protection of children's rights.[70]

The review judge underscored that courts were constitutionally mandated to adopt a reasonable interpretation consistent with international law, [71]

> "Gone are the days when it was enough for a judicial officer to be insular in his jurisprudence: attention must be paid to international best practices, particularly on matters that impinge on the rights of vulnerable groups, such as children. The current position that Zimbabwe holds on the African continent requires judicial officers to rise to the responsibility that go with it and help, if not lead, in setting judicial standards and benchmarks for the protection of children".

Charewa J underscored the importance of the constitutional protection of children in Zimbabwe, and cautioned judicial officers against paying mere lip service to these rights.[72] The significance of the paramountcy of the best interests of the child in all court proceedings was emphasised, including handing down appropriate sentences that serve as a deterrent for those preying on children.[73] The constitutional obligation placed on the courts, and the High Court in particular, by section 81(3), makes it imperative to reconsider the sentencing regime for sexual offences. In the judge's view, "the courts must be seen to apply the law in a manner that achieves the intended aim of the legislature which is to effectively protect children from predatory older persons". In reaching his judgement Charewa J relied heavily on international and regional law and opined that, under the circumstances, an effective sentence of not less than three years should be imposed in these cases, on an incremental basis for those accused who are twice the victims' ages, are married with

69 *S v Banda; S v Chakamoga* (CRB GVE 644/15, CRB Mhw 450/15, HH 47-16) [2016] ZWHHC 47 (20 January 2016).
70 *S v Banda; S v Chakamoga supra* 1.
71 S 327(6) of the Constitution.
72 *S v Banda; S v Chakamoga supra* 2.
73 *S v Banda; S v Chakamoga supra* 3.

children of their own, and impregnate the young persons or infect them with sexually transmitted diseases other than HIV.[74]

4 2 4 Child marriages

The approach that courts are obliged to offer adequate protection to children is also evident in the widely celebrated Constitutional Court judgement against child marriages in *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs*.[75] Two young women, acting in the public interest, applied for a declaratory order to the Constitutional Court asking that the minimum age of marriage be set to 18 and that no person under this age should be allowed to enter a marriage. The application was based on section 78(1) of the Constitution, which provides that every person who has attained the age of 18 years has the right to found a family; read together with section 81(1) of the Constitution, which accords special protection to children. In terms of the then applicable law, the Marriage Act[76] and the Customary Marriage Act, a girl above the age of 16 years was allowed to marry.

There were four issues before the Court:[77] (a) *locus standi* of the applicants since they were no longer children; (b) whether section 78(1) sets 18 as the minimum age of marriage; (c) if so, did the coming into force of the Constitution render invalid section 22(1) of the Marriage Act or any other law authorising a girl under 16 to marry; and (d) if it did, what relief should be granted.

On the first issue, the Court found that the applicants had the *locus standi* to bring the matter in the public interest because children are a vulnerable group in society whose interests constitute a category of public importance.[78] The Court was satisfied that the applicants were acting in the public interest specially to protect girls' rights. Malaba DCJ (as he then was) writing for a unanimous court held that,

> "Children fall into the category of weak and vulnerable persons in society. They … have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest".[79]

74 *S v Banda; S v Chakamoga supra* 7.
75 *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* CC 12-15. See Sloth-Nielsen and Hove "Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review" 2016 *African Human Rights Law Journal* for an in-depth discussion of the case.
76 In particular, S 22 provided for the marriage of the girls under the age of 16 years or boys under 18 years with the written consent of the Minister of Justice and Parliamentary Affairs.
77 *Mudzuru supra* 7.
78 *Mudzuru supra* 12.
79 *Mudzuru supra* 24.

On the second issue, the Court pronounced that section 78 of the Constitution, as read with section 81(1), makes it clear that any person below the age of 18 years is a child and cannot start a family.[80] The Court noted that the enactment of sections 78(1) and 81(1) of the Constitution was born out of Zimbabwe's commitment to provide greater protection for the fundamental rights of the child as provided for in international and regional law. According to the Court, the obligation imposed by article 21 of the ACRWC to observe 18 as the minimum age to marry was clear and Zimbabwe was duly bound to comply with it and abolish child marriages.[81]

Thirdly, the Court declared provisions in the Marriages Act and the Customary Marriages Act unconstitutional, from the date of the judgement in 2016. The applicants argued that, because

> "the … government failed to take legislative measures to repeal s 22(1) of the Marriage Act, it has continued to provide…legitimacy to child marriages entered into after 22 May 2013".

The Court opined that "invalidity of existing legislation inconsistent with a constitutional provision occurs at the time the constitutional provision comes into force and not at the time a fundamental right is said to be infringed or when an order of invalidity is pronounced by a court".[82] Lastly, the Constitutional Court declared, as its first children's rights judgement since its creation, that child marriages are unconstitutional.

Sloth-Nielsen and Hove lists three ways in which the Mudzuru judgment made significant jurisprudential contribution: "first, with respect to legal standing to bring a constitutional challenge under the Zimbabwean Constitution; second, with respect to the use of international treaty law and foreign case law; and third, in its purposive approach to the interpretation of the relevant constitutional provisions relating to child marriages".[83] We agree with this view and note that the Mudzuru judgement is undoubtedly one of the Zimbabwean judiciary's trailblazing rulings.

4 2 5 Judicial corporal punishment

In *S v Chokuramba*[84] the Constitutional Court was tasked to confirm the declaration of unconstitutionality of judicial corporal punishment from the High Court.[85] The High Court had declared section 353 of the Criminal Procedure and Evidence Act, which permitted the sentence of whipping of *juvenile* male offenders, unconstitutional. In terms of section

80 *Mudzuru supra* 45.
81 *Mudzuru supra* 43.
82 *Mudzuru supra* 47.
83 Sloth-Nielsen and Hove 2016 *AHRLJ* 555
84 *S v Chokuramba* (CCZ 10/19 Constitutional Application No. CCZ 29/15) [2019] ZWCC 10 (03 April 2019).
85 *S v C (A Juvenile)* (CRB R 87/14) [2015] ZWHHC 718 (30 December 2014).

175(4) of the Constitution, the High Court referred the matter to the Constitutional Court for confirmation of the order of invalidity.

In Court, three key issues were up for determination: the constitutionality of section 353 of the Criminal Procedure and Evidence Act which allowed the use of corporal punishment as a sentence against male *juvenile* offenders; the meaning of the phrases "inhumane punishment" and "degrading punishment" and whether judicial corporal punishment amounts to 'inhuman' or "degrading punishment". The Constitutional Court confirmed the order of invalidity and ruled that judicial corporal punishment was by nature, intent and effect an inhuman and degrading punishment within the meaning of section 53 of the Constitution.[86] The Court emphasised the centrality of section 53 in the constitutional protection of human rights in Zimbabwe. Malaba DCJ (as he then was) opined that the value system underpinning the Constitution was instructive,[87] the Court held that the object and purpose of section 53 is to afford protection to human dignity as well as physical and mental integrity.[88] Human dignity is a foundational value which consequentially gives rise to all fundamental rights, and the Court made reference to inherent human dignity as a guiding provision.[89] The Court underscored the fact that:

> "Human dignity is a special status which attaches to a person because he or she is a human being … Human dignity is inherent in every person all the time regardless of circumstances or status of the person. Human dignity is not a creature of State law; the law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it".[90]

In terms of section 86(3) of the Constitution, the limitations clause, the right to dignity and right not to be subjected to inhuman and degrading punishment are non-derogable rights. Therefore, no law may limit these rights and no person may violate them.

In determining what constitutes inhuman or degrading treatment, the Court was guided by the right to human dignity. Malaba DCJ noted that the appropriate approach when interpreting a provision guaranteeing a fundamental right must be purposive, broad, progressive and a value-based approach.[91] Following a purposive approach towards section 53, the Court opined that if punishment invades a person's human dignity then it is inherently inhuman.[92] Judicial corporal punishment, in the Court's view, brutalises the recipient as it violates their physical and mental integrity. Furthermore, punishment is degrading if the recipient

86 The section guarantees freedom from torture or cruel, inhuman or degrading treatment or punishment.
87 S 3 of the Constitution.
88 *Chokuramba supra* 13.
89 S 51 of the Constitution.
90 *Chokuramba supra* 19.
91 *Chokuramba supra* 17.
92 *Chokuramba supra* 22.

is, according to the Court, exposed to disrespect and contempt from fellow human beings. Lastly, the fact that punishment arouses fear, anguish or inferiority in the person being punished means that it can be considered degrading.

Addressing alternative sentencing options and dismissing that corporal punishment can serve the interests of keeping children in conflict with the law out of prison, the Court stated that: [93]

> "Keeping male … offenders out of jail cannot justify the imposition of inhuman or degrading punishment … as the means of securing the legitimate objectives of punishment … Human dignity may not be infringed upon for any reason. No interest, such as saving the … offender from imprisonment, can justify infringement of human dignity. Interpretation of what constitutes the best interests of the … offender cannot be used to justify practices which conflict with … human dignity and right to physical integrity … Judicial corporal punishment is not in the best interest of the male juvenile".

Apart from relying on international law, in particular the UNCRC, ACRWC and the Beijing Rules, the Court utilised the best interests principle emphasising its centrality in determining appropriate sentences for child offenders.[94] The Court was wary of competing interests and pointed out that, in as much as the best interests should be a primary consideration in every decision affecting the child, this principle will not always be the single overriding factor to be considered. Rightfully, the Court declared that in those exceptional circumstances, a child's best interests must be the subject of active consideration. Active consideration, in this case refers to a demonstrated fact that the child offenders' interests have been explored and taken into account as a primary consideration in the choice of appropriate sentences for juvenile offenders.[95]

The Court noted that, the abolition of judicial corporal punishment should give new impetus to the establishment of a well-equipped juvenile justice system that is specifically responsive to the needs of juvenile offenders and which will also contribute to their reintegration into society.

This judgment is important for several reasons: firstly, it underscores the fact that child offenders are individual rights holders whose right to human dignity is not created or awarded by the State but rather requires legal protection at all times. Secondly, it emphasises that sentencing child offenders should be a less formal and more inquisitorial process that is able to provide sentences which are geared towards rehabilitation of children in line with principles of restorative justice. Although the *Chokuramba* judgement was a big win for children's rights, the delay by the Constitutional Court in handing down judgement is a grave concern.

93 *Chokuramba supra* 40.
94 *Chokuramba supra* 51.
95 *Chokuramba supra* 52.

5 Conclusion: Giant leaps or baby steps?

This article has done three things. Firstly, it looked at Zimbabwe's performance in implementing children rights under the UNCRC and the ACRWC and found that Zimbabwe is still grappling with a significant number of children's rights issues. Secondly, the article reflected on how Zimbabwean courts, under the LH Constitution, conceptualised children's rights in the absence of a children's rights clause. The lack of a children's rights clause in the LH Constitution resulted in slow progress, referred hereto as "baby steps", in the development of children's rights via courts. However, we acknowledge that lawyers and judges did the best they could in the context of broad human rights provisions and applied them to protect children's rights as seen in the judicial corporal punishment and freedom of religion judgements. Thirdly, we analysed the emerging children's rights jurisprudence under the 2013 Constitution, reviewing cases between 2013-2019. Under this period, we demonstrated how Zimbabwean courts have engaged with children's constitutionally protected rights resulting in a progressive and promising jurisprudence. This is evident in how the High Court has been a front-runner in shaping the contours of children's constitutional rights resulting in the development of a fledgling children's rights jurisprudence in the areas of child justice – limiting the detention of child offenders to the shortest period of time; underscoring the role of courts in protecting children from sexual exploitation and developing the common law in as far as it denied children born out of wedlock from inheriting because of their "illegitimacy" status.

Section 81 of the Constitution is a powerful tool for the Constitutional Court, together with other superior courts, to set promising and transformative child rights jurisprudence, such as the ones we have seen on child marriages and judicial corporal punishment. Section 81 has also been used in conjunction with other rights, such as the use of human dignity as a core value in the *Chokuramba* case dealing with judicial corporal punishment. Unlike under the LH Constitution in which rights were construed in general, we see the children's rights provision taking centre stage and operating as the fulcrum in the interpretation of children's rights.

The constitutionalisation of children's rights in the 2013 Constitution is a watershed moment in how courts interpret children's rights in Zimbabwe. The courts' treatment of children's rights has been far more engaging. The emerging jurisprudence demonstrates how children's rights and child law in Zimbabwe is replete with potential for further developments. From the discussion above, we submit that Zimbabwe is making decent and promising progress, not quite giant leaps yet, in the development of children's rights via courts. Progress is owed, in no small part, to a progressive Constitution which has entrenched children's rights as opposed to the LH Constitution.

Lessons from history predicting a possible tax revolt in South Africa

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SUMMARY

South Africa is experiencing harsh economic circumstances, which negatively affects the economic environment of its citizens. Literature shows that historical tax resistance or tax revolts were mostly sparked by citizens burdened by their economic living conditions. South Africans' disgruntlement has been voiced in many ways, from resistance to E-tolls to increasing numbers of violent service protests. This article explores the economic factors present in three historical tax revolts to assess the possibility of tax resistance and/or a tax revolt in South Africa. The three historical tax revolts were identified through a purposive selection process. A systematic review was then followed to identify the economic factors present in each historical tax revolt. Finally, the economic factors deduced from the historical tax revolts were applied to the current economic situation in South Africa. The findings are that all the economic factors identified from history are currently present in South Africa, indicating the imminent possibility of a tax revolt. Whilst previous research has focused mainly on explaining past events, this article attempts to anticipate and prevent a future event. The contribution of this article is thus to underline possible economic factors that may lead to tax resistance and/or a tax revolt in South Africa. The aftermath of COVID-19 may further worsen the current economic situation, especially with the exacerbation of the already high unemployment rate that may just be a tipping point for a possible tax revolt.

1 Introduction

Can South Africa learn from the wisdom of George Santayana (1863-1952), who said: "Those who cannot learn from history are doomed to repeat it"?

Resistance to and revolt against the imposition of taxes by governments are as old as taxation itself. History is scattered with examples of both tax resistance and tax revolts,[1] which date back as far as the Hammurabi era in Babylon (BC 1792–BC 1750), the Late Han

1 The terms "tax resistance" and "tax revolt" have a specific meaning in the context of this article and are defined in Section 2.

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Dynasty in Asia (25 AD–220 AD) and the Roman Empire in Europe (BC 27–337 AD).[2]

Since 2013, some evidence and many current debates about whether South Africa is encountering unusual tax resistance or is even heading for a tax revolt have been observed. Tax resistance is evident, for example, in the attitudes and behaviour of citizens towards electronic tolling (E-toll) in Gauteng.[3] South Africa has seen increasing numbers of social protests such as the resistance of vehicle owners to pay their E-toll accounts.[4] The media has recently speculated on the possibility of a tax revolt and has identified factors that can be classified as political (such as perceived corruption), social (such as service delivery protests) and economic (such as high unemployment).[5] Understanding the prospects or likelihood of tax resistance and/or of a tax revolt is of critical importance, because such a resistance or revolt may lead to a decline in income for the fiscus, which may have a negative effect on the provision of public goods and services.[6]

Non-compliance is a form of tax resistance and leads to a disintegration of trust in government and to the possibility of a breakdown in the rule of law. The maintenance of democratic institutions and the building of state capacity are thus critical for the continuing development of South Africa in the twenty-first century.[7]

2 Burg *A World History of Tax Rebellions* (2004) vi.

3 Gauteng Provincial Government, "The socio-economic impact of the Gauteng Freeway Improvement Project and E-tolls report" Report of the Advisory Panel appointed by Gauteng Premier, Mr David Makhura 2014 http://www.gautengonline.gov.za/Campaign%20Documents/E-%20Toll%20Report.pdf (last accessed: 2017-06-06) 41.

4 Nkrumah "We'll fight this little struggle' alleviating hunger in South Africa" 2020 *De Jure* 194-211.

5 Online newspaper articles have discussed the probability of a tax revolt in South Africa: *Moneyweb* "Is SA heading for a tax revolt?" 2015 https://www.moneyweb.co.za/mymoney/moneyweb-tax/is-sa-heading-for-a-tax-revolt/ (last accessed: 2017-03-13); *Fin24* "Tax revolt threat heed the signs" 2016 http://www.fin24.com/Opinion/tax-revolt-threat-heed-the-signs-20160106 (last accessed: 2017-03-13); *Biznews* "Gordhan's killer blow to SA? expect higher debt, tax revolt as tax hikes take effect – Legwaila" 2017 http://www.biznews.com/budget/budget-2017/2017/02/28/gordhan-higher-debt-tax-legwaila/ (last accessed: 2017-03-13); *BusinessTech* "The real state of South Africa's economy and why a tax revolt is coming" 2017 https://businesstech.co.za/news/government/163011/the-real-state-of-south-africas-economy-and-why-a-tax-revolt-is-coming/ (last accessed: 2017-03-13).

6 Lowery & Sigelman "Understanding the tax revolt: eight explanations" 1981 *Am. Political Sci. Rev.* 963.

7 McKerchar & Evans "Sustaining growth in developing economies through improved taxpayer compliance: challenges for policy makers and revenue authorities" 2009 *eJTR* 170.

Research has been conducted to understand historical tax resistance and tax revolts.[8] Burg[9] studied historical tax rebellions[10] from Antiquity until the twenty-first century.

Lowery and Sigelman[11] focus on the period from 1978 to 1980, attempting to explain the Proposition 13 Californian Revolt. Findings emerging from these studies suggest that tax resistance and tax revolts share many characteristics and causal factors.

The causes of tax resistance and tax revolts are usually found in a combination of political, social, economic and even religious factors.[12] Although the influence of political, social and religious factors cannot be ignored, this article only focuses on the economic factors influencing tax resistance and tax revolts. However, the article acknowledges that political, social and religious factors are fundamentally interlinked with economic factors.

The research question is: Can historical events provide evidence of a possible tax revolt in South Africa?

The purpose of this article is to use history as a determinant of possible tax resistance and/or of a tax revolt in South Africa. More particularly, this article explores the underlying economic factors present in the identified historical tax revolts that may serve as factors influencing the potential for tax resistance and/or a tax revolt in modern-day South Africa.

The value of this contribution can be found in the fact that previous research has focused mainly on explaining past events, whilst this article attempts to anticipate and prevent a future event. The intended contribution is to highlight possible economic factors that may lead to tax resistance and/or a tax revolt in South Africa. These economic factors can also enlighten and caution the government against possible tax resistance and/or a tax revolt.

This article is a systematic literature review, which involves a detailed and systematic analysis of the content of the historical material in order to identify significant economic factors.[13] A systematic review integrates or compares qualitative studies with an aim to identify themes or constructs found in the studies.[14] Through the systematic review of the historical material, history was divided into three eras, namely:

8 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963; Burg 6.
9 Burg 6.
10 Tax rebellions include tax resistance and tax revolts.
11 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963.
12 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963; Listhaug & Miller "Public support for tax evasion: self-interest or symbolic politics?" 1985 *Eur. J. Political Res.* 265; Burg.
13 Leedy & Ormrod *Practical Research Planning and Design* (2014) 341.
14 Grant & Booth "A typology of reviews: an analysis of 14 review types and associated methodologies" 2009 *HILJ* 91-108.

Antiquity, the Dark and Middle Ages, and the Modern times. Due to the large number of tax resistance or tax revolt events that occurred in these eras,[15] a purposive approach was followed in this study to identify one of the most prominent instances of tax resistance or of a tax revolt from each of the three eras. The selected event was then analysed to deduce the economic factors present during that period.

The selected historical events are the Jewish Revolt of 66 AD–70 AD against the Roman Empire, the Great Spanish Revolt of 1520–1521 against the rule of King Charles IV and the Proposition 13 Californian Revolt against the United States of America's government in 1978. These events offer insight into the economic factors that were present historically in instigating tax resistance or tax revolts.

This article commences by defining the concepts of "tax resistance" and "tax revolt". Thereafter, the three historical events are discussed according to the economic factors identified through the systematic literature review. The identified economic factors are then evaluated against the current economic environment in South Africa. Finally, the article concludes by highlighting the possibility of tax resistance and/or a tax revolt in modern-day South Africa.

2 Tax resistance and tax revolts

"Tax resistance" and "tax revolt" are terms which are often used interchangeably, although they refer to different concepts. Tax resistance can be achieved through passive non-compliance and typically takes effect as tax avoidance or tax evasion. Tax avoidance involves using legal methods to reduce one's tax liability: Taxpayers reduce the payment of tax by identifying loopholes in the tax legislation. Meanwhile, tax evasion involves the illegal structuring of one's tax affairs to reduce the payment of taxes. An example of tax resistance is driving through an E-toll gantry without paying the toll.

History[16] reflects an overarching theme that when tax resistance does not yield the anticipated results, citizens may resort to a tax revolt. A tax revolt would thus involve action (and sometimes violence) against a tax or tax system. An example of a tax revolt would be the burning down of the gantry upon which the E-toll charging mechanism is located.

In the South African tax system, all salaried taxpayers have their taxes deducted as a form of withholding tax (PAYE). A tax revolt would thus not be the non-payment of taxes, but rather the non-submission of tax returns or non-payment of additional taxes (for example: taxes on interest, etcetera).

15 Burg 6.
16 Burg 6.

For this article, "tax resistance" is defined as an objective achieved through passive noncompliance in the form of tax avoidance or tax evasion,[17] whilst "tax revolt" is defined as an objective achieved through active opposition. Tax resistance transitions into tax revolt in progressive stages on a continuum that ranges from general, passive non-compliance on one end (tax resistance) to active opposition on the other end (tax revolt).[18] Three historical tax revolts are now analysed in light of the definition of "tax resistance" and "tax revolt". The focus of these analyses is the identification of economic factors that may in turn assist in the identification of possible tax resistance and/or a tax revolt in South Africa in the present day.

3 Three historical tax revolts

Tax revolts have a long history and were seen for the first-time during Antiquity. Accordingly, this article focuses on three periods in history and on a corresponding tax revolt during each of the three periods. The discussion commences with the Jewish Revolt of 66 AD–70 AD (during Antiquity), then looks at the Great Spanish Revolt (during the Middle Ages) and finally at the Proposition 13 Californian Revolt (during post-modern times). These three historical incidents, all of which had moved beyond tax resistance and culminated in tax revolts, are considered here in order to identify the economic factors that led to the spark of the tax revolts: The historical background for each revolt is discussed; the economic factors are analysed; and the root causes underpinning the reasons for the tax resistance/revolts are examined with their resulting effects. The main purposes of the tax revolts were to change the tax system, to demand accountability from rulers and to change the economic situation of citizens to a more favourable one.[19]

3 1 The Jewish Revolt of 66 AD–70 AD

3 1 1 Historical background

Josephus was a first century historian who fought alongside the Jews during the revolt and provided first-hand evidence of the circumstances and events. Extensive research and analyses have been done of this incident based on the work of Josephus.[20] Scepticism exists around the objectivity of this source and the events leading up to the revolt instigated by the Jewish people against the Roman Empire.[21] Josephus states that

17 Oberholzer & Stack "Possible reasons for tax resistance in South Africa: a customised scale to measure and compare perceptions with previous research" 2014 *Public Relations Review* 251.
18 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963.
19 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 963; Beard *The Administration of Spain Under Charles V. Spain's New Charlemagne* (MA thesis 2005 UNT) 165.
20 Lopez *Jewish War and the Causes of the Jewish Revolt: Re-examining Inevitability* (Masters dissertation 2013 UNT) 47.
21 Lopez 47.

the incompetence and corruption of the Roman governors, the oppressiveness of the Roman rule, the impoverishment and indebtedness of the Jewish peasantry, Jewish religious susceptibilities and quarrels with local gentiles were some of the main reasons for the revolt.[22] In contrast with the ideas of Josephus, however, Goodman[23] argues that the Jewish revolt was caused mainly by class tensions between the elite and the poor in Judea: The Jewish elite supported the Romans and thus gained access to privileges offered by the Romans.[24] Lopez[25] argues that Josephus tried to conceal the distinction between the poor and the elite in Judea. According to Lincoln,[26] the "Jewish peasantry was largely illiterate, desperately poor, increasingly landless and burdened by taxes that were mainly spent on supporting the lifestyle of the priestly elites and other aristocratic groupings".

Josephus' account also has a religious perspective, when he states that God was also punishing the Jewish people for their sins. Scholars[27] indicate that the aforementioned religious tensions were both external (between Romans and the Jewish people) and internal (between the Jewish poor and their priests). Furthermore, temple priests ceased to bring sacrifices for the emperor, indicating the Romans' loss of control over the temple.[28]

> The factors discussed above had negative consequences for the Jewish people. The Jewish people, especially the peasants, were forced into poverty because of their excessive debt. In order to pay their debt, they gave up their land as security. These debts were caused by the punitive taxes imposed on them by the Romans, the temple and by other religious taxes they had to pay. Therefore, these factors resulted in socioeconomic challenges for the Jewish people, namely, high unemployment, high indebtedness, inequality, and an excessive tax burden.

3 1 2 Economic factors

3 1 2 1 High unemployment

The employment of Jewish peasants flourished through Herod's great building projects, inter alia, the building of several temples, including the Jerusalem temple and royal palaces at the peak of Jerusalem's economic growth.[29] Nevertheless, this stimulus for employment through the growth of the economic infrastructure was not sustainable. Crisis ensued

22 Horsley in Berlin & Overman *The First Jewish Revolt: Archaeology, History and Ideology* (2002) 87; Silberman in Berlin & Overman *The First Jewish Revolt: Archaeology, History and Ideology* (2002) 237.
23 Goodman *The Ruling Class of Judaea* (1987) 3.
24 Oates "The Great Jewish Revolt of 66 CE" 2015 https://www.ancient.eu/article/823/ accessed (last accessed: 2020-04-10).
25 Lopez 50
26 Lincoln *A Socio-Historical Analysis of Jewish Banditry in First Century Palestine 6 to 70 CE* (MPhil dissertation 2005 US) 14.
27 Goodman 237; Lopez 37.
28 Burg 7; Lopez 3.
29 Goodman 64; Lincoln 102.

upon the completion of the temple in 64 AD, when 18 000 workers were left unemployed.[30] According to Lincoln,[31] the masses of Jewish peasants left unemployed created fears within the Roman government of civil disorder.

3 1 2 2 High indebtedness

There is a possible correlation between the high unemployment and the high indebtedness of the Jewish people. Rich Jewish people and landowners took advantage of the deteriorating conditions of the Jewish peasants and farmers.[32] The Jewish peasants and farmers were still required to pay their religious taxes and tithes.[33] The Jewish farmers borrowed from the rich and used their own land as security. Farmers then forfeited their land to their creditors,[34] resulting in the farmers' becoming outlaws.[35] The rich became richer and the poor became poorer.

3 1 2 3 Inequality

The Jewish people suffered unfairness at the hands of the Romans and the imperial Jewish family. Romans regarded the Jewish people as peculiar and handled them differently because of their religious customs. Inequality came through double taxation, including both Roman tributes and Jewish taxes in support of the temple and priests. The famine during 48 AD resulted in a decline in the economic status of the Jewish people: The land owned by the Jewish peasants and farmers was taken over by the wealthy gentry and the imperial family. The Jewish farmers and peasants became labourers on their own farms when they forfeited their lands due to debt payments.[36] Due to the decline in the economic situation of the peasants and farmers, they became hostile towards the rich, who only became richer. This inequality in their economic situations led to class tensions.[37]

3 1 2 4 Excessive tax burden

Herod's building projects birthed a new burden of more taxes for the Jewish people, especially for the farmers and peasants.[38] Romans imposed poll tax, land tax and a range of indirect taxes on the Jewish people, and Jewish religious tax and tithes still had to be paid.[39] The

30 Goodman 64; *The Testimony* (2005-01-01) 23.
31 Lincoln 102.
32 Lincoln 102.
33 Tithe means "one-tenth". Tithing was introduced as a law in the book of Leviticus in *The Bible* (NIV 2011).
34 Horsley "The zealots: their origin, relationships and importance in the Jewish Revolt" 1986 *Novum Testamentum* 176.
35 The Testimony (2005-01-01) 23.
36 Lincoln 106.
37 Horsley "Ancient Jewish banditry and the Revolt against Rome, AD 66–70" 1981 *CBQ* 413; Goodman 13; The Testimony (2005-01-01) 26.
38 Horsley "The Sicarii: ancient Jewish 'terrorists'" 1979 *Journal of Religion* 446; The Testimony (2005-01-01) 26.
39 Horsley 1979 *Journal of Religion* 447; *The Testimony* (2005-01-01) 26.

peasants and farmers were taxed up to 40 percent of their income,[40] which contributed significantly to their excessive tax burden.

3 1 3 Summary

When a man cannot work, is indebted, treated unequally when compared with others and burdened by taxes, he is bound to act.[41] Jewish people had a history of resistance against the Roman Empire. Before the Jewish Revolt of 66 AD–70 AD, the Jewish people revolted in the Maccabee Tax Revolt in BC 160–BC 167 and in the Hyrcanus Opposition in BC 67.[42] The economic conditions and status of the Jewish people may have been a motivation for them to revolt.

The Jewish Revolt of 66 AD–70 AD did not yield the anticipated result for the Jewish people. Instead, they were more oppressed by the Roman Empire and more burdened with taxes. Although the revolt was deemed unsuccessful, the violent actions of the Jewish people were a "voice" loudly heard by the Roman Empire.[43]

3 2 The Great Spanish Revolt of 1520–1521

3 2 1 Historical background

The Revolt of the *Comuneros* against King Charles V between 1520 and 1521 is hailed as one of the most dangerous and history-making rebellions.[44] To the discontent of the Spanish population, Charles V was appointed the sole ruler of the Spanish Kingdom in 1516. Having been born and educated in Ghent, Belgium, he was regarded as a foreigner.[45] King Charles V arrived in Spain in 1517. In 1520, the public was further outraged by the announcement that King Charles V would be absent from Spain for a long period whilst visiting Germany. The public viewed the absence of the King as abandonment. In addition to his absence, taxes were increased to fund the state visit to Germany. The increase of taxes resulted in a greater burden for the citizens who were already heavily burdened by the existing taxes (thus culminating in an excessive tax burden).[46] The rebel movement, *Comuneros*, instigated the Great Spanish Revolt in the Castilian cities – the core of the Spanish

40 *The Testimony* (2005-01-01) 26.
41 Lincoln 9; *The Testimony* (2005-01-01) 26.
42 Horsley 1979 *Journal of Religion* 448; Burg 18.
43 Goodman 3.
44 Szaszdi "The Castilian resistance to the imperial ideal (1520–1522)" 2014 *JEHL* 57.
45 Espinosa "The grand strategy of Charles V (1500–1558): Castile, war, and dynastic priority in the Mediterranean" 2005 *Journal of Early Modern History* 254.
46 Beard 183.

Kingdom.[47] The *Comuneros* consisted mainly of the low and middle classes of the Castile.[48]

The *Comuneros* openly rebelled against the monarchical authority.[49] They aimed to make Constitutional changes, which would result in King Charles V's being dethroned.[50] A petition sent to the King by the rebels cited the following grievances: Taxes should not be increased; money should not be taken out of Spain to foreign countries; the King's absence from Spain was objectionable to the citizens; and offices in government should not be given to foreigners. The King ignored the petition, and riots and violence erupted.[51]

The purpose of the Great Spanish Revolt was to demonstrate the Spanish people's discontent by listing their grievances and petitioning the King. The main economic factors present in the Great Spanish Revolt were an excessive burden of taxes and inequality.

3 2 2 Economic factors

3 2 2 1 Excessive tax burden

According to Beard,[52] King Charles crippled Spain's economy through an excessive tax burden exacted in order to fund wars in other parts of his Empire. King Charles inherited an existing problematic tax system from the Catholic Monarchs, but his imposition of excessive taxes crippled the economy of the Castile and, ultimately, of Spain.[53]

In Spain, new taxes had to be approved by the *Cortes,* a body of taxpayer representatives. King Charles exercised substantial influence over the *Cortes* and they subsequently approved his demands for revenue. King Charles kept them under his influence by giving them lucrative pensions, offices and "benefits". The revolt was sparked when King Charles persuaded the *Cortes* to approve the introduction of a new tax called *servicio* (a direct tax on farmers). The *Comuneros* rebel movement protested against *servicio*. *Servicio* replaced the traditional *encabezamiento* (a fixed tax levied on each city according to the proportion of households). Queen Isabella (1451–1504) had instituted *encabezamiento*, and King Charles committed himself to continue with this. The public perceived this tax as fair; however, King Charles changed his mind because he needed to increase his income, and he therefore instituted *servicio*. The *Comuneros* called for the abolishment of *servicio* and the reinstatement of the traditional *encabezamiento*.[54]

47 Burg 146; Beard 80.
48 Crews "Juan de Valdes and the Comunero Revolt: an Essay on Spanish Civic Humanism" 1991 *SCJ* 238; Beard 170.
49 Burg 149; Beard 170.
50 Burg 149.
51 Burg 149.
52 Beard 162, 187.
53 Beard 183.
54 Burg 148; Beard 183.

The tax system of the Castile[55] also included *alcabala* tax (a 10 percent excise tax on the transfer of all real and personal property). *Alcabala* contributed a large portion of revenue to the state coffers and could therefore not be abolished. It was even expanded to include food, resulting in increased local food prices that made food prices too expensive in comparison with those of imported foods which were often smuggled in and excluded *alcabala*.[56]

Since the clergy and nobility were exempt from *servicio*, it was a tax that proved more burdensome than *alcabala*, specifically for the common people.[57] Another reason for the Castilians' disgruntlement was the fact that these burdensome taxes were used to support foreign wars.[58]

3 2 2 2 Inequality

According to Beard,[59] the Great Spanish Revolt was initially across all classes, but later, the noble and wealthy stepped back. Therefore, the Great Spanish Revolt became a class action with the lower and middle classes at the forefront. The intention of the lower and middle classes was to re-establish their political, social and economic status. King Charles was perceived as pursuing political power at the expense of the lower and middle classes. The middle class in Castile was quite small before King Charles took office, but it increased due to the heavy burden of taxes.[60] The burdensome taxes led to the decline of the economic status of the Castilians, increasing the levels of inequality.

3 2 3 Summary

The success of a revolt depends on the government's response. The Great Spanish Revolt had a bittersweet ending.[61] Many of the leaders of the *Comuneros* were executed, and others were silenced when King Charles returned to Spain[62] and declared war on the *Comuneros*. The violent suppression of the revolt by King Charles led to greater stability in his authority, and he obtained greater political power. According to Adams,[63] the revolt appeared to have failed when King Charles crushed the rebels. However, Adams[64] also states that the "revolt taught the monarchy a lesson – taxes still had to be tolerable for the taxpayer, regardless of what their corrupt representative might do". After the

55 Kingdom of Castile. King Charles V assumed the crown of Aragon and Castile of Spain.
56 Adams *For Good and Evil: The Impact of Taxes on the Course of Civilization* (2001) 192.
57 Ames & Rapp "The birth and death of taxes: a hypothesis" 1977 *J. Econ. Hist*. 165.
58 Beard 162.
59 Beard 170.
60 Beard 179.
61 Beard 174.
62 Burg 150.
63 Adams 193.
64 Adams 193.

revolt, King Charles established a "no new taxes" policy. Therefore, although the *Comuneros* rebel movement was crushed, their voices were heard.[65]

3 3 The Proposition 13 Californian Revolt of 1978

3 3 1 Historical background

The Proposition 13 Californian Revolt was the result of an anti-tax campaign by a grassroots movement called the United Organization of Taxpayers, chaired by Howard Jarvis. Although Jarvis spearheaded the campaign, the tax revolt had been looming since the 1960s due to seemingly unfair political practices and shifts in taxation levels. The purpose of the Proposition 13 Californian Revolt was to reduce property taxes by curbing increases in tax rates and government spending. Californians were heavily burdened by taxes, and 60 percent of property owners viewed the property taxes as inequitable.[66] Proposition 13 stated that new tax legislation must be approved by a two-thirds majority vote of the state legislature before being introduced. Proposition 13 set a 1 percent maximum limit on property taxes.[67] The economic factors of the Proposition 13 Californian Revolt were high inflation and an excessive tax burden.

3 3 2 Economic factors

3 3 2 1 High inflation

Lowery and Sigelman[68] found that one of the possible explanations for tax revolts relates to the anxiety people experience over the economy in general and in their personal finances. An increase in the inflation rate decreases household disposable income. This may in turn serve as a motivation over the long term for a tax revolt due to the lack of economic progress. Inflation and recession play vital roles in the instigation of tax revolts. California experienced high inflation in the 1970s. In 1974, consumer prices increased by 10.3 percent. The inflation rate also increased by an average of 6 percent annually from 1975 to 1978.

3 3 2 2 Excessive tax burden

Californians experienced an increasing tax burden[69] because of the high inflation rate and personal income taxes that increased to 48 percent between 1975 and 1978. Californian homeowners, most of whom were middle-class citizens, faced high property taxes and a 6 percent sales tax. California used a progressive income tax system, resulting in the

65 Adams 193.
66 Ladd, Potter, Basilick, Daniels & Suszkiw "The polls: taxing and spending" 1979 *Public Opin. Q.* 127; Burg 410.
67 Baratz & Moskowitz "Proposition 13: how and why it happened" 1978 *Phi Delta Kappan* 11; Burg 410.
68 Lowery & Sigelman 1981 *Am. Political Sci. Rev.* 965.
69 Burg 410.

overburdening of the highest tax bracket earners. State revenue from all taxes rose by 40 percent between 1975 and 1978.[70] According to Baratz and Moskowitz,[71] perceptions at the time "among middle-class voters [were] that taxes [were] too high and government [was] both uncontrollable and unaccountable". The government was unresponsive to the cries of the citizens regarding the citizens' tax burden.

3.3.3 Summary

The outcome of the Proposition 13 Californian Revolt was experienced immediately. State revenue decreased by 57 percent in 1978.[72] Government spending was modestly reduced and continued to decrease until the 1990s. The success of the Proposition 13 Californian Revolt against excessive tax burden due to property taxes and high inflation indicates that when citizens voice their grievances, government can be forced to listen.

4 Economic factors present in South Africa

In South Africa, the first known tax revolt was the 1906 Bambatha Rebellion.[73] The Bambatha rebellion was against a poll tax imposed by the British colony of Natal, and the rebellion ultimately opposed the colonial rule.[74] Ndlovu[75] focuses on the history of taxation in South Africa and the imposition of excessive taxes on South Africans. Violent protests against regressive apartheid government policies and excessive tax burden on Africans were experienced between 1960 and 1990.[76] A continuation of such protests can be found in 1991 when the Congress of South African Unions (Cosatu) protested against the enactment of Value-Added Tax (VAT).[77]

Protests, especially of a violent nature, are common in South Africa, spurning from the unequitable policies of the British since the nineteenth century. More recently, South Africa experienced a number of service delivery protests. Rough[78] analysed these events in order to conclude on whether these protests had a revolutionary potential. He found that some of the factors instigating the service delivery protests are cultural cleavage, land tenure and economic development. Economic development is hindered by poor service delivery. Service delivery protests often occur in poor communities (grassroots protests) and

70 Baratz & Moskowitz 1978 *Phi Delta Kappan* 10.
71 Baratz & Moskowitz 1978 *Phi Delta Kappan* 12.
72 Baratz & Moskowitz 1978 *Phi Delta Kappan* 11; Burg 411.
73 Burg 375.
74 Burg 375.
75 Ndlovu "Fiscal histories of Sub-Saharan Africa: the case of Botswana" 2016 *WITS Working Paper Series* 13.
76 Ndlovu 24.
77 Ndlovu 26.
78 Hough "Violent protest at local government level in South Africa: revolutionary potential?" 2008 *South African Journal of Military Studies* 1.

provide a voice for the frustrations of the poor.[79] Manyaka[80] argues that the primary cause of service delivery protests is rooted in frustration with socioeconomic conditions in South Africa. He further states that a lack of basic service delivery is a symptom and is not the root cause of protests. The root cause can be attributed to high levels of unemployment, poverty and inequality. The National Development Plan of 2030[81] states that the eradication of poverty and inequality are the plan's desired outcomes. South Africa is facing a poverty crisis, as more than 49.2 percent of the population live below the upper-bound poverty line[82].

When comparing the root causes of protests in South Africa with the economic factors of the historical revolts identified, it seems as if there are similarities. This article assumes that a comparison between historical economic tax revolt factors (together with the root causes of service delivery protests) and the current economic environment in South Africa may provide an indication and even a prediction of the possibility of a tax revolt. The following economic factors were found to be present in all or some of the three historical revolts and/or the service delivery protests in South Africa: high unemployment, high indebtedness (together with an increase in poverty), inequality, high inflation and an excessive tax burden.

4 1 High unemployment

South Africa's unemployment rate at the end of 2019 was 29 percent. This figure is expected to rise to 50 percent after the COVID-19 pandemic.[83] The unemployment rate amongst graduates between the ages of 15 and 24 was 55.2 percent in 2019. The youth unemployment rate (15–34 years) accounts for more than 63.4 percent of the unemployed people in South Africa. The high unemployment rate amongst the youth stifles the economy, as it means that a large share of the potentially active population is inactive.[84] The National Development Plan of 2030 lists unemployment as a critical challenge for South Africa and aims to reduce the overall unemployment rate to 19 percent by 2030.

79 Mkhize "Is South Africa's 20 years of democracy in crisis? examining the impact of unrest incidents in local protests in the post-apartheid South Africa" 2015 *ASR* 192.

80 Manyaka "Making sense of community protests in South Africa: issues for consideration" 2018 *Journal of Public Administration* 57.

81 South African Government "National Development Plan 2030 'Our Future–Make it work'" 2012 https://www.gov.za/issues/national-development-plan-2030 (last accessed: 2020-04-10).

82 StatsSA "Five facts about poverty in South Africa" 2019 http://www.statssa.gov.za/?p=12075 (last accessed: 2020-05-03).

83 *IOL* "Covid-19: South Africa's unemployment rate expected to reach 50 as economy keeps plummeting" 2020 https://www.iol.co.za/news/south-africa/covid-19-south-africas-unemployment-rate-expected-to-reach-50%-as-economy-keeps-plummeting-48457893 (last accessed: 2020-07-02).

84 Aflagah "Failed promises of a wage subsidy: youth and South Africa's employment tax incentive" 2020.

McClelland and MacDonald[85] highlight that unemployment causes poverty, debt, housing stress and crime. Unemployment negatively affects living conditions and contributes to the high poverty rate in South Africa. A further result of unemployment is an increase in indebtedness to cover day-to-day living expenses.

4 2 High indebtedness

High unemployment has a negative impact on household disposable income, and people often turn to debt to cover their daily expenses, which contributes to a rise in the indebtedness of South Africans.[86] According to Dimant,[87] South Africa's household-debt-to-disposable-income-of-households ratio increased from 54.8 percent in 1994 to 74.3 percent in 2016. The debttodisposableincome-of-households ratio was 72.5 percent in the 2019 fourth quarter.[88] During the COVID-19 pandemic, many people have not received employment income. Although the government has provided a solution to some extent, the household debt is predicted to increase substantially due to a need for daily necessities. Individuals with a low disposable income are encouraged to use credit in order to cover their living expenses.[89] A study by the National Planning Commission in collaboration with World Bank in 2018 highlighted that individuals who can be described as lower income earners in the young to middle age groups have high rates of indebtedness.[90] Household debt in South Africa was 72.8 percent of gross income in 2019.[91] The National Credit Act[92] was introduced in 2005 to assist over-indebted consumers through debt relief measures such as debt counselling.[93] An increasing number of consumers applying for debt counselling is a witness to the high indebtedness of South

85 McClelland & Macdonald "The social consequences of unemployment" Report for the Business Council of Australia 1998 http://library.bsl.org.au/jspui/bitstream/1/266/1/social_consequences_of_unemployment_AMcClelland.pdf (last accessed: 2020-04-14).

86 Bond "Debt, uneven development and capitalist crisis in South Africa: from Moody's macroeconomic monitoring to Marikana microfinance mashonisas" 2013 *TWQ* 585.

87 Dimant "The economy" 2018 South African Survey: South African IRR 140.

88 South African Reserve Bank "Quarterly bulletin" 2019 https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/9328/01Full%20Quarterly%20Bulletin%20%E2%80%93%20June%202019.pdf (last accessed: 2020-04-19) 25.

89 Fanta, Mutsonziwa, Goosen, Emanuel & Kettles "The role of mobile money in financial inclusion in the SADC region" 2016 FinMark Trust Policy Research Paper No 03/2016 5.

90 Hurlbut "Overcoming poverty and inequality in South Africa: an assessment of drivers, constraints and opportunities" 2018 World Bank xvi.

91 Trading Economics "South African household debt" https://tradingeconomics.com/south-africa/households-debt-to-income (last accessed: 2020-04-17).

92 National Credit Act 34 of 2005.

93 Boraine, Van Heerden & Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)" 2012 *De Jure* 82.

Africans.[94] The level of indebtedness is on the rise, and high unemployment is a contributing factor to this challenge.

4 3 Inequality

"Inequality is [South Africa's] defining feature" is an opinion expressed recently about the gap between the rich and the poor in South Africa.[95] The Gini coefficient[96] of 0.65 calculated in 2014[97] (the most recent figure) supports this opinion, showing that South Africa is one of the most unequal countries in the world.

The two most prominent factors affecting inequality in South Africa are education and the labour market. Employment income is by far the biggest contributor to income inequality.[98] To illustrate the extent of inequality in South Africa, The World Bank states the following: "The bottom 50 percent of households account for only 8 percent of incomes, 5 percent of asset values, and 4 percent of net wealth. Conversely, the top 10 percent of households account for 55 percent of household incomes, about 69 percent of total household asset values, and 71 percent of household net wealth."[99] Therefore, wealth inequality is greater than income inequality.

Income inequality declined during the period between 2006 and 2015 due to the social welfare system. There are currently seven types of social grant, and these are used to substitute employment income. Although the current welfare system has little effect on the wealth inequality level, social grants aim to reduce the levels of income inequality.[100] Inequality is a challenge that frustrates society, as it impacts the very livelihood of its people.

4 4 High inflation

Inflation is a well-known phenomenon in the world of economics – it is a measure of the overall increase in prices or of the increase in the cost

94 Masilo & Marx "Assessment of debt counselling services: a case of Gauteng, South Africa" 2015 *JEF* 194.

95 *News24* "SA is a country of two nations – and evictions lay bare its injustice" 2020 https://www.news24.com/news24/Columnists/GuestColumn/opinion-sa-is-a-country-of-two-nations-and-evictions-lay-bare-its-injustices-20200702?isapp=true (last accessed: 2020-07-02).

96 The Gini coefficient is a measure used to calculate income inequality over time with a distribution between 0 and 1, where 0 means total equality and 1 means total inequality.

97 World Bank "The World Bank in South Africa: Overview" 2019 http://www.worldbank.org/en/country/southafrica/overview (last accessed: 2020-08-17).

98 World Bank "Overcoming poverty and inequality in South Africa" 2018 https://openknowledge.worldbank.org/handle/10986/29614 (last accessed: 2020-07-13).

99 World Bank "The World Bank" 2019 https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA (last accessed: 2020-08-08) 52.

100 Lehohla & Shabalala "Inequality in South Africa" 2014 *Development* 501.

of living in a country. The inflation rate target for South Africa is set by the South African Reserve Bank and has been set between 3 percent and 6 percent, based on the Consumer Price Index.[101] In 1994, the inflation rate was 9 percent, and it had risen to 11.5 percent in 2008 after the financial crisis. Since 2010, inflation has remained within the set target range of between 3 percent and 6 percent. In March 2020, the inflation rate was 4.1 percent, representing a decrease from 4.6 percent in February 2020.[102]

An increase in the cost of goods has a negative impact on the disposable income of citizens. South Africa has a high number of poor households living below the poverty line. National poverty lines are used as statistical monetary measures of poverty and are calculated approximately every five years.[103] Important factors in determining poverty lines are changes in the cost of goods and household consumption expenditure. There are three poverty lines in South Africa that were established using April 2019 prices. These poverty lines are the food poverty line (FPL), the lower-bound poverty line (LPL) and the upper-bound poverty line (UPL). FPL, also known as the extreme poverty line, represents the minimum amount an individual needs for required daily energy intake and amounts to R561 per month. LPL represents FPL plus an average amount for non-food items whose **total** expenditure is equal to the FPL and amounts to R810 per month. UPL represents FPL plus an average amount for non-food items, where **food** expenditure is equal to the FPL and **total** expenditure amounts to R1 227.[104] The South African government aims to eradicate poverty by 2030,[105] whilst the welfare system assists poor households in living above the poverty line. Between 2006 and 2015, the standard of living of 2.3 million South Africans improved to above the LPL, and 1.2 million improved to above the UPL. There was also an increase of 343 000 in South Africans that lived on the FPL.[106] Furthermore, the social wage provided access to the social grant system to 17 million low-income earners in 2015.[107]

The living conditions of South Africans may worsen after the COVID-19 pandemic. Prices may rise due to suppliers' and retailers' desperately trying to make ends meet. The inflation target of 4.1 percent excludes the effects of COVID-19, as it was calculated using the February 2020 figures in South Africa. Countries are implementing measures to neutralise the impact of COVID-19 on the economy and its citizens. Will the worsening

101 South African Reserve Bank "Inflation target" 2017 https://www.resbank.co.za/monetarypolicy/decisionmaking/Pages/InflationMeasures.aspx (last accessed: 2017-08-17).
102 StatsSA "Consumer Price Index report" 2020 http://www.statssa.gov.za/?page_id=1854&PPN=P0141&SCH=7922 (last accessed: 2020-05-01).
103 StatsSA "National poverty lines 2018" 2018 http://www.statssa.gov.za/publications/P03101/P031012018.pdf (last accessed: 2020-05-01).
104 StatsSA "National poverty lines 2019" 2019 http://www.statssa.gov.za/publications/P03101/P031012019.pdf (last accessed: 2020-05-05).
105 World Bank 2018.
106 Hurlbut xix
107 Hurlbut xxv

living conditions, poverty and income inequality create a surge in service delivery protests?

4 5 Excessive tax burden

The South African population currently consists of approximately 59.4 million people.[108] The number of individual taxpayers registered increased to 22.2 million in 2019 from 21.1 million in the 2018 tax year. There are 4.9 million active personal income taxpayers in South Africa.[109] VAT and personal income tax (PIT) are the largest sources of tax revenue for SARS, with a combined contribution of 64.6 percent of the total revenue. PIT contributes 39 percent of the total tax revenue.[110]

An indication of the tax burden in South Africa can be found in the analysis of the tax-to-GDP ratio. When the percentage of this ratio is high, it is an indication that the tax collected is higher relative to the size of the economy. Thus, the higher the percentage, the greater the tax burden.[111] For the 2017/2018 tax year, the tax-to-GDP ratio for South Africa was 25.9 percent. According to the IMF, this percentage places South Africa on the list of top 10 countries with the highest tax-to-GDP ratios.[112] This percentage is troubling considering the persistent high inequality and poverty in South Africa.

A number of civil movements have risen in South Africa in an attempt to voice the dissatisfaction of citizens with the current tax burden. Examples of such movements are the Organisation Undoing Tax Abuse (OUTA) and service delivery protests.[113] The small proportion of the population contributing towards the tax revenue is a result of the high level of income inequality.[114] Ndlovu[115] indicates that South Africans have always experienced excessive tax burden. Her study shows that the oppressed taxpayers instigated resistance, even in the form of protests, against the tax burden and other policies implemented by the government. This behaviour is evident in historical tax revolts in South Africa. A study conducted by Statistics SA[116] on the perceived impact of COVID-19 indicated that 93.2 percent of respondents were very or

108 Worldometer "World population prospects" 2020 https://www.worldometers.info/world-population/south-africa-population (last accessed: 2020-07-06).
109 *BusinessTech* "This is who is paying South Africa's taxes" 2020 https://businesstech.co.za/news/finance/386931/this-is-who-is-paying-south-africas-taxes/ (last accessed: 2020-07-06).
110 *BusinessTech* 2020.
111 StatsSA "A breakdown of the tax pie" 2019 http://www.statssa.gov.za/?p = 12238 (last accessed: 2020-07-06).
112 StatsSA "A breakdown of the tax pie" 2019 http://www.statssa.gov.za/?p = 12238 (last accessed: 2020-07-06).
113 Manyaka 2018 *Journal of Public Administration* 57.
114 World Bank Group 2019.
115 Ndlovu 3.
116 StatsSA "Behavioural and health impacts of the COVID-19 pandemic in South Africa" 2020 http://www.statssa.gov.za/?page_id = 1854&PPN = Report-00-80-02&SCH = 72636 (last accessed: 2020-05-03).

extremely concerned about an economic collapse as a result of the COVID-19 pandemic, and 79.7 percent were concerned about possible civil disorder.

6 Concluding remarks

The aim of this article was to use history as a determinant of possible tax resistance and/or of a tax revolt in South Africa. The five economic factors identified in the historical revolts studied (the Jewish Revolt of 66 AD–70 AD, the Great Spanish Revolt of 1520–1521 and the Proposition 13 Californian Revolt of 1978) were systematically identified as high unemployment, high indebtedness, inequality, high inflation and an excessive tax burden. The analyses of the five economic factors assisted in answering the research question: Can historical events provide evidence of a possible tax revolt in South Africa?

In South Africa, the five economic factors were found to be present and integrated within one another. High unemployment is evident in the 29 percent unemployment rate calculated in 2019. This figure is expected to rise to 50 percent after the COVID-19 pandemic.[117] Ministers of Finance have acknowledged that unemployment, inequality and poverty due to slow economic growth are concerns. High unemployment negatively affects the living conditions of South Africans; therefore, households need to borrow money for their day-to-day expenses, plunging citizens into high levels of indebtedness. Household debt in South Africa was 72.8 percent of gross income in 2019. Such high indebtedness leads in turn to high levels of income inequality within a society. This is evident from the Gini coefficient of 0.65 for South Africa in 2014. High inflation rates further decrease disposable income and economic growth.[118] Additionally, the living conditions of South Africans may worsen after the COVID-19 pandemic. Prices may rise, and the inflation rate of 4.1 percent may be distorted, as it excludes the effects of the COVID-19 pandemic. Finally, the tax-to-GDP ratio indicates a high tax burden. With less disposable income and with the simultaneous increases in taxes, citizens are prone to be more disgruntled. This can already be seen in the fact that 79.7 percent of respondents on a Statistics SA survey on the perceived impact of COVID-19 indicated that they are concerned about civil disorder.

Citizens use different methods to voice their displeasure. Tax can be one of the tools used by citizens to show their dissatisfaction when their government is perceived as failing in the improvement of the economic environment of the average citizen. The economic factors deduced from the historical events can thus be seen as lessons from history.

117 *IOL* 2020.
118 Vermeulen "Inflation and unemployment in South Africa: is the Phillips curve still dead?" 2017 *SABR* 5.

The economic factors identified through history also confirm that South Africa is currently experiencing a harsh economic environment. Fiscal policy in South Africa should thus earn credibility by prioritising growth-enhancing spending. The government should improve the cost of spending to assist in curbing the ever increasing public debt. Additionally, South Africa needs structural reforms in order to boost productivity for employment to raise the income and living standards of South Africans: A sustained job creation programme should be able to increase household disposable income and therefore improve the living standards of citizens. According to the Organisation of Economic Co-operation and Development, South Africa is facing a tough monetary policy change.[119]

The contribution of this research can be found in its attempt to anticipate and prevent a future event that may delay the tough monetary policy changes needed in South Africa, whereas previous research has focused mainly on explaining past events. However, as evident from the recent outbreak of the COVID-19 pandemic and its extraordinary impact on the international community, one can merely attempt to pose suggestions for possible future events.

Anticipating and preventing a possible future tax revolt may be possible, but one should never predict more than what is deduced from the research. The COVID-19 pandemic has changed the world's view of what the future may hold. Thus, whilst the five economic factors may be an indication of a future tax revolt, the COVID-19 pandemic may just be the tipping point of the scale.

119 OECD "Developments in individual OECD and selected non-member economies" 2017 http://www.oecd-ilibrary.org/docserver/download/1216021ec042.pdf?expires = 1477311052&id = id&accname = oid011488&checksum = E9FDC2779EB08937DD537467880EAFAB (last accessed: 2016-10-24).

The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?

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SUMMARY

The article examines the possibility of creating an indigenous legal pluralism within the South African context. Due to the historical and current marginalisation of customary law, can customary law be developed, reformed and codified? Furthermore, can the legal regimes and human rights of indigenous people of South Africa be ascertained? The article renegades the historical marginalisation of customary law due to colonialism and apartheid; where indigenous people's legal regimes were placed subordinate to common law. The article further implores the current status of indigenous law nationally and internationally. The article seeks to advance the argument based on legislative and judicial analysis, that customary law is still marginalised under the current constitutional dispensation. The international call and new recognition of customary law are commendable; the article seeks to review whether South Africa is keeping up or not to the international directives embedded within declarations and conventions they are a signatory to. The article will further comparatively analyse foreign countries that have managed to do what South Africa is struggling to achieve with regard to the recognition, development, application, and reform of customary law.

1 Introduction

South Africa prides itself on its post-1994 Constitution.[1] Embedded within it is the Bill of Rights to protect every person in South Africa,[2] and also giving recognition to the indigenous people of South Africa. South Africa's Constitution elucidates that customary law is in parallel with common law under section 39 of the Constitution,[3] in light to the above

1 Constitution of Republic of South Africa, 1996 (hereafter the Constitution).
2 S 7(1) of the Constitution.
3 S 39 of the Constitution.

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contention, the article begs to claim that this is only superficial.[4] The constitutional advancement of customary law has been delayed in terms of legislative and judicial reform and development, and the legislature is inattentive with respect to remedying the inadequate position customary law is placed in. Instead, the legislature has been replacing customary law considered "non-transformative and undeveloped", with common law to promptly deal with customary disputes.[5] The insufficiency of the development and reform of customary law allows the judiciary and the legislature to limit the development of customary law as a whole in terms of its application and interpretation. It is highly significant to engage with the need to ascertain indigenous people's human rights in South Africa, by paving the way and ensuring due regard to their legal regimes and human rights.[6] Indigenous peoples' human rights which Tobin list them as; self-determination; autonomy; land; territory; resource rights; rights to culture and cultural heritage; access to generic resources and protection of traditional knowledge; and the recognition of the issues on the conflict between human rights and customary law, and the future of customary law within the national and the international legal pluralism.[7]

Even at the advent of the codified version of customary law; there are still ambiguities and misunderstandings that exist within the official customary law.[8] Engaging in the creation of indigenous legal pluralism in questioning whether customary law can exist as a separate pluralism within the South African state law pluralism, it is both bold and daunting. If an argument cannot be successfully made, the question left to ask by the article is: Can customary law exists successfully, undistorted and purposefully within the current dispensation? Can the courts and the legislature ensure its constant development and codification, especially giving due regard to living customary law and the customs that exist concurrently?

2 Historical marginalisation of South African customary law

2 1 Concept of customary law

Before the article can engage in the historical analysis of the marginalisation of customary law, it is beneficial to the reader to understand the concept of customary law. Customary law is the concept of law which attaches to a person or a group of people as a form of identity, it serves as both personal and communal law for indigenous

4 G Van Niekerk "The endurance of the Roman law tradition" http://studia.law.ubbcluj.ro/articol.php?articolId = 474 (accessed 2015-07-16).
5 As witnessed in *Bhe v Magistrate Khayelitsha* 2005 1 BCLR 1 (CC).
6 Tobin *Indigenous people, customary law and human rights – why living law maters* 2.
7 Tobin 3.
8 SALRC *Project 144 Single Marriage Statute 35* (2018) 6.

people.[9] It is imperative to draw a distinction between living customary law and official customary law for the purpose of this article. Living customary law consists of unwritten customary practices that regulate the day-today lives of indigenous people.[10] Living customary law consists of actual practices or customs of the indigenous people whose customary law is under consideration.[11] Furthermore, derived from the initial practices of customary law, custom practices that are long-established, reasonable and uniformly observed by the indigenous people,[12] custom can be ascertained under living customary law; it is an original source of living law.[13]While, official customary law is the opposite of living customary law and is written down.

2 1 1 Pre-colonial, colonial, and apartheid marginalisation of customary law

Before the colonial era, customary law was practiced and applied unrestrictedly;[14] customary law was generally unwritten and thus passed orally from one generation to another.[15] The most prominent customary law was made by the ruling monarch, in which their orders and judgment made current law and amendments to existing living customary law.[16] Ndulo correctly states the nature of customary law as:[17]

> "The law before colonialization in most African states was essentially customary in character, having its bases in the practices and customs of the people. The great majority of people conducted their personal activities in accordance with and subject to customary law. 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country."

During this time, harmony to law and custom was brought about within the indigenous communities.[18] Thereafter, a distinctive policy towards customary law in Southern Africa began with the British occupation of the Cape in 1806.[19]

9 Woodman 35.
10 Himonga & Nhlapo (eds) *African Customary Law in South Africa: Post Apartheid and Living Law Perspective* 27.
11 Himonga & Nhlapo 27.
12 *Van Breda v Jacobs* 1921 AD 330.
13 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC).
14 Ndulo "African Customary Law, Customs, and Women's Rights" (2011) *Cornell Law Faculty Publications.* 187.
15 Ndulo 187.
16 Ndulo 188.
17 Ndulo 189.
18 Seroto "An analysis of the depiction of indigenous people during the early colonial conquest in South African history textbooks" (2015) 14 *Indilinga African Journal of Indigenous Knowledge Systems* 169.
19 Seroto 170.

The current colonial power confirmed the Roman-Dutch law already operating in the Cape from 1600s, as the general law of the land, for that system was deemed to be suitably "civilized", unlike customary law.[20] Roman-Dutch law as influenced by English law is what makes up common law, as currently observed in South Africa.[21] Van Niekerk strictly defines Roman-Dutch law as, "…[as] the primary or dominant component of South African state law and in the courts and in academic writing the term 'common law is used.'"[22] No account was taken of the indigenous Khoi and San laws,[23] and based on the history of South Africa, preceding to the arrival of the European settlers in South Africa, indigenous peoples the Khoi, San and the Bantu-speaking people occupied the vast areas of South Africa.[24] In 1828 Ordinance 50 was passed to free people of colour from slavery. This is where the colonial rule was prominent. Consequently, declaring Roman-Dutch law as the law of the Cape.[25] When Britain annexed the Cape territory in 1843, Roman-Dutch law was again declared the general law of the current colony, but shortly afterward courts were also allowed to apply customary law in disputes between Africans.[26] Recognition of customary law was subject to the repugnant formula that was later to be adopted throughout the colony making customary law subject to common law.[27] The government attempted to codify some parts of customary law under the Code of Zulu law, which came in effect in 1869;[28] to regulate customary marriages and divorces for the Zulu nation.[29]

In the Unionisation of the Republic in 1910, the position of customary law differed drastically from one part of the country to the other. In the Cape and Transvaal, customary law had no official recognition.[30] In British held territories and to a lesser extent in Natal and the Transkei territories, customary law was regularly applied subject to the supervision of higher courts.[31] This created a system of confusion and complexities in terms of court application and interpretation because of the fragmented system of customary law. The Native Administration Act 38 of 1927 was passed.[32] Although the government's ostensible purpose was to revive African tradition, its actual intention was to establish a separate system of justice to match segregation in land and society.

20 *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur 72 para 78.
21 Van Niekerk 18.
22 Van Niekerk 19.
23 Elphick *Kraal and Castle: Khoikhoi and the Founding of White South Africa* 7.
24 Seroto 170.
25 Burman 12.
26 Himonga & Nhlapo 5.
27 Ordinance 3 of 1849.
28 Code of Zulu Law 19 of 1891.
29 Code of Zulu Law 19 of 1891.
30 Mahomed & Nhlapo Project 90: The harmonization of the common law and the Indigenous law: Customary marriages Discussion article (1998) 74 *Pretoria: South African Law Commission* 9.
31 Mahomed & Nhlapo Project 90:10
32 Native Administration Act 38 of 1927.

During the advent of apartheid, the systematic oppression of Black indigenous people of South Africa augmented and it also extended to their legal regimes. Customary law was only recognised under a legal exception.[33] This was the apartheid government form of cultural segregation, through enacting of the Bantu Authorities Act 68 of 1951, power was centralised under the tribal rulers, who controlled land and indigenous people, where the tribal ruler was subject to state control and authority.[34] Section 4(1)(d) of the Bantu Authorities Act stated that.[35]

> "A tribal authority shall, subject to the provisions of this Act – generally, exercise such powers, and perform such functions and duties, as in the opinion of the Governor-General fall within the sphere of tribal administration as he may assign to that tribal authority."

These tribal authorities paved ways for indigenous people to be subjected to further segregation, limited access to their land and freedom of movement.[36] Due to the uprising by indigenous communities against imposed and authoritarian traditional authorities in the established homelands (Transkei, Ciskei, Venda, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, and QwaQwa).[37] The then government decided to establish the Law of Evidence Amendment Act 45 of 1988. The Act took judicial notice of customary law principles that could be readily ascertainable and apply them where applicable in customary disputes.[38] Even so, the Act placed a repugnancy clause, which gave the presiding officer the legal discretion to either apply customary law or to not, and when both parties to the litigation were African.[39]

3 Constitutional marginalisation of South African customary law

Under the current dispensation, the Constitution recognises the application of customary law by the courts in order to promote the spirit, purpose, and object of the Bill of Rights.[40] Customary law must be applied when applicable, subject to the Constitution, public policy, rules of natural justice and legislation.[41] Therefore customary law can only apply if applicable and parties seeking to apply customary law in court should prove that: there is a tribal connection between the litigants; that

33 Himonga & Nhlapo 14.
34 Himonga & Nhlapo 15.
35 Bantu Authorities Act 68 of 1951.
36 Himonga & Nhlapo 15.
37 South African History Online "The Homelands" 24 January 2019 http://www.sahsitory.org.za/article/homelands (accessed 2019-09-10).
38 S 1(1) of Law of Evidence Amendment Act 45 of 1988.
39 Mahomed & Nhlapo 33.
40 S 39(2) the Constitution. Furthermore, please refer to Traditional Leadership and Governance Framework Act 41 of 2003.
41 S 211(3) of the Constitution. See also *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) 150 153; *Hlope v Mahlalela* 1998 (1) SA 449 (T); *Metis v Padongelukfonds* [2002] 1 All SA 291 (T).

a particular system of indigenous law applies; and applicable principles.[42] It is judicious that the courts must satisfy themselves with the contents of customary law and evaluate local customs in order to ascertain the contents of legal rules, bearing in mind that customary law is not uniform.[43] This ascertainment was done through the use of communal leaders and leaders within the royal clan or group, this will apply when the court is ascertaining living customary law.[44] Currently, the major constitutional recognition for the application and practice of customary rules, laws, and principles is contained under sections 39(2),[45] 30,[46] and 31[47] of the Constitution, which affords indigenous people the right to cultural self-determination. Sections 30 and 31 of the Constitution provides for the recognition and "assumed" protection of customary law.[48] These entrenched rights are to an extent a way to ascertain the indigenous people's rights to self-determination.[49] The right to self-determination centres on the need to allow indigenous people to exclusively enjoy their own culture, to profess and practice

42 *Maisela v Kgolane* NO [2000] 1 All SA 658 (T). The case concerned application by the appellant for a rescission of default judgment ordered against him for the return sale of a tractor which was sold and delivered to the appellant the respondent. The Magistrate issued a rule *nisi* to hear reasons of the appellant on reasons they did not make it to court for the initial hearing on the matter. After the discharged of rule *nisi* the Magistrate refused to grant the rescission of default judgment after application motion; even with good reasons given by the appellant and furthermore the Magistrate proceeded to refuse a special plea made by the applicant based on the reason that indigenous law applied to the case because the litigants were black thus extinctive prescription did not apply. The appellant applied to court for the decision on three issues: (1) whether the magistrate had been wrong to discharge the rule in terms of which the attachment was suspended pending the outcome of the application for rescission of the judgment and to award costs against the appellant; (2) whether the magistrate had been wrong not to set aside the judgment of 3 September 1996 as the appellant had shown good cause and had not been in wilful default; and (3) whether the magistrate had been wrong to dismiss the special plea of prescription, in particular in his finding that indigenous law applied without any mention of it on the papers. In an appeal to a Provincial Division. The court held that the Magistrate was wrong in refusing to grant the rescission of the default judgment; the court further held that the magistrate's application of indigenous law and his consequent dismissal of the appellant's special plea, that it was wrong to adjudicate on a sale that was not governed by indigenous law according to the principles of indigenous law merely because the parties were both black. It was clear that indigenous law could apply in cases of sale only where the principles of indigenous law provided for the sale of the thing sold. It would also be wrong to regard such an agreement as regulated by indigenous law if common law principles not known to indigenous law had been agreed upon by the parties.

43 *MM v MN* 2013 (4) SA 415 (CC) para 48-51.

44 Himonga & Nhlapo 25-27.

45 S 39(2) of the Constitution.

46 S 30 of the Constitution.

47 S 31 of the Constitution.

48 Ss 30 & 31 of the Constitution.

49 Tobin 3.

their own religion, or to use their own language.[50] Whilst, section 39(1)(b) of the Constitution, which states that, "when interpreting the Bill of Rights, a court, tribunal or forum; must consider international law."[51]

Realising the importance of the Bill of Rights in ensuring the values of equality, freedom, and dignity especially for the marginalised women and children; which customary law may seek to exclude in terms of succession/ownership of land and property.[52] This questions the real legitimacy of customary law and the indigenous community right to self-determination for the law to apply according to their beliefs and custom. The evidence in *Bhe v Magistrate, Khayelitsha,*[53] and *Mthembu v Letsela,*[54] both these cases indicate the current position of customary law in the constitutional dispensation, both these cases are similar in terms of customary rule and principle challenged.[55] Both cases are to be discussed below they deal with the rules of intestate succession in terms of Black indigenous people of South Africa.

4 Judicial marginalisation of customary law: Case law precedents

4 1 *Mthembu v Letsela* 2000 (3) SA 867 (SCA)

In the Supreme Court of Appeal case, in *Mthembu v Letsela*,[56] the court also came to refrain to interfere with how Black indigenous people dealt with their succession, and the court refused to make any decision about the constitutionality of the rule of male primogeniture regulated under section 4(1) of the Black Administration Act 38 of 1927 and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks.[57] Simons explicitly explains the male primogeniture rule and he states that:[58]

> "The rule of male primogeniture is consistent with the structure and functions of the communal family for indigenous people. The general successor, who succeeds in the office as well as to an estate, must be a male because only a man can be head of the household in the traditional society. Intestate succession through the male line forestalls the partitioning of an estate and

50 Ermacora "The Protection of Minorities Before the United Nations" (1983) 1 *Recueil des Course* 246. See also International Covenant on Civil and Political Rights of 1966.
51 S 39(1)(b) of the Constitution.
52 As illustrated in *Bhe v Magistrate, Khayelitsha* (1) SA 580(CC) & *Maisela v Kgolane* NO [2000] 1 All SA 658(T).
53 *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC).
54 *Mthembu v Letsela* 2000 (3) SA 867 (SCA).
55 See *Bhe v Khayelitsha Magistrate* para 3 and *Mthembu v Letsela* 867.
56 *Mthembu v Letsela* 868.
57 Regulations for the Administration and Distribution of the Estates of Deceased Blacks of the Act 23 (10) and promulgated under Government Notice R200 of 6 February 1987.
58 Simons *African Women: their legal status in South Africa* (1968) 239.

keeps it intact for the support of the widow, unmarried daughters, and younger sons."

In the *Mthembu* case, the court was faced with the question whether to recognise Ms. Mthembu and Mr. Letsela, the deceased, as married couple; and whether to grant Ms. Mthembu and her daughter the right to claim succession intestate on the property acquired between her and the deceased, during the subsistence of their relationship/partnership.[59] The respondent, the deceased father, claimed that Ms. Mthembu and the deceased where not married in terms of customary law and that the estate of the deceased should devolve to him by the rule of male primogeniture as regulated by statutes.[60] The court refused to grant respondent's claim, and the court reasoned that "it does not believe that the rule of male primogeniture is inconsistent and infringes on the rights entrenched in the Constitution."[61] Also, the court further substantiated that, "the gender discrimination contented by the appellant was not for the court to answer based on the hiatus of its constitutionality."[62] The court further refused to scrap section 23(4) of the Black Administrative Act which dealt with Black indigenous people succession, the court emphasised that, "the provision of succession under the Act is a legislative recognition of 'Black' laws and custom,[63] allowing Black people the opportunity to choose how they wish their estates to be devolved upon their death, either by means of customary rules or by means of a Will, it would be imposing for the court to declare a provision unconstitutional based on it being *contra bona mores,* which allowed an individual to choose how to devolve or what to do with their estate after their death."[64] The court followed a more indigenous legal pluralism in terms of the interpretation of customary law and maintained the rigidity of the indigenous people's legal regimes.

4 2 *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 (CC)

In the constitutional court case of *Bhe v Khayelitsha Magistrate*, the case is based on the rule of male primogeniture,[65] it is a custom rule where line of succession or inheritance follows the eldest males in the family. In the *Bhe v Magistrate, Khayelitsha* the applicant acting on behalf of her two daughters brought an application to challenge the customary law rule of male primogeniture as well as section 23 of the Black Administration Act.[66] As the applicant wanted to secure the deceased's property for her daughters.[67] Under the customary law rule of male primogeniture as well as section 23 of the Black Administration Act, the house became the

59 *Mthembu v Letsela* para 2.
60 *Supra*.
61 *Mthembu v Letsela* para 3.
62 *Mthembu v Letsela* para 33.
63 S 23(4) Black Administration Act 38 of 1927.
64 *Mthembu v Letsela* para 45.
65 Black Administration Act 38 of 1927.
66 *Bhe v Khayelitsha Magistrate* paras 9-20.
67 *Supra*.

property of the eldest male relative of the deceased, in this case, the father of the deceased.[68] The Constitutional Court declared the customary law rule of male primogeniture unconstitutional and struck down the entire legislative framework regulating intestate succession of deceased Black South Africans.[69] According to the court, section 23 of the Act was archaic since it solidified official customary law and grossly violated the rights of Black South Africans.[70] With regard to the customary law rule of male primogeniture, the court held that it discriminates unfairly against women and illegitimate children on the grounds of race, gender, and birth.[71] The result of the order was that all deceased estates are to be governed, until further legislation is enacted or developed by the legislature, by the Intestate Succession Act 81 of 1987, whereby widows and children can benefit regardless of their gender or legitimacy.[72]

By scrapping out the entire rule/law, the court overlooked the indigenous communities who still practiced this custom and have embedded it as their custom.[73] In both cases, no other rules of interpretation were followed, unlike how it is done with common law, where rules of interpretation are followed. The purposive rule of interpretation could have been used and applied flexibly to allow consideration of the rule of male primogeniture,[74] Ngcobo J makes that suggestion in his minority judgment in *Bhe v Magistrate, Khayelitsha*, and he states that, "the courts have an obligation under the Constitution to develop indigenous law to bring it in line with the rights in the Bill of Rights in order to promote equality."[75] The rigid application and interpretation of customary law is still marginalising, and the courts should be aware of these realities when dealing with disputes that are customary in nature.

5 Legislative marginalisation of customary law: Legislative disparity

5 1 Regulation of indigenous people marriages

Since the enactment of the Recognition of Customary Marriages Act 120 OF 1998 (herewith referred to as RCMA),[76] which came into force on 15 November 2000, there have been quite a few cases that challenged the provisions within the Act. The RCMA was the attempt by the legislature to regulate customary marriage especially with regard to polygynous

68 *Supra*.
69 *Bhe v Khayelitsha Magistrate* paras 107-108.
70 *Supra*.
71 *Supra*.
72 *Supra*.
73 *Bhe v Khayelitsha Magistrate* paras 137-146.
74 *Notham v London Borough of Barnet* [1978] 1 WLR 220.
75 *Bhe v Khayelitsha Magistrate* para 147.
76 Recognition of Customary Marriages Act 120 of 1998.

marriages.[77] The Act came under fire for some of its discriminatory or exclusionary provisions against women to claim their proprietary rights under customary marriages. Specifically, section 7(1) and (2) of RCMA,[78] the court had to consider section 7 constitutional validity in terms of its exclusion for women who were married before the Act's enforcement.[79] Women in monogamous customary marriages who got married before the RCMA's enforcement, could not claim their proprietary rights because of the matrimonial property system of such marriages were out of community of property.[80] Whilst marriages concluded after the enforcement of the RCMA wherein community of property.[81] This question why did the Act not apply retrospectively to protect such women? These provisions were challenged in the case of *Gumede v The President of the Republic of South Africa,*[82] where the applicant concluded a customary marriage with her husband in 1968. The husband instituted divorce proceedings, due to the nature of the customary marriage as classified as out of community of property and challenged the provisions under the RCMA. The applicant claimed that the provisions sought to discriminate wives who concluded their marriages before the enforcement of the RCMA. Section 7(1) of the RCMA stated that, "the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law."[83] Whilst, section 7(2) stated that, "marriage entered into after the commencement of the Act is marriage in community of property."[84] The court concluded that the provisions were indeed discriminatory and declared them unconstitutional.[85] The issue lies with the legislative oversight of the development and the protection of indigenous people with regard to customary law. This is not the only issue with regard to the RCMA, the Act refers to the Matrimonial Property Act 88 of 1984, for customary marriages concluded in community of property according to the default system in South Africa.[86] This means that if married in community of property, you are bound by Matrimonial Property Act, this questions the relevance of the RCMA, because the Act does not establish its own identity in terms of the regulation of Black people customary marriages. This leads back to the semiotic interpretation and view of customary law. This is the blind spot that customary law finds itself under the current dispensation and section 7 of the RCMA was referred to the legislature for amendment.

77 Recognition of Customary Marriages Act 120 of 1998.
78 S 7(1)-(2) Recognition of Customary Marriages Act 120 of 1998.
79 Louw, & Van Schalkwyk *Introduction to Family Law: Student Textbook* (2019) 83.
80 Louw, & Van Schalkwyk 83.
81 Louw, & Van Schalkwyk 83.
82 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152.
83 S 7(1) Recognition of Customary Marriages Act 120 of 1998.
84 S 7(2) Recognition of Customary Marriages Act 120 of 1998.
85 *Gumede v The President of the Republic of South Africa* 152.
86 Recognition of Customary Marriages Act 120 of 1998.

5 2 Regulation of indigenous people law of succession

Due to indigenous people's unfamiliarity with drafting Wills to regulate their estate, this status *quo* has raised a lot of disputes regarding the rights of wives married under customary rites to inherit intestate without an express contract akin to that. One must remember that the aspect of Wills and the devolvement of the estate of indigenous people is a foreign concept and arises from common law.[87] Only indigenous people who have money, resources, and knowledge about the devolvement of one's estate are able to make an informed choice.[88] Succession under customary law rest on the principle of the acquisition of status and family property of the deceased over their lifetime as the head of the household.[89] The successor will acquire the rights, duties and position of the person he succeeded.[90] The judge in *Mthembu v Letsela* erred in assuming that indigenous people do not understand the concept of succession. Where most indigenous communities devolve their estate intestate and also based on the rule of male primogeniture.[91]

Whilst, in the case of *Bhe v Magistrate Khayelitsha,*[92] the court observed whether extra-marital children and domestic partner of the deceased could inherit intestate. The court declared the provision unconstitutional, which discriminated against gender and children with regard to succession and remedied the unconstitutionality by making the Intestate Succession Act,[93] applicable to indigenous people.[94] Balancing the rights of children under section 28(2) of the Constitution, where the best interest of the child is of paramount importance and ensuring the protection of women against gender discrimination.[95] The flexible and practical means sought by the court are commendable, but the judgment further marginalised and subordinated customary law to common law. The court's negation to reform and develop customary law roved the existential crisis that customary law finds itself under the constitutional guise. This declaration of unconstitutionality with regard to the provisions under Black Administration Act,[96] and the rule of male primogeniture came under heavy criticism in the minority judgment of Ngcobo J. The Judge reiterate that, "it is first important to understand the nature and scope of application of the rules established under customary law."[97] Courts should not deviate from the importance and existence of indigenous people's legal regimes.

87 Ndulo 70.
88 *Bhe v Khayelitsha Magistrate* para 66.
89 Himonga & Nhlapo 162.
90 Himonga & Nhlapo 163.
91 *Mthembu v Letsela* 867.
92 *Bhe v Magistrate Khayelitsha* paras 9-20.
93 Intestate Succession Act 81 of 1987.
94 *Bhe v Khayelitsha Magistrate* para 66.
95 S 28(2) of the Constitution.
96 Black Administration Act 38 of 1927.
97 *Bhe v Khayelitsha Magistrate* para 147.

6 International directives for the protection and advancement of indigenous people legal regimes

Article 27(1) of the Universal Declaration of Human Rights (herewith referred to as UDHR) state that: "everyone has the right freely to participate in the cultural life of their community, to enjoy the arts and to share in scientific advancement and its benefits."[98] The right given in the UDHR is not limited by any right, the only infringement which is not allowed is when such enjoyment and practice seek to infringe on another's rights, freedom, and security.[99] Since the prevalence of indigenous law-related cases, the Commission Drafting Group of United Nations proposed for the passing of the Declaration on the Rights of Indigenous Peoples.[100] During its ratification 144 states voted for its passing (this includes South Africa), and only 4 countries voted against it (Australia, Canada, New Zealand, and the United States), with only 11 countries abstaining from voting (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).[101] This was due to the persistence and call by the indigenous communities for the recognition of their legal regimes and independence by seeking autonomy from colonial laws and decolonisation from the colonial influence.[102] Due to international calls by indigenous communities and bodies representing indigenous people, United Nations saw it fit to enact the United Nations Declaration on the Rights of Indigenous Peoples,[103] which South Africa is a signatory, to address the issues of indigenous people's right to self-determination and autonomy from colonial laws that sought to eradicate their legal regimes.[104] Article 34 of the United Nations Declaration on the Rights of Indigenous Peoples states that:[105]

> "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

98 Universal Declaration of Human Rights 1948.
99 Universal Declaration of Human Rights 1948.
100 Establishing a Working Group to Elaborate a Draft United Nations on the Rights of Indigenous Peoples (March 1995), Commission on Human Rights, Report on the 51st Session, UN Doc. E/1995/23 and also UN Doc. E/CN.4/1995/L.11/Add.22.
101 United Nations: Department of Economic and Social Affairs "United Nation Declaration on the Rights of Indigenous Peoples" (2007) http://www.un.org/development/desa/indgenouspeople/declaration-on-therights-of-indigenous-peoples.html (accessed 2019-09-20).
102 Dugard *International Law: A South African Perspective* (2016) 100.
103 United Nation Declaration on the Rights of Indigenous Peoples, 2007.
104 Dugard 102.
105 United Nation Declaration on the Rights of Indigenous Peoples, 2007.

Tobin states that, "these are the instruments that affirm the status of customary law as a source of law that must be taken into consideration by states in the development of any law and policy affecting the rights and wellbeing of indigenous people."[106] Customary law is important in recognising indigenous people's rights to land; resources; guiding with the decision on the exploitation of their customs and resources or on their land; re-defining the relationship between the state and third parties.[107] These can also assist in international peace missions, adopting some of customary norms assist in better ways to solve disputes instead of the western way (i.e. restorative justice, social justice that is community-based and human-centred; transformative justice based on involving all parties and families and community in dispute resolution; the need to create a system of rehabilitation through dialogue and community service and not incarceration of perpetrators, etc.)[108]

7 Foreign comparative law: Learning from Papua New Guinea

Papua New Guinea (hereafter, New Guinea) serves an acclaimed comparative analysis in terms of the reception and legal recognition of customary law. New Guinea was no exception to colonialism.[109] After their colonial independence and placed under the Australian territorial administration, the need to recognise and protect the indigenous people regimes, two legislation, was enacted for this purpose, Laws Repeal and Adopting Ordinance 1921 and Native Administration Regulation 1924, this was the foundation of when the status of custom gradually began to be recognised as a source of law post-colonialism, and over time through further legal developments, it made way into being part of the legal system of New Guineas.[110] New Guinea has adopted a dual legal system where two court systems exist, the customary court systems and the formal court system. This is due to the fact that more indigenous people rely on customary law dispute agencies.[111] To respond as well as ascertain and maintain indigenous people legal regimes, there is a pipeline legal philosophy that needs to be developed into legal statutes, namely, Indigenous Melanesian Jurisprudence where it is based on the diverse custom, culture, and traditions of the people of New Guinea, where, customary law is to be the object of law reform, and as a basis of a legal system in New Guinea.[112] This is a legal stance that South Africa can adopt as part of the customary law reform and development.

106 Tobin 1-2.
107 Tobin 4.
108 Nhlapo 2.
109 Kamongmenan "Status of Customary Law Within Papua New Guinea's Legal System" (2018) https://owlcation.com/social-sciences/STATUS-OF-CUSTOMARY-LAW-IN-LEGAL-SYSTEM-OF-PAPUA-NEW-GUINEA (accessed 2019-07-12).
110 *Supra*.
111 *Supra*.
112 *Supra*.

8 The idea of underlying law and the hierarchy of laws

To place importance in the status and recognition of customary law in New Guinea enacted the Underlying Law Act 2000 under the constitutional directive,[113] which places and recognises that custom is a source of law and also, how it is given preference over common law in terms of the order of application, interpretation in courts and development of the underlying law (common law).[114] Section 6 of the Constitution further orders that:[115]

> "Subject to this Act, in dealing with the subject matter of a proceeding, the court shall apply the laws in the following order: a) Written law; b) The underlying law; and c) The customary law; d) Common law."

This indicates the preference and sequence of the importance of the application of customary law. The provision elucidates that common law has to be consistent with customary law of Papua New Guinea before it can be applied as part of the underlying law, and if a court applies common law instead of customary law, it has to supply reasonable and sufficient reasons for refusing to apply customary law.[116]

Sufficient and reasonable ascertainment of related custom is important. This stride is made by the judicial and legislative system of New Guinea is commendable and inspirational. The stance taken by Papua New Guinea in ascertaining the legal regimes of their indigenous people indicates the importance and respect awarded to the indigenous people residing there. This can also be said about the Constitution of South Africa due to its restorative approach and recognition of customary law but more work still needs to be done to develop customary law in South Africa.

9 Conclusion

Given the historical marginalisation of customary law and its constant battle to remain relevant and applicable to the indigenous communities, it has come to the need to ascertain indigenous people of South Africa are afforded their human rights through the development, reform, and codification of their legal regimes. This contention is based on living customary law, special legal reform is imperative in this regard. The article introspectively looked at the status of customary law in South Africa, and how it is handled, interpreted and understood by the legal fraternity, specifically the judiciary and the legislature.

113 S 20(1) of the Constitution of the Independent State of Papua New Guinea
114 Refer to the Underlying Law Act 2000.
115 S 6 of the Constitution of the Independent State of Papua New Guinea.
116 *Supra*.

The *legislative* approach should be based on understanding and the imposed intention of customary law. Further understanding of what customary law seeks to achieve and the values and norms it held dear by the indigenous people of South Africa, should be interpreted in a socio-traditional manner and a flexible approach must be employed to ascertain customary law in its true light, nature, and scope. Reform and codification of customary law must be understood to the cultural tenets and customs of indigenous people. A single statute that holistically regulates all aspects of customary law (i.e. marriage, land rights/ ownership, succession, customary legal procedure, remedies, legal recourse, etc.), despite of diversity in customs because this will ensure that no doubt is left when customary disputes are in court. Furthermore, the legislative approach should be flexible and non-discriminatory to the legal regimes of the indigenous people of South Africa. The first point of departure is to remove all laws that seek to discriminate and still segregate indigenous people. It is true that customary law must be viewed as a separate legal system and not as stoic law that needs to be reformed according to the tenets imposed under western/common law, such foreign-imposed ideologies are what dismantles the legality of customary law and further distort its intention.

The indigenous people's *legal regimes* need to be maintained for the purpose of identity, cultural development, and reform. Not viewing customary law with a constrict attitude, but then holistically analyse the current status of customary law to the benefit of the current society and communities and also the future generation. Not only questioning its status and its constant marginalisation, but also seeking its preservation, protection, reform, and development. In the aspect of the focus of this article, reform is based on the idea of reforming customary law in correlations to modern society's moral aspects. Where it is found that customary law is contrary to basic human rights,[117] it shall be reformed in a manner that does not eliminate the rule without proper legal interpretation and only eliminating aspects that are contrary to basic human rights and morality aspect.[118] The reform also seeks to ensure the continuous codification and amendment of customary law which truly reflects indigenous people's legal regimes; the aspect of reform also seeks to look at the preservation and creation of indigenous pluralism also synonymously coined term “indigenisation” of customary law. Therefore, legal development in relation to customary law and the focus of this article means, the judicial and legislative development of customary law. This aspect means that the judiciary and the legislature are tasked to ensure that customary law is preserved and developed to fit and suit the modern social aspects of the indigenous people, whether urbanised or in a rural setting. The world, social anthropologists and the legal academic fields should accept and acknowledge the contribution of traditional-scientific research and knowledge in medicine that traditional healers and leaders possess.

117 Chapter 2 Bill of Right of the Constitution.
118 As argued by Ngcobo J in *Bhe v Khayelitsha Magistrate* case.

An international legal discourse based on the status and reform of customary law is indicated in the UNDRIP, this international declaration should be used to appreciate and ensure that the legal regimes of indigenous people are elevated and are acclaimed in a non-discriminatory fashion. The incorrectly unfounded criticism of customary law and indigenous people is the reason why it is difficult to attain indigenous pluralism to successfully exists in the current dispensation. The importance of customary law lays in the indigenous communities who still want to conform and be bound by customary law to the exclusion of positive/common law. Current mutual respect of the indigenous ideas, knowledge, and resource should be the State's approach to better understand indigenous people and their traditional regimes.

The strides in South Africa are commendable and this should be expanded to indigenous people's legal regimes and not only their traditional regimes. As it was said by Van De Westhuizen J, that, "Legislation has to be formulated to substitute the current inadequate requirements for the validity of a custom. These requirements must reflect the changing face of custom and grant this norm-structure its rightful place in jurisprudence,"[119] no better than the article could say.

119 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 44.

Investigating the extraterritorial application of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights

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SUMMARY

The territorial scope of the application of human rights treaties has been a core discussion when dealing with the enforcement of human rights obligations imposed by human rights treaties on State Parties. In particular, this is because the conduct of a State may affect the human rights of people situated outside the State's territorial borders. Accordingly, to afford protection to the affected States, most international human rights instruments contain the so-called jurisdictional clause which aims to identify the range of people to whom States owe their human rights obligations under a treaty. However, the term "jurisdiction" has not achieved an undoubted definition as yet and remains a continued area of contention. The subject matter of this article is the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It concerns therefore, the applicability of these human rights treaties to the conduct of a State which affects the rights of people outside its territorial borders and results in the lack of the full enjoyment of the human rights recognised in the Covenants, and which would be qualified as a violation of human rights treaty had it been undertaken on the State Party's own territory. Although most of the literature on this topic relates specifically to armed conflict and military occupation, the author applies the tests established for the determination of the exterritoriality of the treaties in circumstances inclusive of and beyond armed conflict and military occupation.

1 Introduction

The second half of the twentieth century has given birth to the adoption of significant multilateral international human rights law instruments.[1] These new instruments were different from the treaties that had come before them as they specifically regulated the legal relationship that

1 Hathaway "Human rights Abroad: When do Human Rights Treaty Obligations apply extraterritorially" 2011 *Yale Law Faculty Scholarship Series* 1.

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existed between a sovereign State and its human rights guarantees to its own citizens, in its own territorial frontiers. From this point, States could no longer act in their own national territory with complete impunity.[2] A question that rises from these circumstances is whether there are any limits placed by human rights treaties on States in respect of the States' conduct outside of their own territorial frontiers. Over the years, scholars and courts have expressed their views on the position regarding the applicability of human rights obligations abroad,[3] focusing on aspects that address the framework of extraterritoriality. Nonetheless, the author concludes that this issue remains unsettled, giving rise to great controversies in current international human rights law. In confronting these controversies, this article explores the extraterritorial applicability of the ICCPR and the ICESCR.

2 Interpretation: A point of departure

There is a general presumption under international law reflected in Article 29 of the Vienna Convention on the Law of Treaties (VCLT) that a treaty binds a State within its territory in whole, unless a different interpretation appears from the text of the treaty or it is otherwise established.[4] However, this Article concerns merely the possibility of restricting the application of a treaty to parts of a State territory and does not address the issue regarding the application of the treaty outside of a State's territory.[5] It is the submission of the author that this treaty provision specifically intends to prevent States from claiming that a treaty does not bind certain parts of its territory, it does not establish that a treaty - for example the ICESCR, which does not restrict its binding character only within a territory of a State Party - would not have extraterritorial application.[6]

It follows, then, that the scope of the extraterritorial application of these human rights treaties must be determined by reference to their own provisions and the general presumption can be rebutted through the application of the rules of interpretation contained in Articles 31 to 33 of the VCLT, *inter-alia*, by considering the relevant subsequent State practice, context, purpose and the *travaux preparatoires* in respect of each treaty.[7]

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2 Hathaway 2011 *Law Faculty Scholarship Series* 1.
3 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* (2013) 1.
4 Art 29 of the Vienna Convention of the Law of Treaties 1969 (hereinafter, VCLT).
5 Gondek *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009) 11.
6 Kunnemann "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in *Extraterritorial Application of Human Rights Treaties* (eds Coomans and Kamminga) (2004) 201.
7 Sinchak "The Extra-territorial Application of Human Rights Treaties: Al-Skeini et al. v United Kingdom" 2011 *Pace Int. Law Rev. Online Companion* 416.

For most human rights treaties under international law, the central requirement which allows for the extraterritorial applicability of these treaties is the exercise of "jurisdiction".[8] These treaties use variable terms such as "subject to" or "within" a State's jurisdiction. The author accepts and argues that the restriction of the extraterritorial applicability of human rights treaties is aimed at introducing a reasonable limit to a State's responsibility under the treaties as it is impractical that States should be expected to protect the human rights of all persons all over the world.

The International Court of Justice (ICJ) in its *1986 Nicaragua* judgment espouses what the term jurisdiction could be. This paper argues that although the judgment itself does not concern jurisdiction *per* se, but the exercise of effective control, the Court seems to suggest that "the exercise of effective control" either on persons or territory equals jurisdiction.[9] The factual determination of whether a State exercises jurisdiction in the territory of another State is usually clear-cut when dealing with cases involving the military occupation of a foreign territory by another State's military base.[10]

The Human Rights Committee (HRC) in its Concluding Observations on Croatia,[11] its Concluding Observations on Israel,[12] as well as the European Court of Human Rights (ECtHR) in *Cyprus v Turkey*,[13] came to the conclusion that if a State has effective control in a foreign territory as a result of its military action, that State exercises jurisdiction and will be responsible under the international human rights treaties framework for any violations or damages which result from such exercise of jurisdiction.[14] On this note, it is significant to consider what "extraterritorial application" of the ICCPR and the ICESCR means in order to determine whether the threshold for their extraterritorial applicability fits the "jurisdiction test" set in the preceding paragraph. To appropriately understand and follow the debates and discussions

8 See the International Covenant on Civil and Political Rights 1966 (hereinafter, ICCPR).

9 *Nicaragua v United States of America* 1986 ICJ Rep 14 para 115 (hereinafter, 1986 Nicaragua).

10 Benvenisti "Occupation, Belligerent" 2009 *MPEPIL* 1-3.

11 See Human Rights Committee "Concluding Observations of the Human Rights Committee on Croatia" (2009) *Refworld* 7 and 10.

12 See Human Rights Committee "Concluding Observations on the fourth periodic report of Israel" (2014) *Refworld* 10.

13 *Cyprus v Turkey* 1978 (13) DR 85.

14 See *Loizidou and Cyprus (intervening) v Turkey* 1996 ECHR 64. Subsequently, the Court clarified in its *2001 Bankovic and Others v Belgium and Others Appl No* 52207/99 case that the European Convention on Human Rights (ECHR) would apply extraterritorially only in the situation of inhabitants of a territory being under the effective territorial control of an ECHR Contracting State. It is notable that the Court in that case went on to hold that the North Atlantic Treaty Organization (NATO) member States did not exercise effective control over the territory of the Federal Republic of Yugoslavia, and that the extraterritorial application of the Covenant was therefore inadmissible.

surrounding the text of Article 2(1) of the ICCPR, it is important to quote the relevant provision, which reads:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[15] (own emphasis).

The text of this provision suggests that the ICCPR's extraterritorial application is subject to the jurisdictional clause. On further investigation, the same cannot undoubtedly be said about the ICESCR, which does not contain a jurisdictional clause which delimits a State's fundamental obligations to its own territory or subject to its jurisdiction.[16] Instead, the ICESCR refers to the undertakings by which States are to take steps "through international assistance and co-operation".[17] These two treaties were drafted concurrently, therefore, the differences in the language used would ordinarily be considered to be substantially significant as the territorial applicability of the treaties might be intended to be different in scope.[18] Therefore, this article will particularly consider the circumstances under which the treaties have extraterritorial application.[19]

It is the submission of the author that the texts of the two treaties seem to suggest that the standard used to determine the extraterritorial applicability of each treaty may be different. The ICCPR has an explicit jurisdictional clause, providing protection for individuals within its territory and subject to its jurisdiction. Because of the explicit circumscription of jurisdiction, extraterritorial jurisdiction may be more difficult to substantiate in comparison to the ICESCR which does not contain a similar jurisdictional clause circumscribing its application.[20] However, as to whether this is the case, remains unclear and international law does not seem to resolve this issue, as it provides no

15 Art 2(1) of the ICCPR.

16 Askin "Economic and Social Rights: Extraterritorial Application" 2019 *MPIL* 3; Coomans and Kamminga *Extra-territorial Application of Human Rights Treaties* (2004) 1-29; Skogly *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006) 1-34.

17 International Covenant on Economic, Social and Cultural Rights 1966 (hereinafter, ICESCR).

18 McGoldrick "Extra-territorial application of the ICCPR" in *Extra-territorial Application of Human Rights Treaties* (Coomans and Kamminga) (2004) 47.

19 *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) 2004 ICJ Reports 163 para 111 (hereinafter, Wall Advisory Opinion).

20 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 1-34.

legal certainty in respect of standards that trigger the extraterritorial applicability of human rights treaties in general.[21]

3 The international law framework regarding the application of human rights law treaties

3 1 Interpreting the scope of the ICCPR's application

When considering the territorial scope of the ICCPR, regard must be had to the basic rules of treaty interpretation as contained in the VCLT. It is worth noting that the ICJ stated in its *1989 Arbitral Award* judgment that "Article 31 of the [VCLT] … may in many respects be considered as a codification of existing customary international law …"[22] and therefore, is applicable to all treaties, even when the States concerned are not parties to the VCLT.[23] In particular, Article 31(1) of the VCLT provides that a treaty shall be interpreted in *good faith* and in accordance with the ordinary meaning of the terms of the treaty in their context and in light of its *object* and *purpose*.[24]

This paper argues that on a *prima facie* basis, when following this fundamental rule of treaty interpretation, the conclusion that follows is that the ICCPR does not provide for human rights obligations on State Parties to people who are not within the territory of that State. This suggests that the ICCPR does not apply to a State Party in respect of areas beyond its territorial frontiers.[25] In support of this *prima facie* case, Conrad Harper, the then legal advisor of the United States Department of State, submits that the Covenant is not regarded as having extraterritorial application because the dual requirement restricts the scope of the Covenant to individuals who are within the territory of a State and under the jurisdiction of such State. In support of this argument, Harper submits that the *travaux preparatoires* underscore a clear understanding between

21 CESCR "General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" (2017) para 10; see also International Commission of Jurists Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997.

22 *Guinea-Bissau v Senegal* ICJ Reports 1991 para 53.

23 Mbengue "Rules of interpretation (Article 32 of the VCLT)" 2016 *FILJ* 388-412.

24 Article 31(1) of the VCLT; see also *Australia v France* 1974 ICJ Rep 253, 268.

25 Human Rights Committee "Consideration of reports submitted by States Parties under article 40 of the Covenant" (2008) *Refworld* 109; see Dennis & Surena "Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice" 2008 *Eur. Hum. Rights Law Rev.* 714; see also McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 45-50.

the drafters of the Covenant to limit the territorial reach of the obligations recognised in the Covenant.[26]

This means that the interpretation of the word "and" in Article 2(1) of the ICCPR would naturally be seen to suggest a cumulative test that the individuals must be (i) within the State's territory and (ii) subject to the State's jurisdiction.[27] However, this paper argues that this would be inconsistent with the object and purpose of the ICCPR and therefore manifestly absurd. Article 12(4) of the ICCPR supports this opposing view as it contemplates that in order for an individual to invoke the provisions of Article 12(4), that individual must be outside of the State's territory. Therefore, it is the submission of the author that following a restricted interpretation of the provision would devoid Article 12(4) of its substance if it can only be invoked if the individual is already within the territory of the State.[28]

Such a restrictive interpretation as proposed by Harper also differs from that which follows when we employ the consideration of subsequent practice in terms of Article 31(3)(b) of the VCLT, which supports the extraterritorial scope of the ICCPR.[29] The ICJ has relied on the concept of subsequent practice in its *Wall Advisory Opinion*;[30] in *Certain Expenses*,[31] and in the *Namibia Advisory Opinion*.[32] In these three cases, the ICJ considered the practice of the "relevant organs" such as the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC), to determine the meaning of provisions in the United Nations Charter.[33]

Accordingly, the author disagrees with Harper that the *travaux preparatoires* underscore a clear understanding between the drafters of the Covenant to restrict the territorial reach of the Covenant. It is notable that during the drafting phase of the negotiations over the ICCPR, the United States (US) had proposed an amendment to Article 2(1) of the

26 See Human Rights Committee "Statement of State Department Legal Adviser, Conrad Harper" 53rd Session.
27 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 47.
28 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 48.
29 *Wall Advisory Opinion supra,* para 109.
30 *Wall Advisory Opinion supra,* paras 94-96.
31 See discussion of *Certain Expenses of the United Nations (Article 17 paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962 on Lauterpacht "The Development of the Law of International Organizations by the Decisions of International Tribunals" 1976 *Rec. Cours* 460; Blokker "Beyond 'Dili': On the Powers and Practice of International Organizations" in *State, Sovereignty, and International Governance* (ed Kreijen) (2002) 312-318.
32 *Legal consequences for States of the continued presence of SA in Namibia (South West Africa) Notwithstanding Security Council Resolution 276,* Advisory Opinion 1971 ICJ Rep. (hereinafter, Namibia Advisory Opinion).
33 Arato "Treaty interpretation and Constitutional Transformation: Informal change in International Organisations" (2013) 38 *Yale J. Int'l L.* 289-326.

Covenant. The proposed amendment read "each State Party hereto undertakes to ensure to all individuals *within its territory* the rights set forth in this Covenant …"[34] and was discussed at the fifth and sixth sessions of the Human Rights Commission, where it was ultimately rejected.[35] The British delegate, Ms Bowie, challenged the wording of the proposed amendment. She argued that such an amendment would unreasonably restrict "the guarantees of those rights to individuals *actually* on the territory of a State, while the original text extended it to all individuals within its jurisdiction".[36] Following which the US opted to propose that the phrase "within its territory *and* subject to its" be added immediately before the word "jurisdiction", so that the provision would read "each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory* and *subject to its jurisdiction* the rights recognized in the present Covenant …".[37]

As a result thereof, the Lebanese delegate, Mr Azkoul, requested clarifications regarding the implications of the proposed wording put forth by the US. He specifically expressed that if the implication was the restrictive interpretation that both territory and jurisdictional control must be present for a State to bear obligations in terms of the treaty, then he would object to such amendment and/or interpretation.[38]

This remark allowed the US representative, Mrs Roosevelt, the opportunity to explain the purpose and implications of the amendment. Her explanation was that the amendment would indeed restrict the application of the treaty to a dual threshold of: (i) territory and (ii) jurisdiction.[39] This interpretation did not find much favour. The Yugoslav representative expressed that there was a difference between those individuals who are within the territory of a State, and those subject to the jurisdiction of the State. The Greece representative proceeded to suggest that Article 2(1) must be read with the effect that the words "within its territory" and "subject to its jurisdiction" are distinct and disjunctive tests that give rise to the same obligations. The Chilean

34 For a detailed discussion see the United Nations Document E/CN.4/224.

35 United Nations "Summary record of the 125th meeting of the Commission on Human Rights (Fifth Session)" 1949; see also United Nations "Summary record of the 138th meeting of the Commission on Human Rights: Sixth Session" 1950.

36 United Nations "Summary record of the 125th meeting of the Commission on Human Rights (Fifth Session)" 1949 *supra*; see also United Nations "Summary record of the 138th meeting of the Commission on Human Rights: Sixth Session" 1950 *supra*.

37 This which became the final wording of the Covenant. See United Nations "Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the proposed additional Articles: Memorandum by the Secretary-General" 1950 para 15 (hereainfter, Compilation of Comments).

38 Compilation of Comments *supra*, para 24.

39 Follow this discussion from United Nations "Summary record of the 193rd meeting of the Commission on Human Rights: Sixth Session" 1949 paras 17-87.

representative agreed with this, indicating that the concept of national territory and that of national jurisdiction were distinct matters.

This paper argues that the discussion surrounding the amendment indicates that no such clear understanding was underscored by the drafters as proposed by Harper. Amongst other representatives, those of Lebanon, Belgium, and Yugoslavia, indicated their dissent to the implied interpretation of the amendment as proposed by the US. Subsequently, in response to the US's claim that the ICCPR has no extraterritorial effect, the HRC Stated in its Concluding observations on the fourth periodic report of the US that:

> "[It] regrets that the State Party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State Party has only limited avenues to ensure that State and local governments respect and implement the Covenant, and that its provisions have been declared to be nonself-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2). The State Party should: (a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extra-territorial application of the Covenant under certain circumstances …"[40]

Moreover, long before HRC's Concluding observation, the ICJ in its *2004 Wall Advisory Opinion*, opined that the ICCPR is applicable to the conduct of a State outside of its own territory, in the exercise of its jurisdiction.[41] Furthermore, the HRC had acknowledged in its General Comment No. 31 that a State Party has obligations to respect and ensure the protection of the rights recognised in the Covenant to any person who is within the effective control of that State, even if not situated in the territory of the State Party.[42] This was already long indicated by the HRC in its 1986 General Comment No. 15, where the Committee had indicated that the enjoyment of the rights recognised in the Covenant is not limited to citizens of State Parties but must also be extended to every individual,

40 Human Rights Committee "Concluding observations on the fourth periodic report of the United States of America" 2014 para 14.

41 *Wall Advisory Opinion supra,* para 111.

42 Human Rights Committee "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" 2004 OXIO 10. The Human Rights Committee is the supervisory body of the ICCPR constituted by independent experts that monitor the implementation of the treaty. The Committee also publishes its interpretation of the content of human rights provisions in general comments and these general comments are important when dealing with treaty interpretation as they provide guidance as subsidiary means of treaty interpretation pursuant to Article 38(1)(d) of the Statute of the ICJ.

(irrespective of their nationality or statelessness) who find themselves in the territory *or* subject to the jurisdiction of the State Party.[43]

As early as in 1977, the Committee had already expressed that the Covenant had extraterritorial application, which stems from the fulfilment of either one of the requirements Stated in Article 2(1), arguing that the literal interpretation of Article 2(1) would lead to the absurd conclusion that State Parties could perpetrate with impunity abroad human rights violations that were prohibited within their own territory.[44] It is the submission of the author that notwithstanding the Committee's consistent practice, the debate surrounding the extraterritorial applicability of the treaty has not escaped the hands of international law in recent times. In 2004 the government of Sweden raised an objection to Turkey's declaration that its ratification of the Covenant extends obligations arising from the Covenant only in respect of its national territory. Sweden opined that the duty to respect and ensure the protection and fulfilment of all rights in the Covenant is an obligation upon all State Parties to all persons under the States' jurisdiction and a limitation on the basis of the principle of national territory is inconsistent with the obligations imposed by the Covenant on all State Parties and therefore, incompatible with the object and purpose of the Covenant.[45]

3 2 Illustration: Controversy regarding Article 2(1) of the ICCPR's scope of application

For purposes of this illustration it must be borne in mind that jurisdiction is subject to "effective control".[46] The ICJ in *Nicaragua* had to consider whether some actions by the *contras* in violation of international humanitarian law (such as the killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping)[47] could be attributed to the US.

The Court held that this could not be the case because effective control by the US over the *contras'* individual acts in violation of international humanitarian law was not established. This paper argues that from the reading of the Court's judgment, effective control would be equal to the issuance of directions to the *contras* by the US concerning specific operations (such as the indiscriminate killing of civilians, etc.), that is to say, an exercise of authority over the *contras'* individual acts.[48]

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43 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* 35-56.

44 Kalin and Kunzli 2009 *The law of International Human Rights Protection* (2009) 132-133.

45 Sweden "Objection to the declarations and reservation made by Turkey upon ratification" 2004 *United Nations Treaty Series* 222.

46 *1986 Nicaragua supra*. See also *Bankovic v Belgium supra* where the Court establishes a territorial or spatial model of jurisdiction. Although the Court never bluntly deserted the spatial model, the Court has, before and after *Bankovic*, developed case law that appears to depart from the strict territorial/spatial model of jurisdiction.

47 *1986 Nicaragua supra*, paras 20, 113.

48 *1986 Nicaragua supra,* para 115.

Subsequently, the author posits that since a receiving State does not exercise such authority over a sending State's diplomats or members of its armed forces, if Article 2(1) of the ICCPR is to be interpreted as constituting a cumulative test, this would mean foreign diplomats or members of foreign armed forces stationed on the territory of another State pursuant to international agreements between the two States, would not benefit from human rights recognised in the treaty, as they would not be considered beneficiaries of human rights per that restrictive interpretation.

The author argues that this is because the receiving State has no general power to exercise authority (adjudicative or enforcement jurisdiction) over said diplomats within its territory.[49] Subsequently, if the State has no effective control over a foreign diplomat, it translates that it has no jurisdiction over said diplomat and that means the receiving State would have no human rights obligations in respect of the diplomat because the diplomat is not subject to its jurisdiction. Similarly, the sending State would also have no human rights obligations in respect of the diplomat because the diplomat is not within its national territory. Therefore, this paper concludes that a restrictive interpretation of Article 2(1) of the ICCPR would devoid the treaty of its purpose as it excludes certain categories of persons/situations from protections afforded by international human rights.

3 2 1 The possible interpretation that favours the extraterritorial application of the ICCPR

This paper argues that on a deeper level of inquiry, Article 2(1) of the ICCPR acknowledges that it is *de facto* capable of extraterritorial application. However, this is only possible if the requirement "within a State's territory and subject to the jurisdiction of the State" has been established.[50] It is the submission of the author that the context of the word "and" operates as a disjunctive word that is used to create clear, distinct and independent requirements that are not cumulative to establish the extraterritorial applicability of the Covenant.[51] In fact, the HRC unequivocally interprets the requirements found in Article 2(1) disjunctively and rejects the interpretation that the requirements are cumulative.[52] In addition, the ICJ in its *Wall Advisory Opinion* addressing the question of the applicability of the ICCPR, left no doubt that it does not subscribe to the strictly literal "conjunctive" interpretation of the Covenant, but rather favours that which offers a disjunctive approach.[53] The Court considered the object and purpose of the ICCPR and concluded

49 Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 44.
50 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 43.
51 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 55; see also Kalin and Kunzli 2009 *The law of International Human Rights Protection* 132.
52 Da Costa *The Extraterritorial Application of Selected Human Rights Treaties* 55 and 56.

that even in situations where jurisdiction is exercised beyond national territory, a State should be bound to comply with the treaty provisions.[54]

Accordingly, the effect of the term "and" in Article 2(1) of the treaty is the same as that of the word "or".[55] As such, this paper argues that only in circumstances where the State has established that its peoples are within the territory of another State, *or* are subject to the jurisdiction of another State, will the latter State also incur obligations to respect, protect and fulfil the rights recognised in the Covenant in respect of those individuals.[56] In effect, it is sufficient to accept either one of the requirements in Article 2(1) to establish the extraterritorial applicability of the Covenant.

In this section, the study particularly focuses on the second part of Article 2(1) of the ICCPR: "subject to its jurisdiction", as it primarily concerns itself with issues potentially occurring outside the territorial borders of the State and thus directly relates to the question of extraterritoriality. In this respect, the primary question should not be whether the treaty imposes obligations which find extraterritorial application, but rather, in what circumstances the treaty will find extraterritorial application.

The consistent jurisprudence and authoritative statements of the relevant international human rights law bodies such as the HRC, as well as the ICJ, in respect of the American and European Conventions on Human Rights and the Convention Against Torture (CAT), have been to interpret the term "jurisdiction" in these treaties as operating extraterritorially in certain circumstances.[57] The author argues that although there is not much commentary in support of the extraterritorial effect of the term "jurisdiction" in the ICCPR, the meaning of the term in the Covenant is arguably of an extraterritorial effect.

In the *Namibia Advisory Opinion*, the ICJ opined that South Africa was responsible for the violations of the rights of the people of Namibia because physical control of a territory and not sovereignty or legitimacy

53 Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 205.

54 *Wall Advisory Opinion supra,* paras 109-111; Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 206; *Wall Advisory Opinion supra: Declaration of Judge Buergenthal* 240 para 2.

55 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 47-48.

56 McGoldrick 2004 *Extra-territorial Application of Human Rights Treaties* 47-48.

57 United Nations "Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America" (2006) 15; see United Nations "General Comment No. 2: Implementation of Article 2 by States Parties" 2007; see also Wilde "The extraterritorial application of international human rights law on civil and political rights" in *Routledge Handbook of International Human Rights Law* (eds Sheeran and Roodley) (2013) 635-661.

of title, is the basis upon which State responsibility for acts affecting other States must be decided.[58] Wilde suggests that as a general proposition, the echo of the Court's Statement can be traced through later decisions on the spatial applicability of human rights treaty law in two related but distinct ways:

> "In the first place, the fundamental point that State responsibility should not be limited to situations where a State enjoys title is the basic underpinning of extraterritorial applicability. In the second place, the particular concept of 'physical control over territory' as a basis for determining where the obligations should subsist."[59]

This opinion paved the Court's pronouncements on issues regarding the extraterritorial application of human rights treaties in subsequent matters.[60] Evidently, the ICJ, in its *Wall Advisory Opinion*, as well as the *DRC v Uganda* judgment, appeared to espouse and assume that even though there is less authoritative commentary on the extraterritorial applicability and meaning of the term "jurisdiction" in the ICCPR, the treaty reflected an extraterritorial application.[61] The Court acknowledged that this interpretation was consistent with the drafting history of the Covenant as the drafters of the Covenant had not intended the wording of Article 2(1) to allow a State to evade its obligations when it exercised jurisdiction abroad.[62] The Court considered the ICCPR's *travaux preparatoires* and observed that they did not exclude the extraterritorial applicability of the Covenant.[63] Instead, the Court decided that the *trevaux preparatoires* of the Covenant reinforce the disjunctive reading of the phrase "within its territory and subject to its jurisdiction".[64]

This interpretation is also assumed to have been favoured by most States during the drafting of the Covenant as pointed out in the preceding paragraphs.[65] Moreover, the author acknowledges that although there is room to argue against the extraterritorial applicability of the Covenant from the preparatory works, it must be considered that the applicability of the Covenant to States operating abroad was not considered, except in cases of military occupation.[66] Thus, it cannot be said that the

58 Namibia Advisory Opinion 54 par 118.
59 Wilde 2013 *Routledge Handbook of International Human Rights Law* 663.
60 Wilde 2013 *Routledge Handbook of International Human Rights Law* 650-663.
61 *Wall Advisory Opinion supra,* paras 109-112; *Democratic Republic of the Congo v Uganda* 2005 ICJ Reports 168 paras 216, 217 (hereinafter, Armed Activities).
62 Kalin and Kunzli 2009 *The law of International Human Rights Protection* 132-133.
63 *Wall Advisory Opinion supra,* para 109.
64 *Wall Advisory Opinion supra*.
65 See United Nations Documents "E/CN.4/224" 1949; see also United Nations Documents "E/CN.4/SR125" 1949.
66 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 37-40.

Covenant is by all means not capable of finding an interpretation that favours extraterritorial application.[67]

During the 6th Session of the HRC in its 194th meeting, several issues were raised regarding Article 2(1), however, most of them were merely "flagged up but not necessarily agreed upon and thus there was no clear and decisive answer" regarding various issues for the current study.[68] It is on this basis that it is reasonably fair to conclude that much room was left for subsequent interpretation of the Covenant.[69] This paper argues that such subsequent interpretation of the Covenant as indicated in the preceding paragraphs favours the extraterritorial application of the Covenant. Even the report of the then Special Rapporteur of the Commission on Human Rights on the situation of human rights in Kuwait under Iraqi Occupation, Mr Walter Kälin, infers that although the occupation of Kuwait by Iraqi troops was not "within the territory" of Iraq, the application of the obligations envisaged in the Covenant were not precluded by the stipulation of the requirement of territoriality in Article 2(1).[70] The same report was referred to in the UNGA Resolution 46/135 of 17 December 1991 which was adopted with 155 votes to 1, with 10 abstentions.[71] It is the submission of the author that the favour received by this report and its inclusion in the adopted resolution is important as it is indicative of the *opinio juris* shared by the global community of States regarding the issue of extraterritoriality.

3 2 2 Interpreting the scope of the ICESCR's application

Noticeably, Article 2(1) of the ICESCR does not contain a jurisdictional clause.[72] The Covenant makes no reference to the qualification of jurisdiction or the territory of a State.[73] Rather, the Covenant includes an express reference to the concept of international cooperation and assistance in order to achieve its objects and purpose.[74]

The debates surrounding the ICESCR are therefore not concerned with the meaning of jurisdiction, but on whether the lack of an express

67 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 40.
68 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 29.
69 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 29.
70 See Kälin "Special Rapporteur of the Commission on Human Rights: Report on the Situation of Human Rights in Kuwait under Iraqi Occupation" 1992.
71 Da Costa 2013 *The Extraterritorial Application of Selected Human Rights Treaties* 85.
72 Coomans "The extraterritorial scope of the ICESCR in the work of the United Nations Committee on Economic, Social and Cultural Rights" 2011 *Hum. Rights Law Rev.* 1 – 35.
73 Ramazanova "Extraterritorial application of Human Rights Obligations in the context of Climate Change Impacts on Small Island States" 2015 *University of Oslo* 35.
74 Article 2(1) of the ICESCR; see Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 295.

provision delimiting the States obligations to its territory or jurisdiction, renders the Covenant always applicable in an extraterritorial context, or whether a spatial test is applied to delimit the obligations of States.[75]

Article 2(1) of the Covenant provides that each State Party to the Covenant shall undertake steps, independently and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the Covenant by all appropriate means as may be necessary.[76] It is the submission of the author that this provision evidences a stronger basis for the Covenant's extraterritorial application of human rights than its sister provision in the ICCPR.[77] Any restrictive approach to the interpretation of Article 2(1) of the ICESCR would render the obligation of international cooperation and assistance meaningless, especially in light of today's globalisation processes.[78]

It is the submission of the author that the extraterritorial applicability of the Covenant is also alluded to in the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.[79] Principle 28 provides that all States are under an obligation independently and jointly, through international cooperation to fulfil economic, social and cultural rights of people within their territory, as well as extraterritorially.[80] This interpretation has also been endorsed by the ICJ in its *Wall Advisory Opinion* where the Court underscored that the ICESCR finds extraterritorial application.[81] Nevertheless, the Court further emphasised that the extraterritorial applicability of the ICESCR cannot be unrestricted so as to obligate State Parties to protect the human rights of all persons all over the world. The Court held that the rights recognised in the Covenant are by nature territorial and thus a State is bound by the obligations in the Covenant outside of its territory only if it exercises effective jurisdiction in another State, thus qualifying the scope for the Covenant's extraterritorial space.[82] The author concludes that although the Court espouses the jurisdictional test for the extraterritorial application of the ICESCR, it would seem that a test based on the effects doctrine is also plausible, especially when dealing with cases of shared resources between two or more States. This test will be discussed below. It must also be noted, that although the Court itself has not made an express decision as to the application of this test specifically in respect of the ICESCR, the Court has

75 See Wilde 2013 *Routledge Handbook of International Human Rights Law* 666.
76 Article 2(1) of the ICESCR.
77 Ramazanova 2015 *University of Oslo* 39.
78 Askin 2019 *MPIL* 2 and 3.
79 Preamble, Principle 9 and 29 of the Maastricht Principles on the Extraterritorial Obligations of State in the Area of Economic, Social and Cultural Rights 2013; De Schutter *International Human Rights Law* (2014) 204.
80 Principle 28 of the Maastricht Principles on the Extraterritorial Obligations of State in the Area of Economic, Social and Cultural Rights 2013 *supra*.
81 *Wall Advisory Opinion supra*, paras 109-113.
82 *Wall Advisory Opinion supra*, para 112.

in fact espoused the effects doctrine in its *1927 Lotus* case to the Convention of Lausanne and principles of international law.[83]

3 2 3 Other considerations as regards the ICESCR's extraterritorial application

Reference can be made to the UN Charter as mentioned in the Preamble of the ICESCR.[84] Article 1(3) of the UN Charter provides that the purpose of the UN is to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[85]

The principle of international assistance is also emphasised in Articles 55 and 56 of the Charter, setting out that the UN shall promote the universal respect for and observance of human rights and fundamental freedoms for all and all member States shall take measures to ensure the achievement of the rights recognised in the Covenant. Accordingly, the author argues that this implies that the principle of international cooperation and assistance means that human rights obligations cannot be limited to territory as that interpretation would run against such principle. The use of the word "universal" instead of "domestic" in Article 55 of the UN Charter supports the extraterritorial application of human rights treaties. This interpretation is consistent with the practice of the ICJ which highlights that should a State Party's conduct violate rights in the Covenant beyond its own territory, then such State Party is in breach of the UN Charter.[86] Similarly, the author argues that the use of "international" in Article 2(1) of the ICESCR to foster for assistance and cooperation, supports the extraterritorial applicability of the Covenant.[87]

83 *France v Turkey 1927* PCIJ 10; see Born & Rutledge *International Civil Litigation in United States Courts* (2007) 567-568; Gerber "Beyond Balancing: International Law Restraints on the Reach of National Laws" 1984 *Yale J. Int'l L.* 196-197, 293-294; see also Parrish "The Effects Test: Extraterritoriality's Fifth Business" 2008 *Articles by Maurer Faculty* 1470-1478.

84 See preamble of the ICESCR; see also Kunnemann 2004 *Extraterritorial Application of Human Rights Treaties* 202.

85 Article 1(3) of the Charter of the United Nations 1945.

86 *Namibia Advisory Opinion supra*; also see Chenwi and Bulto *Extraterritorial Human Rights Obligations from an African Perspective* (2018) 44.

87 Skogly 'Extraterritoriality: Universal Human Rights without Universal Obligations' in *Research Handbook on International Human Rights Law* (eds Joseph & McBeth) (2010) 75.

4 The jurisprudence of the International Court of Justice and the Supervisory Bodies of the Covenants in their determinations on the question of extraterritorial application of the Covenants

The study below will show that there is evidence to support that the world court, and relevant supervisory bodies, consider the ICCPR and the ICESCR applicable on an extraterritorial basis, especially in situations where a State exercises control over the territory of another State and/or over persons who may be situated outside of that States territory.[88]

This paper argues that based on the jurisprudence of the ICJ, it is clear that if violations of treaty based human rights arise from the conduct of a State in a foreign territory, such State would have been in violation of its obligations in respect of said treaty. An example of such jurisprudence is the *Namibia Advisory Opinion* where the Court advised that South Africa was in breach of its obligations under the United Nations Charter for establishing Apartheid in Namibia.[89] It is the submission of the author that although this does not specifically relate to the ICCPR nor the ICESCR, it reflects the attitude of the Court as regards the issues surrounding the territorial reach of human rights treaties. This is an issue that is core to the investigation of the ICCPR and the ICESCR's extraterritorial applicability. Therefore, the author argues that the Court's decision on the matter may be used to anticipate the attitude of the Court when approached with the question of the extraterritoriality of the ICCPR and the ICESCR. This extrapolation will be substantiated below.

The ICJ in its *1996 Bosnia Genocide* case decided that given the *erga omnes* character of rights and obligations under the Genocide Convention, as well as the fact that the treaty contains no clause limiting the treaty's application to a State Party's jurisdictional control, the obligation placed on States to prevent and punish crimes of genocide is not territorially limited.[90] As a result, the Federal Republic of Yugoslavia could be held responsible for acts of genocide perpetrated by Serb forces in Bosnia-Herzegovina.[91] Although the precise basis by which the Court makes this decision in support of extraterritoriality is not immediately apparent, it can be extracted from the decision that the absence of a jurisdictional clause in a human rights law treaty, may extend a State Party's obligations even to those acts performed by the State outside of

88 For a detailed discussion see Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 121-228.
89 *Namibia Advisory Opinion supra*, paras 131 and 133.
90 *Bosnia and Herzegovina v Yugoslavia* 1996 ICJ Reports 31-33.
91 *Bosnia and Herzegovina v Yugoslavia* 1996 ICJ Reports *supra*.

its territorial or jurisdictional control.[92] This paper suggests that the Court seems to draw this conclusion on the basis of the functional approach test.[93] This test bases its foundations on the effect's doctrine. It traces a State's extraterritorial conduct and establishes extraterritorial obligations on the State if the conduct in question has effects beyond the territory of the State.[94]

The Genocide Convention is not the only human rights treaty that lacks a jurisdictional clause. Similarly, the ICESCR which is particularly important for this discussion, does not contain a jurisdictional clause delimiting State obligations to territory or jurisdiction.[95] Moreover, considering the context of the wording of the ICESCR obligations that State Parties shall recognise the right of "everyone" together with the obligation to take steps through "international assistance and co-operation" to fully recognise the rights in the Covenant, it may naturally be construed that the obligations imposed by the Covenant extend beyond the territorial jurisdiction of a State Party.[96] Such a conclusion is also supported by the Committee on Economic, Social and Cultural Rights (CESCR) which has outlined in its General Comment No. 24 that the obligations of State Parties under the ICESCR do not simply stop at their territorial borders.[97] The Committee expresses that obligations of State Parties to the ICESCR have an extraterritorial reach, which is generally confined to the jurisdictional test.[98]

Conversely, Article 2(1) of the ICCPR *prima facie* limits a State's obligations to territory and jurisdiction. However, the HRC has interpreted the provision to mean that "a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if situated outside the territory of the State Party".[99] The Committee seems to suggest that although the treaty subscribes its obligations to territory and jurisdiction, an extraterritorial application of the treaty is possible in situations where a State Party exercises effective control over another State's territory. The

92 Craven "Human Rights in the realm of order: Sactions and Extraterritoriality" in *Extraterritorial Application of Human Rights Treaties* (eds Coomans & Kamminga) (2004) 251.
93 See Craven 2004 *Extraterritorial Application of Human Rights Treaties* 251.
94 Craven 2004 *Extraterritorial Application of Human Rights Treaties* 251; *IACtHR Advisory Opinion OC-23/17 Requested by the Republic of Colombia* 2017 para 81.
95 See Article 2(1) of the ICESCR; see also Craven 2004 *Extraterritorial Application of Human Rights Treaties* 252.
96 Craven 2004 *Extraterritorial Application of Human Rights Treaties* 252.
97 CESCR "General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" 2017 para 26.
98 CESCR "General Comment No. 19: The Right to Social Security - Art. 9 of the Covenant" par 54; see also "General Comment No. 24" *supra* 2017 paras 24-37.
99 Human Rights Committee "General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" 2004 para 10.

Committee has expressed this view in *Lopez v Uruguay*, where it held that the delimitation in Article 2(1) of the ICCPR is not to be read as permitting a State to commit violations of civil and political rights in the territory of a foreign State.[100] Similarly, the HRC also expressed great concern over an interpretation of Article 2(1) that suggests the exclusion of the application of the treaty with respect to individuals under the jurisdiction of a State Party who find themselves within the territory of a foreign State Party.[101]

Noteworthy, the ICJ has also confirmed the extraterritorial applicability of the ICCPR in its *2004 Wall Advisory Opinion* stating that "the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside of its own territory".[102] This principle was subsequently confirmed by the Court in its decision in *DRC v Congo,*[103] Below, these judgments are discussed to briefly highlight the position espoused by the ICJ to the issue of the extraterritorial applicability of the ICCPR and the ICESCR.

4 1 The Wall Advisory Opinion

In July 2004, the ICJ delivered an Advisory Opinion in response to the request by the UNGA on the legality of the situation surrounding the "wall" by Israel in the Occupied Palestinian Territories.[104] The "wall" boasts a breadth between 50-100 metres, circling some areas in Palestine without adhering to the demarcation line between Israel and the Palestinian territories. The construction of the wall "seriously affected the lives of the Palestinians living in the occupied territories, impeding the exercise of a number of their fundamental rights".[105] While assessing the legality of the construction the wall, the ICJ had to determine whether the ICCPR and the ICESCR are applicable outside the territory of a State Party, and if so, in which circumstances would such application follow.[106] Although the ICJ's analysis of the question of the extraterritorial applicability of these treaties is rather brief, the Court left no doubt that it considers the treaties to have an extraterritorial reach. In fact, as regards Article 2(1) of the ICCPR, the Court expressed that it does not subscribe to the strict literal conjunctive interpretation of the Covenant but rather espouses a more "disjunctive" approach.[107] The

100 *López Burgos v Uruguay supra*, para 12.3.
101 See Human Rights Committee "Concluding Observations on the Sixth Periodic Report of Germany" 2012 para 16. The Human Rights Commission has been consistent with its position that the ICCPR is applicable and triggers obligations beyond State territory, an early pronouncement on this can be seen in *López Burgos v Uruguay supra*.
102 *Wall Advisory Opinion supra*, para 111.
103 See *Armed Activities supra*.
104 See General Assembly "10th Emergency Special Session: Resolution ES-10/14" 2003.
105 See Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 205; see also *Wall Advisory Opinion supra*, para 134.
106 *Wall Advisory Opinion supra*, para 107-113.

Court held that the ICCPR enjoys an extraterritorial application as it is applicable in respect of acts done by a State Party in the exercise of its jurisdiction outside of its own territory. In its own words, the Court said:

> "While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that even when such is the case, States parties to the Covenant should be bound to comply with its provisions."[108]

The ICJ also considered the ICESCR's applicability to the conduct of Israel in the Occupied Palestinian Territories. This was the first time that the ICJ acknowledged the extraterritorial applicability of the ICESCR. Although the Courts' analysis of the issue is very succinct, it is quite remarkable as there is still very little judicial authority from the Court on the matter to date. In its opinion the Court reinforces the position taken by the CESCR in its Concluding Observations on Israel's periodic reports by endorsing the extraterritorial applicability of the treaty.[109] In particular, the Court commented on the territorial reach of the ICESCR, stating that the extraterritorial applicability of the treaty should not be excluded, as the treaty's extraterritorial effect will be triggered in a situation where a State Party exercises control (territorial jurisdiction) over the territory of another State.[110] It is the submission of the author that the Court espouses the effective control test, instead of the functional approach test here.[111]

4 2 *DRC v Uganda*

In *DRC v Uganda* the Court had to consider the extraterritorial applicability of the ICCPR in respect of Uganda's armed activities in the territory of the DRC.[112] The Court gave regard that there were two situations of extraterritorial applicability that had to be considered separately. First, the occupation of the Congolese region (Ituri) by the armed forces of Uganda and second, the armed activities in other areas. The Court held that both the occupation of the Ugandan forces in the Ituri region as well as its military activities, signified the exercise of jurisdiction as per Article 2(1) of the ICCPR and thus triggered extraterritorial consequences and/or obligations.[113]

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107 See eg. Coomans and Kamminga 2004 *Extra-territorial Application of Human Rights Treaties* 185.

108 *Wall Advisory Opinion supra,* paras 109-110.

109 CESCR "Concluding Observations on the initial report of Israel" 1998 para 8.

110 *Wall Advisory Opinion supra*, para 112. Note that the CESCR refers to such territorial jurisdiction as 'effective control', see CESCR "Concluding observations on the initial report of Israel" 1998 *supra*, paras 15 and 31.

111 Nonetheless, it ought to be recalled that the Court has not expressly opposed the application of the functional approach test to the ICESCR, conversely the Court has espoused such an approach to the extraterritorial application of human rights in its *1927 Lotus* case.

112 *Armed Activities supra*; see Okowa "Case concerning armed activities on the territory of the Congo (DRC v Uganda)" 2006 *Int Comp Law Q* 742-753.

4 3 A brief analysis as to whether ICJ pronouncements on the extraterritorial applicability of the ICCPR and/or the ICESCR are reflective of CIL

Although the ICJ has not had many opportunities to decide on the extraterritorial application of the ICCPR or the ICESCR, it has set some standard as regards the manner it interprets the territorial scope of the Covenants. Even more significant is the fact that the ICJ has followed the jurisprudence of the supervisory bodies of the treaties when determining the territorial reach of each Covenant. Consequently, this strengthens the argument that the Covenants find extraterritorial application, even though ICJ decisions do not necessarily have the binding value of precedents as they merely constitute subsidiary means for the determination of the rules of law under the international law regime.[114] Therefore, as regards the question whether the relevant position of the ICJ is a reflection of customary international law, one would have to assess State practice and *opinio juris* to determine the status of the position maintained by the ICJ. On that assessment, one can note that State practice on the subject of the extraterritorial applicability of the ICCPR and the ICESCR is equivocal and largely incomplete, and thus cannot decisively meet the requirement of a wide, sufficiently representative, virtually uniform and "settled State practice" as necessary to establish a rule of customary international law.[115] Since there is no State practice in support of such position as maintained by the ICJ, no rule of custom arises.

5 Conclusion

From this article, it is clear that every human rights institution that has had to address the question of the extraterritorial applicability of the ICCPR or the ICESCR, has concluded that the Covenants embrace an extraterritorial application, at least in some situations.

As a result thereof, it is plausible to accept that the treaties are applicable to persons outside of the territory of each State Party. Moreover, the author argues that although international jurisprudence does not regard that there are different standards triggering the extraterritorial application of the Covenants, this paper suggests that a much flexible approach be adopted for matters relating to the ICESCR as its wording is much more flexible in that it has no territorial circumscription. It is the submission of the author that this approach will curb the difficulties present in the attempt of applying human rights

113 *Armed Activities supra,* para 216.
114 Article 59(d) of the Statute of the International Court of Justice 1946.
115 *Federal Republic of Germany v Netherlands* 1969 ICJ Reports paras 74-77.

treaties extraterritorially to situations that do not "wield enough control to guarantee human rights standards",[116] or to guarantee State responsibility for an internationally wrongful act, such as in cases of the misuse of shared resources by one State to the exclusion of a range State. While this article does not exhaust the topic on the extraterritorial applicability of the selected human rights treaties, it must be noted that it suggests that in a globalised world – where activities of one State within its territory may affect the rights of a foreign State – placing greater restrictions to the extraterritorial applicability of the treaties risks the protection of human rights.

116 See Gondek 2009 *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* 368.

Makeshift 1190 (Pty) Ltd v Cilliers 2020 5 SA 538 (WCC)

The increasing difficulty of protecting quasi-possession of incorporeals with the *mandament van spolie*

1 Introduction

The *mandament van spolie* (*mandament*; spoliation remedy) protects peaceful and undisturbed possession against unlawful spoliation (Muller *et al Silberberg and Schoeman's the Law of Property* (2019) 326-327; Boggenpoel *Property Remedies* (2017) 96-101; Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (LLD thesis 1986 UP) 297-307). It also protects *quasi*-possession of certain incorporeals or rights (Muller *et al* 337-346; Boggenpoel 105-121). In *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA) (*Masinda*), the Supreme Court of Appeal held that the *quasi*-possession of a right, specifically electricity supply, does not enjoy protection under the *mandament* if the right is sourced in contract (par 22). The *quasi*-possession of a right only enjoys possessory protection if the right is in the nature of a servitude, is registered or flows from statute (par 22).

In *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC) (*Makeshift*), the Western Cape Division of the High Court, Cape Town (the court; Cape High Court), recently had to decide whether the *mandament* is available for restoring the *quasi*-possession of electricity supply that derives from contract. The appellant severed the electricity supply to the respondent's home without her permission, upon which she instituted the *mandament* to have her *quasi*-possession of the supply restored. Rogers J, with Cloete J concurring, held that the *quasi*-possession of such supply, despite being contractual in nature, enjoys possessory protection. He distinguished the case from *Masinda* by reinterpreting the "incident of possession" notion, which is a key requirement for the *quasi*-possession of a right to enjoy possessory protection. He ruled that electricity supply used on land is an incident of possession of the land – and therefore enjoys possessory protection – if such supply is additional to, or part of, a professed right, the *spoliatus* has against the spoliator to occupy the premises where the right used. Furthermore, the spoliator must have an interest in the possession of the land. By severing the electricity supply, the appellant attempted to evict the respondent without following due process. He therefore granted the *mandament* to protect her *quasi*-possession of the electricity supply.

The Cape High Court's approach towards *quasi*-possession, particularly the "incident of possession" requirement, is novel and deserves attention, particularly due to the precedent in *Masinda*. This is because Rogers J identified a category of rights the *quasi*-possession of

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which enjoys possessory protection regardless of their personal nature. His attempt to distinguish the case from *Masinda* is admirable, as his judgement arguably upheld the respondent's right to have access to adequate housing and her right against arbitrary eviction from her home. Unfortunately, the decision's potential drawbacks seem to outweigh these positive features.

Rogers J's interpretation of the "incident of possession" requirement does not find authority in either case law or academic scholarship. His understanding of this requirement, though appearing to vindicate the respondent's constitutional rights, has the potential to subvert these same rights in other contexts. This is because without the *spoliatus* having an alleged occupation right against the spoliator (or when someone other than the spoliator cuts off the electricity supply), the *quasi*-possession of such *spoliatus* will not enjoy possessory protection. Furthermore, the court's construal of the "incident of possession" notion delves into the merits of the dispute, which are irrelevant in spoliation proceedings. Scrutinising the merits may subvert the speedy and robust nature of the spoliation remedy, which could undermine its purpose and, hence, the rule of law. For these reasons, the judgment is unappealing.

The case note is structured as follows: section 2 sets out the facts of the case and the court's decision. Section 3, in turn, evaluates the decision in view of the two points raised in the previous paragraph. The final part, namely section 4, sets out the conclusion.

2 The *Makeshift* case

2 1 Facts

Makeshift is an appeal to the Cape High Court from the Riversdale Magistrate's Court (court *a quo*). The appellant, namely Makeshift 1190 (Pty) Ltd (the appellant), owned a farm in the Riversdale area, on which the respondent and her family occupied a building (referred to as "the store"). It was common cause that the store was their home.

Eskom served the store with electricity. The respondent's husband paid the electricity bills, though it was the appellant who had the contract with Eskom for the provision of electricity. During December 2017, Eskom disconnected the electricity on the farm after the appellant cancelled its contract with Eskom. The only part of the farm that still used Eskom electricity at that point was the store and its related facilities. There was a strained relationship between the appellant and the respondent, and it appeared that the appellant terminated the electricity supply to force the respondent and her family off the land.

Immediately after the disconnection, the respondent launched an urgent spoliation application in the court *a quo* against the appellant to have the electricity supply restored. Following several developments which are irrelevant for present purposes, the court *a quo* finally granted the spoliation remedy in favour of the respondent on 6 December 2019.

The appellant subsequently appealed this decision to the Cape High Court.

2 2 The judgment

The legal question that confronted the court, according to Rogers J, was whether the respondent had *quasi*-possession of the electricity supply, as meant in *Masinda*, and whether she may use the *mandament* to have such *quasi*-possession restored (par 20). The spoliation remedy only protects the *quasi*-possession of certain rights and it is unnecessary to prove that the alleged right exists to reclaim *quasi*-possession with the *mandament* (par 21). To have *quasi*-possession of an alleged right, the *spoliatus* must have performed acts demonstrating the exercise of the right (par 21). Rights the *quasi*-possession of which enjoy protection under the spoliation remedy are *gebruiksregte* (use rights) or rights which are incidental to the possession or control of the property where the professed right is exercised (pars 22 and 24, with reference to *Firstrand Ltd v Scholtz* 2008 2 SA 503 (SCA) (*Firstrand*) and *Masinda*). However, the mere fact that such supply is used at residential premises does not automatically mean it is incidental to the possession of property (par 25). As held in *Masinda*, the *quasi*-possession of electricity and water supply does not enjoy possessory protection if such supply is personal in nature (par 23).

Rogers J held that *Masinda* does not confine the rights the *quasi*-possession of which enjoys possessory protection only to those right which are "bestowed by servitude, registration or statute" (pars 29-30). In his view, there are rights the *quasi*-possession of which enjoys such protection despite them being "purely personal in nature" (par 30, citing *Firstrand* par 13). He divided *quasi*-possession cases into three categories to provide clarity in this regard:

a) cases where the professed right is an alleged servitude or alleged registered statutory right; here the *quasi*-possession of the professed right enjoys possessory protection (such as in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) (*Bon Quelle*) and *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) (*Impala*));
b) cases where the alleged right is contractual in nature and where no servitude or similar right is alleged; here the *quasi*-possession of the right does not enjoy possessory protection (such as in *Masinda* and *Firstrand*); and
c) cases where the alleged right is personal in nature but where its *quasi*-possession still enjoys possessory protection (as happened in *Naidoo v Moodley* 1982 4 SA 82 (T) (*Naidoo*) and *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W) (*Froman*) (par 32).

In *Naidoo* and *Froman*, which were not rejected in *Masinda*, the courts awarded the spoliation remedy to protect the possession of the premises and not the *quasi*-possession of the alleged right to electricity and water supply (pars 31 and 36, referring to *Masinda*). The defining feature of these cases, and, hence, category (c), is that the claimant is not complaining about the severing of the electricity or water supply in itself

but rather about the "adverse impact" such severing has on her possession of the premises (par 37). Rogers J ruled that the same might also be said of cases in category (b), like *Masinda* (par 37). However, as *Masinda* did not share this view, there must be another consideration which distinguishes category (c) from (b).

In category (b), the supplier of the service has no interest in the possession of the land, while in category (c) the supplier has a direct interest in such possession (pars 33-34). Consequently, in category (c) cases the service provider severs the service to evict the claimant without following due process, while in category (b) there is no such attempt on the supplier's side (par 34). The distinguishing feature of category (c) is therefore that the "alleged right to electricity is an incident of, or an adjunct to, the alleged right which the [*spoliatus*] has against the spoliator to be in occupation of the premises" (par 38). If electricity supply is an incident of the claimant's possession in this manner, the *quasi*-possession of such supply enjoys protection under the *mandament* and terminating such supply amounts to spoliation of the premises where the supply is used (par 38). This is because severing electricity supply used at residential premises amounts to a substantial disturbance with the possession of the premises itself (par 39). As the spoliation remedy guards against interferences of this nature and not only against complete deprivation of possession, it may be awarded (par 39).

The court found that respondent's possession of the premises (and that of her family) was permitted in terms of a *precarium* (revocable consent) from the appellant, which *precarium* extended beyond permission to occupy the premises by including the use of Eskom electricity at the store (pars 43-44, 48). The electricity supply was thus an adjunct to the respondent's permission to occupy the store and, hence, an incident of her possession of the land (pars 44, 48). The respondent's occupation of the premises, and her use of its electrical appurtenances, therefore amounted to possession of the premises while, simultaneously, amounting to *quasi*-possession of the alleged right to electricity (par 41). Therefore, the respondent's case fell into category (c), as the appellant's severing of the electricity supply was intended – like in *Naidoo* and *Froman* – to be a constructive eviction (par 49). Consequently, Rogers J agreed with the court *a quo*'s order and dismissed the appeal.

3 Evaluation

3 1 Introduction

It seems that the source of an alleged right which is being *quasi*-possessed was initially irrelevant in spoliation proceedings, as rights the *quasi*-possession of which enjoys possessory protection could derive from either real or personal rights (Kleyn *Mandament* 394; Kleyn "The protection of *quasi*-possession in South African law" in Descheemaeker (ed) *The consequences of possession* (2014) 187, citing *Firstrand* par 12). However, since *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA)

(*Telkom*) the courts have placed more emphasis on the source of a professed right to determine whether its *quasi*-possession enjoys possessory protection (see, for instance, *Impala*; *Firstrand*; *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA); *Masinda*). This investigation is said to prevent the spoliation remedy from replacing a claim for specific performance, which would collapse the distinction between property law and contract law (*Telkom* par 14). Therefore, if the right is sourced in contract, its *quasi*-possession does not enjoy possessory protection (*Telkom*; *Firstrand*; *Impala*). This trend was recently confirmed in *Masinda* regarding *quasi*-possession of electricity supply.

Given the precedent in *Masinda*, one might have expected *Makeshift* to have gone the other way, as the alleged electricity supply in this case (as in *Masinda*) was sourced in contract. Still, Rogers J awarded the spoliation remedy by finding that the respondent's *quasi*-possession of the electricity supply was an incident of the possession of the land. As mentioned in the introduction, this finding is problematic in view of (i) the way courts and scholars have previously construed the "incident of possession" requirement, and (ii) the purpose of the spoliation remedy. I address these two matters under the next two headings below.

3 2 The "incident of possession" requirement

Rogers J relied on two considerations to award the spoliation remedy in the case before him. The first entails that the courts in *Naidoo* and *Froman* granted the *mandament* to protect the claimant's possession of the premises where the electricity supply was used and not the *quasi*-possession of the supply itself (pars 36-38, with reference to *Masinda* par 16). The second factor, which is related to the first, is the "incident of possession" requirement.

The first factor touches on how the *mandament* protects *quasi*-possession of incorporeals. There are two schools of thought in this context. Both acknowledge that *quasi*-possession plays a role when dealing with the control of rights, as rights – being incorporeals – are not susceptible to possession in the same way as tangible things (*Telkom* par 9; Boggenpoel 105-106). However, they differ as to the relative importance of *quasi*-possession in cases which concern severance of electricity (and water) supply.

For the first school of thought, which consists of Sonnekus, Van der Walt, and De Waal, the point of departure is the *possession of the premises* where the electricity supply is used (Sonnekus "Besit van serwituutbevoegdhede, *mandament van spolie* en logika" 1989 *TSAR* 430; Van der Walt "*Mandament van spolie*" 1983 *THRHR* 237-238; De Waal "*Mandament van spolie*" 1984 *THRHR* 115). By using the mentioned services through the appurtenances on land, such use is incidental to (or is a component of) the possession of the land (Sonnekus 1989 *TSAR* 430; Van der Walt "Die *mandament van spolie* en *quasi*-besit" 1989 *THRHR* 451-452; De Waal 1984 *THRHR* 115). Hence, cutting off the service

amounts to a substantial interference with the possession of the premises, which disturbance may be addressed with the spoliation remedy (Sonnekus 1989 *TSAR* 430; Van der Walt 1989 *THRHR* 452). It is unnecessary to prove the existence of the right to use the spoliation remedy here (Van der Walt 1989 *THRHR* 448, 451; but see *contra* Sonnekus 1989 *TSAR* 432-434). Sonnekus and Van der Walt argue that *quasi*-possession merely shows that the possession at hand is exceptional (Sonnekus 1989 *TSAR* 432-434; Van der Walt 1989 *THRHR* 451-452). Hence, it is unnecessary to work with this notion when dealing with electricity and water supply cases, as it does not add anything to the existing principles on possession (Van der Walt 1989 *THRHR* 451-452).

Kleyn, who represents the other school of thought, focuses on the *quasi*-possession *of the right* instead of the possession of land (Kleyn *Mandament* 391-392; Kleyn "Protection of *quasi*-possession" 200). He argues that by exercising physical acts normally associated with an alleged right on land, such exerciser acquires *quasi*-possession over the right (Kleyn *Mandament* 392-393; Kleyn "Protection of *quasi*-possession" 187, citing *Firstrand* par 12). It is unnecessary to prove the existence of the right to have *quasi*-possession over it (Kleyn *Mandament* 395). A right must be a *gebruiksreg* (use right) for its *quasi*-possession to enjoy possessory protection, as the *mandament* does not protect the *quasi*-possession of all kinds of rights (Kleyn "Protection of *quasi*-possession" 187, citing *Firstrand* par 13). There are two kinds of *gebruiksregte*, namely servitutal rights and rights which are incidental to the possession of land (which he also describes as "incidents of possession") (Kleyn "Protection of *quasi*-possession" 195). Examples of rights which are incidents of possession include electricity and water supply used on premises (Kleyn *Mandament* 393-394; Kleyn "Protection of *quasi*-possession" 204-205).

There must be a link between the exercise of an alleged *gebruiksreg* and corporeal property, like land, for such right to be an incident of possession (Kleyn *Mandament* 392-393; "Protection of *quasi*-possession" 187, citing *Firstrand* par 12). If this link is present, the spoliation remedy may be used to restore the *quasi*-possession of the alleged right, as preventing the *spoliatus* from exercising the right amounts to spoliation of the *quasi*-possession of the right. The link ensures that the spoliation remedy is not abused to compel specific performance, thereby upholding the division between contract law and property law (Kleyn "Protection of *quasi*-possession" 195). Although Kleyn acknowledges that electricity (and water) supply could also be regarded as a component of the possession of land, he prefers working with the notion of *quasi*-possession when dealing with possessory protection of incorporeals (Kleyn *Mandament* 393-394).

These approaches are two sides of the same coin – both reveal that the *mandament* may be used to restore electricity (and water) supply used on land, even though the *spoliatus* may not be entitled to the right. The

incident of possession aspect is an essential requirement for obtaining spoliatory relief under both schools of thought.

Rogers J should be applauded for referring to, and quoting from, many of the sources cited in the previous paragraphs. In terms of the outcome in *quasi*-possession cases, nothing hinges on which school of thought one favours. This is because the correct application of the principles under either one leads to the same result. This view finds support in the *Naidoo* and *Froman* cases, given that the former is characteristic of the first school of thought, while the latter is reminiscent of the second one. The fact that Rogers J preferred the first school of thought is therefore unproblematic for purposes of the outcome in *quasi*-possession cases. Though there may be doctrinal implications for favouring one school of thought over the other, such an investigation is beyond the scope of this case note.

However, Rogers J's construal of the "incident of possession" requirement is problematic. As mentioned above, this requirement highlights the link between the exercise of a professed right and the land where it is exercised under both schools of thought. Rogers J's interpretation of the requirement differs from the views of the two schools of thought and the position in case law (*Firstrand* par 12; *Zulu v Minister of Works, KwaZulu* 1992 1 SA 181 (D) 188C). At best, *Naidoo* and *Froman* only provide indirect authority for his interpretation, as both cases were decided on the basis that the services were used on the land which the *spoliatii* occupied without explicit reference to an alleged occupation right they had against the spoliators. Rogers J's approach supplements the existing considerations under this requirement, as the investigation no longer pivots on whether the *spoliatus* performed acts normally associated with a professed right on land. If the right is sourced in contract, the *spoliatus* must also have an alleged agreement against the spoliator to occupy the premises. Furthermore, it must be the landlord who severs the supply. Absent this alleged occupation right and severance by the landlord, the electricity supply is not incidental to the possession of the premises and cannot, thus, be restored with the spoliation remedy. As will be seen below, these added considerations may undermine the constitutional rights of a *spoliatus* in certain instances.

It must be emphasised that the *ratio decidendi* in *Masinda* precluded Rogers J from only focusing on the link between the exercise of the right and the land where it is used, as per the two schools of thought. Due to the personal nature of the right in *Makeshift*, strict adherence to *Masinda* would have meant that the judge had to reject the respondent's reliance on the spoliation remedy. Instead, Rogers J voiced his disagreement with *Masinda* by holding that severing electricity supply in category (b) cases entails an adverse impact of one's possession of premises in the same way as in category (c) cases, which means there is no difference between these two categories (par 37). Nonetheless, he was bound by *Masinda* due to the doctrine of *stare decisis*. It is for this reason that he attempted

to distinguish *Makeshift* from *Masinda* on another basis, which he did by reinterpreting the "incident of possession" requirement.

Distinguishing *Makeshift* from *Masinda* (as well as disagreeing with the latter decision) is commendable, given the *Masinda* court's (over)emphasis of the source of the right (Kleyn "Protection of *quasi*-possession" 206-208). Furthermore, Rogers J's decision appears to vindicate the constitutional rights of the respondent, namely her right to have access to adequate housing and her right against arbitrary eviction from her home (section 26(1) and 26(3) in the Constitution of the Republic of South Africa, 1996 (Constitution)).

Electricity is necessary for the "dignified and humane occupation of residential premises" (Freedman "The application of the *mandament van spolie* to constitutional and statutory rights" 2015 *TSAR* 200). It is "one of the most common and important basic municipal services and has become virtually indispensable" in modern society (*Joseph v City of Johannesburg* 2010 4 SA 55 (CC) (*Joseph*) par 34). It therefore comes as no surprise that electricity supply is a constitutive element of "adequate" housing, as meant in section 26(1) of the Constitution (G Muller "Restoring electricity use with the spoliation remedy" 2019 *Pretoria Student Law Review* 3-4). Where adequate housing exists, it should not "be removed unless it can be justified" (*Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) par 29). The spoliation remedy protects this right against limitation by forcing those who sever electricity supply through unlawful self-help to restore the supply forthwith. This is so that the dispute may be adjudicated on the merits in subsequent legal proceedings based on the merits (see the discussion in section 3 3 below and the sources referred to there). Although there might be other remedies available to protect an electricity user's electricity supply (and, hence, the right to have access to adequate housing), such as the interdict and perhaps even remedies in electricity legislation, these remedies are arguably not as effective as the *mandament*. This is because they – unlike the *mandament* – require proof of a right (see section 3 3 below and the sources referred to there). Furthermore, where existing legislation does not provide remedies which offer the same type of protection as the spoliation remedy (which seems to be the case in the electricity setting), it might be preferable to use the *mandament* until existing legislation is amended (or new legislation is enacted) to provide similar protection to those whose electricity supply is severed without following due process (Boggenpoel 154-155).

Rogers J's approach also seems to uphold the right against arbitrary eviction from one's home (section 26(3) of the Constitution). In *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC), it was held that any attenuation or obliteration of the incidents of peaceful and undisturbed occupation of one's home, without a court order, amounts to an eviction contrary to section 26(3) of the Constitution of the Republic of South Africa, 1996 (Constitution) (par 12). Given this *ratio* and the indispensable nature of electricity in society, as mentioned in the

previous paragraph, it follows that severing electricity used at residential premises without the occupier's permission amounts to a constructive eviction without a court order and is therefore contrary to section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (see similarly Muller 2019 *PSLR* 8). Forcing the *spoliatus* to restore the electricity supply forthwith discourages the spoliator from engaging in unlawful self-help and forces him to follow due process when evicting the *spoliatus*.

The fact that *Makeshift* seems to vindicate the mentioned constitutional rights is admirable. Yet, the judgment unfortunately only achieves this goal in a narrow setting. For example, it does not cover cases where someone severs electricity supply (which is sourced in contract) to a premises when there is no alleged occupation right between such person and the one using the supply to the land. It also does not extend to instances where someone other than the landlord cuts off such supply (compare *Joseph*, where the electricity supply was severed by the relevant power utility and not the landlord). Although *Masinda*, and not *Makeshift*, bears responsibility for this shortcoming, the problem remains: absent an alleged occupation right and severance by the landlord, the *quasi*-possession of the electricity supply does not enjoy possessory protection. Excluding the *mandament* from cases which fall outside the narrow exception Rogers J created will probably frustrate the two fundamental rights discussed above, as persons using electricity supply at their homes will arguably not be able to protect their section 26(1) and 26(3) rights as effectively as would be the case if they had access to this remedy.

The single-system-of-law principle, which the Constitutional Court laid down in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA674 (CC) (*Pharmaceutical Manufacturers*), entails that all sources of law, including the common law, flow from the Constitution and is subject to constitutional control (par 44; AJ van der Walt *Property and constitution* (2012) 20ff). All legal sources must thus promote the spirit, purport and objects of the Bill of Rights, as per section 39(2) of the Constitution (Van der Walt *Property and constitution* 20). The proviso to the second subsidiarity principle, which the Constitutional Court developed in light of the single-system-of-law principle, states that litigants may only invoke the common law to protect their rights if the common law does not conflict with a constitutional right or, should such a conflict exist, it can be developed to accord with the Constitution (Van der Walt *Property and constitution* 36ff, 115-116). Given the potential of Rogers J's understanding of the "incident of possession" requirement to undermine section 26(1) and 26(3) of the Constitution outside the narrow confines of his approach, this proviso requires that courts should adopt an interpretation of the common-law sources (or develop the common law, if necessary) which does not frustrate these fundamental rights (Van der Walt *The law of servitudes* (2016) 43-44; Van der Walt *Property and constitution* 36ff, 115-116). The construal of the "incident of possession"

requirement in terms of the two schools of thought, and as applied in *Naidoo* and *Froman*, seem to provide a constitutionally-compliant interpretation, as it does not require proof of an alleged occupation right or that the spoliator must have an alleged interest in the possession of the land. It would be better to afford possessory protection to all persons who use electricity at their homes irrespective of there being an alleged occupation right or whether the spoliator has an interest in possession of the premises. That said, this avenue was unfortunately closed to Rogers J due to the precedent in *Masinda*.

3 3 The purpose of the *mandament van spolie*

The second problem with Rogers J's interpretation of the "incident of possession" notion is that it frustrates the purpose of the *mandament* by complicating the investigation under this requirement. The spoliation remedy is usually described as being speedy and robust in nature (Kleyn "Die *mandament van spolie* as besitsremedie" 1986 *De Jure* 1; Muller *et al* 328; Boggenpoel 98-100). It can be obtained on an urgent basis and restores the *status quo ante* forthwith, as per its maxim *spoliatus ante omnia restituendus est* (the *spoliatus* must be restored to her prior position before all else) (Muller *et al* 326; Boggenpoel 96). Merits are irrelevant and may not be raised during spoliation proceedings at all; parties may only litigate on the merits in subsequent legal proceedings (*Nienaber v Stuckey* 1946 AD 1049 1053; Muller *et al* 349; Kleyn 1986 *De Jure* 6-7). The irrelevancy of merits flows from (i) the distinction between the possessory suit (where merits play no role) and the petitory suit (where rights must be proved) in South African law (Kleyn 1986 *De Jure* 3-5), and (ii) the rationale of the remedy.

The spoliation remedy protects bare possession, which is possession without reference to rights, and is therefore available to all types of possessors, namely both possessors and holders (Kleyn 1986 *De Jure* 8-9; Boggenpoel 96). Even a thief may institute the *mandament* against anyone who committed unlawful spoliation, including the owner of property (*Yeko v Qana* 1973 4 SA 735 (A) 739G). The fact that the remedy does not protect rights, but rather possession as a mere factual relationship, makes it unique (Kleyn 1986 *De Jure* 1; Boggenpoel 96-97). The purpose of the *mandament* is to uphold law and order by protecting stable possessory relations against unlawful dispossession (Van der Walt "Squatting, spoliation orders and the new constitutional order" 1997 *THRHR* 525-526). Therefore, it prevents unlawful self-help in the possessory context by discouraging people from taking the law into their own hands (*Nino Bonino v De Lange* 1906 TS 120 156; Kleyn 1986 *De Jure* 11). In *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) (*Ngqukumba*), the Constitutional Court held that "[s]elf-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled" (par 21). The remedy gives effect to the rule of law by requiring spoliators to immediately undo the consequences of their unlawful acts, thereby

encouraging parties to submit their dispute to a court of law instead of resorting to self-help (section 1(c) of the Constitution; *Ngqukumba* par 12).

The following considerations touch on the merits of a dispute and may therefore not feature in spoliation proceedings: the spoliator has a stronger right (like ownership) in the property, the *spoliatus*' possession is unlawful or illegal, the spoliator has a right to terminate the *spoliatus*' possession, and whether restoring possession to the *spoliatus* would inconvenience the spoliator (Muller *et al* 349; Boggenpoel 96-99, 129). Rogers J's construal of the "incident of possession" requirement contains elements of several of these considerations.

According to the judge, electricity supply used at a residential premises is only an incident of the possession of such premises if the supply is additional to an alleged occupation right the *spoliatus* has against the spoliator. The spoliator must therefore have a professed interest (like ownership) in possession of the premises. Stated differently, the spoliator must have a right to terminate the *spoliatus*' possession. On the flipside, the *spoliatus* must have an alleged right against the spoliator (like a lease) to occupy the premises. These aspects, notwithstanding their alleged or professed nature, all touch on the merits and should play no role in spoliation cases.

The spoliation remedy realises its purpose by providing immediate and effective relief. Such relief is only possible if merits are disregarded (Muller *et al* 331-332; Taitz "Spoliation proceedings and the 'grubby-handed' possessor" 1981 *SALJ* 40-41). Investigating the merits undermines the efficacy of the remedy, as it will delay the court in delivering judgment, thereby postponing the restoration of the *status quo ante*. This is because parties will have to lead evidence in addition to the two requirements of the *mandament van spolie*, namely peaceful and undisturbed (*quasi-*)possession and unlawful spoliation (Kleyn 1986 *De Jure* 6). Such an investigation, which involves a factual dispute, is more at home at a trail procedure and not the more expedient motion procedure in terms of which spoliation cases are normally decided (Muller *et al* 331-332). Indeed, one merely has to look at what length Rogers J went to examine the merits of the dispute before him to find that the *spoliatus*' use of the electricity supply was indeed additional to her alleged occupation right and that the severing of the electricity supply was intended to be a constructive eviction (pars 48-49).

Though the merits are examined in spoliation proceedings to some extent, namely, to determine whether an alleged right is an incident of possession to ascertain whether its *quasi*-possession enjoys possessory protection, such investigation is limited and does not dominate the proceedings (Boggenpoel 120). This restricted examination does not extend to the actual rights (namely the merits) the parties to the dispute have in the property (Boggenpoel 120-121). Though Sonnekus argues that the *spoliatus* must prove that he is entitled to the right for its *quasi*-possession to enjoy possessory protection (Sonnekus "Watervoorsiening

en die *mandament van spolie* – die Hoogste Hof verstel die wissels" 2007 *TSAR* 148-149), it is trite law that rights need not be proved in *quasi*-possession cases (*Bon Quelle* 516E-H; *Masinda* par 14; Van der Walt 1989 *THRHR* 448, 451; Kleyn *Mandament* 395). Requiring proof of an *alleged* occupation right, which is nearer Sonnekus' view, seems to conflict with the legal position that rights need not to be proved for their *quasi*-possession to enjoy protection under the spoliation remedy.

Moreover, Rogers J's approach has elements of the notion of the "grubby handed" possessor (Taitz 1981 *SALJ* 36), which entails that a court may refuse to grant the spoliation remedy to a *spoliatus* who has no right in the property (Taitz 1981 *SALJ* 40). This concept, of which scholars are critical (Taitz 1981 *SALJ* 40-41; Van der Merwe *LAWSA* (ed Joubert & Faris) 27 (2014) par 111), has been rejected by the Supreme Court of Appeal (*Yeko v Qana* 1973 4 SA 735 (A) 739G-H; *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA) par 32). Rogers J's seems to apply this notion in a unique manner, namely where the focus falls on the reprehensible conduct of the spoliator (and not that of the *spoliatus*). In his view, *quasi*-possession of electricity supply only enjoys protection if the spoliator has an (alleged) interest (or right) in possession of the premises. Here the spoliator's hands are "grubby" due to him seeking to evict the *spoliatus* without following due process (in terms of section 26(3) of the Constitution and PIE), which means the court may award the spoliation remedy. The same objection to the grubby-handed possessor defence applies to this approach, namely that it touches on the merits and would defeat the purpose of the spoliation remedy (Taitz 1981 *SALJ* 40-41).

The emphasis on the source of the right, which involves the merits, first started to feature in *quasi*-possession disputes with *Telkom*, where it was held that the *quasi*-possession of a right does not enjoy possessory protection if it is sourced in contract. This approach was carried through to the electricity supply context in *Masinda*. In light of *Makeshift*, even further scrutiny of the merits is now necessary to ascertain whether the electricity supply is incidental to the *spoliatus*' possession of the premises. The *quasi*-possession investigation is therefore characterised by increasing difficulty, one where the merits play a bigger and bigger role. The *Makeshift* decision is unattractive because of its potential to undermine the rationale of the spoliation remedy and, hence, the rule of law.

4 Conclusion

In *Makeshift*, the Cape High Court held that the *quasi*-possession of electricity supply enjoys possessory protection despite such supply being sourced in contract. According to Rogers J, exercising a professed right on land is an "incident of possession" – which means the right's *quasi*-possession enjoys protection under the *mandament* – only if the right is additional to an alleged right the *spoliatus* has against the spoliator to occupy the premises where the electricity is used and if the spoliator has

an interest in the possession of the land. The judge deserves praise for his attempt to distinguish the case before him from *Masinda*, where it was held that the *mandament* does not protect the *quasi*-possession of contractual rights at all.

Makeshift is preferable to *Masinda*, as it vindicates *spoliatus*' right to have access to adequate housing and her right against arbitrary eviction from her home (though only in a narrow setting). Nevertheless, Rogers J's decision is problematic for two reasons. Firstly, it misconstrues the "incident of possession" requirement. According to case law and academic scholarship on this notion, exercising an alleged right is incidental to the possession of premises if one performs acts usually associated with such right on land. Severing the right is then tantamount to interference with the possession of the premises, which may be addressed with the spoliation remedy. This is so irrespective of whether the right is additional to an alleged occupation right the *spoliatus* has against the spoliator. More significantly, Rogers J's interpretation of this notion has the potential to undermine the mentioned constitutional rights in cases where his restricted requirements are not met, such as when there is no such alleged right or where someone other than the landlord severs the supply.

Secondly, requiring proof of an alleged occupation right complicates the investigation under this requirement by touching on the merits of the dispute, which are irrelevant in spoliation proceedings. The *mandament*, which restores possession forthwith without considering the merits, upholds the rule of law in the possessory context by restoring the *status quo ante* immediately. Such restoration discourages unlawful self-help and forces litigants to submit their dispute to a court of law. It realises this goal by providing speedy and robust relief, which is only possible if courts disregard the merits. Rogers J's investigation of the merits has the danger of undermining the efficacy of the remedy by requiring courts to consider factors other than the two requirements of the spoliation remedy. Such added investigation has the potential to undermine the speedy and robust nature of the remedy and, hence, the rule of law.

The sourced-based investigation in *quasi*-possession cases, which began in *Telkom* and was confirmed in *Masinda*, has led Rogers J to identify a limited category of personal rights the *quasi*-possession of which enjoys possessory protection. Though preferable to *Masinda* for its potential to uphold the mentioned constitutional rights, the decision is unappealing for the reasons discussed in this case note. The decision needlessly complicates how the *mandament* protects the *quasi*-possession of incorporeals by adding to the array of considerations courts must consider when deciding spoliation cases. It would be preferable if the courts extended possessory protection to all persons who use electricity supply at their homes and not to limit it to the narrow exception Rogers J created, which can be done by returning to the legal position as per *Naidoo* and *Froman*. Given the precedent in *Masinda* and

Telkom, however, this change will have to be brought about by either the Supreme Court of Appeal or the Constitutional Court.

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Falling through the cracks: The plight of "over-aged" children in the public education system

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SUMMARY

The legislative and policy framework regulating compulsory education in South Africa requires that learners beyond the age of fifteen enrol in an adult education centre to meet their educational needs. Adult education which has been called the "dysfunctional stepchild" of South African education, is poorly regulated in terms of access and quality control. Therefore, learners who are forced to leave the formal schooling sector are not necessarily guaranteed a placement in an adult education facility. This article focuses on a specific cohort of learners between the ages of fifteen and eighteen who are technically children in terms of South African law and therefore in need of special protection. In particular, the article assesses the extent to which the constitutional rights of these learners are violated by the current compulsory education legislative and policy structure. These rights include the rights to basic education, equality as well as the bests interests of the child.

1 Introduction

The first democratic South African government inherited a vastly unequal public education system stratified predominantly along the lines of race and class from the apartheid regime.[1] The ANC-led government was tasked with transforming the education system during a time of severe financial restraint in the 1990s.[2] As a result, the new dispensation was fiscally restrained to effectively address the resource constraints in primarily former black schools which included acute infrastructural deficiency and a shortage of qualified teachers.[3] Furthermore, these schools were characterised by exorbitantly high learner-to-educator ratios and in an effort to tackle this, the first post-apartheid government turned its attention to reducing the vast amount of over-aged learners in

1 Arendse "The South African Constitution's empty promise of 'radical transformation': Unequal access to quality education for black and/or poor learners in the public basic education system" 2019 *Law, Democracy and Development* 100-147.

2 Chisholm "Apartheid education legacies and new directions in post-apartheid South Africa" 2012 *Storia del donne* 90.

3 Arendse 2019 *Law, Democracy and Development* 111-127; Burger, Van Der Berg and Von Fintel "The unintended consequences of education policies on South African participation and unemployment" 2015 *South African Journal of Economics* 74; Chisholm 2012 *Storia del donne* 90.

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the education system, among other things.[4] According to the then Department of Education,[5] "many such over-aged learners were learning little, were unlikely to eventually pass Matric and were diverting resources from younger learners."[6] The majority of learners beyond the suitable school-going age at that time consisted of black youths who reached advanced ages in school because of several reasons, including entering school later than normal and grade repetition.[7] In an attempt to diminish the large class ratios and free up limited resources in the schooling system, the Department adopted several policies with the effect of limiting access to schools for over-aged learners and restricting the amount of times a learner could repeat a grade.[8] To this end, state policy defines the suitable age for admission to a grade as "the grade number plus 6."[9] For example, in Grade 2, a learner is supposed to be eight years old. In order to ensure that learners remain the appropriate age for their grade level, the repetition of a grade is only allowed once during any of the education phases.[10] At the stage when a learner reaches Grade 9, they must be fifteen years old, coinciding with the definition accorded to the compulsory schooling period in South Africa.[11] Section 3(1) of the South African Schools Act[12] regulates compulsory education in South Africa and provides that:

> "… [E]very parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first."

4 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 74-75. See Chisholm 2012 *Storia del donne* 81-103 for an analysis on how the first post-apartheid government approached the resource deficit in former black schools.

5 In 2009, the National Department of Education split into two separate departments, namely the National Department of Basic Education and the Department of Higher Education and Training. See https://www.education.gov.za/AboutUs/AboutDBE.aspx (accessed 2021-02-24).

6 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 74-75.

7 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 80.

8 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 80.

9 Department of Education: Age Requirements for Admission to an Ordinary Public School (GG 2433, 1998).

10 The four education phases are "the foundation phase (Grades R to 3), intermediate phase (Grades 4 to 6), the senior phase (Grade 7 to 9) and the further education and training phase (Grades 10 to 12)." See https://www.education.gov.za/Curriculum/CurriculumAssessmentPolicyStatements(CAPS).aspx (accessed 2021-02-25).

11 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 81.

12 84 of 1996.

The status of a learner who has reached the age of sixteen years or older, is regulated in terms of section 29 of the Admissions Policy for Ordinary Public Schools:[13]

> "A learner who is 16 years of age or older and who has never attended school and who is seeking admission for the first time or did not make sufficient progress with his or her peer group, must be advised to enroll at an Adult Basic Education and Training (ABET) centre."

Provincial education departments adopt their own age-related policies in line with the national regulations. Western Cape schools, for example, refuse admission to learners who have reached an age that are two years beyond the suitable grade-age.[14] Since learners are legislatively required to stay in school until the age of fifteen, the students affected by age-related policies obviously include those who are beyond the age of fifteen.[15] Therefore, once a person reaches an age older than fifteen, two scenarios become possible: First, if they apply to a school for the first time or seeks re-admission after having dropped out at an earlier stage but is now beyond the appropriate grade-age, admission will be refused; or second, if they are an existing member of a school but has reached an age not suitable for a particular grade, they will be forced out of school and advised to approach an adult education centre for their education needs.

The main purpose of this article is to call attention to the violation of the constitutional rights of children between the ages of fifteen and eighteen that are considered too 'old' for the conventional schooling system in terms of the compulsory education legislative and policy framework explained above. In many instances, this group of learners are caught between the proverbial rock and a hard place: They are too old to gain admission into a formal school, however the state alternative, an adult education centre is not always accessible to them due to the state's failure to effectively administer adult education as this article will show. Although these learners are technically children in terms of the South African Constitution[16] and therefore constitute a group worthy of special protection in terms of South African law,[17] they are severely marginalised by the current public education system as this article will show.

13 Department of Education: Admission Policy for Ordinary Public Schools (GG 19377, 1998.)
14 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 82.
15 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 81-82.
16 S 28(3) of the Constitution of the Republic of South Africa, 1996.
17 See s 3.1 below.

2 The constitutional right to basic education, including adult basic education

2 1 The textual formulation of the right

Section 29 (1) of the Constitution states:

> "Everyone has the right –
>
> a to a basic education, including adult basic education;[18] and
> b to further education, which the state, through reasonable measures, must make progressively available and accessible."

The explicit reference to the word 'including' suggests that the right to adult basic education is not a separate right, but part and parcel of the right to basic education. Adult basic education is merely a form of basic education as suggested by Sloth-Nielsen and Mezmur's definition of the term 'basic education.'[19] According to the authors, the latter concept has been defined as "education that includes all age groups, and goes beyond conventional curricula and delivery systems, for example pre-school, adult literacy, non-formal skills training for the youth and compensatory post-primary programmes for school leavers."[20] Thus, basic education is not restricted to learners in a school, but can include non-conventional approaches to education, including adult education that are delivered outside the typic school delivery system.

The Department defines an adult, for the purposes of adult education as a person over the age of fifteen.[21] As noted above, learners who are sixteen years and older must be advised to enrol at Adult Basic Education and Training (ABET) centres which are now known as Public Adult Learning Centres (PALCs).[22] This suggests that learners older than fifteen, and not at their typical grade-age, become ineligible for formal schooling and are considered adults by the state for the purpose of their educational needs. The logical inference, therefore, is that learners beyond fifteen and not at the suitable grade-age for the conventional schooling system, become claimants of the right to adult basic education.

In *Governing Body of the Juma Musjid Primary School v Essay*,[23] the Constitutional Court held:

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18 Italics my emphasis.
19 Sloth-Nielsen and Mezmur *Free Education is a Right for Me: A Report on Free and Compulsory Education* (2007) 9-10.
20 Sloth-Nielsen and Mezmur 9-10.
21 Department of Education: Ministerial Committee on Adult Education (2008) 5 ("Green Paper on Adult Education").
22 Aitchison and Land "Secured, not connected: South Africa's adult education system" 2019 *Journal of Education* 139.
23 2011 8 BCLR 761 (CC). See section 3.2 below for an explanation of the background of the judgment.

> "Unlike some of the other socio-economic rights, [section 29(1)(a)] is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'".[24]

As explained above, the right to basic education is inclusive of adult basic education. The Constitutional Court's interpretation of the unqualified nature of section 29(1)(a) in the Juma Musjid decision, therefore, applies to adult basic education as well.[25] Cameron and Chris McConnachie argue that:

> "In Juma Musjid, the court confirmed that the s 29(1)(a) right to a basic education is different. It is a right to a basic education. Anything less is a limitation of the right. This strongly suggests that learners and their parents (or adult learners, in the case of the right to adult basic education) can approach the courts arguing that they are not being provided such an education."[26]

Therefore, learners older than fifteen who have been excluded from formal schooling, can claim a right to adult basic education on demand from the state in the same way that learners in the conventional schooling system can. In other words, for learners in the adult education sector, the right to adult basic education is immediately realisable, not subject to the availability of state resources, but can be limited in terms of the Constitution's general limitation clause.[27] In identifying the content of section 29(1)(a), the Constitutional Court has provided broad parameters by declaring that access "is a necessary condition for the achievement of this right" and that the state has a duty to ensure the availability of schools.[28] In the realm of adult basic education, this means that the state at least has to ensure that learners in the adult education sector enjoy access to an education and that facilities are available to deliver such education.

24 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
25 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
26 McConnachie and McConnachie "Concretising the right to a basic education" 2012 *SALJ* 564. Italics my emphasis.
27 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
28 *Governing Body of the Juma Musjid Primary School v Essay supra* paras 43-45.

2 2 Adult basic education: The "dysfunctional stepchild" of the education system[29]

Contrary to what the name suggests, adult basic education is not managed by the National Department of Basic Education, but by the National Department of Higher Education and Training.[30] Since the splitting of the Department of Education into two distinct departments in 2009, public adult learning centres have been administered by the DHET.[31] The qualifications that are provided by PALCs, vary. In this regard, at some PALCs, programs of basic literacy are available, while at others, programs up to the level of Grade 9 or Matric (Grade 12) are on offer.[32]

Various challenges have plagued the public adult education system. First, the availability of PALCs across provinces is uneven.[33] Second, due to chronic "under-investment" in adult education, PACLs have been known to close down before an academic year is even completed.[34] Finally, in some cases, educators are appointed without meeting the accreditation requirements set by the South African Council of Educators.[35] This, coupled with the precarious working conditions that adult education educators are subjected to, results in a system plagued by concerns of quality control.[36]

Since 2015, PALCs have been incorporated under nine community colleges, one for each province.[37] A National Plan of Action by the DHET to establish effective community colleges around the country was launched in 2019.[38] However, the changes have been largely symbolic because the challenges of the 'old' PALC system continue unabated.[39]

In sum, learners beyond the age of fifteen and not at their suitable grade-age are caught between the proverbial rock and a hard place: Not only are they prohibited from accessing formal schools, but, the only

29 Ivor and Britt Baatjes refer to the adult education system as the "dysfunctional stepchild" of South Africa's education system. Baatjes and Baatjes "The struggle of adult educators in South Africa continues" 2019 *Adult Education and Development* 48.
30 Department of Higher Education and Training:White Paper on Post-school Education and Training "Building an Expanded, Effective and Integrated Post-school System" 2013 xi.
31 White Paper on Post-school Education and Training xi.
32 White Paper on Post-school Education and Training 21.
33 Green Paper on Adult Education 17-35.
34 Green Paper on Adult Education 17-35.
35 Green Paper on Adult Education 17-35.
36 Green Paper on Adult Education 17-35.
37 Aitchison and Land 2019 *Journal of Education* 142.
38 Department of Higher Education and Training: *The Community Education and Training College System: National plan for the implementation of the White Paper for Post school Education and Training System 2019–2030* (2019).
39 See Aitchison and Land 2019 *Journal of Education* 148-149 for a comprehensive discussion of these challenges.

state alternative, a public adult education centre, may also not be accessible. To add insult to injury: A private adult learning centre may be available in a certain area, but due to the commercialisation of private adult education, it is likely that many indigent learners will not go that route.[40]

3 The violation of constitutional rights

This article concerns a specific group of learners older than fifteen, but younger than eighteen who can be forced out of the formal schooling system in terms of section 3(1) of the Schools Act, read in conjunction with the age-related policy framework. As explained above, learners older than fifteen, and not at their typical grade-age, are regarded as over-aged in the conventional schooling system. Hence, they become ineligible for this system and are considered adults by the state for the purposes of entering the adult education system. However, in actual fact, these learners are not adults, but children in terms of South African highest law.[41] In this regard, the Constitution defines a child as "a person under the age of 18".[42] Therefore, the best interests of the child standard applies to the group of overaged learners. Besides the best interests standard, the rights to basic education and equality of the former group are also implicated as will be discussed next.

40 Private adult education centres do exist "with a range of offerings including literacy training, the ABET General Education and Training Certificate and the Senior Certificate." Their funding is received from various sources, including user fees. The South African government has made it clear that "[w]hile recognising and appreciating the role of private institutions, the Department believes that the public sector is the core of the education and training system. The government's main thrust, therefore, should be to direct public resources primarily to meeting national priorities and to provide for the masses of young people and adult learners through public institutions." White Paper on Post-school Education and Training xv, 42.

41 Italics my emphasis.

42 S 28(3) of the Constitution.

3 1 The right to equality[43]

The Admissions Policy for Ordinary Public Schools states that learners aged sixteen and older who are not progressing on par with their peers, "must be advised" to enter the adult education system.[44] The policy therefore gives effect to the Schools Act which restricts compulsory schooling to learners younger than sixteen and is capped at a Grade 9 education.

In *Harksen v Lane*, the Constitutional Court developed a two-stage enquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution.[45] The *Harksen* test has been framed by the Constitutional Court as follows:

> "Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) [of the Interim Constitution and section 9(3) of the 1996 Constitution]."

43 S 9 of the Constitution provides:
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(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.
(5) 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.

44 S 29 of the Admissions Policy for Ordinary Public Schools.

45 *Harksen v Lane* 1998 1 SA 300 (CC).

> "If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."[46]

Applying Harksen, a distinction can be drawn between learners of typical grade-age who are allowed to stay in the formal schooling system and overaged learners who are not academically progressing at an acceptable pace and forced to leave school. On the face of it, the differentiation between these groups is based on two factors, namely age and academic competence. Since age is listed in terms of section 9(3) of the Constitution, discrimination is established in terms of this ground. Academic competence is not enumerated in section 9(3), therefore in accordance with Harksen, differentiation based on this ground will result in discrimination if it has the potential to impair a person's dignity or other comparable interests.[47] Section 5(2) of the Schools Act prohibits school governing bodies from administering any test in relation to the admission of learners to a public school.[48] Section 5(2) must be read in conjunction with section 5(1) of the Act which states that "[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way." The purpose of these provisions is to prevent schools from employing measures, such as academic testing that may result in discrimination against potential learners. In other words, the Schools Act aims to prevent a situation where the academic competence of a learner is used as a means of exclusion. In *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* [49], the Constitutional Court agreed with the Gauteng education authorities that "schools [which] are told in advance of admission that a learner has learning or remedial difficulties, tend to refuse that learner's admission."[50] Therefore, viewed from this perspective, differentiation on the ground of academic competence constitutes discrimination.

A further ground for differentiation that is not immediately apparent, is that of race. The biggest dropout in the South African education system occurs in Grades 10 and 11, thus directly after the compulsory schooling phase.[51] Hartnack defines "dropout" as 'leaving education without obtaining a minimal credential' which in the South African context, amounts to Matric.[52] Approximately half of all South African learners

46 *Harksen v Lane supra* para 53.
47 *Harksen v Lane supra* para 374.
48 S 5(2) of the Schools Act provides: "The governing body of a public school may not administer any test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test."
49 2016 4 SA 546 (CC).
50 *FEDSAS v Member of the Executive Council for Education, Gauteng supra* para 32.
51 Hartnack "Background Document and Review of Key South African and International Literature on School Dropout" (2017) 1-2. (Report prepared for DGMT Foundation).
52 Hartnack 1-2.

drop out of school before obtaining a Matric qualification and black learners constitute the overwhelming majority of this percentage.[53] Therefore, on the face of it, the compulsory education framework appears to be neutral, but its operation results in indirect discrimination against black learners on the basis of race.[54]

The next stage of the Harksen enquiry is to establish whether the discrimination on the basis of age and academic competence amounts to unfair discrimination. The Constitutional Court has distinguished three factors that are considered cumulatively to determine whether discrimination is unfair.[55] These include:

a The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
b The nature of the provision or power and the purpose sought to be achieved by it.
c With due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature.[56]

In respect of the first factor, the equality jurisprudence from the Constitutional Court indicates that a claim of unfair discrimination will usually be upheld where the complainant is a member of a historically disadvantaged group.[57] Thus, where the complainant is part of a vulnerable group and suffers discrimination that could lead to the perpetuation of historical disadvantage, it is likely that the Court will find that unfair discrimination is present. As reasoned above, the majority of learners over the age of fifteen years is black and therefore constitutes a historically disadvantaged group. In respect of the second factor, the importance of a societal goal is directly related to the state's justification for adopting a discriminatory measure in the first place, which goes to the heart of the limitation enquiry.[58] This article considers the second factor as part of the limitation analysis below. The third factor is regarded as the most important determinant of unfair discrimination. According to Albertyn and Fredman, "dignity is generally recognised as the core value and standard of [the unfair discrimination enquiry under] section

53 Hartnack 1-2.
54 This argument is reinforced by the Constitutional Court which held in *Pretoria City Council v Walker* 1998 2 SA 363 (CC) para 32 that indirect discrimination occurs where conduct is neutral in appearance, but the consequences thereof result in discrimination.
55 *Harksen v Lane supra* para 51. These factors are not an exhaustive list. The Constitutional Court has not always been consistent in applying these three factors. See Kruger "Equality and unfair discrimination: Refining the Harksen test" 2011 *SALJ* 479 for a critique of the Constitutional Court's application of the *Harksen* test.
56 *Harksen v Lane supra* para 51.
57 See for example *Bhe v Magistrate,Khayelitsha* 2005 1 SA 563 (CC); *Moseneke v The Master of the High Court* 2001 2 SA 18 (CC).
58 Kruger 2011 *SALJ* 496.

9(3)."[59] In *Prinsloo v Van Der Linde*[60] the Constitutional Court held that unfair discrimination "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[61] According to Currie and De Waal, unfair discrimination occurs when "law or conduct, for no good reason treats some people as inferior or incapable or less deserving of respect than others."[62] The authors' perspective is clearly grounded in *President of the Republic of South Africa v Hugo* where Goldstone J stated that:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our … constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[63]

In assessing whether the dignity of the group of overaged learners is infringed, it is imperative to analyse the situation in which these learners find themselves in once they are forced out of formal schooling and become subject to the adult education system. As noted above, public adult learning centres may not be available in the specific area in which over-aged learners are residing, therefore in some cases, they literally would have no education centre to access. Furthermore, even if an adult education facility is provided, the possibility exist that the facility may close down before an academic year is completed due to the state's scant investment in the adult education system. Having been deprived of the choice to access a formal school as well as an adult education centre, these learners will no doubt end up as part of the approximately 50% of young people in South Africa without a matric certificate.[64] A recent World Bank Report on the state of inequality in South Africa confirms that poverty, inequality and unemployment increases with a low level and poor quality of education.[65] Therefore, it is probable that learners without even the minimal education qualification of a Matric certificate, are likely to become part of "the underclass of South African society where poverty and unemployment is the norm."[66] Furthermore, because the overwhelming majority of over-aged learners is black, it is clear that the current compulsory education framework perpetuates past patterns of racial disadvantage. Viewed against this background, the compulsory schooling provision, in conjunction with the age-related policy

59 Albertyn and Fredman "Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments" 2015 *Acta Juridica* 435.
60 1997 3 SA 1012 (CC).
61 *Prinsloo v Van Der Linde supra* para 31.
62 Curie and De Waal *The New Constitutional and Administrative Law, Volume 1* (2001) 244.
63 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 92.
64 Hartnack 1-2.
65 The International Bank for Reconstruction and Development / The World Bank *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 3, 81.
66 Spaull "Schooling in South Africa: How low quality education becomes a poverty trap" in De Lannoy, Swartz, Lake and Smith (eds) *South African Child Gauge* (2015) 37.

framework has a grave impact on the dignity of learners considered too old for the formal schooling system. To this end, it is argued that a claim of unfair discrimination on the basis of race, age and academic competence against learners between the ages fifteen and eighteen is valid.

3 2 The right to basic education and the best interests of the child

In the Juma Musjid ruling, the Constitutional Court confirmed that access "is a necessary condition for the achievement of [section 29(1)(a)]'.[67] It has been argued above that learners over fifteen years of age are placed in the dire position where once they are forced out of formal schooling, they face the distinct possibility of being denied access to adult education as well. Therefore, it is incontrovertible that an infringement of section 29(1)(a) occurs in respect of these learners.

The best interests standard in terms of section 28(2) of the Constitution is also implicated with regards to learners older than fifteen years. Section 28(2) provides that "a child's bests interests are of paramount importance in every matter concerning the child." The latter provision is not merely a legal principle, but a substantive right that applies to an individual child, a group of children or to children in general.[68] In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development*,[69] the Constitutional Court found that section 28(2) obliges all decision-makers in respect of children to guarantee "that the best interests of the child enjoy paramount importance in their decisions."[70] This means that the judiciary, administrative bodies and legislature, among others, must employ a child-centred approach.[71] For instance, legislation must be construed to the extent that it protects and advances children's interests and the courts must consistently show "due respect" for the rights of children.[72] South African jurisprudence does not endorse a fixed formula to determine the best interests standard. Although the indeterminacy of the concept has been criticised, the Constitutional Court per Sachs J argues that "it is precisely the contextual nature and inherent flexibility of

67 *Governing Body of the Juma Musjid Primary School v Essay supra* para 43. Italics my emphasis.

68 The best interest standard is sourced in the Convention on the Rights of the Child (CRC) to which South Africa is a state party. The Constitutional Court has pronounced that the CRC's general principles, including the one on the best interests of the child, "inform" the interpretation of the section 28(2) provision. The Court has repeatedly confirmed that section 28(2) is an independent right and that its application extends to all rights beyond those listed in section 28(1) of the Constitution. See *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

69 2009 4 SA 222 (CC).

70 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development supra* para 73.

71 *S v M supra* paras 14-15.

72 *S v M supra* paras 14-15.

section 28(2) that constitutes the source of its strength."[73] Since the context of each child or group of children is different, it is important that the content of the best interest standard be flexible and contingent on the actual facts of the specific case.[74] Therefore, an authentic child-sensitive approach necessitates a concentrated and personalised evaluation of the exact "real-life" circumstances in which children find themselves.[75]

Does the adoption of a child-sensitive approach mean that children's rights will always trump the rights of others or outweigh societal (or other) interests? In *De Reuck v Director of Public Prosecutions*,[76] the Constitutional Court held that section 28(2) does not mean that the rights of children trump every other right in the Constitution as this would be in conflict with the notion that "constitutional rights are mutually interrelated and interdependent."[77] In *S v M*, the Court confirmed that section 28(2), similar to other rights in the Bill of Rights, may be limited in terms of the limitation enquiry set out in section 36 of the Constitution,[78] thereby confirming the Court's approach in *Sonderup v Tondelli*.[79] In *S v M*, the Court held that the paramountcy of the principle does not mean that the best interests of children are absolute.[80] Cameron J, describes the paramountcy principle as meaning that "the child's interests are more important than anything else, but not that everything else is unimportant."[81]

Having sketched the general principles that guide the application of the best interests standard in South African jurisprudence, the next section will focus on the interpretation of the standard in the seminal Juma Musjid decision. This case originated in the Kwazulu-Natal High court which sanctioned the eviction of Juma Musjid Primary school, operated on private property owned by the Juma Musjid Trust.[82] In reaching this decision, the High court held that the Trust enjoys the constitutional right to property[83] and may choose to make its property available for the purposes of education.[84] The High court stressed that the Trust has no constitutional duty towards the school's learners, as opposed to the state which carries the primary obligation to provide compulsory education.[85] In the appeal judgment, Nkabinde J, writing for

73 *S v M supra* para 24.
74 *S v M supra* para 24.
75 *S v M supra para* 24.
76 2004 1 SA 406 (CC).
77 *De Reuck v Director of Public Prosecutions supra* paras 54-55.
78 *S v M supra* para 112.
79 2001 1 SA 1171 (CC).
80 *S v M supra* para 26.
81 *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 29.
82 *Governing Body of the Juma Musjid Primary School v Essay supra* para 1.
83 S 25 of the Constitution.
84 *Ahmed Asruff Essay v The MEC for Education KwaZulu-Natal*, Case No. 10230/2008, KwaZulu-Natal High Court, Pietermarizburg (16 September 2009, unreported) para 23.
85 *Ahmed Asruff Essay v The MEC for Education KwaZulu-Natal supra* para 23.

an unanimous Constitutional Court confirmed that the state incurs the primary duty to provide a basic education.[86] However, the apex Court rejected the High court's finding that the Trust has no constitutional obligation at all in respect of the affected learners. In this regard, the Constitutional Court held that the Constitution imposes a negative obligation on the Trust not to impair the learners' right to basic education in terms of section 8(2).[87] Nkabinde J continued that the High court elevated the property rights of the Juma Musjid Trust over the right to basic education of the learners and failed to properly consider the best interests of the learners before granting the eviction order.[88] She stated specifically that the High court "failed to give consideration to the impact that the eviction order would have had on the learners and their interests."[89] The Constitutional Court concluded that the High court erred in granting the eviction order. For this reason, the Court provisionally set aside the eviction order and ordered the Kwazulu-Natal Education Department, the Trust and the relevant school governing body to engage with one another with the purpose of finding alternative accommodation for the affected learners.[90] The Juma Musjid judgment emphasises that the specific impact experienced by children is a decisive factor taken into account by the Constitutional Court when it determines what constitutes the best interests of children and when it weighs up children's rights against competing rights or interests. For instance, had the eviction order granted by the High court been implemented before alternative accommodation could have been secured, the affected learners would have been left without a school to access. Therefore, it seems that the more severe the impact, the more likely it is that the Constitutional Court will find that the best interests of the child has been violated and grant an order that guarantees that the rights of children trump rivalling rights or interests. Similar to the scenario sketched in Juma Musjid, children older than fifteen years may find themselves in the dire position where they literally have no education facility to access. Drawing on the principles established in Juma Musjid and other best interests standard cases above, it is beyond dispute that the best interests of this category of children are being violated by the compulsory education legal framework.

3 3 The limitation enquiry

A finding of unfair discrimination is not the end of the matter. Any right in the Bill of Rights can be limited under the Constitution's general limitation clause.[91] In order to determine whether the state can justify its

86 *Governing Body of the Juma Musjid Primary School v Essay supra* para 57.
87 *Governing Body of the Juma Musjid Primary School v Essay supra* paras 58-60. S 8(2) of the Constitution provides 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."
88 *Governing Body of the Juma Musjid Primary School v Essay supra* para 71.
89 *Governing Body of the Juma Musjid Primary School v Essay supra* para 68.
90 *Governing Body of the Juma Musjid Primary School v Essay supra* para 74.

infringement of the rights of children older than fifteen, it is imperative to determine the reason behind these violations. As can be gleaned from the research, one of the reasons why the government has adopted the compulsory education framework, is to reduce the amount of over-aged learners in public schools, with the aim of freeing up resources in the public education system.[92] Therefore, at the core of the state's justification, is a budgetary constraints argument. It is against this background that the limitation enquiry has to be unpacked. Section 36(1) of the Constitution sets out the circumstances under which rights in the Bill of Rights may be limited:

The 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.

A significant obstacle to clear at the justification stage of the section 36 enquiry, is that the measure limiting the right must be "sourced" in a law of general application.[93] Therefore, the limitation of any right will always be unconstitutional if the right is limited by any measure other than a law of general application.[94] The meaning of a 'law of general application' has been interpreted to mean as "something which the Court recognises as law", such as legislation and which applies generally.[95] The Admissions Policy for Ordinary Public Schools limits formal schooling to learners younger than sixteen and subjects over-aged children to adult education. In this regard, the policy gives effect to section 3(1) of the Schools Act which limits compulsory schooling to learners from the age of seven up until fifteen. The effect of the compulsory school framework is that it forces over-aged children out of the formal schooling system and renders them subject to an adult education system, which in and of itself, violates the rights to basic education, equality and the best interests of the child as examined in detail above. Section 3(1) of the Schools Act is a law of general application that applies uniformly across the country. Therefore, first stage of the limitation enquiry is complied with.

The second stage of the enquiry requires that the factors listed in section 36(1) are examined and weighed up against each other. Sachs J,

91 *S v M supra* para 112.
92 Burger, Van Der Berg and Von Fintel 2015 *South African Journal of Economics* 74.
93 De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 360.
94 De Vos and Freedman 360.
95 De Vos and Freedman 361-362.

per the Constitutional Court in *Christian Education South Africa v Minister of Education*,[96] refers to this stage as a "… nuanced and context-sensitive form of balancing."[97] The Court, in *S v Makwanyane* expands on the balancing exercise:

> "In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[98]

In assessing whether a limitation of a right is justifiable, courts are not required to engage with the factors above as an exhaustive list. These factors are "key considerations" that can be used in combination with "any other relevant factors in the overall determination whether or not the limitation of a right is justifiable."[99]

The right to basic education, like any other right in the Bill of Rights, is subject to the limitation enquiry. The *Juma Musjid* ruling on the unqualified nature of section 29(1)(a) does not mean that the state is always obliged to comply with its section 29(1)(a) duties irrespective of certain restrictions that may deem it impossible to fulfil those obligations. The Constitutional Court has ruled that the right may indeed be limited in terms of the Constitution's general limitation clause.[100] Therefore, where the state is unable to comply with its obligations under section 29(1)(a), there will be a limitation of the right.[101] In *Equal Education v Minister of Basic Education*, the High court held that "in the event that the [Minister of Basic Education] is unable to [comply with her duties in terms of section 29(1)(a)], it is incumbent upon her to justify that failure under section 36 or 172(1)(a) of the Constitution."[102] In other words, where a limitation of section 29(1)(a) occurs, it is up "…to the state to justify this limitation under [the limitation clause] of the Constitution or, if the limitation is not justified, to argue that immediate relief is not just and equitable."[103] Therefore, it seems more probable that the Court will engage in a section 36 analysis and be willing to be convinced "…by the state (with whom the duty to prove the justification lies) that in some situations the state's failure to provide basic education might be reasonable and justifiable."[104]

96 2000 4 SA 757 (CC).
97 *Christian Education South Africa v Minister of Education supra* para 30.
98 *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
99 *S v Manamela* 2000 5 BCLR 491 (CC) para 33.
100 *Governing Body of the Juma Musjid Primary School v Essay supra* para 37.
101 McConnachie and McConnachie 2012 *SALJ* 557.
102 *Equal Education v Minister of Basic Education* 2018 ZAECBHC 6 para 185.
103 McConnachie and McConnachie 2012 *SALJ* 557.
104 Woolman and Fleisch *Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 125.

Concern is directed in this article towards the limitation of the rights of learners older than fifteen who are forced into the adult education system. As indicated above, the state has conceded that it has chronically under-invested in adult education. This means that the government is indeed advancing a budgetary constraints argument in respect of the right to adult basic education in terms of section 29(1)(a) of the Constitution. Taking into account that the Court has already pronounced that section 29(1)(a) is not subject to the internal limitation of "within available resources", the perplexing question arises whether resource constraints can be used as a legitimate justification by the state under a section 36 enquiry? Mandla Seleoane observes that:

> "[T]he desirability of limiting the right to basic … education on the basis of the availability of resources must be problematised. One must proceed on the basis that, where subjecting a social and economic right to the availability of resources was desired, the Constitution specifically provided for that. Therefore it would seem that the omission to subject the right to basic… education to available resources conveys that such subjection is undesirable. To limit the right on account of resource constraints would therefore, it seems, amount to defeating the objective of section 29(1)(a), namely, to free the right from such considerations."[105]

Seleoane seems to contend that the Constitution's explicit exclusion of "within available resources" from the textual formulation of section 29(1)(a) prevents the right from being subject to resource constraints under a section 36 enquiry. In coming to this conclusion, he relies on a pure textual interpretation of the Constitution citing that "where subjecting a social and economic right to the availability of resources was desired, the Constitution specifically provided for that."[106] However, the text of the Constitution also specifically provides that all rights in the Bill of Rights are subject to restriction under the limitation clause. Section 36 (1) does not distinguish between unqualified and qualified rights for the purpose of limiting these rights. The same can be said for section 7(3) which states that "[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 …". Furthermore, the jurisprudence of the Constitutional Court supports the contention that the Court has the freedom to rely on "any relevant factor in the overall determination whether or not the limitation of a right is justifiable."[107] Therefore, provided that the limitation is through a law of general application, it will be legitimate for the state to bring up resource constraints in proving a justifiable limitation of the right.[108] For that reason, the question that should be focused on, is not whether resource constraints can be relied upon in a limitation analysis of section 29(1)(a), but what weight will a court attach to budgetary constraints as

105 Seleoane "The right to education: Lessons from *Grootboom*" 2003 *Law, Democracy and Development* 140-141.
106 Seleoane 2003 *Law, Democracy and Development* 140-141. Italics my emphasis.
107 *S v Manamela supra* para 33. Italics my emphasis.
108 Woolman and Fleisch 25.

justification by the state for its limitation of the right to basic education.[109]

The South African courts have not been provided with a case where it was compelled to apply the limitation clause to the right to basic education. However, some guidance can be obtained from jurisprudence stemming from cases dealing with the limitation of the other unqualified rights in the Constitution. An example of such a case is *Centre for Child Law v MEC for Education*.[110] In this case, the Centre for Child Law lodged an application with the former Pretoria High Court (now the North Gauteng High Court) alleging, inter alia, that the deplorable physical environment in which learners at the hostels of JW Luckhoff school were housed, amounted to an infringement of section 28(1)(c)[111] of the Constitution.[112] The latter provision states that "[e]very child has the right to basic nutrition, shelter, basic health care services and social services." Similar to section 29(1)(a) of the Constitution, section 28(1)(c) is unqualified. The court observed that:

> "What is notable about the children's rights in comparison to other socio-economic rights is that section 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation. Like all rights, they remain subject to reasonable and proportional limitation …"[113]

The state argued that it could not improve the physical conditions in which the learners were housed because of "budget constraints."[114] Of interest to this article, is the court's response to the latter justification. The court noted that:

> "[O]ur Constitution recognises that, particularly in relation to children's rights …, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. The minimal costs or budgetary allocation problems in this instance are far outweighed by the urgent need to advance the children's interests in accordance with our constitutional values."[115]

The approach in Luckhoff alludes to a general principle that has been established in the Constitutional Court's jurisprudence on the section 36(1) enquiry, namely that "…the importance of the right [in light of the values of the Constitution] is a factor which must of necessity be taken into account in any proportionality analysis."[116] In *S v Makwanyane*, the

109 Italics my emphasis.
110 Case No 19559/06 (T) (30 June 2006).("*Luckhoff decision*").
111 S 28(1)(c) is part of the broader s 28 of the Constitution, a clause containing a list of children's rights.
112 *Luckhoff decision supra* 1-2.
113 *Luckhoff decision supra* 7.
114 *Luckhoff decision supra* 7-8.
115 *Luckhoff decision supra* 7-8. Italics my emphasis.
116 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 34.

Court held that "[i]n the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality …"[117] Although the Constitutional Court has denied a hierarchy of rights under the Constitution, some of its pronouncements do indeed imply some sort of hierarchy.[118] For example, in *S v Makwanyane*, the Court held that "the rights to life and dignity are the most important of all human rights."[119] In *Bhe v Khayelitsha Magistrate*, the Court stated that "[t]he rights to equality and dignity are the most valuable of rights in any open and democratic state."[120] De Vos and Freedman reason that "[i]f there is some hierarchy, logically those rights which are directly based on the founding constitutional values of dignity, freedom and equality are likely to receive greater attention than others."[121] Their contention finds approval in the jurisprudence of the Constitutional Court. In *S v Mamabolo,*[122] the Court held that "human dignity, equality and freedom are conjoined, reciprocal and covalent values which are foundational to South Africa."[123] Retired Constitutional Court Judge Kriegler has warned that if the right to dignity is compromised, "the society to which we aspire becomes illusory."[124] He stated further that "any significant limitation [of the right to dignity], would for its justification demand a very compelling countervailing public interest."[125] In *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development*,[126] Mokgoro J took a similar approach by asserting that the rights to life, equality and dignity must be given consideration in socio-economic rights cases.[127] She found that the denial of social security benefits to permanent residents was an infringement of not only section 27(1)(c) of the Constitution, but also of the rights to dignity and equality which were

117 *S v Makwanyane supra* para 104. Italics my emphasis.
118 De Vos and Freedman 374.
119 *S v Makwanyane supra* para 144.
120 *Bhe v Khayelitsha Magistrate supra* para 71.
121 De Vos and Freedman 374.
122 2001 3 SA 409 (CC).
123 *S v Mamabolo supra* para 41. S 1(a) of the Constitution states: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: *Human dignity, the achievement of equality and the advancement of human rights and freedoms.*" S 7(1) of the Constitution provides: "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.*" S 39(1)(a) of the Constitution: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on *human dignity, equality and freedom.*" (Italics my emphasis). See also Moyo "The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence" in Bohler-Muller, Cosser and Pienaar (eds) *Making the Road by Walking:The Evolution of the South African Constitution* (2018) 89.
124 *Ex parte Minister of Safety and Security: In re S v Walters* 2002 4 SA 613 (CC) para 28.
125 *Ex parte Minister of Safety and Security: In re S v Walters supra* para 28.
126 2004 6 SA 505 (CC).
127 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* paras 40-44.

referred to as founding values lying "at the heart of the Bill of Rights."[128] Thus, based on the aforementioned jurisprudence, it becomes clear that where the values and/or rights of dignity, equality and freedom are implicated in the violation of a right, the Constitutional Court will likely find the limitation of the right unjustifiable unless the state provides compelling reasons for the justification.

It is very difficult to conceive of a right more directly grounded in the foundational values of the Constitution than the right to basic education. Kollapen J captures the essence of the right:

> "[I]f regard be had to the history of an unequal and inappropriate educational system, foisted on millions of South Africans for so long, and the stark disparities that existed and continue to exist in so many areas and sectors of our society, education takes on an even greater significance. It becomes at the makro[sic] level an indispensable tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a sine qua non to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society."[129]

Bilchitz argues that "the Constitution places three central values at the core of the society it is designed to create: human dignity, the achievement of equality and the advancement of human rights and freedoms."[130] In other words, the ultimate outcome of the South African constitutional project, is the establishment of a society based on these values. As an "indispensable tool in the imperatives that the Constitution contemplates", the right to basic education is therefore essential in the establishment of a South African society based on the foundational values of the Constitution. The right to basic education which has been described as a "… central and interlocking right in the architecture of the rights framework in the Constitution"[131], plays a crucial role in unlocking the realisation of other rights.[132] This means that the right is fundamental to the development of individual lives lived in dignity, equality and freedom. Therefore, it is difficult to conceive that the state can convince any court that a budgetary restraints argument in limiting the section 29(1)(a) right of over-aged learners is justified. Furthermore, the Luckhoff judgment suggests that a lack of state resources cannot be presented as a justifiable limitation on the urgent needs of children. The needs of children older than fifteen, in particular, who are placed in a situation where they are unable to access any type of educational facility,

128 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra* para 85. S 27(1)(c) of the Constitution provides: "Everyone has the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance."

129 *Section 27 v Minister of Basic Education* 2012 3 All SA 579 (GNP) para 5.

130 Bilchitz "Does transformative constitutionalism require the recognition of animal rights?" in Woolman and Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 173.

131 *Section 27 v Minister of Basic Education supra* para 2.

132 *Section 27 v Minister of Basic Education supra* para 4.

undoubtedly meet the threshold of urgency. Therefore, the state's budgetary restrictions argument would not constitute a justifiable limitation of the section 29(1)(a) entitlement and the best interests standard of the group of learners older than fifteen.

Lastly, this article examines whether the unfair discrimination finding in respect of these learners, is justifiable in terms of the limitation enquiry. An analysis of the equality provision has to take place against the understanding that the Constitution endorses a substantive notion of quality.[133] This particular form of equality was adopted with the purpose of eradicating systemic inequality in South African society so as to ultimately achieve the transformative vision of the Constitution.[134] In *Minister of Finance v Van Heerden*, the Constitutional Court held:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage."[135]

According to De Vos, the transformative vision of the Constitution requires that the right to equality be interpreted more widely so as to embrace a positive aspect.[136] In practical terms, this mean that the state must take active steps to achieve the transformative objectives of the Constitution.[137] Therefore, whenever the courts examine a violation of equality, it has to determine whether the impact of the infringing measure would further the goal of transformation or not.[138] Measures that contribute towards the "creation or perpetuation of patterns of group disadvantage for groups disfavoured in the past, will be constitutionally suspect." [139]

The current compulsory education framework results in the creation of patterns of perpetual disadvantage against black learners. Therefore, these learners are condemned to a life of unemployment and poverty and are rendered incapable of contributing to the transformation of South African society. The Constitution demands that the state eradicate systemic inequality, not perpetuate it as is currently the case with the compulsory education framework. Viewed from this perspective, a resource constraints argument does not constitute a reasonable and justifiable limitation of the right to equality of over-aged learners.

133 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) paras 25-27.
134 *Minister of Finance v Van Heerden supra* paras 25-27.
135 *Minister of Finance v Van Heerden supra* para 27.
136 De Vos "Grootboom, The right of access to housing and substantive equality as contextual fairness" 2001 *SAJHR* 266.
137 De Vos 2001 *SAJHR* 266.
138 De Vos 2001 *SAJHR* 266.
139 De Vos 2001 *SAJHR* 266.

4 Conclusion

In this article, I have drawn attention to the constitutionality of the compulsory education legislative and policy framework. The focus was placed on a specific cohort of learners between the ages of fifteen and eighteen who are beyond the compulsory school going age and regarded as 'adults' for the purposes of adult education. These learners are recipients of the right to adult basic education in terms of section 29(1)(a) of the Constitution. The age-related legislative and policy framework in combination with government's poor regulation of and chronic underinvestment in adult education have resulted in the violation of various constitutional rights. These include the right to basic education, the best interests of the child standard as well as the right to equality. This article concluded that the importance of the right to basic education (which includes the right to adult basic education) in light of the values of the transformative Constitution will probably outweigh a budgetary constraints arguments advanced by the state in respect of section 29(1)(a).

Finally, thoughts on a possible solutions to the matter raised in this article are outlined here. It is important to emphasise that this article is not in favour of an argument that a learner should have access to a particular grade in a formal school, irrespective of their age. There are various social, psychological and other reasons as to why learners close in age should be grouped together in a specific grade. However, those reasons were not explored in this article because they fall beyond the expertise of a legal academic. Instead, the intention of this article has been to highlight the infringement of various constitutional rights of the affected learners and hopefully, kickstart a debate on how to tackle this multifacted problem.

The feasibility of the victims of corruption's claim for constitutional damages against corrupt public officials in South Africa

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SUMMARY

South Africa, just like other countries, is grappling with corruption in the private and public sectors. For this reason, the state has adopted various measures aimed at fighting this scourge. Part of the measures adopted, in this regard, are the legal measures. This article argues that, in addition to the legal measures in place, there is a feasibility for victims of corruption to pursue a claim for constitutional damages arising from corruption by public officials. This contention is based on the fact that constitutional damages is an appropriate remedy for corruption cases involving public officials.

1 Introduction

Corruption, whether by public or private individuals, knows no boundaries. For this reason, the term "corruption" is well known throughout the world.[1] This is evident from the reaction of the international community and different countries to corruption.[2] South Africa's reaction to this scourge emanates from the negative impact that corruption has on political, economic and social life. The following Judge Baqwa's remarks in *Sammy Aron Mofomme v S* are instructive:

> "… our society stands at a precipice where corruption seems to have penetrated every nook and cranny of society to a point where every aspect be it political, economic, social or constitutional is so eroded, so threatened as to bring down the whole edifice."[3]

In addition to regulating this area of life, South Africa also established State Institutions such as the Special Investigating Unit, Human Rights Commission, and Public Protector, among others, which are partly

1 *Ortiz-Ospina and Roser Corruption* 2016 https://ourworldindata.org/corruption (accessed 2018-05-10).

2 Some of the Treaties are: United Nations Convention Against Corruption, adopted on 31October 2003, entered into force on 14 December 2005; the African Union Convention on Preventing and Combating Corruption adopted 1 July 2003, entered into force on 01 August 2006. SADC Protocol against Corruption Adopted 14 August 2001, entered into force on 6 August 2003.

3 (A812/2016) [2017] ZAGPPHC 719; 2018 (1) SACR 213 (GP) (9 November 2017) para 21.

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tasked to deal with corruption. The existence of these measures, essentially, is indicative that corruption is not condoned.[4] This is evident from the fact that neither state institutions nor corrupt public officials are exempted from the wrath of the law. The court captured this assertion in the case of *Mohamed v President of RSA* as follows:

> "The Department of Justice represents the State and its employees represent the department … South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example."[5]

In light of the various legal consequences of corruption by public officials in South Africa,[6] this article seeks to pursue the feasibility of victims' claim for constitutional damages arising from corruption by public officials in South Africa. This article draws inspiration from the United Nations Convention Against Corruption[7] and the Criminal Procedure Act (CPA)[8] which affirm the payment of compensation for corruption.[9] The first part of this article analyses the extent of corruption by public officials and the legal consequences of corruption. The second part explores constitutional damages as an appropriate relief in South Africa. The third and the last part then sets out the legal basis for the feasibility of the victims of corruption's claim for constitutional damages as an appropriate relief for corruption by public officials. This article, in essence, argues that in addition to the legal measures in place, the victims of corruption are legally entitled to pursue a claim for constitutional damages arising from corruption by public officials.

2 The extent of corruption by public officials and its legal consequences

Corruption by public officials, just like corruption by private sector actors, poses a serious challenge for the government, the courts, and the people of South Africa. This scourge has been overwhelming South Africa as far back as when it became a democratic country. For instance, it was

4 De Vos *On Nelson Mandela: Compassion and corruption: choosing the difficult path Transition No. 116* (2014) 49, emphasis added https://constitutionally speaking.co.za/wp-content/uploads/2015/12/Compassion-and-Corruption.pdf (accessed 2018-05-22).
5 2001 (3) SA 893 CC para 68; *Sammy Aron Mofomme v S supra,* para 23.
6 The legal consequences of the law on corruption will be discussed shortly.
7 United Nations Convention Against Corruption *supra*.
8 Criminal Procedure Act 51 of 1977.
9 The details of these instruments will be discussed shortly.

revealed in 1996 that the Department of Social Services lost about R1,5 billion a year as a result of corruption in the delivery of social grants.[10] Few years later, corruption began to involve members of the public who were paying for extra services and the delivery of social grants. After all, around 2003 and 2004, between 15% and 30% of public officials were reported to have received payment for extra services regarded as a "back-door" solutions to the clients' problems.[11]

A decade later, the levels of corruption in the public sector had reached alarming levels, to the extent that the courts described corruption as so "endemic that all right–thinking members of society must be sick and tired of it".[12] However, despite the courts' stance on corruption, it persisted to be rife in South Africa that by the year 2018, it had manifested itself in all the Provinces.[13] Government Institutions such as Schools, Municipalities, South African Police Services (SAPS), Licensing Centres, State Owned Entities (SOE's), and the Health Sector were the hardest hit by this scourge.[14] For instance, about 35.5% of corruption cases concerned the mismanagement of school funds by school officials in order to create favourable conditions for friends and relatives who sought procurement deals and employment opportunities.[15] Further, 7.9% and 3.1% of cases had to do with theft of school resources and sextortion at schools, respectively.[16] The SAPS, Health Sector, and the SOE's are no different. About 28.9% of Police Officers are reportedly accepting bribes from suspects in return for their dockets to be destroyed and their crimes ignored.[17] The bribery and irregularities in the Health Sector and the SOE's are associated with procurement and employment.[18] About 44% of procurements in the SOE's are irregular and 20.3% of cases involves bribery which includes sending officials on expensive holidays and catering for their lavish lifestyles.[19]

10 Council for the Advancement of South African Constitution, "The Impact of Corruption on Governance and Socio-economic Rights" 2011 7 http://www.casac.org.za/wp-content/uploads/2011/09/IMPACT-OF-CORRUPTION.pdf, (accessed 2020-02-05), citing Andile Sokomani and Trusha Reddy, Corruption and Social Grants in South Africa 2008 1 http://www.iss.co.za/uploads/MONO154FULL.PDF1 (accessed 2019-10-04).

11 United Nation Office on Drugs and Crime and Department of Public Service and Administration sacorruptionassessment report 2003 3 https://www.westerncape.gov.za/text/2004/4/sacorruptionassessmentreport2003.pdf (accessed 2019-05-10).

12 *S v Boshoff* (CA &R 390/12) [2013] ZAECGHC 102; 2014 (1) SACR 422 (ECG) (27 September 2013) para 39.

13 Corruption Watch *Analysis of Corruption Trends Report* (2018) https://www.corruptionwatch.org.za/cws-2018-analysis-corruption-trends-report-now-available/ (accessed 2019-10-04).

14 Corruption Watch *supra.*

15 Corruption Watch *supra.*

16 Corruption Watch *supra.*

17 Corruption Watch *supra.*

18 Corruption Watch *supra.*

19 Corruption Watch *supra.*

The foregoing statistics around corruption could, therefore, be interpreted to mean not only that corruption by public officials is rampant in South Africa but also that it has a negative impact on the lives of millions of people of South Africa who are dependent on the State for their survival.

It is worth, however, to note that there are some legal consequences of corruption by public officials. The criminal law consequences of corruption by public officials could be deduced from the Prevention and Combating of Corrupt Activities Act (PCCAA).[20] The PCCAA deems a public official who engages in the following broad acts of corruption directly or indirectly as committing a punishable offence:

> "a accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of another person or
> b gives or agrees or offers to give to any other person any gratification for the benefit of that other person or for the benefit of another person in order to act personally or by influencing another person so to act in a manner
> i that amounts to
> aa) illegal, dishonest, unauthorised, incomplete, or biased; or
> bb) misuse or selling of information or material acquired in the course exercise, carrying out or performance of any powers, duties or function arising out of a constitutional, statutory, contractual or any other legal obligation;
> ii that amounts to –
> (aa) the abuse of a position of authority:
> (bb) a breach of trust; or
> (cc) the violation of a legal duty or a set of rules:
> iii designed to achieve an unjustified result: or
> iv that amounts to any other unauthorised or improper inducement to do or not to do anything."[21]

Over and above these foregoing punishable acts, the PCCAA criminalises an act where a public official holds a private interest in a contract, agreement or investment which is connected with the state institution for which he/she is an employee.[22] These punishable acts of corruption by the PCCAA not only seek to prevent corruption but also align South Africa with the international community in the fight against this scourge. For instance, as it is the case in South Africa, the United Nation deems as illegal or as corruption "any act or omission in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these".[23] Further, the World Bank and Transparency International deem as illegal or as corruption the use of public resources for personal gain and deem bribery as the "offering, promising, giving, accepting or soliciting of an

20 Prevention and Combating of Corrupt Activities Act (PCCAA) 12 of 2004.
21 S 4(1); S 7(1); S 8(1) and S 9(1) of the PCCAA.
22 S 17(1) of the PCCAA.

advantage as an inducement for an action which is illegal or a breach of trust", respectively.[24]

Apart from the PCCAA, the Public Finance Management Act;[25] the Local Government: Municipal Finance Management Act;[26] and the Prevention of Organised Crime Act[27] directly or indirectly attach some form of criminal sanctions against corrupt public officials. For instance, in prohibiting irregular, fruitless and wasteful losses resulting from a criminal conduct, both the Public Finance Management Act and the Local Government: Municipal Finance Management Act recommend either a fine or imprisonment for an irregular, fruitless and wasteful expenditure. The Prevention of Organised Crime Act, on the other hand, allows courts to impose a fine not exceeding R100 000 000 or imprisonment for a period up to imprisonment for life to any person who receives or retains any property that has been obtained directly or indirectly from racketeering activity.[28]

The civil law legal consequences of corruption by public officials, on the other hand, could be gleaned from the United Nations Convention Against Corruption[29] and the CPA.[30] The United Nations Convention Against Corruption partly obliges state parties to ensure that people who have suffered damage as a result of corruption get compensated.[31]This Convention is given effect to by section 300(i) of the CPA which provides that:

> "Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor

23 Article 7 of the Code of Conduct for Law Enforcement Officials adopted by Resolution 36/169 of the 17th of December 1979 https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx (accessed on 2021-03-10). The United Nations Convention against Corruption *supra* describes corruption, as Danilet argue in a book entitled, *Corruption and Anti-corruption in the Justice System* 2009 6, as any act of bribery, influence peddling, abuse of functions, illicit enrichment, laundering of proceeds of crime, concealment, obstruction of justice.

24 Combat *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8 http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf (accessed 2021-03-10). Transparency International *Business Principles for Countering Bribery* (2013) http://www.transparency.org/global_priorities/private_sector/business_principles (accessed 2021-03-10).

25 Public Finance Management Act 1 of 1999.

26 Local Government: Municipal Finance Management Act 56 of 2003.

27 Prevention of Organised Crime Act 121 of 1998.

28 S 3 of the Prevention of Organised Crime Act 121 of 1998.

29 The United Nations Convention Against Corruption *supra*.

30 Criminal Procedure Act *supra*.

31 Article 35 of the United Nation Convention Against Corruption *supra*. South Africa signed this Convention on 09/12/2003 and ratified it on 22/11/ 2004.

> acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss …"[32]

This section, essentially, empowers the victims of corruption to institute legal proceedings for compensation emanating from corruption by public officials. However, for the purposes of section 300(i) of the CPA,[33] courts can only issue an award for compensation against a corrupt public official if he or she is in a financial position to pay it.[34] However, the foregoing legal consequences of corruption do not make any specific mention of a claim for constitutional damages emanating from corruption by a public official. It is on this basis that the next paragraphs focus on constitutional damages as an appropriate relief and the feasibility of the victims of corruption to claim constitutional damages against a corrupt public official.

3 Constitutional damages as an appropriate relief

The claim for constitutional damages emanates from the Constitutional Court's interpretation of section 7(4) of the Interim Constitution (1993) which later became section 38 of the Final Constitution (1996) in the case of *Fose v Minister of Safety and Security*.[35] Section 38 of the Final Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights ..."

In interpreting this section, the Constitutional Court categorically stated that constitutional damages would qualify as an appropriate relief for the violation of a constitutional right. The Constitutional Court argued this as follows:

> "… it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights …"[36]

It is on this basis that Shaun argues that "[t]he starting point for a claim for constitutional damages in South Africa is section 38 of the Constitution."[37]

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32 The incorporation of United Nation Convention Against Corruption into the Criminal Procedure Act renders it enforceable in South African courts.
33 Criminal Procedure Act *supra*.
34 *S v Huhu* (96/2012) [2013] ZAFSHC 74 (16 May 2013) para 4, citing the case of *S v Khoza* 2011 (1) SACR 482 (GSJ) 8.
35 *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997).
36 *Fose v Minister of Safety and Security supra*, para 60.
37 Barns "Constitutional damages: A call for the development of a framework in South Africa" 2013 *Journals* 9 https://www.journals.ac.za/index.php/responsa/article/view/3790 (accessed on 2021-03-10).

This remedy, unlike other constitutional reliefs, seeks to compensate a person who has suffered loss because of a breach of a constitutional right.[38] According to Currie and De Waal, there are two reasons that justify an award of constitutional damages:

> "First, there are situations where a declaration of invalidity or an interdict makes little sense and an award for damages is then the only form of relief that will vindicate the fundamental rights and deter future infringements.
>
> Secondly, the possibility of substantial award of damages may encourage victims to come forward and litigate, which may in itself serve to vindicate the Constitution and to deter further infringements."[39]

The general principles regulating constitutional damages, as developed by the courts over the years, are as follows: This remedy is to be awarded only if it is appropriate considering the circumstances of each case and the particular right which has been infringed.[40] The appropriateness of this remedy lies in its effectiveness and vindication of a constitutional right and in its upholding the values underlying the Constitution.[41] Barns, citing the case of *Fose v Minister of Safety and Security,* sums up these principles as effectiveness, suitability and a just relief.[42] The effectiveness of this remedy focuses on its ability to vindicate the Bill of Rights and deters future violations.[43] This partly includes taking into account the poor status of the victims of corruption.[44] Suitability of this remedy, on the other hand, considers whether this remedy fit the nature of the infringement and its impact.[45] Just relief requires that the interest of those affected by the remedy are accounted for.[46] It is worth noting that vindication of a constitutional right goes beyond the person who suffered harm to society as a whole because the infringements of a citizen's rights "impair public confidence and diminish public faith in the efficacy of the protection".[47]

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38 Barns 9.
39 Currie and De Waal *The Bill of Rights Handbook* (2013) 200.
40 *Fose v Minister of Safety and Security supra,* para 60.
41 *Fose v Minister of Safety and Security supra,* para 69. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay II*) para 42. *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) paras 46 and 48. *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39 para 203. *MEC for the Department of Welfare v Kate (580/04)* [2006] ZASCA 49; 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) (30 March 2006) para 27.
42 Barns 9 citing *Fose v Minister of Safety and Security supra,* 826.
43 Barns 9.
44 This was one of the factors that the court took into account when awarding constitutional damages as appropriate remedy in the case of *MEC for the Department of Welfare v Kate supra,* para 31. This factor is also reiterated by De Vos in his article entitled, "Glenister: a monumental judgment in defence of the poor" 2011 https://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defence-of-the-poor (accessed 2018-05-22), emphasis added.
45 Barns 9 citing *Fose v Minister of Safety and Security supra,* 826.
46 Barns 2013 9, citing *Fose v Minister of Safety and Security supra,* 836.

The appropriateness of constitutional damages also lies in the advantage it has over other reliefs in a particular case. For instance, in awarding constitutional damages in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, the court stressed the importance of considering the advantage that this remedy has over other constitutional reliefs.[48] In summing up these principles, the Supreme Court of Appeal (SCA) listed the following factors, among others, that play a role in determining whether the constitutional damage is appropriate in the case of *MEC for the Department of Welfare v Kate*:

> "… the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned."[49]

The case of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency,* however, also stressed that appropriate relief is the one that serves the interests of the society. The court argued this as follows:

> "In crafting an appropriate remedy, even where a range of court orders have been violated, the interests of the public must remain paramount."[50]

Thus, the court will award constitutional damages as an appropriate relief if it has the effect of serving the interest of the society in a particular case. It also seems that our courts seem to favour an award for constitutional damages as an appropriate relief for cases involving pecuniary loss as opposed to non-pecuniary loss.[51] However, it is worth noting that constitutional damages are not appropriate in a case where the court has already awarded common law damages. The reason being common law

47 Barns 10.

48 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 31-33.

49 *MEC for the Department of Welfare v Kate supra,* para 25.

50 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency supra*, para 32. *Department of Transport and Others v Tasima (Pty) Limited supra*, para 205.

51 This contention stems from the case of *Fose v Minister of Safety and Security supra,* para 74 in which the court avoided dealing with a claim that does not sound in money and indicated that jurisprudence pertaining to claims not sounding in money would be gradually developed. In rejecting the constitutional damage claim for partly being a non-percuniary loss, the SCA in the case of *R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 58, partly referred to some of the following cases where the courts awarded constitutional damages for percuniary loss: *MEC for the Department of Welfare v Kate supra,* in which the court granted constitutional damages equivalent to the interest which would have been payable on the money which had been unlawfully withheld; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd supra,* where the court ordered the State to pay damages equivalent to the value of land that had been lost due to a squatter invasion that occurred after the State failed to provide land for occupation by the residents of an informal settlement. Thus, the courts are yet to award a constitutional damage for a non-pecuniary loss.

damage could also serve as an appropriate relief that protects or vindicates a constitutional right. The following paragraph in the case of *Fose v Minister of Safety and Security* is instructive:

> "[O]ur common law of delict is flexible and will in many cases be broad enough to provide all the relief that would be appropriate for a breach of the constitutional right, depending of course on the circumstances of each particular case."[52]

4 The feasibility of the victims of corruption's claim for constitutional damages against corrupt public officials

Having analysed the extent and legal consequences of corruption as well as constitutional damages as an appropriate relief, this part of this article outlines the feasibility of the victims of corruption's claim for constitutional damages arising from corruption by public officials in South Africa. In other words, the following paragraphs are indicative of an appropriateness of the constitutional damages for corruption by public officials in South Africa. The appropriateness of constitutional damages in this regard emanates from the following hypothetical example:

The Department of Human Settlement issues a R500 000 000 tender to Mr X in terms of which Mr X is to erect 200 houses for the community of Seshego over a period of five years. However, on the expiry of the period of five years, it turns out that Mr X has erected 100 houses instead of 200. Mr X's version is that his failure to build the other 100 houses is that he transferred R250 000 000 of the R500 000 000 as a gratification to the public officials of the Department of Human Settlement who had pulled the strings in ensuring that he was awarded the tender.

This hypothetical example, by far, depicts an act of corruption on the part of the public officials of the Department of Human Settlement. The public officials' acceptance of R250 000 000 amounts to corruption as described by the PCCAA and international regulations. As already argued above, the PCCAA and international regulations deem as punishable act a situation whereby public officials accept gratification from any person for their own benefit.[53] The reason being, such an act amounts to an unauthorised performance and has the effect of abusing position of authority; breaching trust; and violating legal duties. Danilet describes

52 *Fose v Minister of Safety and Security supra,* para 58; *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) para 67*; R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 58.

53 Ss 4(1); S 7(1); S 8(1) and S 9(1) of the PCCAA *supra*; Article 7 of the Code of Conduct for Law Enforcement Officials *supra*; The UN Convention against Corruption *supra*; Combat *supra*; Transparency International *supra*.

this situation as an abuse of office for the purpose of satisfying personal interests.[54]

Having established that an acceptance of R250 000 000 by public officials would amount to corruption, it becomes crucial to set out the basis for an appropriateness of constitutional damages for the aforementioned hypothetical example. The appropriateness of this remedy for this hypothetical case is based on the application of the principles regulating the appropriateness of constitutional damages and which are: effectiveness, suitability and just relief[55] and which are summarised as "… the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned".[56]

First and foremost, this remedy would be effective in that it would vindicate the most important constitutional rights of the Seshego community (victims of corruption)[57] such as the right to equality, right to development[58] and the right to have access to adequate housing.[59] These rights would be vindicated on the following grounds: Firstly, an act of corruption on the part of the public officials in this hypothetical example infringes them as it would have an effect of diverting funds that are intended for their development as some of the members of Seshego community would end up not receiving houses. Put differently, an act of corruption by public officials would reinforce the existing socio-economic inequality,[60] and abuses public trust in violation of some of the members of Seshego community's rights.[61] So, corruption by public officials would

54 Danileţ 10.

55 As summarised by Barns 9 citing *Fose v Minister of Safety and Security supra,* 826.

56 As summarised by the SCA in the case of *MEC for the Department of Welfare v Kate supra,* para 25.

57 This assertion is inspired by the PPCCAA *supra* which acknowledges that corruption and related corrupt activities undermine the constitutional rights. It also draws inspiration from the Constitutional Court case of *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) (17 March 2011) para 177 in which the Constitutional Court argued "… It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy …"

58 Moyo "An analysis of the impact of corruption on the realisation of the right to development" 2017 *South African Journal on Human Rights* Vol 33 No. 2 193-213, emphasis added.

59 Danileţ 10.

60 Council for the Advancement of South African Constitution 3, emphasis added.

61 In establishing the link between the breach of public trust and the violation of human rights, the Constitutional Court, in the case of *K v Minister of Safety and Security* (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC) (13 June 2005) para 56 found that the actions of the policemen when raping the applicant not only amounted to an abuse of authority or breach of public trust but also infringed her rights to dignity and security of the person. While this case

undermine the rights of the very poor members of the Seshego community who have nothing to sustain them and have no knowledge of their rights and have no resources readily to secure them.[62] This factor, essentially, echoes the following former United Nations (UN) High Commissioner for Human Rights, Judge Navi Pillay's, remarks in favour of a human rights-based approach to anti-corruption:

A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promise of freedom from fear and freedom from want."[63]

Secondly, an act of corruption on the part of public officials violates the foregoing rights in a constitutionally unjustifiable manner. In other words, an act of corruption by public officials cannot be justified under section 36 of the Constitution or by the internal limitation clause in the community's right to adequate housing. This contention is based on the following factors: an act of corruption is a criminal act; an act of corruption does not constitute a law of general application;[64] and that corruption by public officials is contrary to constitutional values such as human dignity, the achievement of equality and the advancement of human rights and freedoms.[65] After all, corruption by public officials partly weakens accountability structures which are responsible for

dealt with whether the Minister of Police was vicariously liable for the actions of the policemen, it serves as an authority for an argument that the corrupt act of the public official has the effect of violating the right to dignity. The Supreme Court of India from the case of *Common Cause A Regd. Society v Union Of India And Ors* on 4 November, 1996 https://indiankanoon.org/doc/1155600/ (accessed 2020-06-05) made it clear that the Minister's betrayal of trust reposed in him had the effect of violating human rights.

62 As mentioned above, this was one the factors that the court took into account when awarding constitutional damages as appropriate remedy in the case of *MEC for the Department of Welfare v Kate supra*, para 31.

63 Former UN High Commissioner for Human Rights, Judge Navi Pillay, Corruption kills. Here's what we can do to address the rot, lecture delivered at the University of KwaZulu-Natal on 2018 https://www.news24.com/citypress/voices/corruption-kills-heres-what-we-can-do-to-address-the-rot-20180316, (accessed 2020-06-05).

64 The same argument was raised by the Constitutional Court in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd supra*, para 52 when it argued that section 36 of the Constitution (1996) was not applicable since no law of general application has been invoked in the limitation of Modderklip Boerdery's rights.

65 In *South African Association of Personal Injury Lawyers v Hendrik and others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) para 35, Chaskalson P argued that, "'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution …" The importance of human dignity in the limitation of human rights was

protecting human rights.[66] The internal limitation clause in the community's right to adequate housing cannot also rescue an act of corruption by public officials. In other words, it is highly unlikely that corruption by public officials can be deemed to be reasonable for the purposes of the right to adequate housing.

The suitability of constitutional damages for the afore-mentioned hypothetical example would emanate from the following three factors: Firstly, other constitutional reliefs would not be appropriate for this hypothetical example. In other words, there would be no other alternative remedies that might be available to assert and vindicate the most important rights of the Seshego Community, mentioned above. The reason being, the declaration of rights would not assist the victims of corruption (Seshego Community) to recover the loss they would have suffered. Further, while a remedy of *mandamus* might be effective in cases where public officials have breached or threatened to breach a constitutional right,[67] it would not be suitable for this hypothetical example because the Seshego community would have already lost R250 000 000 as a result of corruption. Secondly, the Seshego community would have suffered a pecuniary loss (R250 000 000 which is the consequence of the breach of the rights of Seshego community) and which could be recovered only by a claim for constitutional damages.[68] Thirdly, constitutional damages for this hypothetical example would also be in line with the United Nations Convention Against Corruption to which South Africa is a party, and which partly obliges state parties to ensure that people who have suffered damage as a result of corruption get compensated.[69]

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stressed by the court in the case of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 35.

66 Okpaluba "The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law" 2018 *SA Public Law Journal* 1-39.

67 *MEC for the Department of Welfare v Kate supra,* para 31.

68 As already mentioned, in rejecting the constitutional damage claim for partly being a non-percuniary loss, the SCA in the case of *R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 58, partly referred to some of the following cases where the courts awarded constitutional damages for percuniary loss: *MEC for the Department of Welfare v Kate supra*; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd supra*.

69 Article 35 of the United Nation Convention Against Corruption *supra*.

The justness for constitutional damages for the foregoing hypothetical example would be based on three factors: Firstly, this remedy would serve the interests of the society[70] in that it would enable the Seshego community to recover (R250 000 000) which belongs to them and not the state. This contention draws inspiration from the following remarks of Chief Justice Mogoeng:

> "… The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests… They convey a very profound reality that State power, the land and its wealth all belong to "we the people", united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people …"[71]

Secondly, this remedy would seek to address or deal with corrupt or unfaithful public officials. As Currie and De Waal argue, compensation for an aggrieved party is necessary in cases where "the administrative decision is taken in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision".[72] Thirdly, this remedy would serve as a maintenance of public confidence and faith in the efficacy of this remedy.[73]

5 Conclusion

South Africa is battling corruption by public officials. However, South Africa needs to be commended for putting in place some measures that are aimed at dealing with corruption. However, the recent statistics on corruption paints a disheartening picture, especially the one involving public officials. It is on this basis that the author reveals another legal mechanism (a claim for constitutional damages against corrupt public officials) that can also be pursued in the fight against corruption by public officials. This assertion is based on two factors emanating from the hypothetical example, discussed above. The first one is that the public officials' acceptance of R250 000 000 would amount to corruption as described by the PCCAA and international regulations. The second one is that constitutional damages would be an appropriate relief for the hypothetical case, discussed above, taking into account the principles regulating constitutional damages as an appropriate relief in South Africa. In other words, constitutional damages would be an effective,

70 Serving the interests of the society is one of the critical factors considered when crafting an appropriate remedy in a particular case. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency supra,* para 32; *Department of Transport and Others v Tasima (Pty) Limited supra,* para 205.

71 *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017) para 7.

72 Currie and De Waal 200.

73 This is in line with Barns' article 10 which is based on the case of *Fose v Minister of Safety and Security supra,* 836, emphasis added.

suitable and a just relief considering the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned and other relevant factors.

Constitutional damage would be effective in that it would vindicate the most important rights of the poor community of Seshego. It would be suitable since no other constitutional reliefs would be appropriate for the hypothetical example, discussed above. The suitability of this remedy would lie in the fact that the loss that the Seshego community (victims of corruption) would have suffered is a pecuniary loss (R250 000 000 which is the consequence of the breach of the rights of Seshego community) for which constitutional damages has already been awarded by the courts in South Africa. The justness of constitutional damages for the hypothetical example, discussed above, would emanates from its ability to serve the interests of the society and the maintenance of public confidence and faith in the efficacy of this remedy.

The foregoing application of the principles regulating the appropriateness of constitutional damages for the afore-mentioned hypothetical case serves as a justification for the feasibility of the victims of corruption's claim for constitutional damages for corruption by public officials in South Africa.[74] Therefore, a claim for constitutional damages emanating from corruption by public officials can be deemed as an additional legal measure aimed at combatting corruption.

74 This is the case because the group of people are entitled to approach a competent court when their rights have been infringed as per the judgement of the case of *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape, and others* 2001 (2) SA 609 (E).

Sexual autonomy and violence against women in Nigeria: Assessing the impact of Covid-19 pandemic

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SUMMARY

Sexual and reproductive rights are centred on an individual's autonomy. However, these rights are jeopardised when women and girls are faced with sexual violence. Recently, there was reported increase in violence against women and girls, constituting an infringement of their human rights. Relieving this burden has become a human rights commitment for most countries including Nigeria. Therefore, this article examines how these rights were impacted during the COVID-19 pandemic in Nigeria. It examines reports from media sources, and conducted in-depth interviews with Forty-five (45) women in a bid to elicit their responses on their experiences during the pandemic. The research found that the pandemic had both positive and negative impacts on the women's sexual autonomy. This article recommends the creation of more awareness for women, the fostering of political will, and dedicated funding to ensure active implementation and better protection of women's rights in Nigeria.

1 Introduction

The realisation of an individual's Sexual and Reproductive Health Rights (SRHR) is indispensable in attaining the right to the highest standard of physical and mental health. This right is protected in various international human rights conventions. SRHR allows women to be in control of their own bodies and decide if, when, with whom and how often to bear children. SRHR depends on timely, comprehensive sexuality education that allows individuals to learn about their bodies, to understand relationships, to make informed decisions about their sexuality, and to stand up against sexual harassment, exploitation and abuse. Consequently, it is important to note that SRHR includes the right to an effective remedy for violations of fundamental rights.[1]

1 WHO Defining Sexual Health' 2006 Updated 2009 http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/ (accessed 2020-08-03).

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In some countries, including Nigeria, women and girls are forced to marry and have sex with men they do not desire. Women are unable to depend on the government to protect them from physical violence in the home. Women in state custody face sexual assault by their jailers. Women are punished for having sex outside of marriage or with a person of their choice. Husbands and other male family members obstruct or dictate women's access to reproductive health care. This is mainly because the culture has always been a male-centric one; with women and girls been treated as objects of sexual pleasure and not as individuals who can have their own sexual desires and fantasies.[2]

Reproductive rights are human rights, and the ability to fully exercise them, is key to sustainable development. When these rights are in jeopardy, they negatively and conversely affect the rights to health and consequently the achievement of Sustainable Development Goals (SDG). It is increasingly being realised that SRHR constitute an integral core of the SDG. Nations of the world committed themselves to ensure that these goals are realised by the year 2030. This was also done by breaking down these goals into achievable milestone and targets. For instance, SDG 3 aims at good health and well-being.[3] This goal is further broken down to 8 targets which, among others, aims at ensuring universal access to sexual and reproductive health-care services, including family planning, information and education, and the integration of reproductive health into national strategies and programs by the year 2030.[4] Nigeria, being a member nation in the UN was not left out in the implementation of programs and policies to realise this goal amidst other SDG goals. However, the onset of the COVID-19 pandemic has had an impact on the implementation of these goals. The aim of this article is to examine how the COVID-19 pandemic has impacted on sexual autonomy which is a core component of sexual and reproductive rights in Nigeria. In achieving this aim, the article examines the concept of sexual autonomy and sexual violence. It sets out the legal provisions which guarantee this right in the Nigerian legal system. The article further expounds on the COVID-19 pandemic in Nigeria and how this has affected sexual autonomy and violence against women. The article concludes with suggestion on how the reproductive rights of women can be improved upon with a view to the SDG timelines and bearing in mind that the pandemic may be with us for longer than anticipated.

2 Omo-Aghoja "Sexual and reproductive health: Concepts and current status among Nigerian" 2013 *African Journal of Medical and Health Sciences* 103-113.

3 United Nations Sustainable Development Goals Goal 3: Good Health and Well-Being https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-3-good-health-and-well-being.html (accessed 2021-02-24).

4 WHO Sustainable Development Goals https://www.who.int/health-topics/sustainable-development-goals#tab = tab_2 (accessed 2021-02-24).

2 What is sexual autonomy?

Sexual autonomy depicts a person's prerogative to determine when, with whom, and under what circumstances they engage in sexual activity; to only engage in sexual activity to which they consent.[5] Put differently, sexual autonomy involves the right to choose to either have sex or to refuse. In *Coker v Georgia,*[6] the Supreme Court held it unconstitutional to sentence someone to death for the crime of rape, thus, the Court enunciated why rape is proscribed as it infringes on a person's "privilege of choosing those with whom intimate relationships are to be established," that is, their sexual autonomy. Closely related to the concept of sexual autonomy is sexual violence. It is "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."[7] Furthermore, it may take various forms, such as, rape within marriage or dating relationships; rape by strangers; systematic rape during armed conflict; unwanted sexual advances or sexual harassment, including demanding sex in return for favours; sexual abuse of mentally or physically disabled people; sexual abuse of children; forced marriage or cohabitation, including the marriage of children; denial of the right to use contraception or to adopt other measures to protect against sexually transmitted diseases; forced abortion; violent acts against the sexual integrity of women, including female genital mutilation and obligatory inspections for virginity; and forced prostitution and trafficking of people for the purpose of sexual exploitation.[8] Violence against women is an issue of public health and human rights concern in Nigeria.[9] Physical violence is also associated with sexual abuse and loss of autonomy. These negative acts on women apart from leading to physical injury and death can also result in mental and emotional trauma for women.

3 Reproductive health rights and sustainable development goals

In the year 2015, nations of the world adopted the SDGs. Each of these goals has specific targets which are to be achieved in the next 15 years.

5 Brown "Against Sexual Autonomy: Why Sex Law's Lodestar Should Be Self-Possession" (2014-12-16) https://www.libertarianism.org/columns/against-sexual-autonomy-why-sex-laws-lodestar-should-be-self-possession#:~:text=Put%20broadly%2C%20sexual%20autonomy%20means,activity%20to%20which%20they%20consent (accessed 2020-08-03).

6 *Coker v Georgia* 433 U.S. 584 (1977).

7 WHO *Violence against women – Intimate partner and sexual violence against women* 2011 Geneva, World Health Organization 149.

8 WHO 149-150.

9 Atsenuwa and Ezeilo Review of the laws relating to reproductive health rights in Nigeria 2006 *Law Reproductive Health and Human Rights* Women Aids Collective 148.

The SDGs include one broad health goal and over 50 health-related targets which are applicable to all countries, irrespective of their level of development.[10] In the field of SRHR, the SDGs include several relevant goals and targets such as those related to health, education and gender equality. Goal 5, target 5.6 aims at ensuring universal access to SRH services, including family planning, information and education and integration of reproductive health into national strategies and programs.[11] Apart from this, target 5.2 aims at eliminating all forms of violence against all women and girls in public and private spheres, including trafficking, sexual and other types of exploitation.[12] The inclusion of these specific targets is a recognition that addressing all forms of violence and harmful practices against women and girls is central to achieving gender equality and women's empowerment, which is essential for sustainable development.[13]

It is gradually being recognised that when a woman's sexual autonomy is respected and there is freedom from sexual violence, it contributes to the realisation of SRHR. Improved SRHR likewise leads to better and improved health outcomes and translates to development of the society at large. Although recorded successes were documented in achieving Millennium Development Goals, not much progress was recorded in the area of SRHR because the MDGs were not specific in the roles of SRHR in improving health outcomes. In 2015, the Guttmacher Institute recommended indicators specifically for SRHR. The purpose of the indicators was to assess how countries have fared in relation to achieving the SDGs and targets.[14] Amongst other indicators, is that which evaluates access to respect for women's autonomy within marriage.[15] From data available from the World Health Organization, reproductive health conditions are responsible for 22 percent of health years of life lost by women annually.[16] This is a grappling figure when compared with that of 3 percent attributable to men. This underscores the importance of ensuring access to reproductive health rights of women. According to the Nigerian Ministry of Women Affairs and Social Development, 28% of Nigerian women in their reproductive years have

10 WHO World Health Statistics: Monitoring health for the SDGs 2018 www.bvs.hn (accessed 2020-09-02).

11 UN Goals 5: Achieve gender equality and empower all women and girls https://sdgs.un.org/goals/goal5 (accessed 2021-02-24).

12 UN Goals 5

13 Garcia-Moreno and Amin "The Sustainable Development Goals, Violence and Women and Children's Health" 2006 *Bulletin of the World Health Organization* 396-397.

14 Guttmacher Institute "Sexual and Reproductive Health and Rights Indicators for the SDGs, Recommendations for inclusion in the sustainable development gaols and the post-2015 development process" 2015 www.guttmacher.org (accessed 2020-08-28).

15 Galati "Onward to 2030: Sexual and Reproductive Health and Rights in the context of the SDG" 2015 *Guttmacher Policy Review,* https://www.guttmacher.org/gpr/2015/10/onward-2030-sexual-and-reproductive-health-and-rights-context-sustainable-development (accessed 2020-08-28).

16 Guttmacher Institute.

experienced one form of violence or the other since the age of 15.[17] The SDGs promise is to ensure healthy lives and promote well-being for all at all ages through universal access to sexual and reproductive health care services, including, for family planning, information and education, and the integration of reproductive health into national strategies and programmes. It is of no doubt that SRHR of the female gender that has been relegated in previous years can be reawakened through the active implementation of the SDGs.[18]

4 Legal framework for reproductive rights in Nigeria

Nigeria is a pluralistic society and thus laws governing its citizenry are contained in different sources. These are mainly statutory laws, the received English Common law and doctrines of equity, customary law and Sharia law that is applicable mostly in the northern parts of the country. It should be pointed out that some of the laws which make up the legal framework for reproductive rights as discussed in this section are prohibitive in that they are negative rights that do not promote reproductive health rights. However, they are still discussed therein because notwithstanding their contents, they still form part of the laws governing reproductive health rights in Nigeria.

4 1 The Nigerian 1999 Constitution (as amended)

This is the grundnorm from which all other laws in Nigeria derive their validity. The basic question is to enquire if the Nigerian Constitution guarantees a basic right to health for all Nigerians including women. The Constitution does not directly address rights to health, however, there are provisions in it that allude to the right to health. For instance, healthcare provisions are contained in Chapter II of the Constitution which embodies the economic and social policies of the country. Section 17(3)(c) provides that the State shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons. However, the provisions of Chapter II of the Constitution have been excluded from adjudication by the courts, thus, no right of action can ensue from the breach of the provisions of the said chapter by the government. The courts have also held consistently in a plethora of cases that this right as contained in this section of the Constitution is not justiciable.[19] However, by virtue of judicial interpretations in more recent times, it appears that the non-justiciability of these provisions have been given another

17 Leon "Nigerian Women say No to violence" www.un.org (accessed 2020-09-01).

18 Nkem and Dimkpa "The Sustainable Development Goals and its promises for the sexual and reproductive health of girls and women in Africa" 2018 *Journal of Biosciences and Medicine* 105-110.

19 See *Okogie v A.G. Lagos State* [1981] 2 NCLR 337, *Adewole v Jakande* [1981] 1 NCLR 262, *Ehimare v Governor of Lagos State* [1981] 2 NCLR 166.

outlook, for instance in the case of *A.G Ondo v A. G Federation*[20] the court stated that …..'all directive principles need not remain mere or pious declarations. It is for the Executive and the National Assembly, working together to give expression to any one of them through appropriate enactment as occasion demands'. The effect of this landmark decision is that the contents of Chapter II of the Constitution can be subjected to legislative enactment and where this occurs, the courts can enforce the provisions of the law notwithstanding the limitations on non-justiciability contained in Section 6(6) (c).[21]

4 2 Violence Against Persons Prohibition Act 2015

The Violence Against Persons (Prohibition) Act (VAPP) was passed into law in May, 2015. The Act came about as a result of anxieties and activism for protection of persons against the different forms of violence which was becoming a trend in the country.[22] Thus, the VAPP is an all-encompassing legislation covering wide-ranging forms of violence in Nigeria. It regulates violence such as physical violence, psychological violence, socio-economic violence and social violence. It criminalises offences such as spousal rape, spousal battery, and harmful traditional practices such as female genital mutilation. The definition of rape provided in the Act protects both males and females from rape.[23] The Act categorises domestic offences such as abandonment of children and spouse without any means of sustenance by the man. Under the Act, forceful ejection from marital home by either of the marriage partners is an offence.[24] A very interesting feature of the Act is that it provides for compensation to victims of crimes under the Act.[25] The Act authorises protection orders. This order is an official legal document endorsed by a High Court Judge and which restrains a person or persons from further aggressive or abusive conduct towards victims. This provision gives room for victims to apply for protection order to be given in their favour against violators.[26] The Act also provides for a sexual offender register.[27] This provision hitherto had been lacking in legislations on crimes and offences in Nigeria. This register is made a public record. As laudable as the provisions of the VAPP Act are, its application is restricted to the Federal Capital Territory, Abuja. Thus, the Act is not applicable in other parts of the country. However, different state legislatures are at liberty to make similar laws with similar provisions. Some states in Nigeria haven taken a cue to do such. For instance, the Oyo State Government passed

20 (2002) NWLR (Pt.772) 222.
21 Isokpan "The role of the courts in the justiciability of socio-economic rights in Nigeria: Lessons from India" 2017 *Nnamdi Azikwe University Journal of International Law and Jurisprudence,* 106-108.
22 Violence Against Persons Prohibition Act (VAPP Act) 2015 Cap A2, Laws of the Federation of Nigeria 2004.
23 S 1(1) VAPP Act.
24 S 9(1) VAPP Act.
25 S 1(3) and S 2(5) VAPP Act.
26 S 28-36 and S 46 VAPP Act.
27 S 1(4) VAPP Act.

Violence against Women Law in 2016. This law protects the female gender specifically from violence in public and private life as well as other harmful traditional practices in the state.

4 3 Criminal Code and Penal Code

The Criminal Code[28] is applicable in the southern states of Nigeria while the Penal Code operates in the Northern parts. They make provisions for offences relating to reproductive rights. Under the criminal and penal codes, offences are classified based on how grave the offences are into simple offences, misdemeanours and felonies. The offences relating to reproductive rights as contained in the Criminal Code include S214 -229, which deals with offences against morality, these offences include unlawful carnal knowledge against the order of nature, gross indecency, unlawful detention in a brothel, attempt to procure a miscarriage or an abortion. Under the Criminal Code, abortion is only allowed where it is done for reasons such as to preserve the life of the mother.[29]

4 4 Marriage Act and Matrimonial Causes Act 1973

The Marriage Act prescribes the age of marriage. This age has relevance to whether a person can possibly attain reproductive rights and health or not. According to the Act in section 18, where either party to an intended marriage is below the age of 21 years, the written consent of either father or mother, or of the guardian where both parents are dead, or are of unsound mind must be produced before the licence is granted or certificate issued. By implication, this law sets the age of consent for marriage at 21 years whilst indirectly allowing persons below the age of 21 to be lawfully married once the parent has given the requisite parental consent. In addition, the Matrimonial Causes Act uses the phrase marriageable age but does not prescribe this age anywhere in the Act. The age of marriage is provided for in respective state legislations, however, there is no uniformity concerning this age.

4 5 International Conventions and Treaties

According to various stipulations of Human RightsConventions and Declarations, countries are mandated to protect SRHR of women while safeguarding their SA, including the enjoyment of violence-free relationships, and protection from relationships and homes filled with violence. Such conventions include:

"1) Convention on the Elimination of all forms of Discrimination Against Women;[30]

28 The Criminal Code Act Cap 77, Laws of Federation of Nigeria, 2004.
29 Atsenuwa and Ezeilo 163.
30 Convention on the Elimination of All Forms of Discrimination against Women. Adopted by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981.

2) International Covenant on Civil and Political Rights;[31]
3) International Covenant on Economic, Social and Cultural Rights;[32]
4) UN Convention on the Rights of the Child;[33]
5) African Union Protocol on the Rights of Women in Africa;[34] and
6) African Charter on Human and Peoples' Rights."[35]

The rights ancillary to SRHR of women ensured to be protected by State Parties to the Conventions above comprise of:

"i Right to Life: this right offers protection for safe motherhood practices, using FP and safe abortion services to circumvent unplanned pregnancies and pregnancies that threaten a woman's life, thus, limiting the rate of maternal mortality and morbidity.[36]
ii The right to health and medical protection: it ensures the provision of adequate, accessible, cheap, safe, and confidential SRHR care to women during the pandemic.[37]
iii The right to be free from torture and ill treatment: it offers protection against activities that infringes on a woman's SA, including rape, marital rape, forced prostitution."[38]

4 6 Islamic Law

It has been said that Islamic jurisprudence is extensively developed in relation to sexual and reproductive rights.[39] This Islamic approach to protection of women's rights is best shown by reference to the interlinking web of family relationships which evolve round an array of reciprocal rights and obligations.[40] In the field of reproductive health rights, Islam recognises the right of all persons to marry, the right of all married couples to have children, the equal right of the man and woman to conjugal relations, the right of married persons to plan their family and the right of a married expectant mother to be well maintained by her husband.

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31 International Covenant on Civil and Political Rights. Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.
32 International Covenant on Economic, Social and Cultural Rights. Adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.
33 Convention on the Rights of the Child. Adopted by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.
34 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Endorsed by resolution AHG/Res.240 (XXXI).
35 African (Banjul) Charter on Human and Peoples' Rights. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.
36 Art 6 of ICCPR; Article 6 of CRC; Article 4 of Maputo Protocol; and Article 4 of ACHPR.
37 Art 12 of CEDAW; Article 10 of ICESCR; Article 24 of CRC; Article 14 of Maputo Protocol; and Article 16 of ACHPR.
38 Article 6 of CEDAW; Article 7 of ICCPR; Article 19, 37 and 39 of CRC; Article 4 of Maputo Protocol.
39 Atsenuwa and Ezeilo 163.
40 Sada, Adamu and Ahmad "Promoting women's rights through Shariah in Northern Nigeria" 2006 www.ungei.org/files/dfid 1-36 (2020-08-26).

5 Materials and methods

This article adopts a systematic review of grey literature by identifying journal articles, law reports and textbooks on the subject matter. The review was guided by a search using the keywords COVID-19, sexual autonomy, women's rights and reproductive rights. The results of the search was subjected to content analysis. In addition, the research conducted in-depth interviews with women between 15-49 years. This age range depicts the reproductive years of women as seen in the Nigeria Demographic Health Survey 2018. The opinion of the women were used to triangulate documented findings on the subject matter. A total of 45 women were interviewed. The sampling size was limited to 45 because it was observed that the responses had reached saturation point at which time responses being received were getting similar. The women were selected based on their willingness to participate in the discussion and their consent was obtained after the purpose of the research was explained to them and they fully understood. This facilitated discussions between the researchers and the respondents. Four of the respondents were uneducated and the interview was conducted in a native language for them to understand and give responses. The responses were translated back to English language to ensure that the original meaning of the questions were retained. The interviews lasted approximately between 15 to 20 minutes for each respondent. The interviews were carried out over a period of two weeks preceding the total relaxation of most forms of restriction by the Nigerian Government. Furthermore, this research checked online for discussions of Nigerian women on how the pandemic has impacted upon their rights. To this end, Nairaland[41] forum, a prominent online blog where active discussions take place was understudied to elicit the opinions of Nigerian women on how this pandemic has affected their daily lives. Information from this source was filtered to determine the recurring themes in the discussion about COVID-19 and reproductive rights in Nigeria. This online source was considered necessary due to the sensitive nature of the interview and reluctance of women generally to disclose sensitive issues relating to their personal lives with anyone.

5 1 Research instruments

In-depth Interview guide was the major instrument used in this research. The interview guide was designed and guided by extensive literature review of the subject matter. Open ended questions addressing the topic were used by the researchers for all the women interviewed. In some instances, the researchers asked probing questions to obtain more exhaustive information from the respondents.

41 Nairaland.com https://www.nairaland.com/ (2021-02-24). Nairaland forum is an online community created in 2005. As at January 2018, it had over 1,943,105 registered accounts and was ranked as the 9th most visited site.

5 2 Data management and analysis

Data obtained from the in-depth interviews was carefully kept. The data was saved in well protected digital software to ensure confidentiality of the information obtained. Narratives from the interviews was transcribed verbatim. Themes were identified from the discussions in the interviews and subjected to content analysis. For the respondents who were uneducated, the interview was conducted in a native language for them to understand and give responses. The responses were translated back to English language to ensure that the original meanings of the questions was retained.

All ethical considerations were observed in this research and this included seeking the informed consent of the respondents after the nature of the research was explained to them. The respondents were assured of confidentiality and anonymity. No name was required, and each respondent was informed that she could end her participation in the research whenever she no longer wished to continue.

6 Emergence of Covid-19 pandemic in Nigeria

On January 31, 2020, the WHO declared an outbreak of COVID-19 as a public health emergency of international concern.[42] On February 27, 2020, the index case of COVID- 19 was announced in Nigeria. As it was with other countries in the world, the WHO advised on steps to help combat the spread of the disease and protect health systems across the world from collapse. On March 30, 2020, the Federal Government enforced a lockdown order for an initial period of three weeks in some states of the federation which was thereafter extended for a further two weeks.[43] In addition to this the government placed a strict ban on public gatherings for more than 10 persons. These efforts were supplemented by similar initiatives in several other States, imposing restrictions on entry in and out of the states as well as restrictions on movement within the state, enabling them to buy time for the recommended measures including for testing, isolation and contact tracing to be implemented.[44]

42 A pandemic is a global outbreak of a disease from a new virus that affects the whole country or the entire world. An epidemic refers to an outbreak of disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population and in which the disease is actively spreading.

43 S 1(1) COVID-19 Regulations 2020, Quarantine Act Cap Q2, Laws of Federation of Nigeria 2004.

44 United Nations Development Programme, 'The COVID-19 pandemic in Nigeria: potential impact for the North- East', Available from https// UNDP.NE.covid-19brief (accessed 2020-05-23).

7 The Covid-19 pandemic in Nigeria and Reproductive Rights

As the COVID-19 pandemic deepened, marked by economic and social stress coupled with restricted movement and social isolation measures, gender-based violence increased exponentially. Many women were forced to 'lockdown' at home with their abusers at the same time that services to support survivors were disrupted or made inaccessible.[45] For instance, the likelihood that women in an abusive relationship and their children were exposed to violence dramatically increased, as family members spent more time in close contact and families coped with additional stress and potential economic or job losses. Women were perceived to have less contact with family and friends who could provide support and protection from violence.[46] The disruption of livelihoods and ability to earn a living, including for women, decreased access to basic needs and services, increasing stress on families, with the potential to exacerbate conflicts and violence.[47]

Some reports indicate that calls to domestic violence helplines, police and shelters increased during the COVID-19 outbreak.[48] In other cases, reporting, calls and service use decreased as women found themselves unable to leave the house or access help online or via telephone.[49] The use of these technologies during confinement and staying at home measures, however, may increase the risk of violence to women and their children as ensuring privacy and guaranteeing confidentiality will be nearly impossible.[50] Electronic communications can leave a trail. If a perpetrator learns that a woman is sharing her experience it increases her risk of further and even more severe abuse.[51] Thus, COVID-19 would probably cause a reduction in the provision of SRH services, such as maternal health care and gender-based violence related services; and as attention and resources are being diverted away from SRH provisions,

45 United Nations (UN) "Policy Brief: The Impact of COVID-19 on Women (2020-04) *UN Women Headquarters* 1-21 https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf (accessed 2020-08-26).

46 WHO "COVID-19 and violence against women: What the health sector/system can do" https://www.who.int/reproductivehealth/publications/emergencies/COVID-19-VAW-full-text.pdf (accessed 2020-08-26).

47 Gupta "What does coronavirus mean for violence against women?" 2020 *Women's Media Centre* https://womensmediacenter.com/news-features/what-does-coronavirus-mean-for-violence-against-women (accessed 2020-08-26).

48 UN 17-19.

49 Some women use code words at pharmacies to escape domestic violence during COVID-19 lockdown.

50 UN 17-19.

51 National Network to End Domestic Violence (NNEDV) "Technology Safety: Safety Net Project: Using technology to communicate with survivors during a public health crisis" 2020 https://nnedv.org/content/technology-safety/ (accessed 2020-08-26).

there would be an upsurge in maternal mortality and morbidity, increase in unplanned pregnancies, sexually transmitted infections and diseases (STIs and STDs), HIV, and even death.

8 COVID-19 pandemic in Nigeria and sexual autonomy: Findings and discussions

This section presents findings from selected sources on effects of the pandemic. It also presents the opinions of women in their reproductive years on their experiences during the pandemic. For women who had been subject to sexual abuse and loss of sexual autonomy, the COVID-19 pandemic aggravated issues as things got worse during the pandemic. The Mirabel Centre, a one stop centre managed by Partnership for Justice reported that the lockdown led to an increase of over 50% in the number of reported cases of sexual violence at the centre; and unfortunately, 85 percent of the cases were children.[52] Similarly, ActionAid Nigeria reported that COVID-19 pandemic exposed a silent culture of violence. As stated by Lola Ayanda, economic fallout led to soaring levels of violence against women and girls. ActionAid documented 299 cases of violence against women and girls between March and June 2020. This report covered 7 states in the federation. 51 of the cases were sexual violence cases that involved minors between the ages of 3 and 16.[53] In Lagos state, the state run Domestic and Gender Violence Response Team also reported that during the peak of the lockdown in March 2020, the team received on the average 13 new cases of violence daily and in the month of March a whopping 390 cases were received. The Director of the team stated that there was a 60 percent increase in domestic violence, 30 percent increase in sexual violence and 10 percent increase in physical child abuse.[54]

BBC reported about 4 cases of SV occurring within a week in Nigeria. The first was the rape and murder of a 22-year-old university student, named Uwavera Omozuwa, in a church where she was studying in the southern city of Benin.[55] Others were the rape of a 12-year-old girl in Jigawa state; the gang-rape and killing of Barakat Bello in Oyo state; and the gang-rape of a 17-year-old girl in Ekiti state.[56] The Nigerian police recorded 717 rape cases between January and May, 2020.[57] Presently,

52 UNICEF "COVID-19 children suffer violence during Lagos lockdown" (2020-07-03) http//www.unicef.org/Nigeria (accessed 2020-08-26).

53 Umukoro "Amidst COVID-19 lockdown, Nigeria sees increased sexual and gender violence" (2020-06-01) *Premium Times* http//pulitzercentre.org (accessed 2020-08-27).

54 Umukoro "Amidst COVID-19 lockdown, Nigeria sees increased sexual and gender violence" (2020-06-01) *Premium Times* http//pulitzercentre.org (accessed 2020-08-27).

55 Orjinmo "WeAreTired: Nigerian women speak out over wave of violence" (2020-06-05) *BBC News*. https://www.bbc.com/news/world-africa-52889965 (accessed 2020-08-27).

56 Orjinmo.

there is hardly a day when reports of rape or sexual molestation do not make the pages of Nigerian newspapers.[58]

9 Socio-demographic characteristics of respondents

A total number of 45 respondents were interviewed. 80% of them were married. The rest were single but were in one form of relationship or the other. Forty-one (91%) of the women were educated having at least Senior Secondary School Leaving Certificate. Four of the respondents were uneducated. The respondents were mainly from the south western part of the country. It is doubtful if the opinions expressed by these respondents will be the same in other geo-political zones of Nigeria. This is due to the diversity of culture and values in the multi-ethnic Nigeria. The findings from the semi structured interviews held with women in this study reflects a variety of opinions on the possible reasons for the reproductive rights violations. These are presented below.

9 1 On what sexual autonomy is and how this can be violated

Reflections from the study carried out by Viswan et al[59] shows that sexual autonomy can either be economic autonomy, physical autonomy or decision-making autonomy. The aspect that relates to this present study is decision making autonomy which deals with aspects of sexual relations or reproductive decisions. Respondents were asked what their basic understanding of what sexual autonomy was and how this can be violated.

Out of the 45 participants, 10 of them had never heard of the term sexual autonomy or violence before; 21 had clear understanding and emphasized reproductive rights; while the remaining 14 of them emphasized consent in sexual relations. Majority of the respondents, though educated, had a fair understanding of what sexual autonomy is. However, few other respondents in this study knew nothing about sexual autonomy. For instance, a single female respondent stated categorically:

57 Anon "Nigeria Records 717 Rape Cases in Five Months – Official" (2020-06-15) *Premium Times* https://www.premiumtimesng.com/news/headlines/397748-nigeria-records-717-rape-cases-in-five-months-official.html (accessed 2020-08-27).

58 Omoniyi "Nigerians call for stiffer punishment as reported rape cases increase" (2020-06-15) *Premium Times* https://www.premiumtimesng.com/news/headlines/396497-nigerians-call-for-stiffer-punishment-as-reported-rape-cases-increase.html (accessed 2020-08-27).

59 Viswan et al "Sexual autonomy and contraceptive use among women in Nigeria: findings from the Demographic and Health Survey" 2017 *International Journal of Women's Health* 538.

I have never heard about the term sexual autonomy before in my life, I hear about sexual rape on radio but I don't know if it is the same with the autonomy you just mentioned.

IDI/33/22 years

Findings on the responses of respondents who had a fair understanding of what sexual autonomy is, related sexual autonomy to the ability to make decisions on when to have and with whom to have sexual relations and freedom from coercion in matters of sex. A key factor in determining sexual autonomy for the women was 'consent and the ability to exercise this consent freely and without any form of coercion.' A particular respondent stated that:

For me sexual autonomy is a woman's prerogative to decide who, where and under what circumstances she wants to have sex. For me as a woman, consent is important, and where my consent is inappropriately obtained, through fraud, undue influence, sexual harassment, sexual assault, rape, child defilement, spousal rape, etc, my autonomy as a woman is violated.

IDI/42/30 years

This differs a bit from what was found in a study carried out in Pakistan in which most of the research findings related sexual autonomy to the ability to control or decide on the number of children one should have and to determine the spacing of the children. All respondents interviewed in this present study agreed that rape constitutes a major way in which a woman's autonomy can be violated.

9 2 On knowledge of existing laws and policies that guarantee sexual autonomy for women and freedom from sexual abuse in Nigeria

A number of studies[60] have documented the low knowledge and perception of SRHR amongst young women in developing countries such as Nigeria. This was a similar finding in this study. 18 respondents did not know of any existing law or regulation that guarantees sexual autonomy, even though most of the respondents were educated. This can be noted in the following response by one participant:

I don't not know of any law.

IDI/17/31 years

Out of the 27 participants that knew about the extant laws, 11 had little knowledge about it while 16 of them had full knowledge of the laws.

60 Egenba and Ajuwon "Knowledge and Perception of reproductive rights among female postgraduate students of the University of Ibadan, Nigeria" 2015 *African Journal of Biomedical Research* 95-105. See also Ogunlayi "An assessment of the awareness of sexual and reproductive rights among adolescents in south western Nigeria" 2005 *African Journal of Reproductive Health*; Olomola and Ajagunna "Knowledge and Access to Reproductive Health Rights by Adolescents in Ibadan, Nigeria" 2020 *African Journal of International and Comparative Law* 401-405.

Respondents who had some legal backgrounds or education were the ones that gave detailed information about the law and its penalty. One participant indicated that:

> *There are the Criminal Code and Penal Code which prohibit rape (but are inadequate because marital rape isn't recognised).*
>
> **IDI/4/34 years**

Another respondent submits

> *Each state makes its own laws to protect its women. There is a Bill in Oyo State which is at its 2nd reading which will protect women from sexual abuse. There is presently a contemplation between death by hanging or life imprisonment for its violators. But, I don't know the name of the Bill.*
>
> **IDI/7/35 years**

> I know about Criminal Code prohibiting rape; Lagos State Laws on sexual abuse; Child Right Act protecting children against abuse; and Violence Against Persons (Prohibition) Act of 2016.
>
> **IDI/9/30 years**

In another study carried out by Makinde and Adebayo,[61] knowledge about SRHR as contained in Nigerian statutes was low. In that particular study, respondents could not list any sexual right as found in laws. 10% of respondents in this study made mention of the Violence against Persons Prohibition Act of 2015 and the Criminal Code of Nigeria whilst others could not mention any laws at all. Some of them could only relate laws on sexual autonomy in Nigeria with laws that imprison offenders for crimes committed.

9 3 On experiences in the home and/environment during the COVID-19 Pandemic

The respondents shared a lot of experiences heard or seen within their neighbourhood during the pandemic, however, only one of the 45 respondents had an unpleasant experience in their home and neighbourhood. 8 of them shared some of the instances of sexual violence perpetuated on fellow women in their neighbourhood; 17 of them either heard on the radio or television while 19 read on social media about sexual violence in Nigeria. For example, a respondent indicated that:

> *I was almost raped by a drunk man while returning home in the evening from tutorials. Also, men who visit my house (big house) sometimes make attempt to abuse me, but, I normally discourage them by frowning my face.*
>
> **IDI /2/26 years**

61 Makinde and Adebayo "Knowledge and Perception of sexual reproductive rights among married women in Nigeria" 2020 *Sexual and Reproductive Health Matters* www.tandfonline.com (accessed 2020-09-07).

The experiences reported were both positive and negative. Majority of the respondents reported negative effects of the pandemic. For example, a respondent said:

> *I heard on news and some women in my church complained of sexual abuse especially with the lockdown. Wives being at the receiving end. Also, women with low financial autonomy are mostly victims, for instance, I saw an online video of a woman living in Lagos Island who complained of being sexually abused by her husband from midnight till morning.*
>
> **IDI /8/34 years**

Another respondent narrated her experience in her neighbourhood, that:

> *There was a remarked increase in sexual violence, especially among young girls (12-16 years) in the Northern parts who were given out in marriage as Northerners saw the pandemic as a time waster.*
>
> **IDI/1/32 years**

Majority of respondents' experience either personally or in their environment can be summed up as negative impacts of the lockdown. This corroborates reports on social media about how the pandemic has affected the lives of people. Experiences in other parts of the world on reported effects of the pandemic are not different. For instance, in a study commissioned by the European Parliamentary Forum for Sexual and Reproductive Rights, an overwhelming number of countries in Europe reported substantial increase of cases of sexual and gender-based violence. In the wake of massive lockdowns imposed to contain the spread of the disease, reports of domestic violence surged worldwide. In France, reports of domestic violence increased by 32%. This was attributed to restrictions on movement which forced women and children to be isolated with perpetrators. It also restricted women's escape routes and support networks, such as hotlines and shelters. Economic and social distress further increased loss of sexual autonomy in these countries. Other effects of the pandemic as reported in these countries included significant reduction in access to essential SRHR services such as lack of respectful maternity as care during maternity became compromised. Birth companions were not allowed and newborn babies were separated from their mothers at birth. In addition, immediate risks of unintended pregnancy increased as women had to wait to access scheduled contraceptive injections. In countries where telemedicine was not accessible, women abstained from physical visits to the hospital. Some countries reported shortage in contraceptives due to restrictions on exportation of products containing progesterone.[62]

62 European Parliamentary Forum for Sexual and Reproductive Rights and International Planned Parenthood Federation "Sexual and Reproductive Health and Rights during the COVID-19 pandemic" www.ippfen.org (accessed 2020-09-10).

Contrary to reports on media on the effects of the pandemic which were mostly negative and untoward, a few respondents reported positive impact of the pandemic. A particular respondent affirmed as such:

> *I have had a good experience during this pandemic. Although some bad news were reported, for me, it has impacted on my sexual relationship with my husband positively. There was more time for bonding during the lockdown as my husband doesn't work in the city where my children and I live.*
>
> **IDI/18/31years**

9 4 On how COVID-19 pandemic has personally impacted upon sexual autonomy and sexual violence?

One out of the 45 interviewed respondents admitted that they had a personal sexual violence encounter during the pandemic, probably because some felt that such issues were too personal and did not wish to disclose this. For this aspect, the researchers have relied extensively on reports from social blogs where people relay their experiences with others to add to what the interviews reported.

On Nairaland, a particular respondent affirmed that she was sexually abused by her step-father during the lockdown. She claimed that her step-father who worked in a biscuit factory was laid off work during that time and this made the step-father stay at home with her during the lockdown.[63]

When asked questions relating to personal impact of the pandemic, the respondents had differing encounters; some believed the pandemic had a positive impact because movement of proposed sexual offenders' was restricted and as such they could not go about to perpetrate their nefarious activities. Another respondent had this to say:

> *It has impacted on sexual autonomy negatively, and also increased its prevalence. It has made women more vulnerable. Some women lost their jobs. Men are more cranky and aggressive, and resort to abuse their wives. However, COVID-19 has helped to create more awareness about sexual violence. My neighbour now goes to Lagos markets to enlighten women about their sexual autonomy and contraception.*
>
> **IDI/29/ 34 years**

Another female commented on her experience thus:

> *Negatively- because men with high libido raped their wives, and positively- it increased sexual relationships among couples as they were able to have more consensual sex during the lockdown.*
>
> **IDI/9/30 years**

Other respondents lamented that a number of non-governmental organisations focusing on women and children's rights had to be closed

63 Nairaland.com https://www.nairaland.com/ (2021-02-24).

down due to the lockdown restrictions and this made help inaccessible to vulnerable women. Another positive impact of the pandemic as reported by a particular respondent was that the pandemic gave women voices to be heard on sexual abuse, especially through social media like Twitter.

9 5 On the steps that can be taken by the Nigerian Government, with a view to the SDG timelines, in protecting women's reproductive rights during the COVID-19 pandemic?

Countries that aim to achieve SDGs must realise that SRHR of the populace must be met at all times. Respondents in this study gave their opinion on how best to ensure that SRHR of women are saved from jeopardy given that the timelines for the achievement of the sustainable goals are just around the corner. They all had different opinions ranging from recommendations for stiffer sanctions and penalties for sexual offenders. Some respondents believed that the Nigerian culture has contributed to the manner in which women are treated. Majority of the responses of the women in this section focused on the victims. To them, in most instances of infringement of sexual autonomy, less attention is paid to the victim while most attention is placed on the crime committed and the perpetrator of the crime. To the women, attention can be given to the victim through establishment of victim support network that aid in the recovery and healing of victims and in addition, provision of adequate counselling to victims of abuse. Some said the criminal justice system should be improved to fast-track cases relating to sexual abuse. Others recommended enlightenment and more awareness on sexual autonomy and the rights of women in particular. A particular respondent stated:

> *We can only speak of guarantee for the rights of women when every woman everywhere is made aware of their rights, we need more information on our rights as women. Our culture has encouraged silence as the role of women in the society, this ought not to be. Let us teach our children from infancy that a girl has rights to be respected and when these rights are not respected, there should be some form of legal redress.*
>
> **IDI/40/24years**

10 Conclusion

Previously stated, SRHR is vital to the attainment of the right to the highest standard of physical and mental health of women. Similarly, it is important for a woman to be able to exercise her sexual autonomy in determining when, with whom, and under what circumstances she wishes to engage in sexual activity. However, where a woman is disrobed of this right, sexual violence occurs. Although, sexual violence is an unfortunate incident for any woman, its prevalence increased not only in Nigeria, but also worldwide with COVID-19 pandemic.

According to the World Bank,[64] experiences from previous pandemics have shown that women and girls can be active actors for change because they can experience effects of crisis in different, but mostly negative ways. This study has presented the impacts, albeit mostly negative, the COVID-19 pandemic has had on sexual autonomy and sexual violence in Nigeria. The study has also shown that the COVID-19 pandemic can possibly create a setback in realising these targets. Maintaining the momentum towards actualisation of SRHR as contained in the SDGs is only possible if countries have the political will and the capacity to prioritise regular, timely and reliable data collection to guide policy decisions and public health interventions. The current administration in Nigeria kicked off with a roadmap to ensuring the actualisation of the SDGs. This roadmap can only be adhered to where there is a political will to overcome all obstacles in the implementation of SRHR. Political will is expressed in adequate funding and active implementation of the existing legal framework thus making SRHR priorities for action.

64 Paz et al "Policy Note: Gender dimensions of the COVID-19 pandemic" (2020-04-16) *World Bank Group* 1-19 www.openknowledge.worldbank.org (accessed 2020-09-11).

The admissibility of criminal findings in civil matters: Re-evaluating the *Hollington* judgment

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SUMMARY

In *Hollington v Hewthorn & Co Ltd* 2 1943 All ER 35 it was held that a finding of a criminal court did not have any probative value in a subsequent civil action and was inadmissible as evidence. Despite the case being one of English origin, the South African courts have largely adopted this ruling as one grounded in our common law. In this paper, the judgment in the *Hollington* case is critically analysed in order to determine its continued applicability in the face of South Africa's existing law of evidence and the Constitution of the Republic of South Africa, 1996 ("the Constitution"). It is argued that in light of the existing law, this rule no longer finds application in South Africa.

1 Introduction

In this paper the judgment of *Hollington v Hewthorn & Co Ltd*,[1] is critically analysed in order to determine its continued applicability in the face of South Africa's existing law of evidence and the Constitution. The rule formulated in the *Hollington* case ("*Hollington* rule") is grounded in our common law.[2] It prevents the admission of any criminal findings as evidence in a subsequent civil action, even one arising out of the same facts.[3] It is argued that in light of the existing law, this rule no longer finds application in South Africa. Following this introduction, the article discusses the judgment in light of the existing common law. To this end, it explains that evidence of a previous conviction is not always irrelevant, its admissibility is dependent on whether in the particular circumstance it can resolve the issue in dispute. The article further explains how the operation of the *Hollington* rule is somewhat relaxed by legislative provisions dealing with the admissibility of evidence in civil proceedings. Lastly, the article shows how the rule potentially impacts the rights entrenched in the Constitution and therefore warrants legislative intervention.

1 *Hollington v Hewthorn & Co Ltd* 2 1943 All ER 35.
2 Schwikkard *et al*, *Principles of Evidence* (2006) 110.
3 *Hollington v Hewthorn & Co Ltd supra*.

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2 The *Hollington* judgment

The rule in *Hollington* originated from English law; which forms the basis of the South African evidentiary process and is regarded as its common law.[4] Domestic statutes regulate South Africa's procedures and where statutes are silent on certain issues, the English law of evidence which was in force on 30 May 1961 in South Africa takes precedence.[5] This is provided for in various sections of the Criminal Procedure Act,[6] as well as section 42 of the Civil Proceedings Evidence Act. The common law that must be followed includes English cases decided prior to 30 May 1961,[7] and it is upon this that the rule in *Hollington* has come to bind South African courts. This is, of course, the case unless the rules are contrary to the provisions of the Constitution.[8]

The rule arose as a result of a dispute involving a motor vehicle accident, in which the plaintiff brought an action in his own capacity as owner of the car and on behalf of his son, who had suffered injuries as the driver. At the time of the action, his son was deceased and could not be called as a witness. Despite this, judgment was given in favour of the plaintiff and as a result, the defendants appealed. On appeal, the plaintiff sought to uphold the judgment and render inadmissible evidence of a previous conviction admissible. The previous conviction aimed to show negligence on the part of the defendant. On a separate occasion, the defendant was involved in an accident and was subsequently convicted of negligent driving.[9]

In delivering the judgment, Goddard LJ cited judicial precedent as a ground for exclusion, in that courts have previously ruled against the admission of such evidence. He further objected to the admissibility of the conviction as evidence, on the basis that it amounted to an irrelevant opinion of another court, and it was difficult to determine its probative value. Further, although Goddard LJ did not categorise the evidence as one affecting specific parties ("*res inter alios acta")*, he considered the possibility.[10]

2 1 The judgment in light of the prevailing common law

2 1 1 Judicial precedent

There is much to be said for the judgment, particularly in the present times. In support, Goddard LJ referred to the prevailing practice of excluding evidence of this kind. He warned that such practice should not be ignored, unless it can be proven that the decision to exclude the

4 Schwikkard *et al*, 110.
5 S 42 of the Civil Proceedings Evidence Act 25 of 1965; Schwikkard *et al*, 26.
6 Criminal Procedure Act 51 of 1977.
7 Schwikkard *et al*, 29.
8 Schwikkard *et al*, 27 & 31.
9 *Hollington v Hewthorn & Co Ltd supra*.
10 *Hollington v Hewthorn & Co Ltd supra*.

evidence was incorrectly arrived at. As correctly stated by Goddard LJ, and subject to certain exceptions, the ultimate enquiry is whether the evidence sought to be adduced is relevant to the fact in issue.[11]

Although decided after, in the cases of *R v Trupedo*,[12] and *S v Shabalala,*[13] the court was faced with an issue of whether in identifying a suspect, the evidence of a sniffer dog is admissible. Although the court in *R v Trupedo* excluded the evidence as being irrelevant, Nestadt JA in the subsequent court in *S v Shabalala* noted that the earlier court relied heavily on judicial precedent which excluded evidence of a sniffer dog, and neglected the important exercise of looking at the specific facts prevalent in the particular case before it.[14] Nestadt JA in dismissing judicial precedent as binding, pointed out that if in a particular case, the facts would be such to sufficiently reduce the uncertainty that taints evidence of a sniffer dog, such evidence will carry probative value and be rendered relevant for admissibility purposes.[15] Evidently, courts need to be cautious of solely relying on judicial precedent in order to determine the admissibility of a previous conviction in civil proceedings, but must decide each case on its own merits, with an essential enquiry into the relevance of the previous conviction to the facts in issue. Therefore, it is submitted that judicial precedent cannot be unduly emphasised, it can only serve as a guide because every case ought to be determined on its own facts.[16]

2 1 2 Res inter alios acta alteri nocere non debet

The trial judge rejected the admission of the conviction on the basis that it was *res inter alios acta,* which loosely translates to "a transaction between parties should not affect another party".[17] Zeffert opined that the maxim *res inter alios acta* could not be used as justification for the decision in *Hollington* as it was outdated and could not be regarded as a fundamental rule of evidence.[18] In Goddard LJ's own words, it was difficult to understand how one can successfully prosecute his opponent in a criminal court, and be subsequently prevented from adducing evidence of this victory in support of his claim for damages against the same party.[19] It is submitted that the maxim is essentially used to guard against prejudice that may be directed to a litigant who was never party to the criminal proceedings and did not have the opportunity to challenge the evidence in those proceedings.[20] Consequently, it is submitted that

11 *Hollington v Hewthorn & Co Ltd supra*.
12 *R v Trupedo* 1920 AD 58.
13 *S v Shabalala* 1986 4 SA 734 (A).
14 Schwikkard *et al*, 60; *S v Shabalala supra*.
15 *S v Shabalala supra*.
16 Schwikkard *et al*, 60.
17 Collins dictionary of law https://law.academic.ru/10405/res_inter_alios_acta_nocere_non_debet (accessed 2020-01-15).
18 Zeffert "The Rule in *Hollington v Hewthorn* Revisited" 1970 SALJ 333.
19 *Hollington v Hewthorn & Co Ltd supra*.
20 Bentham *The Works of Jeremy Bentham* (1843) 275 – 276.

the question should not be whether the evidence is *res inter alios acta*, but whether any of the parties would be prejudiced by its introduction.

Goddard LJ correctly stated that at the heart of any objection relating to the admissibility of evidence, the question of relevance is emphasised.[21] It is submitted that when considering the relevance of any evidence, it is important to look at the prejudicial effect of the evidence sought to be adduced on the parties concerned. It is further submitted that evidence which is relevant, but in the same instance prejudices the parties, may be excluded on this basis alone unless its probative value outweighs its prejudicial effect.[22] Therefore, it is argued that the maxim may well be subsumed in the relevance enquiry as it also guards against prejudice.

Bentham states that prejudice arises where evidence of a conviction in a criminal court is used against a third party not concerned with the initial proceedings, and it is unlikely to arise where the same third party uses the evidence in his favour.[23] It is submitted that in *Hollington*, the latter was the case. The plaintiff sought to adduce evidence of a verdict by a criminal court in which he was not an adversary, but which favoured him. Without any evidence of prejudice against the defendant, in that he was a party to the initial criminal proceedings and therefore had an opportunity to challenge any evidence adduced in those proceedings, it is hard to establish how the trial court reached its conclusion and classified such evidence as *res inter alios acta*.

2 1 3 The criminal finding as an irrelevant opinion

The main reason for Goddard LJ's exclusion of a previous conviction as evidence in subsequent civil suits is that it amounts to an irrelevant opinion with no greater probative value than that given by a lay person.[24] It is submitted that his finding of irrelevance in the mentioned circumstances, although not conclusively flawed, raises much debate, as evidence of a previous conviction may not always be excluded from admission. Goddard LJ classified the evidence as an opinion, and it is accepted that an opinion is merely conclusions or inferences drawn by a witness on certain facts, and thus a previous conviction by a criminal court can easily amount to such, based on the fact that the trial judge makes a conclusion of guilt, influenced by the facts and evidence presented before the court.[25]

Opinion evidence is not automatically excluded from admission, and as correctly stated by Goddard LJ, admissibility is largely dependent on relevance. As such, the real question in the particular circumstance is whether introducing evidence of a negligent driving conviction, which

21 *Hollington v Hewthorn & Co Ltd supra*.
22 Schwikkard *et al*, 56.
23 Bentham 276.
24 *Hollington v Hewthorn & Co Ltd supra*.
25 Schwikkard *et al*, 89; Tapper *Cross & Tapper on Evidence* (2010) 530.

was not connected to the plaintiff's claim for damages was relevant to the issue before the court; namely whether the defendant's negligent conduct unreasonably caused the plaintiff's damages. As rightly submitted by the plaintiff's defence, unless it can be proven that the negligent driving conviction was an element of the claim for the damages suffered by the plaintiff, the evidence of the previous conviction was inadmissible.[26]

On the facts, Goddard LJ's finding of irrelevance was warranted. It is submitted that the evidence sought to be adduced was unrelated to the claim for damages, in that the negligent driving related to a separate matter not linked to the plaintiff's case.[27] The evidence merely showed that the defendant was convicted of driving negligently on the same day as the plaintiff's accident.[28] Arguably, one cannot tender such evidence as conclusive proof for negligence on the part of the defendant in the plaintiff's civil suit for damages. In fact, it is submitted that it does not even suffice as *prima facie* proof, as this implies that any failure by the defendant to object to the evidence, may well result in a finding of negligence on his part.[29] Of course this cannot be the case, especially without a direct link between the defendant's negligent conduct and the harm suffered by the plaintiff.[30] It cannot be said however that the same is arguable where the previous conviction actually stems from the same incident.

Considering the above, the important consideration is now whether such decision to exclude evidence of a previous conviction is rightly extended to other matters. Goddard LJ did not express when an opinion would be considered relevant. However, it is noted from early writings of the law of evidence that the general rule was that opinion evidence was inadmissible.[31] For instance, Sir James Fitzjames Stephen stated:

> "The fact that any person is of the opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter."[32]

It is submitted that the specified exceptions were of limited scope and included expert opinion.[33] According to Schwikkard, opinion evidence was generally irrelevant and therefore excluded on the basis that it "makes no probative contribution, creates the risk of confusion of the main issues, can lead to prolongation of trials, and can open an 'evidential pandora's box'". These being important factors when determining the relevance and admissibility of evidence.[34]

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26 *Hollington v Hewthorn & Co Ltd supra*.
27 *Hollington v Hewthorn & Co Ltd supra*.
28 *Hollington v Hewthorn & Co Ltd supra*.
29 Schwikkard *et al*, 22.
30 Owen "The five elements of negligence" 2007 *Hofstra Law Review* 1683.
31 Doyle "Admissibility of opinion evidence" 1987 *Australian Law Journal* 688.
32 Stephen *A Digest of the Law of Evidence* (1914) 55.
33 Doyle 1987 *Australian Law Journal* 688.

However, in recent times the rules relating to opinion evidence do not automatically exclude it from admission. The Constitutional Court held that:

> "Any opinion, whether from a lay person or expert, which is expressed on an issue the court can decide without receiving such opinion is in principle inadmissible because of its irrelevance. Only when an opinion has probative force can it be considered admissible."[35]

Therefore, whether an opinion carries any probative force will depend on the issues before the court. According to the Constitutional Court, any opinion, regardless of whether it is expressed by a lay person or an expert, which speaks to an issue that the court may decide without receiving it is irrelevant and inadmissible.[36] Consequently, the evidence is only receivable if it is capable of putting the court in a better position when deciding on the matter.

It is arguable that the previous conviction in *Hollington* was irrelevant and inadmissible, in that the court was capable of deciding on the issue of whether the defendant in the circumstances acted negligently in causing the plaintiff's harm. It had sufficient evidence before it and could draw the necessary inferences. Further, the conviction could not assist as there was no direct link between the defendant's negligent driving conviction and the harm suffered by the plaintiff, more especially because the conviction was based on a separate set of facts not linked to the plaintiff's accident.[37]

Notably, if the previous conviction had been introduced for the purposes of proving the character of the defendant, the evidence would have been treated differently. This is because similar facts are often relevant and admissible for purposes of showing that the defendant had previously behaved in a similar manner as the occasion being considered by the relevant court.[38] The court in *S v M* stated that:

> "[S]imilar fact evidence is evidence which refers to the peculiar or immoral or illegal conduct of a party on an occasion or occasions other than the incident or occurrence in contention, but which is also of such a character that it is pertinent to or in essentials similar to the conduct on the occasion which forms the issue or subject-matter of the dispute."[39]

Essentially, this means that had the plaintiff in *Hollington* introduced the previous conviction in order to show that the defendant had on another occasion aside from the one in question drove negligently, such evidence, if found to be sufficiently relevant, would be admissible.

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34 Schwikkard *et al*, 93.
35 *Helen Suzman Foundation v President of the Republic of South Africa* 2015 2 SA 1 (CC).
36 *Helen Suzman Foundation v President of the Republic of South Africa supra*; Schwikkard *et al*, 98.
37 *Hollington v Hewthorn & Co Ltd supra*.
38 Schwikkard *et al*, 76.
39 *S v M* 1995 1 SACR 667 (BA).

When dealing with the admission of similar fact evidence, the judgments in the cases of *Makin v Attorney-General for New South Wales*,[40] and *DPP v Boardman*,[41] become particularly relevant. Although speaking to similar fact evidence in the context of criminal proceedings, Lord Herschell in his *dictum* pointed out that the evidence is not admissible where its main purpose is only to show that the defendant has a propensity to act in a certain manner.[42] Accordingly, the evidence of the previous conviction in *Hollington* would not be admissible if the aim was simply to show that the defendant had a tendency of driving negligently, unless the degree of relevance warrants its admission.[43]

The degree of relevance is decided on a case-by-case basis by mostly looking at the degree of similarity in the defendant's conduct.[44] Lord Wilberforce speaking to the requirement of similarity, stated that the admission of similar fact evidence is dependent on the similarity of circumstances which must be such that if compared they are likely to produce the same results. This would mean that for admission, the circumstances that led to the previous conviction sought to be adduced in *Hollington'* must have been of such a nature that they are similar to the circumstances in the occasion under the scrutiny of the court, and are likely to produce the same conclusion. Of course, this requirement of similarity cannot be unduly emphasised, especially in the light of other submissions relating to alternative tests for the admission of similar fact evidence.[45]

For instance, MacEwan submits that the admission of similar fact evidence does not require that the compared incidents be "uniquely strikingly similar", but in order to establish the requisite probative value, the preferred approach is whether the evidence can be explained away as merely "coincidence".[46] Essentially, this means that regardless of the absence of any striking similarities between the other unlawful incidents, the court may still admit the similar fact evidence. As such, even if the circumstances that gave rise to the dispute in *Hollington* were not strikingly similar to the circumstances leading to the previous conviction, the evidence would be admitted where the defendant's behaviour in the compared occasions could not be explained as a mere coincidence. It is also accepted that in some instances, where there is a lack of collaborating evidence supporting the prosecution or plaintiff's case, a higher degree of similarity is required.[47]

In *DPP v Boardman*, it was said that:

40 *Makin v Attorney-General for New South Wales* 1894 AC 57 (PC).
41 *DPP v Boardman* (1975) AC 421.
42 *Makin v Attorney-General for New South Wales supra*; Schwikkard *et al*, 79.
43 *DPP v Boardman supra*.
44 *S v M supra*.
45 *DPP v Boardman supra*.
46 McEwan *Evidence and the Adversarial Process: The Modern Law* (1998) 58 – 59.
47 Schwikkard *et al*, 60.

> "The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury would acquit in the face of it."[48]

Accordingly, the relevance of the similar fact evidence will be tested against the issues to be decided by the court and any other available evidence. This would mean that the defendant's culpability in *Hollington* would not only depend on the previous conviction, but also on other evidence tendered by the plaintiff and the issues before the court.

3 Previous convictions and the Civil Proceedings Evidence Act 25 of 1965 and the Superior Courts Act 10 of 2013

For purposes of both civil and criminal matters, any evidence which does not serve to make plausible or implausible a fact in issue before the court will be inadmissible as a result of its irrelevance.[49] The idea of irrelevance has been largely considered in relation to opinion and similar fact evidence above and is regarded as evidence that is unlikely to assist the court in deciding on the matter before it. The prescripts of the Civil Proceedings Evidence Act and the Superior Courts Act relating to the admissibility of evidence, become particularly important when speaking to the admissibility of previous convictions, and the rule in *Hollington* ought to be discussed in relation to the relevant provisions.

Owing to the fact that the *Hollington* rule is largely applied in civil matters, the Civil Proceedings Evidence Act becomes particularly relevant and section 17 and section 42 of the Act are a point of reference in so far as they relate to the admission of evidence in civil matters. The Civil Proceedings Evidence Act contains a residuary provision which prompts the application of the law of evidence applicable to civil proceedings on 30 May 1961, unless the contrary is rendered possible by the Act or any other relevant law.[50] Accordingly, where the Civil Proceedings Evidence Act is silent on certain issues, such as the admissibility of a previous conviction, the matter will be dealt with in terms of the law applicable on 30 May 1961. With that said, and in light of section 17 of the Civil Proceedings Evidence Act, read together with section 42 above, there is inconsistency in applying the *Hollington* rule.[51]

48 *DPP v Boardman supra*.
49 S 210 of the Criminal Procedure Act 51 of 1977; S 2 of the Civil Proceedings Evidence Act 25 of 1965.
50 S 42 of the Civil Proceedings Evidence Act 25 of 1965.
51 See judgments of *Cape Pacific Ltd v Lubner Controlling Investments* 1995 4 SA 790 (A); *Groenewald v Swanepoel* 2002 6 SA 724 (E); *Lagoon Beach Hotel v Lehane* 2016 1 All SA 660 (SCA); *Leeb v Leeb* 1999 2 All SA 588 (N); *Prophet v National Director of Public Prosecutions* 2007 6 SA 169 (CC).

Although section 17 of the Civil Proceedings Evidence Act does not speak to the relevance and admissibility of previous convictions in civil matters per se, it does make the production of such evidence possible by way of certified documentary evidence.[52] Despite the section not providing clarity as to the purpose of admitting the certified document as proof of a previous conviction, it is arguable that the inclusion of this section in the Civil Proceedings Evidence Act means that in some instances, and depending on the circumstances before the court, the evidence of a previous conviction may be relevant in deciding the issues before the court and as such, be admissible for purposes of proof. Interestingly, it is submitted that evidence of a previous conviction is not only adducible through section 17 of the Civil Proceedings Evidence Act, as the use of "any other law" under section 42 of the Civil Proceedings Evidence Act may include the prescripts of the Criminal Procedure Act or the rules of admissibility relating to perhaps similar fact evidence.

It is also worth noting that the Superior Courts Act also provides for the submission of documentary evidence in order to prove one's criminal history.[53] Again, it is submitted that this indicates that previous judgments may serve as admissible evidence in subsequent court proceedings. Similar to section 17 of the Civil Proceedings Evidence Act, the section does not explicitly render judgments of previous courts relevant in subsequent proceedings as this is decided depending on the prevailing circumstances. The ultimate question being whether receiving the evidence will provide reasonable assistance to the court in deciding on the facts in issue.[54]

Although in the case of *S v Mavuso*,[55] the Supreme Court of Appeal by way of an *obiter* left open the question as to whether the judgment in *Hollington* extends to criminal matters, it is submitted that in light of the Criminal Procedure Act, to extend the rule to criminal matters will result in an erroneous application of our existing law as the Criminal Procedure Act provides for the admission of previous convictions in specified instances.

Section 197 of the Criminal Procedure Act allows for an accused to be questioned on their previous convictions where their conduct falls within the provisions contained therein. Importantly, section 197 of the Criminal Procedure Act provides that the accused's previous conviction will be put to him or her where s(he) led evidence of good character or where its introduction is admissible for purposes of proving guilt.[56] Accordingly, and contrary to the judgment in *Hollington*; it is submitted that this section may well be indicative of the fact that in certain circumstances, one's previous conviction may be such that it is capable of assisting the court in resolving the issue of guilt or witness credibility.

52 S 17 of the Civil Proceedings Evidence Act 25 of 1965.
53 S 34 of the Superior Courts Act 10 of 2003.
54 Schwikkard *et al*, 53.
55 *S v Mavuso* 1987 3 SA 499 (A).
56 S 197(a) & (b) of the Criminal Procedure Act 51 of 1977.

Arguably, a civil court may accept evidence of previous convictions where the defendant has portrayed himself as a person of good character, this is considered relevant for purposes of proving credibility, which is particularly important for purposes of assessing the final weight of all evidence.[57]

Further, the Criminal Procedure Act provides that evidence of a previous conviction will be admissible where the previous conviction is an element of the offence the accused is charged with.[58] It is submitted that although it is not clear when a previous conviction will be an element of another offence, arguably, it would seem to mean that the previous conviction must also relate to the unlawful causing of the prohibited consequences which form the subject of the court's enquiry. Criminal liability only attaches where it can be proven beyond a reasonable doubt that all elements of a crime exist, specifically those relating to the conduct and the mental state of the accused.[59] Thus, a previous conviction will have to serve this purpose.

Similarly, in *Hollington* it was accepted by the plaintiff that the previous conviction will only become relevant and admissible as *prima facie* evidence, if it can be proven that the negligence leading to the conviction also resulted in the accident which was the subject of dispute in the case. Goddard LJ did not dispute this argument, although he advanced that to identify the conviction with the matter before him may well result in the retry of the criminal case.[60] Accordingly, in a civil matter, and in a case of fraud for instance, it would seem that the previous conviction will be sufficiently linked where the intention to defraud is also the intention to cause pure economic loss.

In light of this, the judgment may not pose problems in criminal matters, considering the provisions of the Criminal Procedure Act that readily provide for the admission of previous convictions in those proceedings. It is also worth noting that previous convictions in criminal matters also play a rather important role in determining the appropriate sentence pursuant to a conviction.[61]

4 The constitutionality of the *Hollington* rule

The Constitution being the supreme law of the land demands that all law is consistent with it, with the result of a declaration of invalidity on any

57 Schwikkard *et al*, 566.
58 S 211 of the Criminal Procedure Act 51 of 1977.
59 Grant *The Responsible mind in South African Criminal Law* (PhD thesis 2011 WITS) 23; Snyman *Criminal Law* (2016) 29 – 31.
60 *Hollington v Hewthorn & Co Ltd supra*.
61 *S v Scheepers* 2006 1 SACR 72 (SCA); Page 37 of the Discussion Paper 91 (Project 82): Sentencing (A New Sentencing Framework) 2000.

law if the contrary exists.[62] Accordingly, in the case of *De Lange v Smuts NO*,[63] the Constitutional Court recognised that it is everyone's fundamental right to challenge the legality of any law in the Republic.[64] It is upon this basis that this paper examines how the *Hollington* rule may negatively impact the principles of the Constitution.

Section 34 of the Constitution grants access to courts to all people in the Republic who seek civil action refuge. Amongst other things, the provision guarantees the resolution of legal disputes by way of fair proceedings.[65] The Constitutional Court pronounced on the fair hearing component and said:

> "This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it reasonably possible to do so, in a way that would render the proceedings fair."[66]

Accordingly, section 34 requires that civil proceedings be conducted fairly,[67] and where the proceedings conflict with the Constitution, the relevant legislation and rules should be interpreted accordingly to bring the proceedings in line with the prescripts of the Constitution.

It has been submitted that section 34, although applicable to civil matters is contextually similar to section 35 of the Constitution which deals with arrested, detained and accused persons for purposes of criminal proceedings.[68] As such, it has been argued that in so far as section 35 refers to the right to a fair trial in the form of certain sub-rights, these should also be recognised as forming part and parcel of section 34 of the Constitution.[69] This is of course with the exception of certain sub-rights, which may not explicitly apply in civil proceedings – i.e. the right to be presumed innocent, the right to silence and the right speaking to state appointed legal representation.

62 S 8 & S 39 of the Constitution of the Republic of South Africa, 1996.
63 *De Lange v Smuts* 1998 3 SA 785 (CC).
64 *De Lange v Smuts supra*.
65 Currie & De Waal *The Bill of Rights Handbook* (2015) 740.
66 *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC).
67 *Barkhuizen v Napier* CCT72/05 2007 ZACC 5; *De Beer v North-Central Local Council and South-Central Local Council supra*; *De Lange v Smuts supra; Mohlomi v Minister of Defence* CCT41/95 1996 ZACC 20; *Van Huysteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (CPD).
68 Brickhill & Friedman *Access to Courts in Constitutional Law of South Africa* (2006) 5.
69 Brickhill & Friedman 6.

The Constitutional Court has indicated that an important aspect of this fair hearing component is the ability of all parties to reasonably present their case. This translates to an adequate opportunity to prepare one's defence and to also present or challenge any evidence put before the court.[70] The Constitutional Court further states that this is essential, as it ensures that the presiding officer reaches an objective conclusion in relation to the existence or non-existence of facts.[71]

It is submitted that the rule in *Hollington* which relates to the withholding or exclusion of evidence, does not accord with this fundamental aspect of fairness in civil proceedings as it limits the right of litigants to present and possibly challenge evidence. It is apparent that courts are required to enquire into the relevance of every piece of evidence received,[72] and a cautionary approach is necessary before invoking any rule, especially one based on judicial precedent.[73] Facts of cases differ and therefore the enquiry needs to be reflective of this, in that it is possible that evidence may be considered irrelevant in one matter, only to be admitted in another. It is submitted that the relevance of evidence must be tested against the prevailing facts and issues before the court, and to neglect this may well amount to a limitation of a litigant's right to adduce and challenge evidence.

In *Hollington*, Goddard LJ had no objections to the fact that if a sufficient link is established it is possible to find such evidence relevant and admissible. This suggests that had the previous conviction been one that stems from the same facts or incident, a substantial link would exist, as the plaintiff would be able to bring evidence to show that the defendant by his careless driving, caused the damages suffered by the plaintiff. Accordingly, to simply rely on this judgment without any assessment of the conviction in relation to the issues may prevent a litigant from adducing evidence potentially relevant. Resultantly, to neglect to assess the evidence, prevents the admission of a previous conviction in this regard and limits a litigant's right to adduce relevant evidence.

Goddard LJ also states that one of the reasons for exclusion relates to the fact that the defendant is entitled to challenge this evidence and resultantly, admission would result in a retry of the criminal matter.[74] Although this is true, particularly in the light of our Constitution which recognises the right to challenge evidence by way of cross-examination,[75] it is submitted that this right will not be limited in civil proceedings where the courts prevent the challenge of such evidence. This is because section 35 of the Constitution already provides an accused person with the right to review any criminal proceedings or

70 *De Lange v Smuts supra*.
71 *De Lange v Smuts supra*.
72 *S v Shabalala supra*.
73 *S v Shabalala supra*.
74 *Hollington v Hewthorn & Co Ltd supra*.
75 *Jongilanga v S* 2016 2 SACR 404 (ECB).

appeal any criminal decision.[76] In the circumstances, it is argued that the litigant against whom such conviction is to be adduced already has a right to review or appeal, and any failure to use this opportunity in criminal proceedings can be construed as a waiver of such right and as such, the litigant is not expected to challenge the conviction in civil proceedings. Perhaps the challenge must only extend to the admissibility of such evidence against the said litigant and not whether the conviction was correctly arrived at. It is argued that section 35 of the Constitution already serves as a safeguard against any injustice in relation to the conviction.

As correctly observed, the fundamental principle of the law of evidence is that evidence is only admissible where it is relevant in proving a fact in issue,[77] and this is the case where it assists the court in deciding on the issues before it.[78] The court in this instance does not decide on the final weight, it only makes a potential assessment of the evidence in order to determine whether its probable contribution is substantial to justify admission. Evidence may be such that its potential contribution is easily assessed, whereas other evidence may have a probative value dependent on the existence of other facts.[79] The latter case is applicable to previous convictions.

Accordingly, the court is under an obligation to assess any evidence presented and received by it. A failure to do so may result in neglecting one's right to adduce evidence. It is submitted that this process of assessment is essential in every individual case, and evidently, the Superior Courts Act provides under section 22 that issues relating to admissibility of evidence warrant a review of proceedings.[80] It is submitted that an omission of this kind may amount to a gross irregularity reviewable in terms of the mentioned Act,[81] provided the affected litigant may show materiality in the form of prejudice.[82]

5 Conclusion

The rule in *Hollington* originates from English law and finds its dominance in South African law by virtue of Section 42 of the Civil Proceedings Evidence Act. It renders a criminal conviction inadmissible as evidence in a subsequent civil action, regardless of whether such conviction stems from the same facts. However, it is submitted that the

76 S 35 (3) (o) of the Constitution of the Republic of South Africa,1996.
77 *R v Trupedo supra*; Schwikkard et al, 4.
78 Murphy *A Practical Approach to Evidence* (2008) 25.
79 Zuckerman *The Principles of Criminal Evidence* (1989) 51.
80 S 22(1)(d) of the Superior Courts Act 10 of 2003.
81 S 22(1)(c) of the Superior Courts Act 10 of 2003.
82 In *ABSA Bank Limited v De Villiers* 2010 All SA (SCA), Navsa JA stated that a "gross irregularity in civil proceedings in an inferior court means an irregular act or omission by the presiding judicial officer in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant".

rule no longer finds application in light of the developments found in existing legislation, particularly section 17 of the Civil Proceedings Evidence Act and section 34 of the Superior Courts Act. Further, section 34 of the Constitution grants every civil litigant a right to a fair trial, and the application of the rule proves to be unconstitutional if viewed against such right. This is problematic as it is likely to result in reviewable decisions. It is therefore necessary for the legislature to intervene and reform the position in law regarding the rule established in *Hollington* in order to ensure certainty in the treatment of previous convictions in civil matters.

Disruptive technologies and the future of regulations – ICT regulatory structure(s) determined

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SUMMARY

Digitisation of information compels a revision of the Fourth Industrial Revolution (4IR) and its associated technologies. This arises because 4IR technologies, for example, the Internet of Things (IoT), Big or Massive Data, Artificial intelligence (AI), augmented or virtual reality and machine learning, drastically adjust the manner in which an information society operates. Specifically, they present unprecedented opportunities for business, economy and online user or consumers. Furthermore, they profoundly model and re-model productions. As a result, the conventional lines between the physical, digital and biological spheres become imprecise. Given the extent of the transformation that 4IR technologies bring to society, it has become necessary to refer to them as the disruptive technologies. However, the inquiry is to what extent is the information society ready to take advantage of disruptive technologies and control some of the setbacks that emanate from therefrom? For regulatory purposes, how electronic or e-ready regulators are to control the adverse consequences that are associated with disruptive technologies? To address these questions, this paper discusses some of the selected theories for technology regulations (artificial immune system (AIS) theory and theory for *Lex Informatica*). The theories are not technology regulations, as such. Simply, they concede that technology regulations should encourage a proper scrutiny of the position of the technologies in the information society.

1 Introduction

It has become customary to talk about "disruptive technologies", that is, technologies arising consequent to the Fourth Industrial Revolution (4IR), that have major impact on society.[1] These technologies focus, among others, on the creation of intelligent and communicative systems.[2] These may be systems fostering machine-to-machine (M2M) and human-to-machine (H2M) interactions.[3] When this happens, there is mention of

1 In the information or digital age, reference to a society means the Information Society. See, Webster *Theories of the Information Society* (2002) 2-7.
2 Schwab *Shaping the Future of the Fourth Industrial Revolution: A Guide to Building a Better World* (2018) 23.
3 Schwab *The Fourth Industrial Revolution* (2016) 17.

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technologies, for example, the Internet of Things (IoT),[4] Big or Massive Data,[5] Artificial intelligence (AI),[6] augmented or virtual reality[7] and machine learning.[8] However, one still finds views doubting the effect that 4IR technologies have or continue to have on society. For example, there are those who opine that the idea for disruptive technologies is a fallacy.[9] They argue that all society currently witnesses are mere random technological interruptions.[10] To them, the technological interruptions are not so tumultuous that they revolutionise society or the way society operates. In the main, these assertions are a further development of the idea of "*The Shock of the Old*" established by David Edgerton.[11] This notion propounds that there is no such a thing as radical or extraordinary technologies.[12] Simply, ICTs are products of history.[13] In other words, they emerge, disappear and re-emerge depending on their relevance to society.[14] Because of this, categorising technologies as disruptive is "just a reheated nonsense from a hundred years ago".[15]

As convincing as the view of the Shock of the Old is, it however does not seem to be the most popular amongst academics. Proponents of the 4IR technologies argue that recent technologies present unprecedented opportunities for or paradigm shifts in the economy, business, society,

4 IoT is often referred to as Internet of Everything, Web of Things, Internet of People and Things, Internet of Vehicles, Internet of Animal Health Things and Internet of Services. It is a "global infrastructure for the information society, enabling advanced services by interconnecting (physical and virtual) Things based on existing and evolving interoperable information and communication technologies". See, International Telecommunication Union (ITU).

5 Big data is the term used to describe complex or large volumes of data. It really does not matter whether the data is structured, semi-structured or un-structured. It is only sufficient if the data is part of an activity that "collects, analyses, packages, and sells data, even uninteresting-looking data, to reveal tastes, habits, personality, and market behaviour".

6 AI can be defined as machines that have the ability to structure, re-structure, develop itself, and design or re-design more progressive machines. See, Vinge *The Coming Technological Singularity* (1993).

7 Augmented reality implies the real-time direct or indirect view of a physical real-world environment that has been enhanced/augmented by adding virtual computer-generated information to it.

8 Machine learning is also called "automated learning". This is because automation plays a key role to the functioning of the machine. In other words, the AI has the ability to discern, learn and systematise information automatically without the necessity for programming. See, Nagy *Artificial Intelligence and Machine Learning Fundamentals: Develop Real-World Applications Powered by the Latest AI Advances* (2018) 2.

9 Vilakazi "How are Universities Responding to 4IR" in *Proceedings of the 6th DHET Research Colloquium on the Fourth Industrial Revolution (4IR): Implications for Post-School Education and Training* (2019) 15.

10 Vilakazi.

11 See, Edgerton *The Shock of the Old: Technology and Global History Since 1900* (2008).

12 Edgerton xi-xvi.

13 Edgerton xi.

14 Edgerton xvi.

15 Edgerton xvi.

and individual users of these technologies.[16] In other words, ICTs have become so radical that they model and re-model productions, and "blur the lines between the physical, digital and biological spheres".[17] From the business standpoint, these technologies disrupt the manner of generating, creating and preserving value or income.[18] This then creates massive variations in the prevailing models and re-structuring of the data[19] necessary to operationalise businesses. Consequently, questions arise, inter alia, to what extent is society ready to take advantage of 4IR technologies and control some of the setbacks that emanate therefrom? Finding suitable responses to these questions is a challenge to regulators. This ensues because the starting point to commencing legal regulations is usually the adoption of the "command and control" principle.[20] In South Africa, the Cybercrimes and Cybersecurity Bill, 2017 is an example of this challenge.[21] For example, Chapter 2 of this Bill creates more than forty cybercrimes. By so doing, it establishes a framework of over-regulation.[22] In other words, almost all the activities carried out online and without the necessary consent and authority of a person (authorising person) are likely to fall under the category of cybercrimes in terms of this Bill. Commenting on it, the Law Society of South Africa (LSSA) had the following to say:

> "The Cybercrimes and Cybersecurity Bill (the Bill) is a daunting undertaking resulting in a portmanteau of 11 chapters of draft legislation, which include chapters on definitions, offences, jurisdiction, powers to investigate, search

16 Schwab 33-45.

17 Department of Science and Technology White Paper on Science, Technology and Innovation of March 2019 https://www.dst.gov.za/images/2019/WHITE_PAPER_ON_SCIENCE_AND_TECHNOLOGY_web.pdpf (accessed 2020-05-26).

18 Rayna and Striukova "360°Business Model Innovation: Toward an Integrated View of Business Model Innovationa" 2016 *Research Technology Management* 41-51.

19 Data is the electronic representation of information in any form. See, s 1 of the Electronic Communications and Transactions Act 25 of 2002 (hereinafter referred to as the ECT Act).

20 See Baldwin, Cave and Lodge *Understanding Regulation: Theory, Strategy, and Practice* (Oxford 2012) 1-2 and Coglianese and Mendelson "Meta-Regulation and Self-Regulation" in Baldwin, Cave and Lodge (eds) *The Oxford Handbook of Regulation* (2010) 146-168 146.

21 Hereinafter referred to as the Cybercrimes Bill. The object of the Bill is to "create offences and impose penalties which have a bearing on cybercrime; to criminalise the distribution of data messages which are harmful and to provide for interim protection orders; to further regulate jurisdiction in respect of cybercrimes; to further regulate the powers to investigate cybercrimes; to further regulate aspects relating to mutual assistance in respect of the investigation of cybercrime; to provide for the establishment of a designated Point of Contact; to further provide for the proof of certain facts by affidavit; to impose obligations to report cybercrimes; to provide for capacity building; to provide that the Executive may enter into agreements with foreign States to promote measures aimed at the detection, prevention, mitigation and investigation of cybercrimes; to delete and amend provisions of certain laws; and to provide for matters connected therewith". See, Preamble to the Cybercrimes Bill.

22 Njotini *E-Crimes and E-Authentication - A Legal Perspective* (2016) 9.

> and access or seize and international cooperation, 24/7 point of contact, structures to deal with Cybersecurity, National Critical Information infrastructure protection, evidence, general obligations of electronic communications, service providers and liability, agreements with foreign state and so on up to general provisions. From the outset, it is clear that the inclusion of 68 sections in the Bill results in a voluminous document. It is submitted that the unnecessary duplication and incorporation of many common law principles in the Bill has contributed to the 128 pages of draft legislation that is not easy to digest".[23]

For regulatory purposes, the ICT regulatory approach adopted in the Bill is far-reaching and legally unsound and untenable. Specifically, it is abstracted on a framework that is inconsistent with developments in technologies. Furthermore, it offsets the proper application of the Bill and hinders its usefulness to address cybercrimes in South Africa.[24]

Given the challenges mentioned above, some limitations exists with the adopted command and control principles for technology control purposes. Specifically, these shortcomings are unavoidable, especially when regulating a dynamic, energetic and flexible phenomenon similar to the 4IR technologies. Thus, it is necessary to study technologies with particular reference to their position in society. For example, Plato developed what he referred to as the "Two-World Theory" of legal reasoning.[25] These two worlds are simply the sensible or physical and metaphysical worlds.[26] Plato argues that living organisms, such as, the people, animals and plants inhabit these worlds.[27] Accordingly, intelligible or synthetic things, such as the technologies, necessitate an investigation of their position in the physical and metaphysical worlds. The principle that technology regulations have to examine the "whole" or "wholeness" of the technologies themselves guide this investigation.[28] In other words, the systems[29] or networks[30] that characterise the

23 The Law Society of South Africa (LSSA) "Comments by the Law Society of South Africa (LSSA) on the Cybercrimes and Cybersecurity Bill" https://www.lssa.org.za/wp-content/uploads/2020/01/LSSA-CYBERCRIMES-AND-CYBERSECURITY-BILL-Comment-30-Novemeber-2015.pdf (accessed 2021-03-11).

24 LSSA.

25 Huard *Plato's Political Philosophy: The Cave* (2007) 35-37 and Solomon and Higgins *The Big Questions: A Short Introduction to Philosophy* 8th ed (2010) 121-123. A theory may be defined as a "set of propositions or hypothesis about why regulations or regulatory processes emerge, which actors contribute to that emergence and typical patterns of integration between regulatory actors". See, Morgan and Yeung *An Introduction to Law and Regulation: Text and Materials* (2007) 16.

26 Huard.

27 Huard.

28 See in general, Von Bertalanffy *General System Theory: Foundations, Development, Applications* (1968) and Von Bertalanffy *Perspectives on General System theory: Scientific-Philosophical Studies* (1975).

29 A system is a contrivance that facilitates the generating, sending, receiving, storing, displaying or processing data messages and includes the Internet. See, s 1 of the ECT Act.

technological wholeness have to be analysed.[31] This paper lucidly makes this analysis. In doing so, the discussion made forms part of four sections. Section 2 studies some of the theories that inform or could inform ICT regulations. Generally, the theories are vast and sometimes diverge. For that reason, only the theories that support the study of regulating disruptive technologies have relevance to this section. The latter relate to those entities that operate independent of human control and intervention. Section 3 examines some of the related laws that are or could be impacted for technology regulations. This includes a discussion of some of the related aspects of the law of property, that is, ownership as a right, and criminal law, that is, attributing responsibility for conduct or acts carried out by machines. The last section is the conclusion. In this section, a summary of the facts examined in the previous sections is made. Thereafter, a conceivable approach to regulate the disruptive technologies is presented.

2 Regulatory theories

2 1 Artificial Immune System (AIS) Theory

The biological operation of the human body is the basis for the Artificial Immune System (AIS) theory. Specifically, the manner in which the biological immune system (BIS) shapes the idea for the AIS Theory.[32] For example, the BIS has a number of cells, molecules or lymphocytes, macrophages, dendritic cells, natural killer cells, mast cells, interleukins and interferons.[33] These cells or molecules allow the physical body to identify infections or viruses from external elements, that is, the so-called "pathogens".[34] Once identified, they then provide a shield or defence mechanism for the organic body.[35] In doing so, the BIS follows a very sophisticated approach in identifying these pathogens. Particularly, it categorises the attacks into self-attacks and non-self-attacks. Self-attacks include the attacks that are known and recognised by the system. Non-

30 A network referred to two or more inter-connected or related computer devices, which allows these inter-connected or related computer devices to exchange data or any other function with each other; exchange data or any other function with another computer network; or connect to an electronic communications network. S 1 of the Cybercrimes Bill.

31 Febbrajo "The Rules of the Game in the Welfare State" in Teubner (ed) *Dilemmas of Law in the Welfare State* (1986) 129.

32 Lee, Kim and Hong "Biological Inspired Computer Virus Detection System" in Ijspeert, Murata and Wakamiya (eds) *Biologically Inspired Approaches to Advanced Information Technology* (2004) 153-165 155.

33 Hofmeyr and Forrest "Immunity by Design - An Artificial Immune System" in *Genetic and Evolutionary Computation* (Papers presented at the Genetic and Evolutionary Computation Conference (1999) 1289-1296 1290.

34 Freschi, Coello and Repetto "Multiobjective Optimisation and Artificial Immune Systems: A Review" in Mo *Handbook of Research on Artificial Immune Systems and Natural Computing: Applying Complex Adaptive Technologies* (2009) 1-21 2.

35 Rowe GW *Theoretical models in biology: the origin of life, the immune system and the brain* (1994) 121.

self-attacks arise because of the body or system having been exposed to external danger, for example, bacteria and viruses.[36]

Recognising and categorising self from non-self-attacks is an intricate process. Generally, the system reports and sends alarm signals from injured tissues or cells.[37] These signals are empowered with pattern recognition receptors that study the injuries and evaluate the nature and amount of the required interventions. Following this, the BIS breaks down the attacks into small pieces to restore a suitable balance in the system.[38] If a balance cannot be restored, the system is then immunised to enhance its ability to respond to the attacks. Indeed, the immunisation process is not as straightforward as it seems. For example, there are those who ask what would happen in circumstances where a system attacks itself and subsequently registers the attacks as non-self-attacks?[39] Well, it is possible for self and non-self-attacks to be present at the same time. However, this presence should not destabilise the system and the manner in which it operates. Therefore, the fact that the attacks originate from the system (self-attacks) does not mean that the immunisation process becomes insignificant.

As postulated earlier, the success of the BIS necessitated the development of the AIS theory. This theory came about because of the need to develop flexible and dynamic codes, dispersals and networks that mimic biological cells and molecules.[40] These networks and codes allow programmes and software to be installed, erased and re-installed whenever there is a necessity, new computer users to emerge almost every day and systematic configurations to be flexible depending on imminent self and non-self-attacks.[41]

For technology regulation, the AIS theory promotes the creation of an artificial immune system, that is, the AIS. The AIS detects attacks in a system, for example, a computer, and breaks these attacks down into self and non-self-attacks. Firstly, the breaking down of attacks assists in quantifying damages to the system by, inter alia:

> "Damage to cells indicated by distress signals that are sent out when cells die an unnatural death (cell stress or lytic cell death, as opposed to programmed cell death or *apoptosis*)."[42]

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36 Rowe.
37 Matzinger "The Danger Model – A Renewed Sense of Self" 2002 *Science* 301-305 301.
38 Matzinger.
39 Seker, Freitas and Timmis "Towards a Danger Theory Inspired Artificial Immune System for Web Mining" in Scime (ed) *Web Mining: Applications and Techniques* (2005) 151.
40 Birke *Feminism and the biological body* (1999) 142 and Dasgupta, Yu and Nino "Recent advances in artificial immune systems – models and applications 2011 *Applied Soft Computing* 1574-1587 1574-1575.
41 Hofmeyr and Forrest 46.
42 Aickelin and Cayzer "The danger theory and its application to artificial immune systems" (Papers delivered at the 1st Intentional Conference on ARtificial Immune Systems (ICARIS-2002), 2002 Canterbury) 141-148 141.

Secondly, the process of detecting the attacks involves the building of a set intrusion detection algorithms.[43] These algorithms identify, sense and report external anomalies to a system.[44] These could be the illegal use, exploitation and abuse (intrusions) of computer systems. Thereafter, the system will match the anomalies with the identified self or probed intrusions. In cases where a match is found, or the anomaly or anomalies reach an established threshold, the detectors are automatically activated.[45] The activation is then reported to an operator who evaluates and appraises the nature and extent of the anomaly or anomalies.[46] To do this, a risk-sensitive based approach may be necessary to rid the system of identified and sensed anomalies. The latter necessitates that the extent of the attacks determine the apposite responses (immunisation) to breakdown the anomalies to manageable sizes. In each case, the higher the risks posed to the system, the higher the responses adopted to curtail the anomalies is or will be.

One of the examples of technologically empowered BIS is the idea for Intelligent or Smart Grids.[47] This notion arises following the postulated move from an Information Society to a Smart Society. In both these societies, there is a "high level of information intensity in the everyday lives of most citizens".[48] Furthermore, governments, businesses and consumers transmit, receive and exchange data speedily between jurisdictions notwithstanding the distance.[49] However, Smart Societies are a further development of Information Societies.[50] Simply, they are inter-connected societies in terms of which the data, for example, relating to government, agricultural, health energy, transport, etc., on how these societies operate is immediately available and accessible.

Consequently, Smart Grids are one of the technological developments associated with Smart Societies. They are electricity systems and networks (transmission and distribution) that enhance the delivery of sustainable, economic and secure electricity supply.[51] Furthermore, they

43 Aickelin and Cayzer 148.
44 Aickelin and Cayzer 148.
45 Aickelin and Cayzer 148-149.
46 Aickelin and Cayzer 150.
47 The other example is the system referred to as the Intelligent Water Management or Smart Water Grid. See, Tsakalides et al *Smart Water Grids: A cyber-Physical Systems Approach* (2018), Owen (ed) *Smart Water Technologies and Techniques: Data Capture and Analysis for Sustainable Water Management* (2018) and Roy and Bhaumik "Intelligent Water Management: A Triangular Type-2 Intuitionistic Fuzzy Matrix Games Approach" 2018 *Water Resour Manage* 949-968.
48 Durrani S *Information and Liberation: Writings on the Politics of Information and Librarianship* (2008) 256 and Manning T *Radical Strategy: How South African Companies Can Win Against Global Competition* (1997) 134.
49 Durani.
50 Dameri RP "Urban Tabeau de Bord: Measuring Smart City Performance" in Mola L, Pennarola F and Za S (eds) *From Information to Smart Society: Environment, Politics and Economics* (2015) 173-180 at 173-179.
51 Smart Grids seek to, inter alia, provide proficiency in the transmission of electricity, facilitate speedier restoration of electricity after power

augment the reliability, availability and efficiency of the existing energy control mechanisms. Ordinarily, IoT sensors, wireless sensor node (WSN),[52] digital meters and controllers are attached to the grid.[53] The rationale for this is to assist in identifying and reporting power outages electronically.[54] Using the BIS method, the IoT sensors package the identified or imminent power interruptions. Thereafter, they send or transmit power-specific signals to a remote operator.[55]

2 2 Theory for *Lex Informatica*

Law Merchant (*Lex Mercatoria*) is the foundation for the principle for *Lex Informatica*. The latter is the branch of the law that developed in the Middle Ages and propelled by the practices associated with the Feudal System.[56] This law was inter-national in its nature, in that, it regulated the affairs of the various nation (feudal) states.[57] Furthermore, it embodied the practices and customs followed by the diverse secular states.[58] Given inter-national nature, Law Merchant was so flexible that it could respond to the applicable domestic practices adopted by different states.[59] For example, it existed following the inadequacy of national laws to regulate cross-border trading. Accordingly, Law Merchant provided solutions to determine and settle the related trans-national merchant disputes. Furthermore, it became necessary to expand its reach in a manner that allowed this law to deal with the prevailing business and market improvements.[60] In other words, business and market growths required a development of merchant rules and principles.[61]

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disturbances, reduce operations and management costs for utilities, and ultimately lower power costs for consumers, decrease peak demand, which will also help lower electricity rates, augment integration of large-scale renewable energy systems, cascade the integration of customer-to-owner power generation systems, including renewable energy systems, and improve the energy security. See, Owen 2-3.

52 WSNs are nodes that collects, processes and dissemination information or data through virtual networks. They consist of various online sensing devices and these devices facilitates identifying, segregating monitoring and measuring the quality and quantity of information stored online. See, Vujovic and Maksimovic "Raspberry Pi as a Wireless Sensor Node: Performances and Constraints" 2014 *MIPRO* 1247-1252 1247.

53 Tsakalides et al 4-7.

54 Tsakalides et al 4-7.

55 Owen 2-3.

56 Johnson and Post "Law and Borders – The Rise of Law in Cyberspace" 1996 *Stanford Law Review* 1366-1402 1389.

57 Pollock and Maitland *The History of English Law Before the Time of Edward I* 2nd (1968) 467 and Trakman "From the medieval Law Merchant to E-Merchant Law" 2003 *University of Toronto Law Journal* 265-304 265.

58 Trakman 265.

59 Academy of International Law *Recueil Des Cours 273 (1998)* (1999) 393.

60 Mefford "*Lex Informatica* – Foundations of Law on the Internet" 1997 (5) *Indiana Journal of Global Legal Studies* 211-237 223-224.

61 Mefford.

Following the dynamic nature of the Law Merchant, Reidenberg developed what he referred to as the *Lex Informatica*.[62] His hope for *Lex Informatica* was that the latter would be able to progress with the developments in technologies. This denotes a situation where a connection exists between technological regulations and the technology that informs the regulations. Consequently, Reidenberg used as the point of departure the fact that legal regulations are the elementary structure of the law or *lex*.[63] In other words, they become instruments or tools to channel the behaviour of society.[64] To facilitate this process, the command and control principle is usually applied. However, *Lex Informatica* depends on the architectural standard of the Internet, for example, the HTTP and the defaults as the basic structure for ICT regulations.[65] Furthermore, it relies on certain default rules, the formulation of which is separate from the law-making process. Commonly, the developers or engineers of the technologies build and generate these rules. The rules cover, inter alia, the position of technologies in society, that is, their social construction or process.[66] In this manner, the technological architecture imposes regulations on the users of technologies.[67]

Lessig similarly supports the view of technology-imposed regulations. He argues that technologies regulate in terms of certain codes or computer-generated codes (keys), for example, PINs, Usernames and Passwords.[68] This is the position because technologies necessitate the migration from offline to online spaces (cyberspace). This arises because, according to Lessig, cyberspace is a space where:

> "People meet, and talk, and live….in ways not possible in real space. They build and define themselves in cyberspace in ways not possible in real space. And before they get cut apart by regulation, we (regulators) should know something about their form, and more about their potential".[69]

In the main, the choices in the design of technologies determine the nature of the computer codes available to the cyberspace.[70] For example, the design of the technologies also assist in controlling the accessing or not of the technologies. This access depends on whether a person possesses the correct code to unlock access.[71] Therefore, *Lex Informatica* concedes that the starting point to ICT regulations is the

62 Reidenberg "*Lex Informatica* – The Formulation of Information Policy Rules Through Technology" 1998 *Texas Law Review* 553-584.
63 Reidenberg.
64 Hood and Margetts *The tools of government in the digital age* (2007) 2.
65 Reidenberg.
66 Reidenberg.
67 Murray *The Regulation of the Internet: Control in the Online Environment* (2007) 8 and Paré *Internet Governance in Transition: Who is the Master of this Domain?* (2003) 54.
68 Lessig *Code and Other Laws of Cyberspace* (1999) and Lessig "The Path of Cyberlaw" 1995 *The Yale Law Journal* 17-46.
69 Lessig.
70 Ong *Mobile Communication and The Protection of Children* (2010).
71 Paré 54.

proper understanding of the technologies themselves. This is because the technological architecture, for example, the codes, usernames or passwords, imposes regulations on who should access these technologies.

Having discussed the selected ICT regulatory theories, it is evident that they discard an ICT regulatory structure modelled on legal rules. As such, they accept that understanding technologies should inform ICT regulations. In this manner, the theories may fairly do well in regulating technologies arising consequent to the Third Industrial Revolution, for example, the Internet and the World-Wide-Web. However, they do not adequately cover the developments arising following the 4IR (disruptive) technologies. Specifically, they fail to appreciate that some of the disruptive technologies, for example, AI, have cognitive abilities and that they can operate independent of human control and interventions. Instead, the theories assume that technology regulations control the behaviour of users online. In other words, users migrate online based on them possessing an authentication code, username or password. Thus, the system grants access to users who possess the correct authentication code and deny access to those who do not. Therefore, this presupposes a situation wherein users have control over the code, username or password as a specific regulatory tool. In addition, the theories do not envisage that 4IR technologies are able to generate other technologies or of re-generating themselves in ways that do not require human control and guidance.[72] Conversely, they postulate that the technological codes over which users have control are suitable regulations for the control of ICTs.

In view of the above-mentioned, the sections below examine the element of "(human) control" when dealing with disruptive technologies. This study scrutinises some of the relevant principles of the law relating to ownership and control. This has to do with studying the applicable provisions of the law of property. Thereafter, a discussion is made of the related principles of criminal law, that is, the attribution of criminal responsibility. The rationale for this is to determine whether artificial intelligence (AI) can control other machines or robots.[73] Furthermore, it is to establish whether there is or could be such a thing as a "reasonable AI, machine or robot" for factual and legal purposes.

72 Tegmark *Life 3.0: Being Human in the Age of Artificial Intelligence* (2017) 23.

73 AI are synthetic or man-made machines or robots that are equipped with the cognitive capability similar to that of humans. They include autonomous robots that can respond to a wide range of consternations and follows a particular problem-solving technique. See, Mainzer *Artificial Intelligence – When Do Machines Take Over?* (2020) 2.

3 Selected legal principles

3 1 Background

The ICT regulatory theories assume that ownership and control are the prerequisite for ICT regulations. Thus, a control of an authentication code, username or password determines this control. Should the correct code, username or password be absent or could not be located, required access to an online system could consequently be denied. In terms of the AIS theory, this absence triggers an anomaly-detection process. The effect of this is for the system to reject the requested access on the basis that the granting is or will likely expose the system to external (non-self) attacks. For *Lex Informatica*, the absence of the required code results in a user remaining in offline spaces. This follows the system henceforth declining a user the requested migration to cyberspace.

Therefore, the theories do not deal with situations where human control is not a factor for the effective and efficient operation of disruptive technologies. Given this, it has become indispensable to investigate questions regarding who or what controls these 4IR technologies. This study looks at the nature and essence of the ownership as a right. The idea is not to seek to re-write property law as such. Simply, it is to understand whether the notion of "control" in the law of ownership is elastic or capable of developing. Following this, a determination is made on whether control is central to the attribution of legal responsibility for acts a machine or robot carry out independently of human control. The related aspects of criminal law, that is, criminal responsibility, assist in making or determining this attribution.

3 2 Ownership and control

Generally, the essence of control, in terms of the law of property, is a flexible one. It is adaptable to changes that occur to society. This flexibility does not affect, however, the principle that the basis of control is the acceptance of a relationship that exists between a person and thing.[74] Old Roman law recognised this relationship in the Laws of Twelve Tables.[75] For example, Table IV.V of the Twelve Tables states that only Roman citizens could assume control of or over things. This assumption did not translate to ownership as such. It had relations to the fact, inter alia, that:

> "The technical word for ownership of things: it (ownership) was an element of the house-father's *manus*. In time, although it is impossible to say when, the word *dominium* came into use; but, so far as can be discovered, it did not occur in the Tables, and must have been of later introduction. In those days,

74 Njotini "Examining the 'Objects of Property Rights' – Lessons from the Roman, Germanic and Dutch Legal History" 2017 *De Jure* 136-155 154-155.
75 Hereinafter referred to as the Twelve Tables.

> when a man asserted ownership of a thing, he was content to say, - 'It is mine,' or 'It is mine according to the law of Quirites."[76]

Pre-classical and classical Roman law also followed this old Roman law formulation of control. However, classical Roman law introduced, for first time, the notion of ownership or *dominium* to the Roman law study of property law.[77] In this manner, the element of control of or over property is inferred from this classical Roman law concept of *dominium*. Well, the notion was altered a number of times, for example, in post-classical, Germanic law, Medieval law, Sixteenth century (*mos italicus, mos gallicus,* moral philosophers), the Pandectists (private law dogma) and Dutch law. However, the classical Roman law formulation of control remains the finest in the history of the law of property. Specially, it is during this period that ownership was defined very broadly to include certain other rights, for example, the right to use, enjoy, destroy and transfer a thing.[78]

Now that ownership has to do with control of or over things, the next stage of the inquiry is what were the things over which control was exercised? Classical Roman law described those things as the objects that are of economic value to a person.[79] These were the *res in commercio*.[80] Consequently, control was possible or only conceivable in respect of those objects or things that guaranteed economic interest of a monetary value.[81] These were both corporeal property (land, house, horse, slave, garment, gold or silver) and incorporeal property (rights,[82] inheritance, servitude or *hereditas*).[83]

It is possible that South Africa follows the classical formulation of ownership and control. Particularly, South Africa accepts that the notion of *dominium* is symbolical to the "control" a person has over property. Some academics regard this control as connoting the power that a person has over a thing, that is, the *ius in rem suam*.[84] However, South Africa extends the objects of property or rights in property beyond *res in*

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76 Muirhead *Historical Introduction to the Private Law of Rome* (1998) 126. See also, Bouckaert "What is Property?" 1990 *Harvard Journal of Law and Public Policy* 775-816 781.

77 Schulz *Classical Roman law* (1961) 338-339.

78 Garnsey *Thinking About Property: From Antiquity to the Age of Revolution* (2007) 177, Buckland *A Manual of Roman Private Law* (1939) 111 and Buckland *The Main Institutions of Roman Private Law* (1931) 93.

79 Garnsey.

80 Kaser *Roman Private Law* (translated by Dannenbring R) (1980) 80.

81 Moussourakis *Fundamentals of Roman Private Law* (2012) 119.

82 A right in property is a legally justified entitlement or interest. See, Van der Walt and Pienaar *Introduction to the Law of Property* 6th ed (2009) 13. It gives a person (legal person) a valid claim to or over property (a legal object) as against other persons. See, Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 9.

83 Sohm *The Institutes: A Textbook of the History and the System of Roman Private law* 3rd ed (1907) 225.

84 Van der Walt and Kleyn "Duplex Dominium – The Theory and Significance of the Concept of Divided Ownership" in Visser (ed) *Essays on the History of*

commercio. In other words, it also included those things that are of sentimental value to a person, for example, a photograph. These could be both corporeal and incorporeal things. On the one hand, corporeal things are, among others, a horse, furniture, vehicle, motorbike, cylinder with oxygen, landed property or fruits that still hang on the tree.[85] On the other hand, incorporeal things include a right, duty, credit[86] or share,[87] electricity,[88] servitude or inheritance.

Important to the study of property as an object of rights in South Africa is the distinction between private and public rights. Firstly, private rights have basis on private law, that is, the law regulating the relationship between individuals in society, for example, the law of property.[89] Because of this relationship, a person acquires a legally recognised claim over a thing.[90] Secondly, Chapter 2 of the Constitution of the Republic of South Africa, 1996[91] enshrines the public rights. Specifically, section 25 of the Constitution (the "Property Clause") enumerates the public rights to property in South Africa. Therefore, studying these developments is essential in properly understanding the evolution of property as a right in South Africa. For example, it assist in appreciating the relevance of the so-called "dephysicalisation of property" to the study of control of or over things.[92] The latter notion exists because of the acceptance that:

> "Complex social, economic and legal processes by which incorporeal or intangible property are becoming increasingly important for personal wealth and security and for social welfare, while the importance of traditional tangible property such as land declines."[93]

The dephysicalisation of property accepts that control for purposes of the law of property does not only apply to the traditional forms of things. However, it can also arise in respect of another or other subjective rights, for example, real rights,[94] personality rights,[95] intellectual property

Law (1989) 213 213 and Hosten and Schoeman "Private Law – Law of Things" in Hosten et al (eds) *Introduction to South African Law and Legal Theory* (1997) 622-659 624.

85 Van der Walt and Pienaar 14.

86 See, *S v Kotze* 1961 (1) SA 118 (SCA).

87 *Cooper v Boyes No and Another* 1994 (4) SA 521 (CPD) 535B-C.

88 *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) 610I. For further interesting reading, see, *Naidoo v Moodley* 1982 (4) SA 82 (TPD).

89 Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 7th ed (2015) 3.

90 Badenhorst, Pienaar and Mostert 9.

91 Hereinafter referred to as the Constitution.

92 Vandevelde "The New Property of the Nineteenth Century – The Development of the Modern Concept of Property" 1980 *Buffalo Law Review* 325-367 333.

93 Van der Walt *Constitutional Property Law* (2005) 66.

94 Where the object of right is a thing, it is presumed that real rights accrue to the property. See, *Cape Explosive Works Ltd and Another v Denel (Pty) and others* 2001 (3) SA 569 (SCA) 20.

rights[96] or personal rights.[97] Accordingly, property rights over other property rights are possible in South Africa.[98]

Having examined the above-mentioned, it is evident that the notion of control has basis on a flexible and adaptable system of the law. Specifically, the developmental state of society determines the meaning to be attributed to control. In other words, it signifies the nature and extent of control to be exercised in each case. In turn, studying control requires an investigation to be made of the societal developments. This view is particularly true of South Africa. For example, South Africa accepts that circumstances may exist that necessitate the dephysicalisation of control. Following this, the requisite control may not necessarily be in relation to corporeal or incorporeal objects. However, it may be over other rights in respect of corporeal and incorporeal things.

Therefore, the question is what is the relevance of this dephysicalisation of control to the necessity to regulate disruptive technologies? The sections below provide a suitable attempt to respond to this question.

3 3 Legal (criminal or civil) responsibility

Generally, attributing criminal or civil responsibility is the product of history. In the law of delict, for example, it has basis to the fundamental principle of the *res perit domino*.[99] This principle rests on the premise of the law that "damage or harm rests where it falls".[100] In other words, a person bears the damage or harm he or she suffers.[101] Thus, a person, A, has no legal ground for complaint in situations where lightning struck him on his way home. For delictual purposes, this implies that, for damage or harm to rest where it fall, a person, that is, a wrongdoer, must have caused the damage to A.[102] Now, the question is what would happen in circumstances wherein the wrongdoer is not a person, but is a machine or robot? Let us explain this situation by means of an example: In 1981, a robot killed a 37-year-old Japanese employee of a motorcycle

95 These are the rights that a person has to his or her physical or psychological wellbeing. They are claimed or claimable in delict where damage or harm was caused to a person.

96 Intellectual property rights include those rights that are a creation of a person's mind, for example an invention or symbol. See, Van der Walt and Pienaar 307-312.

97 These rights are, inter alia, a claim for specific performance. See, Hosten et al *Introduction to South African Law and Legal Theory* 2nd ed (1997) 625.

98 Hosten et al.

99 Neethling and Potgieter 3.

100 Neethling and Potgieter.

101 *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 (3) SA 407 (SCA) 418 and *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) 468.

102 Indeed, causation is one of the elements a person (plaintiff) should allege and prove for another person (defendant) to be held liable in delict. The other elements are an act, wrongfulness, fault and harm. See, Neethling and Potgieter 4.

factory. The robot made an error of judgement by identifying the employee as a risk to its intended (programmed) mission. It then calculated that the most effective way to remove this ostensible threat was to push or squeeze it into an adjacent operating machine. Using its very commanding hydraulic arm, the robot shattered the shocked worker into the operating machine, killing him instantly. Following this, the machine resumed with its duties as if nothing had happened. Consequently, the question was who or what could be held responsible for the killing of the employee?

Well, a strict application of the *res perit domino* principle will conclude that damage or harm does not rest on the machine. In other words, the machine is not a person for purposes of determining wrongfulness in delict. Furthermore, one would be inclined to invoke the notion of control to establish who had control over the machine. In this endeavour, an attempt would be made to ascertain whether the requisite control was exercised or carried out in line with or for the purpose for which the machine was programmed. Simply, finding a suitable answer to the above-mentioned questions is fundamentally a cumbersome process. However, the starting point in attempting to get a reasonable response should be to distinguish between:

- Instances wherein where technologies follow the instructions of a human or carries out an act under the direction and control of a human.
- Instances wherein technologies act without the required direction and control, that is, independent of human direction and control.

In relation to the first-mentioned occurrence, the ordinary principles of criminal law would apply. Simply, the technology is merely an instrument, similar to a knife or gun, which a human would use in carrying out the act. Accordingly, the fact that technologies carry out the act is indecisive. It is sufficient if the requisite act or *actus reus* and mental state (*mens rea*) of a human in the form of an intention to carry out the act is present. Because of this, the actions of the technologies are or would be attributed to those of a human.

As regards the second-mentioned circumstances, the positions seems to be more burdensome. This is the position because disruptive technologies possess the cognitive abilities that render an inquiry into the required control insignificant. Specifically, these technologies operate autonomously and can produce and re-produce themselves and other disruptive technologies.[103] As a result, the determination is not so much about who or what controls these technologies. Rather, it includes an investigation of the place where legal responsibility vests in situations where technologies operate independently and autonomously. There are many reasons why an inquiry of this nature is essential. Firstly, it assists in responding to the question regarding whether human control prevails or is the only *sine qua non* for the operation of AI. Secondly, it helps in

103 Turner *Robot Rules: Regulating Artificial Intelligence* (2019) 4.

determining whether the disruptive technologies have become so autonomous that human control has now become inconsequential. Simply, has society reached a stage wherein disruptive technologies ought to be studied as independent entities with their distinctive rights and obligations?

Hallevy authored a book titled *When Robots Kill: Artificial Intelligence under Criminal Law*. In this book, he identified some of the challenges emanating from technologies operating independently of human control by stating the following:

> "Robots and computers are more frequently replacing humans in performing simple activities. As long as humanity used computers more as tools, there was no significant difference between computers and screwdrivers, cars, or telephones. But as computers became increasingly sophisticated, we started saying that they 'think' for us. The problem began when computers evolved from 'thinking machines' (devices programmed to perform specific thought processes, such as computing) into thinking machines without the quotation marks – in other words, artificial intelligence."[104]

Consequent to this identification, Danaher posits that there is generally a "mismatch between the human desire for retribution and the absence of subjects of retribution blame".[105] He refers to this mismatch as the "retribution gap". Retribution gap exists when a determination has to be made about how to allocate (civil and criminal) responsibility between humans and robots or between machines or robots themselves.[106] In fields such as the law of delict, the mismatch is elongated in certain circumstances. This is particularly the case because, sometimes, some acts or conduct are expected of a reasonable person or should be judged using the standard of a reasonable person or the *boni mores* criterion and others are not.[107] For example, in the case of *Lee v Minister for Correctional Services*,[108] the court stated that:

> "Our law has reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the legal convictions of the community demand that the omission should be considered wrongful. This open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in all cases, not only omission cases."

104 Hallevy *When Robots Kill: Artificial Intelligence under Criminal Law* (2013) xv.

105 Danaher "Robots, Law and the Retribution Gap" 2016 *Ethics and Information Technology* 299.

106 Danaher.

107 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 387. See also, *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) 139, *Phumelela Gaming and Leisure Ltd v Grndlingh* 2007 (6) SA 350 (CC) 361–362, *Marais v Richard* 1981 (3) SA 1157 (A) 1168 and *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597.

108 *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) 167.

According to *International Shipping Co (Pty) Ltd v Bentley*, the wrongful or unlawful act is "linked sufficiently closely or directly to the loss".[109] It really does not matter whether the loss is too remote.[110]

Given the above-mentioned, an inquiry is made regarding whether it is possible to expect a machine or robot to act reasonably. Alternatively, is it fair and reasonable to attribute the standard of a reasonable person to a machine or robot? In seeking to respond to these questions, Hallevy introduces the three models[111] or the "Matrix of Derivative Criminal Liability".[112] He calls these the "Perpetration-via-Another Liability Model", "Natural-Probable-Consequence Liability Model" and 'Direct Liability Model".[113] The first model regards a machine as an innocent agent that do not possess any human attributes, for example, memory, cognition and independent operation.[114] Specifically, it excludes the possibility of machines carrying out certain acts resulting in the attribution of responsibility. According to Hallevy, the disruptive technology, inter alia:

> "… resembles the parallel capabilities of a mentally limited person, such as a child, or a person who is mentally incompetent and thus lacks a criminal state of mind".[115]

Thus, the least that could happen is that "perpetrator-via-another" could ensue. In this instance, the principal becomes the perpetrator by means of his or her conduct and *mens rea*.[116]

The second model looks at the involvement of the programmers and users of the technologies.[117] Particularly, it requires that an examination of a specific program, for example, human pilot, be made to determine the allocation of responsibility.[118] Pagallo argues that this model presents two possibilities. Firstly, it relates to:

> "The hypothesis of *Picciotto Roboto* by design, insofar as it is defined as programmers, manufacturers or users who intend to commit a crime through

109 *International Shipping Co (Pty) Ltd v Bentley* [1990] 1 All SA 498 (A) 700.
110 *International Shipping Co (Pty) Ltd v Bentley supra,* 700.
111 Hallevy "The Criminal Responsibility of Artificial Intelligence Entities – From Science Fiction to Legal Social Control" 2016 *Akron Law Journal* 171-219 174. See also, Hallevy *Liability for Crimes Involving Artificial Intelligence Systems* (2015) 82-112.
112 Hallevy *The Matrix of Derivative Criminal Liability* (2012) 63-138.
113 Hallevy 138.
114 Hallevy 179.
115 Hallevy "Criminality Liability for Intellectual Property Offences of Artificial Intelligent Entities in Virtual and Augment Reality Environments" in Barfield & Blitz (eds) *Research Handbook on the Law of Virtual and Augmented Reality* (2018) 389-420 400. For furthermore interesting reading see, Hallevy *When Robots Kill: Artificial Intelligence Under Criminal Law* (2013).
116 Hallevy.
117 Hallevy 181.
118 Pagallo *The Law of Robots: Crimes, Contracts, and Torts* (2013) 71.

Picciotto Roboto, but the latter deviates from the plan and commits some other offence".[119]

Secondly, it excludes the intent to commit a wrong and evinces negligence on the part of the programmers or manufactures or users when designing, constructing or using the machine.[120] Consequently, the inquiry relates to whether the programmers, manufactures or users had foreseen or could reasonably have foreseen the possibility of the technologies carrying out an act or conduct.[121] Conversely, the investigation is whether the harm or damage is or was the natural or probable consequence of the wrong carried out by the machine or robot.[122]

The third model examines the technologies as an independent entity. Accordingly, it requires consideration to be made of both the internal (the algorithms) and external elements (software and hardware) of the technologies.[123] Here, the question is whether the entity failed to exercise due and reasonable care in the circumstances.[124] In this instance, the behaviour or activities of the agent, that is, the programmer, manufacturer or user of the robot, are indecisive.[125] It is sufficient if the entity failed or omitted to take due and reasonable measures of care to prevent a wrong from occurring.[126]

As convincing as the models Hallevy champions are, they, however, do not adequately address some of the questions raised in this paper. Specifically, these models are still attached to the notion of control. In other words, they follow the idea of always determining "who controls and owns the disruptive technologies". In addition, they do not explore the possibility of machines acting reasonable or unreasonable for legal purposes. To this end, the Matrix of Derivative Criminal Liability may have reasonably addressed some of the technological developments at the time (in 2010) when Hallevy first published his paper. However, they do not adequately address the current regulatory challenges that these disruptive technologies continue to generate. Furthermore, the fact that Hallevy refers to Asimov's Three Laws of Robotics does not justify this insufficiency.[127]

119 Pagallo.
120 Pagallo.
121 Hallevy 101 182.
122 Hallevy.
123 Hallevy.
124 Lehner "The Australian Model of Attributing Criminal Responsibility to Legal Entities" in Brodowski, De la Parra, Tiedemann and Vogel (eds) *Regulating Corporate Criminal Liability* (2014) 79-86 81.
125 Lehner.
126 Lehner.
127 These are that a robot may not injure a human being or, through inaction, allow a human being to come to harm (Law 1), a robot must obey the orders given to it by human beings except where such orders would conflict with Law 1 (Law 2) and a robot must protect its own existence as long as such protection does not conflict with the Laws 1 and 2 (Law 3). See, Asimov *The Three Laws* (1981) 18.

4 Conclusion

Disruptive technologies that the 4IR generates have radical or disruptive effects on an information society. The impact extends beyond the provision of paradigm shifts or transformations on the economy, business and consumers. It furthermore relates to these technologies blurring the lines between that which is physical, digital and biological domains. Flowing from these developments are uncertainties regarding the manner and structure of technology regulations. Generally, there are numerous reasons why these regulatory uncertainties exist. Firstly, there is a need for society to embrace disruptive technologies. This need fosters the taking advantage of developments in technologies. Secondly, society must stablish measures to control and ameliorate the associated technological setbacks, for example, the re-structuring of businesses or economy. Now, this necessity compels a complete understanding of the position of disruptive technologies on society. For example, Richard Susskind argues that legal regulations play a dominant function for technological control.[128] However, there is a danger, Susskind continues, of legal regulations lagging behind or continuously playing catch-up with developments in technologies. To avert this, regulators are likely to introduce inchoate legal regulations. The latter includes regulations that encourage the re-invention of the technology-regulatory wheel. [129]

Therefore, the question is how should the structure of technology regulations be if disruptive technologies present both the opportunities and setbacks to the information society? Certain regulatory theories are discussed that suggest a postulated overview of technology regulations. The first theory abstract technology regulatory structures from the BIS. The second theory champions the idea of codes for technology regulations. In other words, it surmises that codes are the laws (or *lex*) that regulate the online activities or behaviour. In view of this, there is no necessity to commence or introduce legal regulations outside of the codes. Well, the view of codes as technology regulations is convincing. However, it rests on the premise that the regulatory instrument, that is, the code, is subject to the control of a user or consumer. In other words, the performing of an online activity depends on a person possessing the correct code. The challenge then is that codes do not regulate innovations associated with the disruptive technologies. For example, disruptive technologies do not rely on human control for them to perform a function. Specifically, they can produce other technologies or re-produce themselves without human control or intervention. Consequently, a strict application of codes for technology regulation is problematic.

In this paper, a further extension or development of Hallevy's "Matrix of Derivative Criminal Liability" is proposed. This development should encourage a study of 4IR and 4IR technologies as independent entities.

128 Susskind *The Future of Law: Facing the Challenges of Information Technology* (1996) 2-43.
129 Susskind.

This means discouraging the idea of, for example, measuring the intelligence of an AI or Machine using the intelligence of human. For technology regulations, it is possible to impose penalties (punitive or compensatory) on machines or AI. These penalties could be modelled from those currently existing or are imposed to regulate offline conduct. The examples are, inter alia, the actions for damages and those relating to the sentencing of the accused person. For example, consumers download online applications (Apps) with the object that the App will facilitate their online activities. Should the App fail to achieve such an objective, consumers would impose a death penalty on the App. In other words, they delete the App from their machines or computers and even discourage others from using the App in the future. Another example relates to the determination of reasonableness in the law of delict. For example, it is inquired whether machines or AI can act wrongfully to such an extent that it may be said that they failed to conform to the standard of a reasonable person? There is no reason why machines or AI cannot act in the aforesaid manner. However, it is still necessary for technology regulators to study the dynamics of the disruptive technologies, and examine instances wherein these technologies will benefit society and those where they exacerbate societal setbacks or disparities.

Zimbabwe's natural person debt relief system: Much-needed relief for No Income No Asset (NINA) debtors or 'out with the new'?[1]

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SUMMARY

Access to debt relief measures and a concomitant discharge of debts are some of the most fundamental elements of an effective natural person debt relief system. Failure to gain access to debt relief measures – due to, among others, stringent access requirements has plagued No Income No Asset (NINA) debtors in many jurisdictions worldwide. In response to this plight of NINA debtors, a remarkable trend in insolvency law has been witnessed which seeks to accommodate the needs of this widely excluded group of debtors. Zimbabwe is one of the countries which has responded positively to this trend by reforming its natural person debt relief system. This has seen the introduction of a consolidated Insolvency Act 7 of 2018. The Insolvency Act introduces the novel pre-liquidation and post-liquidation compositions to the debt relief system. This paper examines the treatment of NINA debtors in the recently reformed natural person debt relief system of Zimbabwe. This examination has reviewed that the natural person debt relief system affords relief to over-committed debtors with excess income and/or disposable assets while ostracising NINA debtors. Additionally, this paper also juxtaposed Zimbabwe's natural person debt relief system with internationally regarded principles and policies in insolvency law as outlined in the World Bank *Report on the treatment of the insolvency natural persons* and provided necessary recommendation for the reform of the prevailing debt relief measures.

1 Introduction

The plight of No Income No Asset (NINA) debtors has been brought to the fore by researchers in many jurisdictions worldwide.[2] This plight is characterised by the failure of NINA debtors from accessing debt relief measures and obtaining a much-needed discharge of debts.[3] This exclusion from accessing debt relief measures results in NINA debtors being perpetually trapped in debt and left vulnerable to creditor intimidation.[4] This paper seeks to explore the under-researched natural person debt relief system of Zimbabwe and critically examine its treatment of the NINA group of debtors. This examination will especially

1 This article is partly based on an on-going research currently titled *Debt relief as part of the social safety net: A comparative appraisal of natural person insolvency in Zimbabwe* (LLD thesis UP).

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be directed towards determining the extent to which the natural person debt relief system affords or inhibits access and facilitates a concomitant discharge of debts to NINA debtors.

No published research of the Zimbabwean natural person debt relief system has been undertaken thus far, therefore; this paper provides a ground-breaking analysis of the system by exploring the treatment of NINA debtors at the background of worldwide exclusion of this group of debtors. On a secondary level, this paper utilises the non-prescriptive guidelines stipulated in the World Bank *Report* as the benchmark to measure the treatment of Zimbabwe's NINA debtors and provide recommendation for reform of the system, where necessary. The World Bank *Report* is of interest in this article because it provides internationally regarded policies, principles and guidelines which are essential in facilitating reform of the natural person debt relief system into an effective and inclusive system that balances the interests of all stakeholders in insolvency,[5] especially, the NINA category which form the subject of this paper.

2 Zimbabwe's natural person debt relief landscape

Zimbabwe's debt relief system has recently been reformed by the introduction of the Insolvency Act 7 of 2018[6] that is aimed at regulating the administration of insolvent and assigned estates and the consolidation of insolvency legislation.[7] The Insolvency Act consolidates the natural and juristic person regulation by repealing Chapter 6:04,

2 See, Ramsay "The new poor person's bankruptcy: Comparative perspectives" 2020 *Int Insol Rev* 4-24; Coetzee and Roestoff "Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to no income no asset debtors in South Africa 2020 *Int Insol Rev* 95-115; Schwartz and Ben-Ishai "Establishing the need for a low-cost Canadian debt relief procedure" 2020 *Int Insol Rev* 25-43; Littwin 2020 *Int Insolv Rev*; Heuer "Hurdles to debt relief for "no income no assets" debtors in Germany: A case study of failed consumer bankruptcy law reforms" 2020 *Int Insolv Rev* 44-76; Frade and de Jesus "NINA?LILA debtos under the Portuguese Insolvency Act: A hidden problem in plain sight?" 2020 *Int Insolv Rev* 77-94.

3 See, among others, World Bank *Report on the treatment of natural persons, 2013* 45 (hereafter 'the World Bank *Report*'), where access and discharge are regarded as some of the core legal attributes of an insolvency regime for natural persons.

4 See, among others, Boterere *The proposed debt intervention measure* 1 (LLM mini-dissertation UP, 2019); World Bank *Report on the treatment of the insolvency of natural persons* 36 (hereinafter the World Bank *Report*)

5 Madhuku "Insolvency and the corporate debtor: Some legal aspects of creditors' rights under corporate insolvency in Zimbabwe" 1995 *Zim Law Review* 85.

6 The Insolvency Act 7 of 2008 (hereinafter the Insolvency Act). The Insolvency Act came into operation on 25 June 2018.

7 Preamble of the Insolvency Act.

which previously regulated the natural person debt relief system in Zimbabwe through the liquidation procedure.[8] The consolidated Insolvency Act incorporates the liquidation measure,[9] pre-liquidation composition,[10] post-liquidation composition,[11] and juristic person liquidation.[12]

The pre-liquidation and post-liquidation compositions are novel features in Zimbabwe's debt relief system that were introduced into the system by the Insolvency Act.[13] No explanatory notes were provided to indicate the objectives of these newly introduced measures, however, the pre-liquidation composition's origins can be traced to South Africa's natural debt relief system.[14] The procedure, which is yet to be operational in South Africa's insolvency regime,[15] was proposed at the background of NINA debtor exclusion and was advanced with the aim of remedying this exclusion.[16] South Africa's NINA debtor exclusion has been aptly described as an unfair discrimination that is tantamount to an unconstitutionality of the debt relief system.[17]

This paper comprehensively analyses the pre-liquidation and the post-liquidation compositions along with the liquidation procedure regulated by the Insolvency Act. This analysis seeks to determine whether Zimbabwe's natural person insolvency regime comprehensively caters for the needs of NINA debtors. Furthermore, the paper juxtaposes Zimbabwe's natural person debt relief system's treatment of NINA debtors with internationally regarded principles as outlined in the landmark World Bank *Report*. This juxtaposition is aimed at aligning Zimbabwe's natural person debt relief system's regulation of NINA

8 *Ibid*.
9 Part II – XXI of the Insolvency Act.
10 S 119 of the Insolvency Act.
11 S 120 of the Insolvency Act.
12 Juristic person liquidation will not be discussed in this paper as it does not fall within the scope of this study. It is mentioned here to provide a holistic understanding of the general insolvency landscape in Zimbabwe.
13 However, it should be noted that compositions were previously recognised in Zimbabwe's debt relief system in terms of s 136 of Chapter 6:04.
14 See, National Credit Amendment Act 7 of 2019.
15 The National Credit Amendment Act of 2019 was signed by the president of the Republic of South Africa on 13 August 2019.
16 For a detailed discussion of South Africa's natural person debt relief system, see, among others, Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis UP, 2015). It should be noted that South Africa's natural person debt relief system is in active process of reform by seeking to accommodate NINA debtors through the introduction of the debt intervention measure in terms of the National Credit Amendment Act 7 of 2019. The National Credit Amendment Act 7 of 2019 was signed by the president of the republic of South Africa on 13 August 2019, however, it is not yet operation. South Africa's debt relief system is not discussed in detailed because it will derail the focus of this paper.
17 See, Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *Int Insolv Rev* 36.

debtors with internationally regarded principles and trends in insolvency law.

3 The liquidation procedure

The primary natural person debt relief measure in Zimbabwe is the liquidation procedure. Pursuant to a liquidation order, available to debtors whose liabilities exceed their assets or unable to pay their debts,[18] custody and control over a debtor's non-exempt property[19] is transferred to the Master.[20] Thereafter, a liquidator must dispose the property and utilise the proceeds from such disposition to, among others, defray the costs of the procedure and to repay unsecured creditors from the free residue.[21] Summarily, it is essential that a debtor has disposable assets, thus, the procedure excludes NINA debtors who lack the requisite assets.

The liquidation procedure may be commenced by a voluntary application by the debtor to a court,[22] or through a compulsory application by his creditors.[23] Debtors who have gained access to the procedure may automatically be rehabilitated after the effluxion of a 10 year period.[24] Rehabilitation has the effect of discharging all debts of the debtor[25] and this gives the debtor an opportunity to restart his life, without the burden of debts. Discharge of debts is in line with international principles in insolvency, this enables a debtor to re-enter the credit economy.[26]

18 S 14(b)(ii) of the Insolvency Act.

19 *Idem* s 19(a). Property exemption is essential and is connected to discharge. Through an exemption of property, a debtor who has obtain a discharge of debts will be provided with sufficient property to meet post-insolvency minimum domestic needs for himself and his family; World Bank *Report* 76.

20 *Idem* s 19(1)(a) read with s 42(7). The property will be in custody and under the control of the Master until a liquidator is appointed.

21 *Idem* s 89.

22 S 4(1) of the Insolvency Act. A trend has been noted in insolvency law which has a seen a widespread preference of out of court debt settlement informal procedures over formal court based insolvency procedures; World Bank *Report* 45.

23 S 6 of the Insolvency Act.

24 *Idem* s 108. This period may be shortened through a court application in terms of s 106. This is in contrast with international trends where it is noted that the most common repayment terms tend to fall between three to five years; World Bank *Report* 88. Therefore, Zimbabwe's liquidation procedure is unnecessarily long and cumbersome on debtors who are hindered from re-entering the credit economy because of their participation in the insolvency system.

25 *Idem* s 109(b).

26 Effective discharge or economic rehabilitation must be accompanied by three elements, namely, freeing a debtor from excessive debt, non-discrimination of debtors and avoidance of future over-indebtedness; World Bank *Report* 117.

Despite the benefits arising to debtors through the discharge option, the liquidation measure does not cater for the needs of NINA debtors because access to the measure is a 'privilege' only available to debtors who can afford the costs associated with the procedure.[27] Additionally, to access the liquidation procedure a debtor must provide:

> "A certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the Court, that sufficient security has been given for the payment of all cost in respect of the application that might be awarded against the applicant, and all costs of the liquidation of the estate that may be incurred until the appointment of a liquidator".[28]

Consequently, because of the procedure's stringent access requirements, NINA debtors are hindered from accessing the liquidation procedure because they lack the requisite income to offer security for the payment of costs related to the application. Therefore, this paper argues that the liquidation procedure ostracises NINA debtors through the stringent financial requirements that do not allow access to the measure to indigent consumers.

Additionally, the liquidation procedure further ostracises NINA debtors through its pro-creditor requirements. The creditor-oriented nature of the liquidation procedure is highlighted through the 'advantage for creditor' requirement, that runs throughout the Act.[29] In terms of the 'advantage for creditors' requirement, a court can only grant an order of liquidation if it is proven that such liquidation is to the advantage of creditors.[30] Therefore, the liquidation procedure excludes NINA debtors because they lack the any excess income and/or disposable assets which can offer the necessary advantage to creditors. Consequently, it can be concluded the liquidation procedure does not cater for the needs of NINA debtors.

4 Alternative debt relief measures

An insolvent debtor who wishes to access Zimbabwe's natural person debt relief system, can utilise the composition procedure.[31] The composition procedure is a voluntary debt restructuring agreement between the insolvent debtor and his creditors. The World Bank *Report* notes that informal voluntary debt restructuring agreements are crucial to an insolvency regime because of their advantages they offer which

27 See s 88 of the Insolvency Act for an indication of the costs of liquidation which must be repaid from the debtor's estate.
28 *Ibid* s 4(4)(b).
29 Ss 4(8)(a)(ii), 14(1)(b)(i), 15(1)(c) and 50(6) of the Insolvency Act.
30 This is in contrast with international trends in insolvency that have witnessed a departure from creditor-oriented insolvency regimes to regimes that balance the interests of all stakeholders in insolvency; Boraine and Roestoff "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform (1)" 2014 77 *THRHR* 351 and Coetzee 2016 *Int Insolv Rev* 36.
31 Part XXII of the Insolvency Act.

includes aiding debtors in avoiding the stigma attached to insolvency, lower procedural costs compared to formal procedures, providing an incentive to debtors to make a higher offer to creditors to avoid the inconveniences of the court procedure and flexible thereby accommodating the needs of all stakeholders in insolvency.[32]

The World Bank *Report* indicates that a trend has emerged in natural person insolvency which favours the use of informal debt relief procedures over formal procedures and that it is essential for a formal debt relief system to encourage informal negotiation and resolution between a debtor and his creditors.[33] Additionally, the World Bank *Report* notes that this has resulted in a two-stage approach to insolvency in many jurisdictions whereby debtors are required to access informal negotiated settlements before they can gain access to formal measures.[34]

Despite the many benefits emanating from utilising informal procedures, the World Bank *Report* cautions against the illusory nature of voluntary settlements and the possibility of creditors using their bargaining power to pressure debtors unto accepting onerous payment plans.[35] Zimbabwe's composition procedure is divided into two processes, namely, pre-liquidation composition,[36] and post-liquidation composition,[37] and these are discussed below.

4 1 The pre-liquidation composition

The pre-liquidation composition supports out-of-court negotiated settlements between a debtor and his creditors.[38] The procedure is a transplant of the proposed pre-liquidation composition in South Africa's debt relief system, in terms of the 2015 Insolvency Bill.[39] The use of the term 'pre-liquidation' is misleading, because it creates the impression that the procedure is only available to debtors who intend or are in the process of accessing the liquidation procedure, but who have not yet obtained an order for liquidation or where the liquidator is yet to

32 World Bank *Report* 46.
33 *Idem* 45.
34 *Idem* 46.
35 *Idem* 47.
36 S 119 of the Insolvency Act.
37 *Idem* s 120.
38 See, World Bank *Report* 46.This is in line with international principles as debt relief matters are dealt with by institutions or bodies which are better suited to handle financial matters. Furthermore, where an attempt to settle the debt voluntarily has failed, the well matter can be filed to the court thereby making it easier to process and alleviating pressure on the judiciary system.
39 For a detailed analysis of the proposed procedure in the South African debt relief system, see, among others, Coetzee "Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what would?" 2017 *THRHR* 18-26.

liquidate the debtor's assets.[40] However, it might be interpreted that the use of the term merely points to the procedure being accessible to debtors who have not applied for and/or accessed the liquidation procedure. The latter interpretation is preferred, because it accommodates debtors who cannot meet the stringent access requirements of the liquidation procedure.[41]

The pre-liquidation composition can be accessed by a debtor with debts of less than $20 000, who cannot satisfy his financial obligations.[42] A debtor may initiate the pre-liquidation composition by lodging a signed copy of the composition and a sworn statement with an administrator.[43] Thereafter, the administrator must arrange a hearing between the debtor and his creditors.[44] The administrator is better suited to handle financial matters compared to the court system, however, this paper calls for the introduction of a low or free cost assistance to debtors by mediators with credibility to both debtors and creditors. Jurisdictions where trusted mediators play a role in negotiations have indicated a higher percentage of creditor participation thereby increasing the effectiveness of the insolvency regime.[45] The mediator can also offer free financial counselling to debtors thereby empowering them to make better financial decisions as a benefit for accessing the insolvency regime.

A moratorium on debt enforcement becomes effective between the determination of a date for a hearing and the conclusion of the hearing.[46] This is a praiseworthy feature which is in line with international trends. It has been remarked that voluntary negotiations have been successful in jurisdictions where debtors are not threatened with debt enforcement while the negotiations are ongoing.[47] At the hearing, the administrator and any interested credit provider may investigate and question the debtor on his financial circumstances.[48] The composition must be accepted by two-thirds of the concurrent creditors for it to be binding between the debtor and all his creditors.[49] This provision assists in alleviating non-acceptance of settlements due to creditor passivity which is an essential feature for voluntary debt agreements.[50]

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40 *Ibid*. Similar observation was made regarding the proposed pre-liquidation composition in the South African debt relief system.

41 If the former interpretation is utilised, all debtors who cannot meet the access requirements of the liquidation procedure will also be hindered from accessing the pre-liquidation procedure because access to the liquidation procedure will be a pre-requisite to access the pre-liquidation procedure.

42 S 119(1) of the Insolvency Act.

43 *Ibid*.

44 S 119(6) read with s 119(7) of the Insolvency Act.

45 World Bank *Report* 49.

46 S 119(29) of the Insolvency Act. See, Coetzee 2017 *THRHR* 23 in the context of the South Africa's proposed pre-liquidation composition, where it is argued that the moratorium on debt enforcement must become effective once a debtor applies for the procedure.

47 World Bank *Report* 49.

48 S 119(8) of the Insolvency Act.

49 S 119(15) of the Insolvency Act.

50 World Bank *Report* 49.

The pre-liquidation composition is not suited to NINA debtors' needs. Despite being a streamlined procedure, which does not carry the same procedural costs associated with the liquidation procedure, this procedure cannot be successfully utilised by the NINA group of debtors. This is because the measures requires an agreement between a debtor and his creditors despite the two parties occupying an unequal bargaining position in relation to one another. Because NINA debtors do not have anything to offer creditors, they do not have any bargaining power, thus, concluding a favourable agreement is highly improbable.[51] This unequal bargaining positions occupied by the debtor may be detrimental because they can be pressured by creditors into accepting onerous payment plans that are not viable.[52] However, where a debt restructuring proposal is accepted, NINA debtors will not be able to meet their obligations because they lack the requisite income and/or assets to enable a debt re-arrangement. Owing to this inequality, the World Bank *Report* has indicated that voluntary settlements have often had illusory benefits because they usually lead to the conclusion of unenforceable agreements reached through undue pressure by creditors.[53]

Non-acceptance of the composition by creditors triggers the second part of the procedure, which leads to a discharge of debts. Where a majority of creditors have rejected the composition and the debtor cannot make a substantially different offer to creditors than that which he had offered,[54] the administrator must declare that the proceedings have ceased.[55] Thereafter, the administrator must lodge a copy of the declaration with the Master of the High Court.[56] Upon application by the debtor, the Master may grant a discharge of unsecure debts if:[57]

(i) the debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor's application at least 28 days before the application to the Master; and
(ii) the Master is satisfied after consideration of comments, if any, by creditors and the administrator and the application by the debtor –
(a) that the composition was the best offer which the debtor could make to creditors;
(b) that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor.

51 See, Coetzee 2017 *THRHR* 25.
52 World Bank *Report* 47.
53 *Ibid*.
54 S 119(28) of the Insolvency Act.
55 S 119(28)(a) of the Insolvency Act.
56 As above. Master of the High Court (hereafter 'the Master').
57 S 119(28)(b) of the Insolvency Act.

It is notable that the pre-liquidation composition may lead to a possible discharge of debts for *bona fide* debtors. However, the procedure is not suited to NINA debtor's needs.[58] The composition procedure is initiated by an offer for a debt re-arrangement, which NINA debtors cannot make, because they neither have the income nor the assets to make an offer for composition. Where a NINA debtor, who lack the necessary income and/or assets, makes an offer for composition, the offer will not result in a financial benefit for creditors, because the debtor is incapable of meeting his obligations in terms of the offer. The negotiation phase of the pre-liquidation composition is not suitable to the financial circumstances of NINA debtors who lack any negotiating power.[59] While evaluating South Africa's proposed pre-liquidation composition, Coetzee puts forward that "administrators would further not be willing to set security where there is insufficient value in the estate to cover costs".[60] Furthermore, the procedural costs, which include the expenses of the administrator, render the procedure unaffordable to NINA debtors who cannot afford the costs.

4 2 The post-liquidation composition

Alternatively, a debtor who has gained access to the liquidation procedure can enter into a settlement with his creditors through the post-liquidation composition.[61] This requirement excludes NINA debtors who are excluded from accessing the liquidation procedure because of the lack of income and/or assets necessary for the procedure.[62] A debtor can initiate the post-liquidation composition by lodging a written offer of composition with the liquidator.[63] The offer of composition may be lodged "at any time after the issuing of the first liquidation order but after he has sent his statement of affairs".[64] The post-liquidation composition is a debt re-arrangement settlement, which does not lead to a discharge of debts. The procedure is not suited to the needs of NINA debtors, because it is only available to debtors who have already gained access to the liquidation procedure. As indicated above, NINA debtors cannot access the liquidation process because of the procedure's stringent access requirements.

58 See, among others, Coetzee 2017 *THRHR* 25 who makes the same determination in her evaluation of the proposed procedure in the South African debt relief system.
59 *Ibid*.
60 Coetzee 2017 *THRHR* 25.
61 S 120 of the Insolvency Act.
62 See part 3 above for the discussion of the exclusion experienced by NINA debtors in the liquidation procedure.
63 S 120(1) of the insolvency Act.
64 *Ibid*.

5 Concluding remarks and way forward

The World Bank *Report* indicates that access and a discharge of debts are essential features of an effective and inclusive debt relief system. Failure to gain access to a debt relief system has left many NINA debtors vulnerable to creditor intimidation and being perpetually trapped in debt. This failure to access debt relief measures is experienced by NINA debtors worldwide because of the stringent access requirements which prohibit such debtors from accessing the insolvency regime and obtaining a much-needed discharge of debts.

This paper examined the treatment of NINA debtors in Zimbabwe's debt relief system and highlighted the side-lining of this category of debtors which is characterised by their failure from accessing Zimbabwe's insolvency regime. Despite, the liquidation procedure providing a discharge of debts to debtors who had a 'privilege' of accessing the measure – it fails to cater to the needs of NINA debtors who lack an income and/or assets necessary for the procedure.

With the reform of Zimbabwe's debt relief system, through the introduction of the pre-liquidation composition whose origins can be traced in the South African debt relief system and the post-liquidation composition, Zimbabwe's legislature has attempted to accommodate the excluded NINA debtors. It is notable that the pre-liquidation composition offers a discharge options, however, it fails to accommodate the needs of NINA debtors who cannot participate in a negotiation phase because they lack the necessary bargaining power. This paper has argued that the pre-liquidation composition is not suited to the needs of NINA debtors. However, it can be utilised by other groups of debtors who can meet the procedure's stringent financial requirements and are thus capable of successfully utilising this informal streamlined procedure which does not carry the costs of the formal liquidation procedure and affords a discharge of debts.

This paper's examination of the post-liquidation composition has reviewed that the procedure also excludes NINA debtors. This exclusion emanates from the procedure's access requirement that requires a debtor to gain access to the liquidation procedure before applying for the post-liquidation composition.

This paper has indicated that Zimbabwe's natural person debt relief system is exclusionary in nature because it excludes NINA debtors. This emanates from stringent access requirements associated with debt relief measures that are not in line with international trends in insolvency law. This paper calls for the reform of Zimbabwe's natural person debt relief system into an inclusive and effective system that caters for the needs of all debtors, especially the excluded NINA debtors. Zimbabwe's natural person debt relief system can be reformed through various means, which include, among others:

- Implementing a means-test in all insolvency measures which is aimed at identifying debtors who cannot afford to pay the costs associated with debt relief and offering a discharge option to such debtors thereby accommodating the indigent NINA debtors;
- Implementing a two-stage approach to debt relief. This entails making access to informal procedures a pre-requisite for applicants to be granted access to the primary debt relief measure, namely, the liquidation procedure. This will assist in encouraging debtors to seek relief by accessing the debt relief system thereby avoiding the stigma which accompany formal debt relief measures. Furthermore, this will potentially assist in alleviating the delays associated with court related settlements and aligning Zimbabwe's debt relief system with international trends in insolvency;
- Government oversight over the informal alternatives to insolvency procedures. This can be achieved by utilising government funded mediators with experience in financial matters and is trusted by both creditors and debtors; and
- Aligning Zimbabwe's natural person debt relief system with international trends in insolvency law by, among others, shifting from a pro-creditor system which seeks to uphold and protect the interests of creditors at the expense of debtors.

Is discriminating against employees living with cancer in the workplace justified?

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SUMMARY

This article interrogates the issue relating to employees living with cancer taking part in employment without being discriminated against based on their medical condition. It will be clearly outlined that cancer does not take away the ability of employees living with cancer to continue with work or enter into employment, which is what most employers and fellow employees believe based on the myth and stigma attached to cancer. This needs to be discouraged through proper education and creating awareness about cancer. This article will interrogate what cancer is and how it develops in the human body as well as the extent or impact of cancer on a patient to a point of leading to disability. The debate of whether cancer amounts to a disability in the South African context will be entertained and recommendations outlined with the aim of ensuring that employees living with cancer are not excluded in taking part in employment among other things. Focus will then shift to the most important aspect of this article which is discrimination, and to explore the different forms of discriminations as well as outline why employers tend to discriminate against employees living with cancer and can this conduct of employers be justified in any way in line with the South African legal system and the article will be incomplete if reference is not made to the English legal system. This is attributed to the fact that the South African legal system is built on the English legal system to a lesser or greater extent and lessons can be drawn from the English legal system due to the advances that have been made when it comes to the protection of employees living with cancer in the workplace. Recommendations will follow with the aim of providing a way forward for employees living with cancer in the South African market.

1 Introduction

Discrimination refers to treating employees differently by unjustifiably including some and unjustifiably excluding others from workplace activities and processes. For example, in the process of promotion, discrimination will take the form of unduly preferring certain employees over other employees who are in the same league of competence and hold similar qualifications.[1] It is important to note that there are different reasons why the employer may apply differentiation between employees. These reasons include, but are not limited to, qualifications,

1 Basson A *et al*, *Essential Labour Law* 5 ed (2009) 217.

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experience, seniority and the operational requirements of the company.[2] Differentiation does not necessarily amount to discrimination but differentiation will become discrimination in cases where the differentiation is based on one or more of the listed grounds in section 6(1) of the Employment Equity Act 55 of 1998 ("EEA").[3] This view was confirmed in *NEHAWU obo Nquma v Department of Justice and Constitutional Development*, where it was held that the differentiation on the part of the employer was justified.[4] In this case, a driver of the company argued that the employer unfairly discriminated against him by paying a fellow employee, who was also a driver, a higher salary than he was earning.[5] However, the employer argued that the reason for the pay difference between the two drivers was that the comparator was in possession of a Code 11 drivers licence and could perform tasks that the applicant could not perform because the applicant was only in possession of a Code 8 drivers licence.[6] The court held that the differentiation on the part of the employer was justified and did not constitute unfair discrimination as alleged by the applicant.[7] The focus of this article will be on cancer as the ground of discrimination against employees in the workplace. First one needs to consider the meaning of cancer and how it develops in the human body, in order to gain a comprehensive understanding of this medical condition, before considering the legal implications in the context of workplace unfair discrimination law.

2 The meaning of cancer

As a point of departure, it is essential to consider the definition of the term "cancer". In the twelfth century, Hippocrates, also known as the "Father of Medicine", discovered cancer.[8] Today, cancer is defined as a process where cells in the body grow in an irrepressible way.[9] 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.[10] These include cancers from covering tissues,

2 Basson *et al*, 217.
3 S 6(1) of the EEA. See *HOSPERSA obo Venter v SA Nursing Council* 2006 6 BLLR 558 (LC) the Court in applying Article 1 of the International Labour Organisation Convention (No 111) held that for the purpose of s 6(1) of the EEA, discrimination should be interpreted as any distinction, exclusion or preference which has an effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
4 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* 2017 1 BALR 76 (CCMA).
5 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* para 76.
6 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* para 77.
7 *NEHAWU obo Nquma v Department of Justice and Constitutional Development* para 77.
8 Barrow MV "Portraits of Hippocrates" (2001) 23 *Medical History* 85-88.
9 Friedberg E *Cancer Answers* (1993) 2.
10 David J *Cancer Care* (1995) 2.

skin cancer, mucous membrane cancer and cancer of the glands.[11] Further, the Regulations Relating to Cancer Registration,[12] define cancer as all malignant neoplasms and conditions suspected to be such, as contained in the International Classifications of Diseases for Oncology ("ICD-O"). 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 until it is impossible to control. One can be sure that cancer is indeed a very dangerous disease that can affect any person.[14] However, because of its complex nature, new knowledge is discovered daily and there is still a lot to be learned about cancer, both in the medical profession and society in general.[15]

3 Unfair discrimination on the basis of disability

For purposes of this discussion, it is important to describe what constitutes unfair discrimination in the workplace. Section 6(1) of the EEA states that no person may unfairly discriminate, either directly or indirectly, against an employee in any employment policy or practice, on one or more of the following grounds: 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, or birth. Cancer is not one of the listed grounds of discrimination in terms of section 6(1) of the EEA; however, it can be argued that disability as a listed ground surely includes cancer since the latter has the ability to render an employee temporarily or permanently disabled, owing to its aggressive nature. Disability can be defined as different functional limitations that occur in any group of

11 Scott RN *Cancer facts* (1979) 2.

12 S 1 of 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 D *et al*, *Rethinking Experiences of Childhood Cancer* (2005) 21.

14 Carnevali D and Reiner A *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. 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 P *et al, Cancer Prevention and Control* (2001) 9.

15 Carnevali and Reiner 2.

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.[16] The Code of Good Practice relating to Disability in the workplace, that was adopted in 2001 ("the Code"), further strengthens the aspect of equality in the workplace by prohibiting unfair discrimination on the basis of disability. The aim of the Code is threefold and includes: to affirm the position of the EEA; to guide employers and employees on key aspects of promoting equal opportunities and fair treatment for people with disabilities as required by the EEA; and to help employers and employees understand their rights and obligations, promote certainty, and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights in the workplace.[17]

3 1 The extent and meaning of the concept of disability

When dealing with the concept of disability, it is important to note that there are two schools of thought that facilitate a comprehensive understanding of disability. According to these schools of thought, there is a medical model and a social model of disability. The medical model of disability emphasises the medical condition or impairment of the person with a disability.[18] For example, in the context of an employee diagnosed with cancer, the medical model focusses on the employee instead of the ability of the employee to perform work. For this reason, the medical model of disability is criticised as it personalises disability and makes it the problem of the individual concerned, which can be solved through a cure or the treatment of that disability.[19] 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 rather from society.[20] In terms of this school of thought, society is characterised as being unable to accommodate people with

16 Art 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. Furthermore, please refer to the Code of Good Practice relating to Disability in the Workplace 19 April 2001. In terms of s 5 of the Code disability is defined as a long term, or recurring condition; having a physical or mental impairment, which substantially limits the ability of a person. This definition of disability without a doubt caters for chronic medical conditions like cancer, which have a long term or recurring element and have the ability to leave one with either a permanent or a temporary deformity.

17 S1 Code of Good Practice relating to Disability in the Workplace.

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

19 Olivier and Smit 230-231.

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

disabilities; and disability is not seen as an inability which takes away the affected person's ability to do work.[21]

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 of the Republic of South Africa, 1996 ("Constitution") without any focus on the impairment.[22] The social model of disability is in line with the notion of substantive equality. In this context, Ngwena argues that no country follows the social model of disability in its purest form, but that a combination of both the medical and social models of disability is required when disability is interpreted for an improved understanding.[23] This view is to be supported because cancer can be construed as a disability in terms of both the medical and social models of disability. The challenges that employees living with cancer experience at 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 that society attaches to cancer result in discrimination against employees living with cancer, which is in line with the social model of disability.

Persons who claim unfair discrimination on grounds other than the ones listed in the EEA must, first of all, convince the court that the unlisted or 'arbitrary' ground on which they claim to be discriminated against affects them adversely or may potentially affect them in an adverse manner. Once the court is satisfied that this has been shown the affected employee will have to prove the alleged unfair discrimination on the basis of the unlisted ground.[24] According to section 11 of the EEA, the employee who claims unfair discrimination on an arbitrary ground must prove the discrimination and that it was unfair. This was confirmed in *Ndudula v Metrorail PRASA (Western Cape)*,[25] which concerned a dispute about the salary scales of employees who were in the same position and doing the same work. Two new employees who were appointed as section managers received higher remuneration than the other section managers in the company with long service of employment.[26] The aggrieved employees, who were the applicants in this matter, argued that the conduct of the employer amounted to unfair

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

22 S 10 of the Constitution of the Republic of South Africa, 1996. See Wookman S *et al*, *Constitutional Law of South Africa: Student Edition* (2007) 35.

23 Ngwena C "Interpreting Aspects of the Intersection between Disability, Discrimination and Equality: Lessons for the Employment Equity Act from Comparative Law. Part I (Defining Disability)" 2005 16 *Stellenbosch Law Review* 211.

24 S 6(1) of the EEA, prohibits unfair discrimination on the basis of race, sex, disability, religion, HIV status, culture and language in the employment context.

25 *Ndudula v Metrorail PRASA (Western Cape)* 2017 38 ILJ 2565 (LC).

26 *Ndudula v Metrorail PRASA* 2565.

discrimination in terms of section 6(1) of the EEA, but failed to specify exactly which ground of discrimination they were referring to in the circumstances.[27] The employer, as the respondent in the matter, argued that a mistake was made and that it had corrected the matter by informing the two newly appointed section managers that they were appointed on a wrong salary scale. Furthermore, the employer argued that there was no discrimination as alleged by the applicants but merely a mistake that was corrected.[28] The court held that since the applicants failed to show which form of discrimination they alleged to have suffered in terms of section 6(1) of the EEA (length of service was not found to be an arbitrary ground) combined with the employer's acknowledgement of the error, the claim of the applicants was dismissed and the cost order as requested by the applicants against the respondent employer was rejected by the court.[29]

With regard to people who suffer from a progressive or recurring condition such as cancer, South African law follows the medical model and not the social model of disability. Ngwena argues that the non-recognition of progressive conditions such as cancer, which can leave a person with a temporary or permanent impairment, makes a person vulnerable to discrimination in both society and in the workplace and that the employer should be under a duty to provide reasonable accommodation.[30] However, in as much as employers are required to embrace diversity in the workplace, they are not expected to incur undue hardships in the process of embracing diversity through reasonable accommodation.[31] The type of reasonable accommodation required will, therefore, depend on the nature and essential functions of the job, the work environment, and the nature of the specific impairment experienced by each individual concerned.[32] At this stage, it is very important to take into consideration that reasonable accommodation on the part of the employer is based on three interrelated criteria which justify its purpose. First, the reasonable accommodation must effectively remove the barriers or obstacles which prevent an individual employee, who is otherwise qualified, from being able to carry out his or her duties.[33] Secondly, the accommodation must allow the individual employee with a disability to enjoy equal access to the benefits and opportunities of employment, such as the right to promotion in the workplace.[34] Thirdly, employers can adopt the most cost-effective means which is consistent with the two criteria outlined above.[35]

27 *Ndudula v Metrorail PRASA* 2565.
28 *Ndudula v Metrorail PRASA* 2566.
29 *Ndudula v Metrorail PRASA* 2567-2568.
30 Ngwena 2005 *Stellenbosch Law Review* 230.
31 Bernard RB "Reasonable accommodation in the workplace: To be or Not to be?" 2014 *PER/PELJ* 2880.
32 BC Public Service *A Managers Guide to Reasonable Accommodation* (2008) 5.
33 BC Public Service 5-6.
34 BC Public Service 6.
35 BC Public Service 7.

The principles above outline the basic manner in which the employer can reasonably accommodate an employee living with a disability in the workplace. One can surely argue that these three criteria serve as the yardstick with which to determine if the duty to provide reasonable accommodation has been fulfilled on the part of the employer. When considering whether this duty has been fulfilled, the court will take into account the rational and proportional relationship between the measure employed and the purpose it seeks to achieve.[36] In the context of this article, the purpose of employing reasonable accommodation measures would be to accommodate employees living with cancer to continue working, despite their medical condition, in order to overcome the effect which their condition may possibly have on their working ability.

In South Africa, a great deal of focus is only directed towards people with actual disabilities which fall under the legislative definition, leaving out a large number of people who suffer from progressive conditions such as cancer. This is contrary to the current position in countries like England, where cancer is recognised as a progressive condition which constitutes a disability (more on the English approach to this topic will be discussed later on in the article). This is surely in line with the argument raised by Ngwena and Pretorius, that disability must be interpreted in a generous manner, without imposing the substantial limitation requirement on people with disabilities, which tends to exclude those people who suffer from progressive conditions such as cancer.[37] Substantial limitation has caused many people with disabilities to suffer unfair discrimination as imposed by employers and fellow employees. Therefore, their suffering is not experienced because 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 disabilities.[38] This is the common trend when it comes to discrimination against employees living with cancer, because most of them are discriminated against unfairly in the workplace, not because they are unable to work but merely because they have cancer.[39] It is to be noted that the dismissal of an employee living with cancer on the basis of the cancer and not the capacity of the employee amounts to automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 ("LRA").[40] This was found to be the position in

36 BC Public Service 7.

37 Ngwena C and Pretorius L "Conceiving Disability, and Applying the Constitutional Test for Fairness and Disability: A Commentary on *IMATU v City of Cape Town*" 2007 28 *Industrial Law Journal* 747.

38 Ngwena and Pretorius 2007 *Industrial Law Journal* 747-748.

39 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* (JA104\2015) [2017] ZALCJHB (4 July 2017).

40 S 187(1)(f) of the Labour Relations Act 66 of 1995 states that a dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to s 5 or if the reason for the dismissal is that the employer unfairly discriminated against an employee, either directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social, origin, colour, sexual orientation, age, disability, religion, belief, political opinion, culture, language, marital status or family responsibility.

the case of *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman*.[41] In this case, the conduct of the employer in dismissing the employee on the basis of her disability was found to constitute an automatically unfair dismissal.[42] This was attributed to the fact that the employee was suffering from bipolar disorder and it had no effect on the ability of the employee to do her work but the employer wanted her to undergo a psychometric assessment, which was contrary to her right to privacy. Based on the refusal of the employee to go for such a test, she was dismissed by the employer.[43] The conduct of the employer was found to be unlawful and amounting to discrimination against the employee on the basis of her disability.[44] The employer was ordered to compensate the employee in the amount of R222 000 for the violation of her right to human dignity and an additional R15 000 for the automatically unfair dismissal in terms of section 50(2)(b) of the EEA.[45]

However, the conduct of the employer in dismissing the employee for a diagnosis of cancer can be justified in a case where the cancer has resulted in or affected the capacity of the employee to perform his or her duties effectively in the workplace. The employer must show or prove that reasonable accommodation in terms of section 15(2) of the EEA was provided but still the concerned employee is unable to execute his or her duties due to cancer, then in such a case the conduct of the employer in dismissing the employee will be lawful.[46] In cases of unfair discrimination on the part of the employer, it is the duty of the concerned employee who alleges the discrimination on the part of the employer to prove it in terms of section 11 of the EEA.[47]

3 2 Examples of case law regarding unfair discrimination

In South African law, employees who suffer discrimination on the basis of an unlisted ground such as cancer, carry a heavy burden in succeeding with their claim, because they first have to prove that they will objectively be adversely affected by the unlisted ground before moving on to prove that discrimination occurred on the part of the employer.[48] A number of decisions are relevant in this discussion, which will be outlined below.

41 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 223.
42 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 223.
43 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 224.
44 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 224.
45 *Pharmaco Distribution (Pty) Ltd v Lize Elizabeth Weideman* 225.
46 S 15 (2) of the Employment Equity Act 55 of 1998 places an obligation on employers to provide reasonable accommodation in the workplace in order to achieve equity and diversity in the workplace.
47 S 11 of the Employment Equity Act 55 of 1998 deals with the burden of proof when discrimination is alleged and needs to be proved.
48 Basson *et al,* (2009) 217 and S 6(1) of 55 of 1998.

3 2 1 Harksen v Lane NO and Others

In *Harksen v Lane NO and Others*,[49] the court held that the crux of an unspecified ground of discrimination must be comparable to the specified grounds. In other words, the particular ground ought to also relate to personal attributes or characteristics which, if used as a basis for discrimination, could impair the fundamental human dignity of persons or adversely affect them in a comparably serious manner.[50] This case involved the provisions of the Insurance Act, which were found to be discriminating against spouses who were solvent and married out of community of property to the insolvent spouse. This was because the solvent spouse's estate would be taken into account when the sequestration of the estate of the insolvent spouse was taking place, and this was found to be contrary to the provisions of the Bill of Rights and not in the interest of the administration of justice.[51]

3 2 2 Hoffmann v South African Airways

Another case of interest in South African law which deals with unfair discrimination in the workplace is the landmark case of *Hoffmann v South African Airways* ("*Hoffmann*").[52] In this case, the applicant was living with HIV and applied for a position as cabin attendant with South African Airways ("SAA").[53] The applicant went through all the stages of the interview process and was one of the successful applicants for the position in question. The problem only arose when the applicant had to undergo a pre-employment medical examination including blood tests, where it was discovered that the applicant was HIV positive which resulted in the company refusing to employ the applicant.[54]

The company argued that it was not possible to employ an HIV positive candidate as the nature of the job required an individual who was healthy, and who would not contract any communicable disease, which would possibly put the lives of other colleagues and airline passengers in danger.[55] Furthermore, the company argued that it was not only in the best interests of the company to reject the applicant, but also in the best interests of its passengers to do so.[56] The applicant approached the High Court to challenge the constitutionality of SAA's decision which resulted in him being granted leave to appeal to the

49 *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997). See also *National Union of Metal workers of South Africa and Others v Gabriel (Pty) Ltd* (2002) 23 ILJ 2088 (LC) in which it was held that when an employee claims unfair discrimination on an unlisted ground, the employee must show that the discrimination impacted on their human dignity.
50 *Harksen v Lane* 1489.
51 *Harksen v Lane* 1490.
52 *Hoffmann v South African Airways* 2001 1 SA 1 (CC).
53 *Hoffmann v South African Airways* 1365.
54 *Hoffmann v South African Airways* para 40.
55 *Hoffmann v South African Airways* para 40.
56 *Hoffmann v South African Airways* para 41.

Constitutional Court. The plaintiff based his claim on the violation of his rights to human dignity, equality and freedom; as well as the right not to be unfairly discriminated against on the basis of race, gender, religion, HIV status, family or marital status.[57] Ngcobo J was of the view that persons who live with HIV are often marginalised and unfairly discriminated against in society, due to the stigma attached to the disease. These people are vulnerable in our society because where matters of employment are concerned, attention is unduly placed on their HIV status, instead of being directed at their abilities and level of education.[58] Ngcobo J further explained that the duty rests upon the courts and all the various state organs to ensure that people living with HIV/AIDS are fully protected from any form of discrimination and abuse. SAA as an organ of state is compelled and bound by the Constitution and thus it must uphold the values of the Constitution, which includes the prohibition of unfair discrimination against any person.[59] It was on the basis of this reasoning that the court came to the decision that SAA unfairly discriminated against the applicant on the basis of his HIV status, and ordered SAA to employ the applicant as he was appropriately qualified and competent to do the work in question.

3 2 3 Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration

Another example in this context is the case of *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration*.[60] Ms Ferreira, an employee of Standard Bank, worked as a loan consultant for a period of 17 years.[61] Her job entailed using the company car to travel and meet with clients. On 2 February 2002 she was involved in a car accident while on duty and sustained serious back injuries which later developed into fibromyalgia; a disorder that causes pain and fatigue.[62] As a result of her condition, the employee was moved from being a consultant to the position of a receptionist, and then later to data capturing, and finally ended up shredding papers; which was work that was done by the cleaning personnel of the company.[63] Owing to the demotion she experienced after the accident, she was demotivated and unhappy in her job and thus wanted to resign from the company. Furthermore, she was not provided with the necessary assistance she required, since her request for the provision of headsets and a computer

57 *Hoffmann v South African Airways* para 41.
58 *Hoffmann v South African Airways* para 41.
59 *Hoffmann v South African Airways* para 41.
60 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 2008 4 BLLR 356 (LC).
61 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* 356.
62 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 20.
63 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 21.

in order for her to work effectively was not met by management.[64] The company rejected her application for resignation because the company doctor was of the view that she could fully recover and was still capable of working.[65]

The employee was later called in by management and directed to resume her old post of a loan consultant. She was happy and appreciated that the company realised her commitment to the company, but her excitement was short-lived as she was dismissed in two months' time after being granted the position.[66] The employer justified this dismissal on the basis that she was not appropriately competent as she required a substantial amount of time off in order to receive medical treatment.[67] The Commission for Conciliation, Mediation and Arbitration ("CCMA") ruled in favour of the employee and held that the company discriminated against her on the basis of her disability and failed to reasonably accommodate her and so place her in a position to carry out her duties effectively.[68] This decision was also affirmed by the Labour Court.[69]

In view of the abovementioned court decisions, it is arguable that courts recognise the broad meaning of the concept of disability based on the facts of each case. For purposes of this article, one could possibly rely on the decision in the *Hoffmann* case, among others, to support the enforcement of the right of equality in instances of employees living with cancer and the Code of Good Practice relating to Disability in the Workplace in terms of sections 6 and 7 respectively in which employers are encouraged to ensure that the is diversity in the workplace through their advertising and selection process with the aim of ensuring that people with disabilities are catered for in the workplace.[70] However, taking into account the fact that litigation is an expensive and time-consuming exercise it must be emphasised that the law ought to readily and directly serve as protection for the rights of persons living with cancer.

64 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 21.
65 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 22.
66 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 23.
67 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 23.
68 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* para 24.
69 *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* paras 24-25.
70 *Hoffmann v South African Airways* paras 41-42 and please refer to the Code of Good Practice relating to Disability in the Workplace in terms of ss 6 and 7 respectively of the Code which calls for diversity in the workplace which includes employees living with disability.

3 3 The statutory meaning and scope of unfair discrimination

There rests a duty upon the government to ensure that legislation is developed in such a way that it can accommodate employees living with cancer from unfair discrimination. Currently, cancer is not one of the listed grounds of unfair discrimination in terms of the definition provided in the EEA.[71] A generic approach ought to be established to recognise chronic diseases which have the ability to render a person incapable of working for either a temporary or long-term period. Such an approach will assist in eliminating the challenge of the lack of recognition of certain diseases under the listed grounds for discrimination and thus expand the protection measures which are in place for employees living with cancer and others facing similar challenges. It is important to emphasise that there is a need to amend section 6(1) of the EEA to include disabilities inflicted by chronic medical conditions as a listed ground of discrimination, instead of recognising a select few of diseases therein.

It is interesting to note that HIV/AIDS is one of the listed grounds of unfair discrimination which are prohibited in terms of the EEA.[72] This is attributed to the fact that HIV/AIDS is a widespread disease.[73] One can argue that the inclusion of HIV/AIDS in the statutory provision of the EEA is because of the greater awareness and education invested in educating people about HIV/AIDS.[74] There is more knowledge and understanding on the part of employers and broader society about the disease, though unfortunately, this is not the case when it comes to cancer.[75] Despite the high mortality rate of HIV/AIDS, the survivors of this disease and its victims often experience some kind of abuse and unfair discrimination which is attributed to the stigma that society attaches to the disease.[76] The same view can apply to cancer patients, who also suffer from socio-economic hardships due to the myth and ignorance surrounding cancer.

71 S 6(1) of 55 of 1998 prohibits unfair discrimination of employees who suffer from any form of disability including cancer from its broad interpretation in the workplace on the part of the employer.

72 In terms of S 6(1) of 55 of 1998, it states that no person my unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on one or more grounds including race, sex, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language and birth.

73 HIV/AIDS is one of the diseases which claim millions of lives of people especially in the developing parts of the word such as Africa. The unfair discrimination of an employee owing constitutes unfair labour practices in terms of s 186(2) of 66 of 1995.

74 Ambasa-Shisanya CR *Cultural Determinants of Adoption of HIV/AIDS Prevention Measures and Strategies among Girls and Women in Western Kenya* (2009) 2-3.

75 CancerNet http://www.cancer.net/coping/relationships-and-cancer/cancer-and-workplace discrimination, accessed on 2014-02-03.

76 Page J *et al*, *Working with HIV/AIDS* (2006) 118.

Some of these myths include that cancer is contagious and that the people who live with cancer are unable to work.[77]

Having listed the grounds for unfair discrimination, the Act goes further to define unfair discrimination and to exclude certain specified conduct from the scope of unfair discrimination. In terms of section 6(2) of the EEA, it would not amount to unfair discrimination on the part of the employer to take affirmative action measures consistent with the purpose of the Act, and to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job (which is the operational needs of the employer).[78] Unfair discrimination may take two forms; direct and indirect discrimination.[79] The next paragraphs will discuss the concepts of direct and indirect discrimination. This discussion will consist of an analysis of these two concepts as illustrated in case law, legislation, and the opinions of various authors.

4 Direct discrimination

4 1 A theoretical view of direct discrimination

Direct discrimination is relatively easy to recognise and occurs where a differentiation or distinction between employees is clearly and expressly based on one or more of the prohibited grounds of discrimination listed in section 6(1) of the EEA.[80] Direct discrimination occurs when people are differentiated from each other because they possess particular characteristics which are disvalued by others.[81] For example, where an employer clearly treats a woman less favourably than a man in the same position simply because the employee is a woman; or where the employer selects employees with disabilities for purposes of retrenchment.[82] Direct discrimination on the part of the employer can also occur where the employer treats an employee with a disability less favourably than someone without a disability in the same or similar circumstances. For example, denying a person a job or a promotion

77 Farley SP *et al*, "Work disability associated with cancer survivorship and other chronic conditions" 2008 17 *Psycho-Oncology* 91-92.

78 S 6(2) of 55 of 1998 champions for affirmative action measures in order to redress disadvantaged people from designated groups in order to ensure that they are equitably represented in the employment context. This includes, black people, women and disabled individuals.

79 Martin LL *et al*, *Lessons from the black working class* (2015) 151-152. See *Harmse v City of Cape Town* (2003) 6 BLLR 557 (LC) 16-18, in which the court held that a distinction between direct and indirect discrimination is not so fundamental that it is not possible for the respondent to reply meaningfully to a claim without knowing whether a claim of direct or indirect discrimination is being relied on. Waglay J found that failure by an applicant to specify whether discrimination is direct or indirect does not render a claim excipiable.

80 Martin *et al*, *Lessons from the black working class* 153.

81 Basson *et al*, *Essential Labour Law* 218.

82 Basson *et al*, *Essential Labour Law* 218 and further refer to Steenkamp A *et al*, *Labour Relations Law: A Comprehensive Guide* (2011) 651.

merely because they are living with cancer or have a history thereof.[83] This conduct constitutes direct discrimination and can further be challenged as an unfair labour practice.[84] The focus of this discussion will now shift to enquiring why employers tend to discriminate against employees living with cancer.

Barofsky argues that employers discriminate against employees living with cancer because they seek to avoid making contact with members of an undesirable group, in this case employees living with cancer; and even do so at the risk of financial loss through litigation and legal sanctions.[85] Fobair and Hays attest that discrimination perpetuated by an employer towards employees living with cancer is typically self-imposed discrimination, which is associated with passive coping skills; negative self-esteem; poor body image; decreased energy and depression on the part of the employee living with cancer.[86] Skipper argues that most employers discriminate against employees living with cancer in different ways, including denying them employment benefits such as promotion or providing them with reasonable accommodation. In other circumstances, employers even refuse to employ people living with cancer, because they regard this as a burden to them and the company at large.[87] Skipper points out that such discrimination can be attributed to the myths and false notions which employers have about cancer such as the myth that cancer is considered a contagious disease.[88] All of this highlights the extreme erroneous misunderstanding of cancer which calls for a better understanding and awareness of cancer.[89] A common thread runs through the different views which the authors express as the reasons why employers discriminate against employees living with cancer; that is the general ignorance towards the disease which emanates from the stigma attached to this disease since ancient times.

83 McKeena MA *et al*, "Workplace discrimination and cancer" 2007 29 *Work* 313.
84 S 186(2) of 66 of 1995 is very instrumental in outlining as to what constitutes unfair labour practices on the part of the employer as outlined above.
85 Barofsky I *Work and illness: the cancer patient* (1989) 22.
86 Hays DM "Adult survivors of childhood cancer" 1993 10 *Cancer Supplement* 3306.
87 Skipper PL *et al*, "Cancer survivors at work: Job problems and illegal discrimination" 1989 16 *Oncology Nursing Forum* 41.
88 Skipper *et al*, 1989 *Oncology Nursing Forum* 41.
89 Skipper *et al*, 1989 *Oncology Nursing Forum* 41.

4 2 Examples of court cases dealing with direct discrimination

4 2 1 Association of Professional Teachers v Minister of Education

In *Association of Professional Teachers v Minister of Education*,[90] a female teacher was denied a housing subsidy by the Department of Education ("Department"). The decision of the Department was based on the policy that was in place which provided that female teachers were not entitled to a housing subsidy, except in cases where their spouses were permanently and medically unfit to partake in employment.[91] The applicant teacher challenged this policy on the basis that it was directly discriminating against her on the basis of sex.[92] In this case the Industrial Court was of the view that such exclusion of female teachers from the housing subsidy was based on sex and marital status and it was totally irrelevant for the subsistence of the employer-employee relationship.[93] The court found that the exclusion of female teachers in the housing subsidy amounted to direct unfair discrimination.[94]

4 2 2 Swart v Mr Video (Pty) Ltd

The issue of direct discrimination was further dealt with in the case of *Swart v Mr Video*.[95] In this case, unfair discrimination was based on the age of an employee. The employer in this case was an owner of a chain of video stores who was in the process of opening a new store in Pretoria.[96] The employer advertised that a new assistant who was 25 years old or younger was required. The applicant who was twenty-eight years old called the employer and indicated her interest in the job and filled in some forms in the process. She went for the interview with her friend whereafter the employer employed her friend instead, because she was 25 years old.[97] The employer argued that the applicant was not fit for the job as she was older and would not take instructions from younger colleagues.[98]

On conciliation, the argument of the employer was rejected and the conduct of the employer was viewed as direct discrimination on the basis of the gender and age of the applicant.[99] There was no evidence to suggest that the applicant would not comply with lawful instructions

90 *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (LC).
91 *Association of Professional Teachers v Minister of Education* 1048.
92 *Association of Professional Teachers v Minister of Education* para 18.
93 *Association of Professional Teachers v Minister of Education* para 18.
94 *Association of Professional Teachers v Minister of Education* paras 19-20.
95 *Swart v Mr Video* (Pty) Ltd (1998) 19 ILJ 304 (LC).
96 *Swart v Mr Video* 304.
97 *Swart v Mr Video* para 17.
98 *Swart v Mr Video* para 17.
99 *Swart v Mr Video* para 18.

from colleagues, and the inherent requirements of the job did not in reality call for an age restriction to be placed on potential employees.[100] The employer was ordered to give the advertised position to the applicant due to the unfair discrimination endured by the applicant at the hands of the employer.

5 Indirect discrimination

5 1 A theoretical view of indirect discrimination

Indirect discrimination is differentiation resulting from a measure that has discriminatory effects without differentiation explicitly revealing itself in its formulation.[101] For example, indirect discrimination occurs where a policy is implemented in such a way that it creates an imbalance of treatment or benefits that are issued within a particular group.[102] Knowles and Prewit provide an ideal definition of this concept. They state that indirect discrimination refers to behaviour that has become so well institutionalised, that the individual or employee generally does not have to exercise choices to operate in a discriminatory nature.[103] The rules and procedures of a large organisation or workplace have already restructured the choice.[104] The individual employee only has to conform to the operating norms or rules of the organisation or workplace and the institution will impose the discrimination.[105]

From the above definition, it is clear that indirect discrimination or institutionalised discrimination as it is often called, means that the particular organisation or workplace promotes or champions values, structures, and processes that deny equal opportunities to a certain group of employees. This may occur in respect of employees living with cancer.[106] In this instance discrimination will not arise from a single individual but will be seen as a pervasive process across the organisation in excluding people from a certain group. Indirect discrimination simply refers to a process which may seem to be objective or neutral, but which in fact aims to place barriers on a particular group of people so as to exclude them.[107] Examples are to exclude people from employment based on height or weight, and in the present context, employees living

100 *Swart v Mr Video* para 18.
101 Rautenbach and Malherbe *Constitutional Law* (2009) 359.
102 Van Reenen TP "Equality, Discrimination and Affirmative Action: An Analysis of S 9 of the Constitution of the Republic of South Africa" 1997 12 *SA Public Law* 159.
103 Knowles and Prewitt *Institutional and Ideological Roots of Racism: In A. Aguirre Sources: Notable Selections in Race and Ethnicity* (1998) 22.
104 McCrudden D "Institutional Discrimination" 1982 2 *OJLS* 303.
105 McCrudden 1982 *OJLS* 303-304.
106 Blyton P and Noon M *The Realities of Work: Experiencing work and employment in contemporary society* (2007) 290.
107 Tobler C *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination in the Workplace* (2005) 294.

with cancer on the basis of their illness.[108] Indirect discrimination may be two-fold in the sense that it may refer to intentional or unintentional conduct on the part of the employer.[109]

5 2 Examples of court cases dealing with indirect discrimination

5 2 1 Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd

The case which serves as authority where indirect discrimination is concerned is that of *Leonard Dingler Employee Representative Council v Leonard Dingler*.[110] This case involved indirect discrimination on the part of the employer against a particular group of employees.[111] This case centred on the issue of three retirement benefits offered by the employer, which included a staff benefit fund, pension fund, and provident fund.[112] All members of the staff benefit were white personnel who were paid on a monthly basis, except for the four white employees in the company who were not part of the staff benefit. All the members of the pension fund benefits were black and were paid on a weekly basis.[113] Members of the provident fund benefit were black employees who were paid on a monthly basis, as they were permanent members of staff in the company.[114] The conduct of the employer towards contributing more to the staff benefits and less on both the pension and provident fund benefits was found to constitute unfair discrimination on the basis of race.[115]

Furthermore, the court found the conduct of the employer as perpetuating the disadvantage which black employees faced in the past, in this context by limiting them to being eligible for the pension and provident fund benefits only. The employer was contributing less respectively towards the two schemes to which these black employees belonged.[116] The court came to the decision to reserve its judgment as it saw it fit since it was in the best interests of justice to allow the two parties to come to a solution. This would allow the employer to rectify the matter to ensure that there is no indirect discrimination affecting black

108 Tobler *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination in the Workplace* 295. See also the landmark case of *Hoffmann v South African Airways* as discussed above.
109 Vandenhole W *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005) 84.
110 *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC).
111 *Leonard Dingler Employee Representative Council v Leonard Dingler* 285.
112 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 33.
113 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 33.
114 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 34.
115 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 34.
116 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 35.

employees in the company, especially in relation to employee benefits.[117]

5 2 2 Dlamini v Green Four Security

In *Dlamini v Green Four Security,*[118] the employer imposed a rule on all security guards of the company which provided that they were not allowed to wear a beard. The employees who were applicants in this case were dismissed by the employer for refusing to shave off their beards on the basis of their religious convictions as they were members of the Nazarene religion which required them not to shave their beards.[119] They further argued that the policy of the employer indirectly discriminated against them on the basis of religion.[120] The court held that not shaving a beard was not a fundamental rule or principle of the Nazarene church as argued by the applicants, and such application by the applicants was dismissed on the basis that the no-beard policy of the employer was justified, as it was not violating the right of the applicants to freedom of religion. However, it is important to note that despite the fact that the court did not rule in favour of the applicants, dress code or appearance policies in the workplace have the ability to indirectly discriminate against a group of employees either culturally or religiously.[121] The reasoning of the court was based on the fact that the applicants had based their claim on false grounds as they could not prove that not shaving their beards was a part of their religious practices.[122]

6 The position of employees living with cancer in South Africa

Cancer affects millions of people who are of working age on a daily basis. This has a detrimental effect on the ability of cancer patients to partake in employment or continue with employment in South Africa.[123] The type of cancer which a person is diagnosed with serves as the strongest indication of whether that particular employee will have a short or long-term impairment. Cancer of the nervous system, leukaemia, and lung cancer have all been known to negatively affect the employee living with cancer's ability to work; thus being one of the contributory factors to a low employment rate of cancer patients in particular.[124] In addition, the treatment mechanisms that are employed to treat cancer patients tend to have adverse side effects and have been found to have long-term

117 *Leonard Dingler Employee Representative Council v Leonard Dingler* para 35.
118 *Dlamini & Others v Green Four Security* [2006] 11 BLLR 1074 (LC).
119 *Dlamini & Others v Green Four Security* 1074.
120 *Dlamini & Others v Green Four Security* para 10.
121 *Dlamini & Others v Green Four Security* para 10.
122 *Dlamini & Others v Green Four Security* para 11-12.
123 Haines C *The New Prescription: How to Get the Best Health Care in a Broken System* (2011) 115.
124 Kraus EK *Chartbook on Disability in the United States* (1996) 39-40.

effects which adds to the cancer patient's inability to maintain employment.[125]

Some of the adverse effects of cancer which have an impact on the employment of cancer patients, is that the employee will have to take time off in order to regularly consult with their doctor, and as prescribed by the doctor; the employee may have to work for a limited time; the employee may become temporarily disabled; and additionally, the employee may have to resign from their employment for the purposes of receiving treatment or dealing with the physical and psychological distress of being diagnosed with cancer.[126] These are the common occurrences that cancer patients typically experience, especially if their condition deteriorates. However, there are cases in which cancer patients are treated successfully. Therefore, it is crucial for an employee living with cancer to be able to resume work after having been treated successfully. Job reinstatement forms part of the healing process for surviving cancer patients, which then leads to normality and stability.[127]

In 2009 it was estimated that one in every four South Africans is living with cancer; which is a cause for concern.[128] This figure indicates that cancer frequently manifests itself in people who are both young and old. This fact plays a part and contributes to the growth of the youth unemployment rate in South Africa, which stands at 47.5% as reported by the National Union of Metal Workers of South Africa ("NUMSA").[129] Similarly, in England it is estimated that employees living with cancer contribute to one out of four unemployed persons; and it has been found that this number is expected to grow in future.[130] These statistics are worrying and require urgent attention through the collaboration of various relevant stakeholders, in order to ensure that employees living with cancer remain employed despite the status of their health. Therefore, it is important to note that cancer is a disease that does not target specific people or individuals, but affects all people either directly or indirectly, irrespective of race, colour, sex, religion or creed.[131]

Since most employees living with cancer are still young and capable of working, it is very important for them to be able to return to work or be employed, as this forms part of the healing process for cancer patients.[132] Furthermore, job reinstatement is essential for purposes of returning to normal and regaining independence and financial stability

125 Weeks JC "Employment among Survivors of Lung Cancer and Colorectal Cancer" 2010 28 *JCO* 1700.
126 Weeks 2010 *JCO at* 1701.
127 Mc Lain RF *Cancer in the Spine Comprehensive Care* (2006) 2.
128 Bradshaw D "The burden of non-communicable diseases in South Africa" 2009 7 *Series* 374.
129 NUMSA http://www.numsa.org.za/article/south-africas-youth-unemployment-crisis/ (date accessed: 2016-04-18).
130 Verbeek JH "Cancer survivors and unemployment: a meta-analysis and meta-regression" 2009 301 *JAMA* 753-754.
131 Huber J *Cancer with Joy: How to Transform Fear into Happiness and Find the Bright Side Effects* (2012) 13.

in order to claim back one's daily routine of work and family responsibilities.[133] The phase in which an employee living with cancer must return to work is not an easy one, especially after being absent for a long period. In most instances, the employee will isolate himself or herself upon returning from such a lengthy period of leave, owing to the depressing nature of cancer and the stigma attached thereto.[134] However, the relationship, which the employee living with cancer initially had with the line manager and fellow employees, is very important in the entire process of re-integrating the employee in the workplace. If the relationship between the employer and employee was good prior to the cancer, then the employer would be more willing to assist with the re-integration of the employee, without problems.[135] The position is not the same in cases where prior to the circumstances, the relationship between the employer and the employee was not good. In such cases, the employer is less likely to assist the employee with the re-integration.[136] This form of conduct by the employer will surely amount to unfair discrimination because the duty of the employer to reasonably accommodate the employee must not be based on personal feelings; but is a legally binding duty, as enshrined in terms of section 15(2)(c) of the EEA.[137]

7 The protection of employees living with cancer in England and the Equality Act of 2010

Discrimination towards employees living with cancer in England has been rising steadily over the past few years. The discrimination includes denying some of these cancer-stricken employees sick leave and which results in them missing some of their doctor's appointments.[138] Employees living with cancer are often harassed by employers and fellow employees to an extent where they feel like abandoning their jobs.[139] The British Government has thus identified a number of considerations which can assist employees living with cancer to be fully rehabilitated and capable of returning to work after being diagnosed with cancer.[140] Among other things, these include providing fast and cost-effective treatment to employees living with cancer, providing personal

132 Huber *Cancer with Joy: How to Transform Fear into Happiness and Find the Bright Side Effects* 14.
133 Mazumdar M "Employment after a Breast Cancer Diagnosis: A Qualitative Study of Ethnically Diverse Urban Women" 2012 37 *J Community Health* 763.
134 Loesser JD and Fitzgibbon DR *Cancer Pain* (2012) 25.
135 Cooper AF, *et al* "Cancer survivors and employers' perceptions of working following cancer treatment" 2010 60 *Occupational Medicine* 612.
136 Cooper, *et al* 2010 *Occupational Medicine* 612-613.
137 S 15 (1) 55 of 1998.
138 Bailey C and Corner J *Cancer Nursing Care in Context* (2009) 623.
139 Devane C "Making the Shift, Providing Specialist Work Support to People with Cancer" 2013 1 *Macmillian Cancer Support* 11.
140 Devane 2013 *Macmillian Cancer Support* 12.

and psychological agencies to employees living with cancer 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; and having the employer modify the workplace for the employee returning to work in order to assist the employee to perform his or her duties.[141]

Over 100 000 people of working age are diagnosed with cancer every year in England,[142] 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.[143] Some of the injustices 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.[144] This has resulted in the government providing effective treatment mechanisms to cancer patients, with the aim of alleviating discrimination in order for employees living with cancer to return to work and not require further time off or reasonable accommodation.[145] It is important for employees living 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:

> "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

141 Devane 2013 *Macmillian Cancer Support* 13.
142 Blanpain R *The Changing World of Work* (2009) 24.
143 Hope "Cancer discrimination in the workplace" *Mail Online* 2 May 2014. Examples of the two incidences in which employees living with cancer suffered unfair discrimination in the workplace in England owing to their cancer are: 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.
144 Bailey and Corner *Cancer Nursing Care in Context* 624.
145 Bailey and Corner *Cancer Nursing Care in Context* 625.

> the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."[146]

Considering the importance of employment in the general makeup of any human being, it is important that the right to work for employees living with cancer be protected through, *inter alia*, legislative reform to ensure their survival in both society and the workplace. Furthermore, the government developed means to protect disabled employees and employees living with cancer in the workplace from unfair discrimination.[147] In England, cancer is recognised as a progressive condition which could result in a disability and thus render an employee living with cancer to be regarded and protected as a disabled employee.[148]

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.[149]

The aim of the Equality Act,[150] 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 law regardless of their background or social being.[151] The Equality Act makes provision for protective features under section 4, which include age, disability, gender reassignment, marriage and civil

146 Blanpain *The Changing World of Work* 24.
147 Krebs and Pelusi (2015) 1 *JCE* 1 13.
148 Krebs and Pelusi (2015) 1 *JCE* 1 14.
149 Krebs and Pelusi (2015) 1 *JCE* 1 15.
150 Equality Act 2010. This is the Act that seeks to take away any form of discrimination which people suffering from disability can experience at 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 EA was developed which is considered as a combination of various pieces of legislation which fight unfair discrimination in one legislation. According to the EA, cancer is recognised as a disability and all people with cancer are protected by this legislation.
151 S 2 of 2010. The importance and broad scope of the EA as outlined above is affirmed by the reasoning of Ashtiany, who argued that the EA 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 EA 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 EA 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 twenty-first 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 3 *IJDL* 29-30.

partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[152] Hepple,[153] 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.[154]

Hepple's view can be supported 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 to first 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 listed in section 9 (the equality clause) of the Constitution.[155] The understanding of "disability", however, differs in these two jurisdictions. In terms of section 6 of the Equality Act,[156] in England a person is said to have a disability if he or she has a physical or 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.[157] This definition of disability was taken further by the British Council of Organisations for Disabled people, an

152 S 4 of 2010.

153 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 EA was developed which is considered as a combination of various pieces of legislation which fight unfair discrimination in one legislation. According to the EA, cancer is recognised as a disability and all people with cancer are protected by this legislation.

154 Hepple B "The New Single Equality Act in Britain" 2010 2 *TERR* 12.

155 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.

156 S 6 of 2010.

157 S 6(1)(a)-(b) of 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.

organisation which champions for the rights of disabled people in society.[158] 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".[159]

In terms of the UN Convention on the Rights of Persons with Disabilities ("Convention"), 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.[160] 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.[161] This understanding is supported and recommended in this article, 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.

8 Possible solutions to address unfair discrimination

In South Africa, employees living with cancer often accept a reduction of their salary, as they face the risk of taking unpaid leave due to the fact that employers are not willing to pay them when they are not at work.[162] Employees living with cancer are also at risk of facing unfair labour practices such as demotion and not being considered for promotion even if they are qualified, merely because of their condition.[163] Such discriminatory conduct on the part of employers must be avoided as it is in conflict with section 2 of the EEA, which aims to achieve equity in the

158 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.

159 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 on 2016-10-22.

160 Hendricks A "Selected Legislation and Jurisprudence: UN Convention on the Rights of Persons with Disabilities" 2007 2 *Eur. J. Health. L* 273.

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

162 Radebe "Challenges of employees living with cancer in South Africa" *Citizen* 15 May 2015.

163 Two sources which provide authority for this view are Radebe *Citizen* 15 May 2015 and Health24http://www.health24.com/Medical/Cancer/News/Enpowering-cancer-patients-in-the-workplace-20130509 accessed 2014-07-16.

workplace by promoting equal opportunity and fair treatment for all employees through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure equitable representation in all occupational categories and levels in the workplace.[164] In terms of section 1 of the EEA, people from designated groups include black people, women and people with disabilities.[165]

A solution to addressing either direct or indirect discrimination in the broad society and particularly in the workplace involves finding a framework of how to approach differences and how to accommodate them without any pejorative connotations. A starting point is recognising that differences are rational, due to the diverse nature of our country that consists of different people from different backgrounds. It is logical to acknowledge that due to the diversity in our country, one should establish an understanding that a group is not different by itself, but only different from another group and that the other group is in turn different from the first.[166] The difference is not the problem of the group in which differences are evident; however, it is the product of a comparison which needs to be embraced due to the diverse nature of our society and the historical background which we have.

Based on this reasoning, it is clear that all forms of discrimination can be defeated if people and organisations only learn to tolerate each other's differences and instead embrace such differences without making assumptions about the capabilities of other people by judging them because they are different. This will be possible if we adopt the reasoning of Finley, who argued that the very idea of a norm means that whatever is considered normal can take on a quality of objective reality. Such reasoning will make it possible to observe our differences as human beings.[167] Disability or disease must be seen as a normal way of life. Furthermore, employees living with cancer face discrimination in the form of unfavourable performance appraisals and unfair hiring practices; this is attributed to the discrimination which is imposed on employees living with cancer by employers who do not view cancer as a way of life and thus normal, as argued by Finley.[168]

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164 S 2 of 55 of 1998.

165 S 1 of 55 of 1998.

166 Hunter R *Indirect Discrimination in the Workplace* (1992) 12.

167 Finley LM "Transcending Equality Theory: A way out of the maternity and the workplace debate" 1986 86 *CLR* 1118.

168 Fow NR "Cancer rehabilitation: An investment in survivorship: As more people survive the disease, focus shifts on improving quality of life" 1996 9 *REHAB Manage* 48. An example of a cancer employee who has experienced unfair discrimination from the employer because of his cancer is that of Paul; a 46-year-old man who resides in London, who was diagnosed with blood cancer in 2010. He disclosed his medical condition to the employer and the employer immediately fired him on the basis of his cancer, and the employer argued that he was not fully committed 100 per cent to the company. This happened after Paul dedicated his life to the company,

It is argued that employees living with cancer are discriminated against on the basis of cancer because the employee living with cancer has lower job satisfaction and is less productive, seeing as the employee would be away in most instances to receive treatment.[169] Furthermore, employers argue that employees living with cancer create a financial burden for the company as integrating them would result in paying higher workers' compensation and disability coverage contributions.[170] McKeena argues that these arguments or allegations on the part of employers and fellow employees persist despite an absence of information or evidence to substantiate the claims that employees living with cancer are unable to work or continue with work.[171] This article is written in support of the aforementioned view by McKeena for the reasons outlined above that cancer does not prevent an employee from working, and that work actually forms part and parcel of the treatment of cancer due to the psychological and physical benefits which come with the fulfilment of being employed.[172]

From the above, it is clear that the discrimination of employees living with cancer is merely based on ignorance about cancer and the stigma, which is attached to cancer. Such discrimination must surely be avoided, and provisions such as section 15(2) of the EEA,[173] should be implemented. The Act provides for reasonable accommodation ought to be provided by the employer as one of the measures of eliminating unfair discrimination which includes to amend workplace conditions and providing flexible working conditions for the employee. For this purpose, employers will have to be extremely conscious and informed about the realities of diversity and disabilities; as this will help them to adhere to their legal obligations, such as the provision of reasonable accommodation.

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which now saw him as incompetent due to the cancer. Paul took the employer to court in order to fight this unfair discrimination, but due to the high legal costs which he could not afford, he settled for an offer of compensation from the employer. The compensation was not that much, but it assisted him in settling some of his expenses and his venture to get a new job in order to start a new life and reaffirm his role in society, which one could say, was stolen by the company. See also http://www.macmillan.org.uk/Aboutus/News/Latest_News/Riseincancerpatientsfacingdiscriminationatwork.aspx, accessed 2016-02-11. In South Africa, many employees living with cancer suffer unfair discrimination in the hands of employers but are afraid to come out due to the stigma that is attached to cancer and not wanting to loose they work in the process, hence a lack of reported incidences in this respect.

169 Adams JE "Judicial and regulatory interpretation of the employment rights of people with disabilities" 1991 22 *JARC* 28.

170 Adams 1991 JARC 28-29.

171 McKeena *et al*, 2007 29 *Work* 314.

172 McKeena *et al*, 2007 316.

173 S 15(2) of 55 of 1998.

9 Conclusion

From the above assessment it is evident that employees living with cancer are discriminated against based on ignorance and the stigma attached to the disease. This means that the discrimination by employers and fellow employees against employees living with cancer cannot be justified, and as already recommended greater awareness about cancer and the amendment of workplace policies can serve as some of the factors to mitigate the discrimination which employees living with cancer experience in the workplace, among other things.

Dewesternising the South African social security law: a leap towards an Afrocentric legal curricular

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SUMMARY

Recent calls to dewesternise the curricular are especially pertinent to the teaching of Social Security Law in South Africa, which has traditionally been dominated by the Eurocentric canon. This article argues that South African Social Security Law is a western-centric phenomenon and dewesternising it is necessary for the decolonisation of legal education. On this score, it provides a critique of the South African Social Security Law in search of pragmatic ideas that can advance the project of decolonising it and creating Third World perspectives. The article unsettles the dominant Eurocentric model on the origin of South Africa Social Security Law which marginalise the role that indigenous knowledge play in the development of this area of law. It argues that placing indigenous knowledge systems on the epicentre of the historiography of teaching South African Social Security Law will lead to some epistemic disruption of the current historic paradigm, a project necessary for the decolonisation of the legal mind and intellectual landscape. The article re-contextualising the orthodox social security theory in the historical scene of colonial and post-era; constructing alternative social security historiography; offering an Africanised dialogue on the origins of the informal strands of social security law; the elaboration of alternative methodologies of actualising the constitutionally protected right to have access to social security. The paper also contends with concepts and ideas such as the deemed trans-colonial importation of social security origins, decolonial philosophy as an epoch of transforming legal education in the context of South African Social Security Law.

1 Introduction

Recent waves of student's protests which engulfed institutions of higher learning across the world, have rekindled the call for the dewesternisation of the intellectual spaces and education from their Eurocentric heritage bequeathed by colonialism to a more nascent Afrocentric perspective.[1] South African student's movements such as

1 Fataar "Decolonising Education in South Africa: Perspectives and Debates" 2018 *Educational Research for Social Change* Vi-ix; Heleta "Decolonisation of

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'Feesmustfall' and 'Rhodesmustfall' epitomise this call for the dewesternisation of the curricular, epistemic justice and transformation of the universities.[2] The call is located within the broader discussion on transformative constitutionalism, a philosophy and constitutional value to re-engineer society.[3] This article present pragmatic ideas on the meaning of this call to dewesternise education in the context of Social Security Law. Such a reflection on legal education is not entirely new.[4] Mpedi, among others, have considered the decolonisation and Africanisation of legal education in South Africa.[5] Some academic commentators have examined the colonial episteme of other law modules.[6] This article makes a novel contribution towards dewesternisation of legal education in particularly Social Security Law in

higher education: Dismantling epistemic violence and Eurocentrism in South Africa" 2016 *Transformation in Higher Education* 9; Manthalu and Waghid *Education for Decoloniality and Decolonisation in Africa* (2019) 1; Jansen *Decolonisation in Universities: The politics of knowledge* (2019) 4; Khoo et al "injustice and decolonisation in higher education: experiences of a cross- site teaching project" 2020 *Acta Academica* 3; Anathunga "Decolonising higher education: creating space for Southern knowledge systems" 2020 *Scholarship of Teaching and Learning in the South* 4; Fagbayibo "Some Thoughts on Centring Pan-African Epistemic in the Teaching of Public International Law in African Universities" 2019 *International Community Law Review* 172; Foster "Decolonizing Patent Law: Postcolonial Technoscience and Indigenous Knowledge in South Africa" 2016 *Feminist Formations* 149; Himonga and Diallo "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" 2017 *Potchefstroom Electronic Law Journal* 6.

2 Ahmeda "RhodesMustFall: Decolonisation, Praxis and Disruption" 2017 *Journal of Comparative and International Higher Education* 10; Fourie "Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping our Legal Order 2016" 2016 *Potchefstroom Electronic Law Journal* 3; Letseka "Ubuntu and Justice as Fairness" 2014 *Mediterranean Journal of Social Sciences* 544; Fomunyam "Decolonising Teaching and Learning in Engineering Education in a South African university" 2017 *International Journal of Applied Engineering Research* 150.

3 Mudau and Mtonga "Extrapolating the Role of Transformative Constitutionalism in the Decolonisation and Africanisation of Legal Education in South Africa" 2020 *Pretoria Student Law Review* 47.

4 Hutchison "Decolonising South African Contract Law: An Argument for Synthesis" in Cinelli and Hutchison *The Constitutional Dimension of Contract Law* (2017) 151.

5 Mpedi, Tshivhase and Reddi *Decolonisation and Africanisation of Legal Education in South Africa* (2019) 4; Ncube "Decolonising Intellectual Property Law in Pursuit of Africa's Development" 2016 *The World Intellectual Property Organisation Journal* 34; Botha and Fourie "Decolonising the labour law curriculum in the new world of work" 2019 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 178.

6 Vandenhole "Decolonising children's rights: of vernacularisation and interdisciplinarity" in Markowska-Manista *Childhood and Children's Rights between Research and Activism* (2020) 187; Rahmatian "Neo-Colonial Aspects of Global Intellectual Property Protection" 2009 *Journal of World Intellectual Property* 40; Willems "Beyond normative dewesternisation: examining media culture from the vantage point of the Global South" 2015 *The Global* 7.

pursuit of an Afrocentric legal curricular which is explicitly and largely predicated on indigenous knowledge systems.[7]

The article is divided into three parts. First, it contextualises the argument(s) for dewesternising Social Security Law by ascertaining the meaning of the term de-westernisation. The objective of this part is to present a brief conceptual and terminological clarification of the term dewesternisation and its ostensive relationship to other terms such as decolonisation and Africanisation. In the second part, the article argues that insofar as the standard orthodox theory on Social Security Law present the subject as a South African phenomenon, it still largely remains a western construct both in philosophy and model, therefore dewesternisng it is not only desirable but necessary for advancing epistemic justice, social justice and decolonisation of legal education.[8] It challenges the dominant narrative on the origin of the South Africa Social Security which has been steeped in Eurocentric intellectualism marginalising the role that informal social security law plays in the development of this area of law.[9] The primary argument is that placing informal social security system on the epicentre of the historiography of teaching South African Social Security Law will lead to some epistemic displacement or disruption of the current historic paradigm, a project necessary for the dewesternisation of the legal mind and intellectual landscape.[10] It is in this light, that the article interrogates the historiography of the South African Social Security system in the context of the indigenous norms providing an argument for why such a project is necessary for the proper teaching and re-configuration of Social Security Law in post-colonial South African legal studies.[11] Finally, the article offers some proposal on how to re-contextualise the historicity of Social Security law in search of curricular transformation which is Afrocentric in character.[12]

2 Defining dewesternisation

Defining dewesternisatiom is often a cumbersome task, given that varied meaning is ascribed to this term making it an elastic, malleable, and a highly contested one.[13] What exacerbates this illusiveness is that the

7 Adebisi "Decolonising the law school: presences, absences, silences and hope" 2020 *The law Teacher* 472.
8 Mungwini "The question of epistemic justice: Polemics, contestations and dialogue" 2018 *Phronimon* 2.
9 Motshabi "Decolonising the University: A Law Perspective" 2018 *Strategic Review for Southern Africa* 105.
10 Oelofsen "Decolonisation of the African mind and intellectual landscape" 2015 *Phroniman* 130; Morreira, Siseko, Kumalo and Ramgotra "Confronting the complexities of decolonising curricula and pedagogy in higher education" 2020 *Third World Thematics: A TWQ Journal* 3; Mpedi, Tshivhase and Reddi (2019) 4.
11 Fagbayibo 2019 *International Community Law Review* 172.
12 Himonga and Diallo 2017 *Potchefstroom Electronic Law Journal* 63.
13 Mignolo 27.

conceptualisations of the term is beleaguered with terminological complexity. There is no clarity as to the proper terminology to be utilised.[14] A cursory survey of the literature shows that academic commentators make use of different terminology.[15] Some prefer to use the term dewesternisation others use decolonisation as well as Africanisation.[16] All three terminologies carry similarities and differences in terms of their scope and meanings.[17] Mbembe argues that the three terms do not carry the same meaning.[18] His trenchant critique is that calls for dewesternisation and Africanisation tinker with the design of the colonial curricular or model.[19] Whereas, decolonisation is not about tinkering with the design of the curricular rather it presupposes an epistemic shift necessitated by innate rights in how knowledge is claimed against the others to achieve self-ownership.[20] Mbembe's view has cracks because it reduces the meaning of dewesternisation to self-ownership excluding other possibilities with minimum consideration that all three terminologies are or could be framed in the academic literature the same in an oppositional and dialectical relationship with colonisation.[21] Chaka and others, opine that this framing of the three concepts is based on the hegemonic European centrist canon systems postured in contradistinction to the peripheral position occupied by the African canons.[22] Consequently, this explicit conflation gives rise to the implied interchangeability use of the three terms, an approach which is adopted in the context of this article.[23]

14 Mgqwashu "Universities can't decolonise the curriculum without defining it first. The Conversation" 2016 https://theconversation.com/universities-cant-decolonise-thecurriculum-without-defining-it-first-63948 (accessed on 2020-08-16).

15 Mgqwashu 3.

16 Mgqwashu 4.

17 Murphy "Decolonising the mind" http://thowe.pbworks.com/w/page/38978159/Summary%3A%20Decolonising%20the%20Mind (accessed on 2020-08-17).

18 Mbembe "Decolonising knowledge and the question of the archives" http://wiser.wits.ac.za/system/files/Achille%20Mbembe%20%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf (accessed on 19-08-2020-08-19).

19 This view is based on the reading of Fanon who is in Mbembe's words extremely critical of the project of Africanisation because of his mistrust of the African post-colonial middle class. See Mbembe 15.

20 Mbembe 16.

21 Dewesternisation is more nuanced than what is presented by these theorists and scholars. Metz "Africanising institutional culture: What is possible and plausible" in Tabensky and Matthews *Being at home: Race, institutional culture and transformation at South African higher education institutions* (2015) 242.

22 Gatsheni "Decolonising the university and the problematic grammars of change in South Africa" 2016 http://www.unisa.ac.za/static/corporate_web/Content/ About/Leading%20change/Documents/Keynote-Address-UKZN-6-7-October-2016.pdf (accessed on 2020-08-19).

23 Nakata, Nakata, Keech, and Bolt "Decolonial goals and pedagogies for indigenous studies" 2012 *Decolonisation: Indigeneity, Education and Society* 121.

Notwithstanding the above, it may be necessary for an article such as this which explores the possibility of dewesternisation of South African Social Security Law, to propose a contextual precise working definition of the term. However, a further reading of the literature on the subject demonstrate that crafting a definition would result in a needless *numerous clause* on what constitutes dewesternisation which in itself may undesirably limit the applicability of the term. Instead, the approach taken by this article is to identify elements of dewesternisation applicable to the subject at hand.[24] Dewesternisation can be construed as the "change" which occur when countries become "politically independent" from their erstwhile "colonisers."[25] It is the inverse to the process of westernisation or colonisation which took place as a consequence of the European quest to expand imperial influence through the imposition of the colonial empire and ecosystems on indigenous people.[26] The contemporary westernisation process in Africa dates to the long era of European imperialism which started in the latter part of the 15th century.[27] The climax to this westernisation was the spreading of the European knowledge systems and influence in Africa as well as elsewhere, through the enactment of laws and policies which enabled dispossession and oppression.[28] Consequently, indigenous people were divested of their laws, lands, cultural identity and often positioned as inferior subjects.[29]

However, dewesternisation transcends mere political independence and sovereignty.[30] To claim that the westernisation project stopped having a bearing on Africa upon the achievement of political independence and sovereignty is to misrepresent the colonial

24 Chakrabarty *Provincialising Europe: Postcolonial Thought and Historical Difference* (2000) 4.

25 Oyedemi "Decoloniality and South African academe" 2020 *Critical Studied in Education* 399.

26 Caroline and Mignolo "Introduction. "The Global South and World Disorder" 2011 *The Global South* 5.

27 Although this was a watershed period in the history of westernisation, this was neither its origin. Since the emergency of states, humanity has always nestled and manifested the drive to spread their influence through subjugating others. From the Egyptian ruler, Phraoh Amasis who established the Greek colony at Naucratis in 570-526 BC, to the Greeks who westernised the colonies of Cyrenaica, and administration of Hellenistic dominions established by Alexander the Great around 356BC, to the Phoenician, Roman, Arabs and Islam colonies along the coast of North Africa, humanity has experienced the tentacles of westernisation long before present-day Europe came into being. Clayton "Critical Imperial and Colonial Geographies" in Mona and *Thrift Handbook of Cultural Geography* (2002) 354; Mahmood *Citizen and subject: contemporary Africa and the legacy of late colonialism* (1996) 6; Harms *Land of Tears: The exploitation of Equatorial Africa* (2020) 24.

28 Comaroff "Colonialism, Culture and the Law" 2006 Law and Social Policy 309.

29 Mignolo *Local Histories and Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (2000) 4.

30 Fukuyama "Westernisation vs Modernisation" 2009 *New Perspectives Quarterly* 84.

enterprise.[31] African systems of government, extractive economic structures, together with their intellectual spaces are predominantly shaped by the former colonial powers and more recently by the Chinese in subtle neo-colonial, diplomatic ties and political power matrix.[32] Therefore, in the context of this article, the notion of dewesternisation should be understood as an on-going process consisting of an Afro centred ideology postured in defence of indigenous knowledge systems.[33] In other words, the concept advances an alternative to the global imbalances in the generation and validation of knowledge.[34] It enriches the academic space with a polemic thesis to the dominant western axiology and epistemology, which side-line, neglect and overshadow indigenous knowledge systems.[35] In sum, despite of the definitional conundrum, the term presents greater prospects for relocating epistemological debates in the teaching of Social Security Law from the periphery of the knowledge economy to the centre narrative.[36]

3 Exploring elements of the western epistemic hegemony in South African Social Security Law

The call to dewesternise South African Social Security Law offers an opportunity to liberate as well as transform our perspectives through critical reflections.[37] As Motshabi observes, self-reflection is the first crucial leap towards dewesternisation of legal education.[38] The important question which then flows from this is why we need to dewesternise Social Security Law.[39] Put differently, what are the merits of dewesternising South African Social Security Law? [40] Dewesternisation

31 Mudimbe *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (1988).
32 Addis and Zuping "Criticism of neo-colonialism: clarification of SinoAfrican cooperation and its implication to the west" 2018 *Journal of Chinese Economic and Business Studies* 357.
33 Kaya and Seleti "African indigenous knowledge systems and relevance of higher education in South Africa" 2013 *The International Education Journal: Comparative Perspectives* 31.
34 Kay and Seleti 32.
35 Willems "Beyond Normative Dewesternisation: Examining Media Culture from the Vantage Point of the Global South" 2014 *The Global South* 7.
36 Heleta "Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa" 2015 *Transformation in Higher Education* 2.
37 Grosfoguel "The Epistemic Decolonial Turn: Beyond political-economy paradigms" 2007 *Cultural Studies* 211; Heleta "Decolonisation: academics must change what they teach, and how" https://theconversation.com/decolonisation-academics-must-change-whatthey-teach-and-how-68080 (accessed on 2020-08-07); Adebanwi "The writer as social thinker" 2014 *Journal of Contemporary African Studies* 405.
38 Motshabi *Strategic Review for Southern Africa* 105.
39 Matshabi *Strategic Review for Southern Africa* 106.
40 Bogues "The University in Africa: Reflections on Epistemic Decolonisation. Social Dynamics" 2007 *A journal of African Studies* 209.

is an important instrument which enables us to respond adequately to questions relating to the politics of knowledge such as whose idea and knowledge systems are prioritised in the economy of knowledge.[41] It is rooted in the idea of knowledge placement. Proper knowledge placement empowers students by restoring their cultural knowledge.[42] It provides avenues to re-establishing the link between knowledge and the community thereby ensuring that knowledge does not exist in a vacuum or decontextualised form.[43] Such linkages are essential for re-contextualising knowledge, deepening understanding, creating new episteme, encouraging the participation of the community in generating new knowledge and reconnecting students with their other beyond colonial identity and values emanating from the colonial project.[44] Therefore, dewesternisation demands us to transcend embedded colonial identity and require an epistemic transformation that challenges the centrality of Eurocentric canon.[45]

Eurocentric canon, Mbembe puts it, is a canon which pretends that the truth is found only in western-based knowledge systems.[46] It is a canon that disregards access to other epistemic traditions thereby undermining free inquiry for the truth which is the primary preoccupation of academic scholarship.[47] It also whitewashes colonialism as a common way of cementing social relations between humans rather as opposed to an exploitative, extractive and oppressive regime.[48] Eurocentric canon portrays knowledge as impartial thereby obfuscate negative stereotypes about the objectification of the other's history, lands, geography and knowledge.[49] Western epistemic traditions or canons, consistent with the nature of colonialism destroys other forms of episteme with the consequence that students cannot relate. Mbembe advances:

> "They rest on a division between the mind and the world as an ontological *a priori*. They are traditions in which the knowing subject is enclosed in itself

41 Mavhungu and Mavhungu "Mafukata Crisis of decolonising education: Curriculum implementation in Limpopo Province of South Africa" 2018 *Africa's Public Service Delivery and Performance Review* 2.
42 Delgado "Critical Race Theory, Latino Critical Theory, and Critical Race Gendered Epistemologies: Recognising Students of Color as Holders and Creators of Knowledge" 2002 *Qualitative Inquiry* 105.
43 Delgado 106.
44 Trunett "Decolonising the Curriculum; Transforming the University: A Discursive Perspective" https://www.dut.ac.za/wp-content/uploads/2017/03/T-JOSEPH.pdf (accessed on 2020-20-20).
45 Grosfoguel "The Implications of Subaltern Epistemologies for Global Capitalism: Transmodernity, Border Thinking and Global Coloniality" in Robinson and Applebaum *Critical Globalisation Studies* (2005) 20.
46 Mbembe 7.
47 Allais "Problematising Western philosophy as one part of Africanising the curriculum" 2016 *South African Journal of Philosophy* 538.
48 Allais 539.
49 Comaroff and Comaroff "Africa Observed: Discourses of the Imperial Imagination" in Grinker and Steiner *Perspectives on Africa: A reader in Culture, History, and Representation* (1997) 610.

> and peeks out at a world of objects and produces objective knowledge of objects."[50]

Mbembe's submission shows that Eurocentric epistemic construction makes a distinction between epistemic location and social location.[51] Further, Grosfoguel argues that colonial construction of knowledge places humans on the other end of the spectrum of power relations so that they are not able to think epistemically beyond such colonial locations or prisms.[52] Essentially, the present-day triumph of the colonial project hinges on creating subjects that are socially positioned and pre-condition in the opposite peripheries of the colonial prism to think epistemically as the ones in dominant locations.[53] This "zoning" of beings by the colonialist makes the dwellers of the inferior zone to continue suffering unremitting epistemic dehumanisation and social invisibility by being pushed below the line where their knowledge, life and voice does not count.[54] In this grand colonial scheme, epistemic perspectives coming from below will not yield much except only supporting the perspective of the hegemonic knowledge of the above in the power relations involved.[55] However, this does not always mean that knowledge produced from below is automatically an episteme of the colonisers.[56] Rather, the claim here is that in most instances knowledge epistemically located in the dominant side of the power relations is related to the geo- and body-politics of knowledge produced from below.[57] Therefore, the disembodied and neutrality fronted by the Eurocentric knowledge canon is a misconception.[58]

The aforementioned Eurocentric constructions of knowledge were then explicitly imported into various domains of knowledge including South African Social Security Law.[59] Therefore, the South African Social Security Law has largely retained western-centred perspectives. It still embeds Eurocentric episteme, and little been done to displace

50 Mbembe 8.
51 Mbembe 9.
52 Grosfoguel "Decolonising Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality" 2011 *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World* 6.
53 Hall and Tandon "Decolonisation of knowledge, epistemicide, participatory research and higher education" 2017 1 (1) *Research for All* 7.
54 Figlan "The Politic of Human Dignity" http://abahlali.org/node/9325/ (accessed on 2020-10-19); B de Sousa Santos "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" 2007 30 *Review* 45.
55 Figlan 46.
56 Andreotti, Ahenakew and Cooper "Epistemological pluralism: Ethical and pedagogical challenges in higher education" 2011 *Alternative: An International Journal of Indigenous Peoples* 42.
57 Le Grange "Decolonising the university curriculum" 2016 *South African Journal of Higher Education* 7.
58 Le Grange 8.
59 By definition Eurocentrism refers to a set of doctrine or ethical views derived from European context but presented as universal values. It has its base in inheriting a European rational philosophy which is considered unique and superior to other views.

hegemonic assumptions that centre European thought at the core of the development of Social Security Law.[60] This thematic critique of Eurocentrism is not only confined to the Social Security Law but rather, has deep roots in many centuries of resistance to modern westernisation project prevalent in all areas of the law including human rights, family law, intellectual property law, among others.[61] This incipient discourse on dewesternisation has been presented as a core demand of self-knowing, self-validation and epistemic sovereignty made by the different schools of thoughts including the Non-Aligned Movement, Pan-African Movement, Postcolonial Theory and Orientalism, Critical Race Theory, Black Atlantic Studies and Third World Feminism.[62] From this vintage point, some insights posited by the Third World Approach to legal studies are relevant for the infusion of Afrocentric perspectives in South African Social Security Law.[63]

Importantly, core Afrocentric perspectives to the South African Social Security Law are foregrounded on scholarship advanced by Fanon, B de Sousa Santos, Mbembe, Ngugi and Moglio, among others.[64] These scholars point to the continuations of colonialism and westernisation through Europe's provinciation of knowledge in our current curricular.[65] As Fanon in Black skin, White Masks writes that "imperialism leaves behind germs of rot which we must clinically detect and remove from our land as well as our minds."[66] In Wrenched Earth, Fanon advances that colonialism is not satisfied merely with the imposition of political control but with the coloniality of power and distribution of knowledge.[67] Motshabi further maintains that the demand for political independence based on dialectics of identity, liberation, recognition and distribution is inadequate for achieving decolonisation of being.[68] This is because colonial curricular as taught in higher education presents biased western-centric logic by turning to the past of the people, distorting, disfiguring,

60 Mignolo (2012) 27.

61 Barkaskas "Beyond Reconciliation: Decolonizing Clinical Legal Education" 2017 *Journal of Law and Social Policy* ; Tshivhase *et al Decolonisation and Africanisation of Legal Education in South Africa* (2015) 9; Kline M "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" 1994 *Social and Legal Studies* 452; Chaka Chaka, Miriam Lephalala, and Nandipha Ngesi "English studies: Decolonisation, deparochialising knowledge and the null curriculum" 2017 *Perspectives in Education* 208.

62 Hudson "Decolonising gender and peacebuilding: Feminist frontiers and border thinking in Africa" 2016 *Peacebuilding* 197.

63 Escobar "Beyond the Third World; Imperial Globality, Global Coloniality and Antiglobalisation Social Movements" 2004 *Third World Quarterly* 207; Lenta "Just Gaming? The case for Postmodernism in South African Legal Theory" 2001 *South African Journal on Human Rights* 177.

64 De Sousa Santos "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" 2007 *Review* 46.

65 Mbembe 4; Fanon *The wretched of the earth* (1965) 2; Thiong'o *Decolonising the mind: The politics of language in African literaturei* (1986) 30.

66 Fanon *Black Skin, White Masks* (1952) 23.

67 Fanon 4.

68 Motshabi *Strategic Review for Southern Africa* 33.

and misrepresenting their history and laws.[69] Therefore, due to the aforementioned legacy of colonialism embedded in South African legal systems, the call for the dewesternisation of the law including Social Security Law remains valid. [70]

However, dewesternisation as an emancipatory construct is often criticised on two fronts. The first criticism is that it is too general, anachronistic and has been overtaken by events.[71] This charge may be justified.[72] Some academic commentators argue that the idea of dewesternisation is anti-development because it seeks to reverse the benefits of modernity by rejecting European episteme thereby returning to the pre-colonial status quo.[73] However, this latter charge has many pitfalls.[74] First, modernity in Africa predates colonialism.[75] Second, the idea that dewesternisation means that the existing western-based knowledge system must be overthrown and replaced by another version in an opposite manner is faulty. Such a view is based on the misinterpretation of the concept of dewesternisation.[76] Current attempts to dewesternise Social Security law should be based on the reading of Thiong'o version of the concept which does not focus on the rejection or side-lining of Eurocentric episteme but focuses on placing Africa canon at the centre of legal education.[77] This localisation and re-centring of the African perspective is a practical approach informed by present realities.[78]

Further, Ngugi Wa Thiong'o version of dewesternisation require African writers to tell their own story through their own perspectives.[79] This is what is termed the decolonisation of the mind.[80] According to Wa Thiong'o, the colonisation of the African mind happened as a result of its contact with the West.[81] This contact ensured the training and conditioning of the African mind to conceptualise and analyse events and phenomenon according to Western fashion.[82] Wa Thiong'o version of

69 Motshabi 34.
70 Graaff "Pandering to pedagogy or consumed by content: Brief thoughts on Mahmood Mamdani's teaching Africa at the post-apartheid University of Cape Town" 1999 *Social Dynamics* 76.
71 Mignolo (2012) 27.
72 Motshabi *Strategic Review for Southern Africa* 35.
73 Ncube *The World Intellectual Property Organisation Journal* 37.
74 Ncube 38.
75 Gyekye *Tradition and Modernity: Philosophical Reflections on the African Experience* (1997) 4.
76 Gyekye 5.
77 Recep Taş "Gugi Wa Thiong'o'nun Decolonising the Mind: The Politics of Language in African 1986 Literature *Adli Eserinin Sömürgecilik - Dil İlişkisi Açisindan İncelenmes" 2017 International Journal of Language Academy* 190.
78 Thiong'o (1986) 12.
79 Thiong'o (1986) 13.
80 Thiong'o (1986) 14.
81 Thiong'o (1986) 15.
82 Chukwuebuka and Ezeanya, Chioma "Mental decolonisation: A Pathway t Sustainable development in Africa" 2020 *Addaiyan Journal of Arts, Humanities and Social Sciences* 1247.

dewesternisation accepts that colonialism is a total project which does not leave any part of the human person including the mind and its reality untouched.[83] In the context of Social Security Law, it has shaped and whitewashed the historiography of Social Security law by advancing the crucial assumption according to which the origin of legitimate thinking is confined to a certain geopolitical location, Europe, excluding the existence of other sites of knowledge generation.[84] In South Africa, the way the development of Social Security Law is understood is a consequence of this dynamic.[85] Having been shaped in the European events and thinking, the standard orthodox theory on social security law offered in the mainstream Social Security Textbook pays little attention to the contribution made by non-European canons.[86]

4 The Orthodox construct

The standard orthodox theory on the origin of Social Security Law frames its content on the statutory measures introduced during the Industrial Revolution, the Great Depression of the 1930, the first and second World Wars of the 20th Century as significant events which contributed to the development of the current systems of social security Law.[87] Whilst it is beyond doubt that these western centred events contributed to the emergency of Social Security Law, their role was not decisive but rather minimum and remote. The theory unequivocally argues that the involvement of society in the welfare of its members although it is now a common phenomenon, was not always the case.[88] It was only through the promulgation of the so-called pro-poor laws in the United Kingdom, and other European countries as well as in the US that societal members could rely on their government for social security assistance.[89]

The aforementioned assumptions propagated by the standard orthodox theory on the origin of Social Security Law in South Africa have cracks.[90] The assumptions are a clear demonstration of the dominance

83 Mamdani "Between the public intellectual and the scholar: Decolonization and some post-independence initiatives in African higher education" 2016 *Inter-Asia Cultural Studies* 70.

84 Strydom (eds) *Essential Social Security Law* (2009) 2.

85 Seekings "Not a Single White Person Should Be Allowed to Go Under: Swartgevaar and the Origins of South Africa's Welfare State, 1924–1929" 2007 *Journal of African History* 375.

86 Strydom (2009) 1. This is the same argument made in the context of rape law. See Deere "Decolonising Rape Law: A Native Feminist Synthesis of Safety and Sovereignty" (2009) *Wicazo Sa Rev.* 149

87 Samir "Underdevelopment and Dependence in Black Africa-Origins and Contemporary Forms" 1972 *Journal of Modern African Studies* 105.

88 Samir *Journal of Modern African Studies* 106.

89 Poole *The Segregated Origins of Social Security: African Americans and the Welfare State* (2006) 3.

90 Fraser *The evolution of the British welfare state: a history of social policy since the Industrial Revolution* (Macmillan International Higher Education 1992); De Vries "The industrial revolution and the industrious revolution" 1994 *Journal of Ecomic History* 249.

of western episteme which affords a greater stature to the European perspectives as the linchpin of the development of social security law.[91]Lamentably, the current Social Security Law while it has been revamped still retains Bismarckian, old west minister social security episteme.[92] This episteme has been the anchor of colonisation for a long time. In the process of centering Social Security law to western episteme, the standard orthodox theory on the origin of Social Security ignores the role that informal Social Security which is underpinned by indigenous values played in the development of social welfare systems in South Africa.[93] It is noteworthy that long before colonisation, indigenous communities in Africa including South Africa had systems put in place to provide social welfare benefits to destitute members of the society and to those who had fallen on hard times.[94] These benefits were availed and protected under an ever-evolving African customary law, a system of law that govern African societies.[95]

It can be strongly argued that the centering of the origin of the South African Social Security Law on European canon legitimatise and promote the colonial project in a way that decontextualize the teaching of this subject.[96] Such an approach cause epistemicide which marginalises the role played by indigenous knowledge systems in the development of Social Security systems in particular the traditional social welfare system of *Ukusisa or Mafias* for the caring of destitute people, orphans, and vulnerable children in society practised by the Nguni tribes such as the

91 Bhorat "The South African social safety net: past, present and future" 1995 *Development Southern Africa* 595; Proudlock, Paula "Lessons Learned from the Campaigns to Expand the Child Support Grant in South Africa" in Devereuxand Webb *Social Protection for Africa's Children* (2011); Carina "Social Security Development and the Colonial Legacy" 2015 *World Development* 333.

92 Tshoose "The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa" 2009 *African Journal of Legal Studies* 12.

93 Woolard and Klasen "The evolution and impact of social security in South Africa" https://www.researchgate.net/publication/242595464_The_evolution_and_impact_of_social_security_in_South_Africa (accessed on 2020-10-18); Pollak "State social pensions, grants and social welfare" in Van der Horst and Reid *Race Discrimination in South Africa - A Review* (1981) 157; Leila *Social Welfare and Social Development* (2015) 2; Seekings, "Visions and Hopes and Views about the Future: The Radical Moment of South African Welfare Reform" in Dubow and Jeeves *In Worlds of Possibility: South Africa in the 1940s* (2005) 5.

94 Hujo "The Politics of Domestic Resource Mobilisation for Social Development" in Mkandawirem *Colonial Legacies and Social Welfare Regimes in Africa an Empirical Exercise* (2020) 139.

95 Schmdt "From Colonisation to Aid: External Actors and Social Protection in Global South" in Seekings *The Effects of Colonialism on Social Protection in South Africa and Botswana* (2020) 109 Palgrave Macmillan

96 Servaas "South African social security under apartheid and beyond." 1997 *Development South Africa* 14.

Zulu, Tswana and Sotho peoples.[97] In terms of this system, a wealthy man would "loan" cattle to a poor person without a herd of his own. Each recipient of cattle through this practice was responsible for their care and retained the right to milk them for nourishment and could keep some of their offspring when he returned or repaid the loan to the owner.[98] Although this practice had elements of contractual obligations, it is also a form of social security system. Several advantages emanating from this social welfare system. It provided an opportunity to spread livestock over large geographical areas, which prevented complete decimation of the herds in the event of community crisis caused by natural disasters such as drought or cattle diseases.[99] The practice was also a form of distributive justice. Indeed, *Ukusisa* is evidence of the existence of strong Social Security systems in precolonial African societies long before the deemed inception of western-oriented Social Security system.[100]

Notwithstanding the above, the standard orthodox theory on the origin of Social Security Law is rooted in the concept of a welfare state which is underpinned mainly by the Eurocentric concept of social liberalism.[101] This concept contends that there is a social contract between the state and their citizens which obliges the former to uphold the freedom of the latter.[102] According to John Rawls whether individuals are free is determined by the rights and duties established by the government.[103] Rawls theory of justice explains the terms of the "social contract" and is commonly held as a basis of the welfare state. One of the terms is that social liberalism requires the state to guarantee genuine freedom by ensuring that citizens are educated, health and free from extreme poverty.[104] This can only be assured when the state provides social assistance to those in need and promulgate laws that prohibit unfair discrimination.[105]

97 Epistemicide refers to the killing or destruction of knowledge systems. See Idang "African Culture and Values" 2015 *Phronimon* 99. Currently, there are indigenous social security measures such as Letsema whose membership is based on periodic contribution such as peer lending arrangement which requires no financial collateral involve relatively substantial amounts of capital for business purposes, consumption or income smoothing.

98 Mottiar "Philanthropy and Development in Southern Africa" https://africanphilanthropy.issuelab.org/resources/21809/21809.pdf (accessed on 2020-10-22).

99 Anyanwu "The African World-view and Theory Knowledge" in Ruch and Anyanwu *African philosophy: An introduction to the main philosophical trends in contemporary Africa* (1981) 9.

100 Nussbaum "Ubuntu: Reflections of a South African on Our Common Humanity' 2003 *Reflections The SoL Journal* 5.

101 Cooper *Decolonisation and African Society* (1996) 2.

102 Noyo "Social policy and welfare regimes typologies: Any relevance to South Africa" 2017 *Comparative social policy in Africa* 4.

103 Rawls: *A Theory of Justice* (1971) 8.

104 Rawals 9.

105 Bennett "Ubuntu: an African Equity" 2011 *Potchefstroom Electronic Law Journal* 30.

Similarly, other scholars foreground Social Security Law on the Eurocentric philosophy of utilitarianism premised on the idea of taxation and redistribution of wealth.[106] Utilitarianism requires the state to aim for the greatest total happiness across the population.[107] In order to achieve that the government must ensure that basic needs and services such as food, water and shelter, health care and amenities are widely available to allow the greatest number of people to have the greatest possible quality of life.[108] Another western philosophy that underpins the current Social Security Law is that of egalitarianism, which actively advocates for the removal of economic inequalities among people to create an egalitarian society.[109] The modern notion of egalitarianism requires society to institute policies and enact laws that secure at least a minimally acceptable threshold of social welfare for all its members.[110]

Based on the above submission, an argument can be made that the standard orthodox theory on Social Security Law with its western-centric perspective does not promote pluriversality.[111] Pluriversality as conceptualised by Motshabi requires a genuine totality of global knowledge, with its multiplicity theorised all over, that permits a true search for the truth.[112] A pluriversality approach to Social Security law would ground this subject not only on Eurocentric theory but rather on African based philosophy such as Ubuntu.[113] The African construct of "ubuntu" enables Social Security Law to be viewed through an African perspective or constructions of the world thereby unravelling the legacy of colonialism.[114] The concept of ubuntu has been well explored repeating it is not warranted. However, in brief, ubuntu is an African idea of humaneness between people within a community. It is described in the isiZulu phrase, "*umuntu ngumuntu ngabantu*" translated to a person is

106 Jackson "The Uses of Utilitarianism: Social Justice, Welfare Economics and British Socialism, 1931–48" 3007 *History of Political Thought* 509; Kelly *Utilitarianism and Distributive Justice* (1990) 6; Knight "In Defence of Global Egalitarianism" 2012 *Journal of Global Ethics* 107.

107 Knight "Theories of distributive justice and post-apartheid South Africa" 2014 *Politikon* 23.

108 Gravel "Utilitarianism or Welfarism: Does it make a Difference?" 2013 *Social Choice and Welfare* 533.

109 Daryl "Should an Egalitarian Support Black Economic Empowerment?" 2007 *Politikon* 123; Daryl "Class as a Normative Category: Egalitarian Reasons to Take it Seriously with a South African Case Study" 2010 *Politics and Society* 287.

110 Eithne and Baker "Equality, social justice and social welfare : a road map to the new egalitarianisms" 2007 *Social Policy and Society* 53.

111 Lund "State Social Benefits in South Africa" 1993 *International Social Security Review* 25.

112 Motshabi *Strategic Review for Southern Africa* 110.

113 Mokgoro "Ubuntu and the Law in South Africa" 1998 *Potchefstroom Electronic Law Journal* 2.

114 Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 *Potchefstroom Electronic Law Journal* 67.

a person through other people. Ubuntu as a concept date back to precolonial days and is a part of a long oral tradition.[115]

The concept of Ubuntu continues to play an important role in the contemporary South African society.[116] It is regarded as the key cultural strength of families, an important foundation for resilience among the youth and can potentially shape community responses to disaster or crisis through informing society's approach to welfare.[117] In *S v Makwanyane*, the Constitutional Court, per Langa J defined *Ubuntu* as follows:

> "A culture which places some emphasis on communality and on the interdependence o the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance [to] each member of that community."[118]

Conceptually, there are two distinct clusters of the meaning to the concept of ubuntu. First, ubuntu is understood as referring to the moral qualities of a person, particularly features like generosity, empathy, forgiveness and considerateness.[119] Some refer to ubuntu as the presence of the divine, directing a person away from bad behaviour towards good. Second, ubuntu refers to the values of interconnectedness between people, in the form of a worldview or philosophy.[120] It can be argued that the principles and values of ubuntu provide a theoretical framework for Social Security Law which serves two main purposes: to make sense of the world (explanatory theory) and to guide social security provision (practice theory).[121] This Afrocentric approach introduces a new paradigm in the teaching and delivery of Social Security which supplements the dominant west-oriented canon or concept of social security.[122]

115 Mbigi and Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 7.
116 Gyekye *Tradition and Modernity: Philosophical Reflections on the African Experience* (1997) 16.
117 Mpedi "The role of Religious Values in Extending Social Protection: Observations from a South African Perspective" 2008 *Acta Theologica* 105;
118 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 300.
119 English "Ubuntu: The Quest for an Indigenous Jurisprudence" 1996 *South African Journal of Human Rights* 641.
120 English *South African Journal of Human Rights* 643.
121 Mpedi and Darimont "The Dualist approach to Social Security in Developing Countries: Perspectives from China and South Africa" 2007 *Journal of Social Development in Africa* 9
122 Skelton "Face to Face: Sachs on Restorative Justice" 2010 *South African Public Law* 97.

5 Towards an afrocentric social security law paradigm

What emerges from the above exegesis is that dewesternisation of Social Security Law opens up important new insights into the politics of social security curricular, pedagogy and the dominant Eurocentrism which characterise this politics. These insights show blind spots in the way Social Security Law is understood, taught and conceptualised. The theoretical approach underpinning Social Security Law should be foregrounding most on the Afrocentric concept of Ubuntu which advances interdependent human relationships, community based solidarity, champion social justice, fosters generosity and has implications for the delivery of social security.[123] This is vital for the development of a comprehensive approach to social security aimed at achieving sustainable development.[124] As Seepamore posits:

> "Indigenous social propection are based on people's cultural beliefs and norms and are self-organised, self-regulating systems of both obligation and entitlement offering not only financial aid but also psychological and emotional support."[125]

As aforementioned, Ubuntu as a theoretical construct informing the conceptualisation of a comprehensive approach to social security will overcomes the epistemological barriers presented by the Western-oriented concept of social security.[126]

In addition, foregrounding Social Security Law on the concept of Ubuntu would enable students and policy makers to understand the subject in terms of multiple traditional perspectives.[127] This is vital for the development of a comprehensive indigenised approach to social security aimed at sustainable development.[128] Ubuntu as a theoretical construct informing the conceptualisation of a comprehensive approach to social security will actualise the right to have access to social security.[129] It is clear that western oriented perspective is unable to comprehend, sufficient recognise and support informal forms of social

123 Keep and Midgley "The Emerging Role of Ubuntu botho in Developing a Consensual South African Legal Culture" in Bruinsma and Nelken *Recht der Werkelijkheid* (2007) 29.

124 Himonga "Exploring the Concept of Ubuntu in the South African Legal System" in Kischel U *et al* (eds) *Ideologie und Weltschauung im Recht* (2012) 2.

125 Seepamore "Indigenous Social Security Systems: A South African Perspective" http://www.saspen.org/home/wp-content/uploads/2016/04/Informal-Social-Security-Systems-Workshop-UJ-2016_Presentation_Boitumelo-Indigenous-Social-Security-Systems.pdf (accessed on 2020-10-22).

126 Himonga "The Right to Health in an African Cultural Context: the Role of Ubuntu in the Realisation of the Right to Health with Special Reference to South Africa" 2013 *Journal of African Law* 165; Battle *The Ubuntu Theology of Bishop Desmond Tutu* (1997) 13.

127 Keep and Midgley 30.

128 Himonga 3.

security obtaining in marginalised South African communities mainly the poor as well as the structurally unemployed and the informally employed.[130] These groups are for the most part excluded from the formal social security framework as they are not in formal employment and often not qualify for social assistance, unless they meet the requirements for accessing narrow categories of social grants such as old-age, child support, disability.[131]

6 Conclusion

To conclude, it has been demonstrated that centring Pan-African epistemic in legal education through transforming, decolonising and dewesternising Social Security Law in South Africa demands re-contextualising the standard orthodox social security theory in light of the indigenous knowledge systems.[132] In other words, there a need to re-think or un-think what constitutes Social Security law episteme from an Afrocentric location of enunciation.[133] This is important because the hegemonic Eurocentric construct of Social Security Law does not fully accommodate alternative Afrocentric based methodologies of actualising the constitutionality protected right to have access to social security obtaining in informal social security for marginalised groups such as those unemployed and the informally employed.[134] Therefore, there is a need to place African canon at the centre of the Social Security Law in South Africa. This will result in the indigenisation of Social Security Law and an epistemic leap towards an Afrocentric legal curricular.[135]

129 Himonga "The Right to Health in an African Cultural Context: the Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa" 2013 *Journal of African Law* 165; Battle *The Ubuntu Theology of Bishop Desmond Tutu* (1997) 3.

130 Cornell and Muvangua U*buntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) 8.

131 Anne, Hosegood and Lund "The Reach and Impact of Child Support Grants: Evidence from KwaZulu-Natal" 2005 *Development Southern Africa* 467.

132 Mokgoro *Ubuntu and the Law in South Africa* (1997) 51.

133 Fagbayibo *International Community Law Review* 173; Foster "Decolonizing Patent Law: Postcolonial Technoscience and Indigenous Knowledge in South Africa" 2016 *Feminist Formations* 149.

134 Olivier and Mpedi "Extending Social protection to families in the African context: Complementary role of formal and informal social security" https://www.eldis.org/document/A13617 (accessed on 2021-01-10); Himonga *Potchefstroom Electronic Law Journal* 7.

135 Bhengu *Ubuntu: The Essence of Democracy* (1996) 24.

Developing the common law crime murder in relation to physician-assisted suicide and physician-assisted euthanasia: Revisiting the missteps of *Stransham-Ford v Minister of Justice and Correctional Development* 2015 (4) SA 50 (G)

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SUMMARY

Digitisation of information compels a revision of the Fourth Industrial Revolution (4IR) and its associated technologies. This arises because 4IR technologies, for example, the Internet of Things (IoT), Big or Massive Data, Artificial intelligence (AI), augmented or virtual reality and machine learning, drastically adjust the manner in which an information society operates. Specifically, they present unprecedented opportunities for business, economy and online user or consumers. Furthermore, they profoundly model and re-model productions. As a result, the conventional lines between the physical, digital and biological spheres become imprecise. Given the extent of the transformation that 4IR technologies bring to society, it has become necessary to refer to them as the disruptive technologies. However, the inquiry is to what extent is the information society ready to take advantage of disruptive technologies and control some of the setbacks that emanate from therefrom? For regulatory purposes, how electronic or e-ready regulators are to control the adverse consequences that are associated with disruptive technologies? To address these questions, this paper discusses some of the selected theories for technology regulations (artificial immune system (AIS) theory and theory for *Lex Informatica*). The theories are not technology regulations, as such. Simply, they concede that technology regulations should encourage a proper scrutiny of the position of the technologies in the information society.

1 Introduction

A physician who assists by way of giving a patient a lethal prescription, which the patient may use to bring about his death, is commonly referred to as physician-assisted suicide. If the physician is called upon to assist with administering the lethal prescription, he or she engages in physician-assisted euthanasia. Despite Stransham-Ford's attempt at challenging the absolute prohibition of physician-assisted euthanasia and physician-assisted suicide, they remain unlawful. The position with respect to physician-assisted euthanasia can be gleaned from the cases

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of *S Hartmann*[1] and *R v Peverett*.[2] In the former, the court held that it constitutes the crime of murder to hasten the death of a human being even if they were due to die of terminal illness, and in the latter, it was held that consent is not a defence to criminal responsibility. In instances of physician-assisted suicide it has been held that a person who provides the necessary means for an intended suicide will be guilty of an offence.[3]

A court confronted with a challenge to the absolute prohibition of physician-assisted euthanasia (PAE) and physician-assisted suicide (PAS) would have to consider how the principles of criminal law should be applied and adopted to the present day. In doing so, the court would also have to heed the requirement of section 39(2) of the Constitution,[4] that is whether the law relating to PAE and PAS requires development in order to promote the spirit, purport and objects of the Bill of Rights. Stransham-Ford had approached the High Court for an order declaring that the law on PAE and PAS be developed, so as to give effect to his constitutional rights.

The research reflects on the court's attempt to develop the common law. It does so by considering whether the court followed a proper remedy when it held that the prohibition on PAE and PAS requires development to give effect to Stransham-Ford's constitutional right to dignity and his right to bodily and psychological integrity.[5] Turning to the thesis of the research, the paper argues that the High Court in *Stransham-Ford v Minister of Justice and Correctional Services*[6] adopted a remedy that was inappropriate for developing the common law. The court erroneously used a remedy that is reserved for impugned statutory provisions. Remedies that are appropriate in matters dealing with breaches of the Constitution by common law principles are referred to and discussed. Furthermore, the research considers which of the available common law remedies would have been constitutionally sound in the circumstances of the case.

It bears mentioning that although the decision in *Stransham-Ford* was criticised on several grounds and subsequently overturned on appeal, the Supreme Court of Appeal did not fully consider the missteps flowing from the manner in which the High Court had sought to develop the common law.

1 *S v Hartmann* 1975 3 SA 523 (C) 534E-F.
2 *R v Peverett* 1940 AD 213.
3 *Ex Parte Die Minister van Justisie: In Re S v Grotjohn* 1970 2 SA 355 (A) 364B-H.
4 S 39(2) of the Constitution of the Republic of South Africa, 1996.
5 S 10 and s 12(2) of the Constitution of the Republic of South Africa, 1996.
6 *Stransham-Ford v Minister of Justice and Correctional Development* 2015 4 SA 50 (GP).

2 Background

A painful and protracted death makes it difficult to prescribe what ought to be done and endured and it is even more challenging to abide by the decision.[7] Should we struggle on and rage against the dying light as suggested by Dylan Thomas,[8] or follow Socrates by letting go and accepting death as the greatest of all human blessings?[9]

Advances in the ability of medical technology to prolong life has further complicated these choices. Although welcomed, in some instances prolonging life can lead to the process of dying being painful, burdensome, and protracted. Social commentators, politicians and philosophers have debated over the years on how we should solve this impasse,[10] which for some is a lived and frightening experience.[11]

Patients who are suffering from an intractable illness may wish to shorten their life as a form of escape.[12] The pain is so unbearable that it leads them to plead to die or to be killed.[13] In South Africa, there are very few avenues open to persons who face terminal illness of this kind. As an option they may lawfully bring about death by refusing life-prolonging interventions. The refusal of treatment is constitutionally protected, because it falls in the protected realm of the right to bodily integrity.[14] Furthermore, a physician who accedes to this request would not be committing an offence, as anything contrary to the patient's wishes may constitute an assault.[15] Refusal of treatment merely allows the disease to progress naturally, and if death results it would be primarily because of

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7 Aristotle *Nicomachean Ethics* (2001) 24. An example of this can be sourced from the High Court case of *Stransham-Ford*. Days after approaching the High Court for an order that would allow him to be killed lawfully, Stransham-Ford inquired as to whether he could change his mind about the need for assisted suicide. It therefore seems that he found it difficult to abide by the decision to seek assisted death.

8 Dylan Thomas 1914 – 1953 *Do not go gentle into that good night*.

9 As quoted in Plato's *Apology* 40e.

10 Jacobs "Legalising physician-assisted suicide in South Africa: Should it even be considered?" 2018 *S Afri J Bioethics Law* 67.

11 In Dworkin *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (1993) 179, Dworkin states that many rational people, the world over, plead to be allowed to die. Some of these persons, like Stransham-Ford, are in great pain. In a graphic explanation, he recounts the experience of Lillian Boyes, who was an elderly woman dying from an extreme form of rheumatoid arthritis. He tells of her experience of pain as being insensible to potent painkillers – to the extent that she would scream even when touched by her son.

12 Intractable pain is a relentless and debilitating pain which is not curable, and which causes a patient to be bedridden and which brings about death.

13 Dworkin 179.

14 *Castell v De Greef* 1994 4 408 (C) 409A-B.

15 Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 681. Here Carstens quotes Van Oosten who writes: "… where a medical intervention has been performed without the patients informed consent, but with due care and skill and has proved to be beneficial to the patient's health: Here the appropriate action would be assault or *inuria*."

the underlying disease and not the result of self-inflicted injury.[16] However, the refusal of treatment holds little respite for persons who wish to end their suffering by bringing a quick and painless end to their lives. A lawful alternative which is at the disposal of those close to death is palliative treatment or the withholding or withdrawal of treatment.

McQuoid-Mason points out that a physician or a *curator personae* would not be liable for murder where death is induced by the withholding or withdrawing of treatment in instances where further treatment would amount to a fruitless attempt to save life, or where the benefits are outweighed by the risks.[17] The position stands, though it is arguable that the physician or the *curator personae* intentionally caused the death of another person. The real reason why no liability is imputed, is because the intentional causation of harm is lawful.[18] Essentially, the court, in light of public and legal policy consideration, regards the cessation of treatment and the consequence harm as being reasonable.[19] The court in *Clarke v Hurst*,[20] clarified the determination of lawfulness in relation to the cessation or withdrawal of treatment:

> "… the decision whether the discontinuance of the artificial nutrition[ing] of the patient and his resultant death would wrongful, depends on whether, judged by the legal convictions of our society, it *boni mores*, it would be reasonable to discontinue the artificial nutrition[ing] of the patient."[21]

It is generally accepted that a patient's life will be curtailed where life sustaining treatment is refused or the same is withheld or withdrawn. Furthermore, and perhaps more meaningful to such patients, is that if treatment is refused, withheld or withdrawn, it saves them from unwanted consequences of life-prolonging medical interventions that have the potential to lower quality of life.[22] Patients who request PAE and PAS often do so in order to escape intractable suffering. One such patient was Stransham-Ford, who had indicated that there is no dignity in dying at hospital while being dulled with opioids. It may appear that refusing, withholding and withdrawing treatment has the effect of improving the quality of life at the moment of death. However, proponents of PAE and PAS would argue that it does nothing to relieve the indignity of being

16 *Re Conroy* 486 A 2d 1209 (NJSC 1985) at 1224.
17 McQuoid-Mason "Withholding or withdrawing treatment and palliative treatment hastening death: The real reason why doctors are not held legally liable for murder" 2014 *SAMJ* 103.
18 McQuoid-Mason 103.
19 *Clarke v Hurst NO* 1992 4 SA 630 (D) 653A-B. It trite that it is lawful for a mentally competent patient to refuse medical treatment, even if it will cause their death. However, it in cases where a patient cannot consent and a decision must be taken on his behalf on whether the decision to cease or withhold treatment is lawful will be judged according to the circumstances of the case as well as policy considerations, see *Clarke v Hurst NO* 1992 4 SA 630 (D) 651E-F
20 *Clarke v Hurst NO supra*.
21 *Clarke v Hurst NO supra,* 653A-B.
22 Reichlin "On the ethics of withholding and withdrawing medical treatment" 2014 *Multidisciplinary Respiratory Medicine* 39.

dependent on others to attend to every detail of their daily lives and the incurable pain associated with terminal illness.[23]

However, incurable pain and the quality of life may be improved by palliative care. The Supreme Court of Appeal in the case of Stransham-Ford had indicated that in recent times there have been considerable advances in palliative care – to the extent that the impact of palliative care had surpassed Stransham-Ford's expectations and predictions of a frightening and undignified death.[24] His symptoms had been managed effectively enough for him to be able to die at home, surrounded by friends and family. It is argued elsewhere and echoed here that while the debate on the legalisation of PAE and PAS continues, we ought to focus on making certain that palliative care services are readily available for those who need them.[25] Palliative care is lawful – even though it could potentially hasten death.[26] It is lawful because the causing of harm is reasonable where:

> "… the purpose of medicine, the restoration of health, can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if measures he takes may incidentally shorten life."[27]

A further lawful alternative for persons who seek to escape intractable illness is death by suicide. Death by suicide is the act of intentionally bringing about one's own death. Such an act is not punishable for it places the responsible person beyond the reach of the law. However, it is generally understood that legal and societal norms neither support nor favour suicide.[28] The position is unlikely to change because suicide often occurs outside a clinical setting, the consequence of which is that it could severely impair bodily functions and it might not have the desired effect of bringing about a hasty and painless death.

In an endeavour to make the dying process as bearable and painless as possible, those making a decision at the end of their lives have often requested that they be allowed to solicit the assistance of a physician in committing suicide. A physician who assists by way of giving a patient a lethal prescription, which the patient may use to bring about his death,

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23 Behrens "Assisted dying: Why the argument from Sufficient Palliation fails" 2017 *South African Journal of Philosophy* 191.

24 *Minister of Justice and Correctional Services v Estate Stransham-Ford* 2017 3 SA 152 (SCA) 188I-189A.

25 Mnyandu "Exploring the concept of *Ubuntu* in relation to dying with dignity in palliative and hospice care" 2018 *Obiter* 398.

26 There is a general understanding to the contrary that states that advances in medical knowledge and skill enable physicians to improve the quality of life without shortening it. Gwyther argues that "there is no evidence that the use of opioids or sedatives in palliative care" has the consequence of a double effect; see Gwyther "Palliative care: Preventing misconceptions" 2014 SAMJ 261.

27 McQuoid-Mason 103; *R v Adams* 1957 *Crim LR* 365.

28 Labuschagne quoted in Kok "Delictual liability in case of suicide" 2001 *Stell LR* 161.

is commonly referred to as physician-assisted suicide. If the physician is called upon to assist with administering the lethal prescription, he or she engages in physician-assisted euthanasia. Stransham-Ford had requested PAE, and, in the alternative, PAS. As stated earlier, a person, and this includes a physician who administers a lethal prescription to a patient at the latter's request, "commits the crime of murder".[29] As to whether a person or physician who assists another person to commit suicide is guilty of an offence, will be determined in accordance with the principles of criminal law. In a case dealing with assisted suicide, the court in *Ex Parte Die Minister van Justisie: In Re S v Grotjohn* clarified that:

> "In connection with encouragement and help corresponding considerations apply. Both the encourager and the helper could, in the light of circumstances of the particular case, be found guilty of murder or attempted murder."[30]

It is for this reason that Stransham-Ford approached the High Court requesting that the law relating to the absolute prohibition of PAS and PAE be developed so as to protect and give effect to his right to dignity and freedom of bodily and psychological integrity. A brief history of the circumstances of the case follows. and thereafter an interrogation of the manner in which the court attempted to develop the common law.

3 *Stransham-Ford v Minister of Justice and Correctional Services*[31]

Stransham-Ford was diagnosed with prostate cancer on 19 February 2013. The cancer became progressive and by 13 March 2015 it had spread to his lymph glands and would eventually reach stage four by the time of his death. On 17 April 2015, Stransham-Ford approached the High Court for an order that would declare that the common law crime of murder in the context of PAE and PAS was unjustly limiting his constitutional right to dignity and his right to bodily and psychological integrity. In effect, he construed these rights as extending to the right to die – that is the right to control the timing and the manner of one's death.[32]

In deciding in his favour, the High Court referred to *Carter v Attorney General of Canada*[33] which had previously explained how one's rights to dignity and to bodily integrity can be infringed by a prohibition on assisted suicide and assisted euthanasia:

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29 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra*, 171E.
30 *Ex Parte Die Minister van Justisie: In Re S v Grotjohn supra*, 365F-G.
31 *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 4 SA 50 (GP).
32 Quinot "The right to die in American and South African constitutional Law" 2014 CILSA 140.
33 *Carter v Attorney General of Canada* [2015] 1 SCR 331.

> "an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life sustaining medical equipment, but denies them the right to request their physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And …it impinges on their security of person [as it leaves them to endure intolerable suffering]."[34]

The court in *Carter* concluded that the prohibition on assisted suicide and euthanasia violated the right to die because it imposed unnecessary suffering on affected individuals. It explained further that it caused them to be deprived of the ability to determine what to do with their bodies and how their bodies are treated.[35] The High Court in *Stransham-Ford* adopted this reasoning and proposed to develop the common law so as to remedy the violation of rights.[36] However, the manner in which it does this is suspect, and thus the approach is critically analysed. The paper argues that the High Court in pronouncing that the prohibition on assisted suicide and assisted euthanasia is unconstitutional used remedial powers that are only available when dealing with impugned legislative provisions. The court ought to have used remedial powers that are set aside for common law principles. As pointed out by Currie and De Waal:

> "… legislation is approached by first interpreting it with the Constitution in mind, prior to any direct application of the Constitution (and any finding of unconstitutionality). In case of the common law, the approach is similar but not identical, the difference lying in the remedial powers of the court."[37]

It must be mentioned that although the precedent set by the High Court was overturned on appeal in *Minister of Justice and Correctional Services v Estate Stransham-Ford*,[38] the reasons for rejecting it do not deal with the remedial powers of the court in so far as impugned law is concerned. It is thus necessary to reflect on this and to provide clarity on the dual role of section 39(2) of the Constitution.

4 Understanding section 39(2) of the Constitution

4 1 Interpreting legislation

Section 39(2) provides for two things. First, it sets out the general principles of statutory interpretation. Courts must interpret the statute

34 *Carter v Attorney General of Canada supra*.
35 *Stransham-Ford v Minister of Justice and Correctional Services and Others supra,*66I-J.
36 *Stransham-Ford v Minister of Justice and Correctional Services and Others supra,* 70C-D.
37 Currie and De Waal *Bill of Rights Handbook* (2013) Chapter 3-60.
38 *Minister of Justice and Correctional Services v Estate Stransham-Ford supra*.

through the lens of the spirit, object and purport of the Bill of Rights.[39] This process is carried out when there is an alleged infringement of rights in the Bill of Rights by a provision of a statute. The court will have to engage in a "threshold analysis," the process of which involves examining:

> "(a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsection (1) and (2) of section 39 gives guidance as to the interpretation of both the right and enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found that is the end of the matter …"[40]

If a limitation does exist, the court will then have to engage in a limitation exercise which requires:

> "… a weighing-up of the nature and importance of the rights(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment."[41]

If, notwithstanding the process, the provision is found to be constitutionally invalid, a court may, under section 172(1)*(b)* of the Constitution employ a number of corrective techniques. Such techniques include reading words into or severing (notional and actual) them from the statute. This is done in order to bring the provision within acceptable constitutional standards. Where a provision cannot be saved, the court may declare it unconstitutional and invalid, leaving it to the legislature to give effect to the concerned rights. It is left to the legislature to deal with it because "the responsibility and power to address the consequences of the declaration of invalidly resides, not with the courts, but pre-eminently with the legislative authority."[42] But with respect to the common law, the approach is different, as it is the law of the courts and not the legislature.

The court in *Carter* took a similar approach, wherein it declared that:

> "… s 241(b) and s 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[43]

Essentially, the court remedied the defect in the statute by way of notional severance of the impugned provision. Notional severance is a remedy that is used to invalidate the application of a statutory provision

39 Maswazi "The doctrine of precedent and the values of s39(2) of the Constitution" 2017 De Rebus April 28.
40 *Ex Parte Minister of Safety and Security: in Re S v Walters* 2002 4 SA 613 (CC) 631A-B.
41 *Ex Parte Minister of Safety and Security: in Re S v Walters supra,* 631B-C.
42 *S v Thebus* 2003 6 SA 505 (CC) 526D.
43 *Carter v Attorney General of Canada supra*, par 127.

to a particular matter.[44] The device allows for certain parts of provisions to be left intact, while removing the offending parts.[45] Furthermore, the offending section is given particular meaning in the sense that the court instructs those who apply the section to apply it to certain cases only or in certain circumstances. In the case of *Carter* the court rendered the application of the *Criminal Code* invalid, only in so far as it prohibits physician-assisted suicide for terminally ill patients. Regrettably, it seems as though the High Court in *Stransham-Ford* followed the same approach, it held:

> "the common law crimes of murder or culpable homicide in the context of assisted suicide by medical practitioners, insofar as they provide for an absolute prohibition, unjustifiably limit the Applicant's constitutional rights to human dignity, (S. 10) and freedom to bodily integrity (S. 12 (2) (b), read with S. 1 and 7), and to that extent are declared to be overbroad and in conflict with the said provisions of the Bill of Rights."

The approach of the court is unfortunate, because the court was faced with common law principles relating to the crime of murder. As stated earlier, a court will use the device of severance only in cases that involve impugned legislative provisions. Gevers et al explain the remedy available in such cases, by stating that:

> "Invalidating legislation can have drastic consequences. Courts use various techniques to limit the drastic consequences of orders of invalidity, including suspending an order of invalidity to give parliament a chance to remedy the defect, severing the bad parts of a provision from the good without invalidating an entire section and reading words into the statute to render it constitutionally valid."[46]

It is argued that a different approach is required when a court deals with a constitutional challenge to a rule of common law.[47] In essence, the development of the common law must take place within its own paradigm.[48]

4 2 Developing the common law

The second aspect of section 39(2) is that it sets out the guidelines for developing the common law. There are two instances where a common law rule may be developed:

> "The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent

44 Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* (Last updated 2018) 1A98.
45 Gevers, Govender, De Vos et al *South African Constitutional Law in Context* (2014) 502.
46 Gevers, Govender, De Vos 522.
47 *S v Thebus supra*, 526D-E.
48 *Carmichele v Minister of Safety and* Security 2001 4 SA 938 (CC) 962B.

> with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution."[49]

Dersso explains that the power to develop the common law is peremptory when the rule is inconsistent with specific provision(s) of the Constitution and that in the second instance, the common law must be developed incrementally and on a case-to-case basis.[50] To this end, Stransham-Ford argued that the prohibition on assisted suicide does not accord with specific constitutional provisions, namely his right to dignity and freedom and security of the person, and therefore it requires development in terms of section 39(2). It would have been favourable to argue that the criminal prohibition of assisted suicide falls short of the spirit, purport and objects of the Constitution, as invariably criminal prohibition of conduct will be in conflict with rights such as dignity and freedoms. In doing so, one can argue that the criminal prohibition of physician-assisted suicide does not accord with changes in the social, moral and economic fabric of society, which are based on human dignity and the advancement of human rights and freedoms.

Section 39(2) provides that when developing the common law the court must promote the spirit, purport and object of the Bill of Rights. The phase "spirit, purport and objects of the Bill of Rights" has no finite meaning, but it is accepted that it is broad enough to include, *inter alia*, normative standards, values and ethos underlying the Constitution.[51] Just as in the case of dealing with a constitutional challenge to legislation, the court in dealing with a challenge to the common law will engage in a threshold analysis that is to determine whether the common law rule limits an entrenched right. Thereafter, a limitation exercise will follow to determine whether the limitation is justifiable in an open and democratic society. If the rule is found not to be justifiable, it will be developed so that it reflects the changing social, moral and economic makeup of society.

Common law principles that are constitutionally invalid must be developed within the paradigm of the common law and this is achieved by introducing a new rule or significantly changing an existing rule or adjusting the way in which an existing common law rule is applied.[52] This position was clarified in *K v Minister of Safety and Security*,[53] where the court stated that:

> "It is necessary to consider the difficult question of what constitutes 'development' of the common law for purposes of s 39(2) … From time to

49 *S v Thebus supra,* 526D-E.

50 Dersso "The Role of Courts in the development of the common law under S 39(2): *Mayisa v Director of Public Prosecutions Pretoria (The State and Another* CCT Case 54/06 (10 May 2007)" 2007 *South African Journal on Human Rights* 384.

51 Moosa "Understanding the "Spirit, Purport and Objects" of South Africa's Bill of Rights" 2017 *J Forensic Leg Investig Scie* 7.

> time, a common-law rule is changed altogether, or a new rule is introduced … More commonly, however, courts decide cases within the framework of an existing rule."[54]

The High Court in the *Stransham-Ford* case had determined that the criminal prohibition of assisted suicide does not accord with Stransham-Ford's rights.[55] However, having engaged in a threshold analysis, the court did not engage in a limitation exercise.[56] Instead, having found that there is a limitation of Stransham-Ford rights, the court sought to develop the common law. This represents another misstep in the attempted development of the common law by the North Gauteng High Court.

4 2 1 Introducing a new rule of law

Where the common law is concerned, a court may make an order that goes beyond the finding of invalidity to developing a new legal rule. O'Regan J pointed out in the case of *K* that the common law is clearly developed when a new rule is introduced.[57] A court will do this to give effect to the right infringed, particularly in instances where there are no rules giving effect to the right. In *S v Bogaards*[58] the court introduced a new rule in order to remedy a lacuna in common law which had resulted in an infringement of the right to a fair trial. The lacuna in common law had been that there was no requirement for an appeal court to give an accused person notice where that court, mero motu, is considering an increased sentence on appeal.[59] The court developed the common law by introducing a rule that an appeal court cannot increase one's sentence without providing an accused with an opportunity to make a submission. In doing so, Kampepe J said:

> "When developing the common law, a court needs first to ascertain that the right relied upon is applicable to the law or conduct that has given rise to the dispute. The court must determine whether the common law is deficient in failing adequately to protect the right. If there is no legislation or common law giving effect to the right, a court is enjoined to develop the common law in order to do so."[60]

52 Brand "The role of good faith, equity and fairness in the South African Law of Contract: The influence of the common law and the Constitution" 2009 *South African Law Journal* 72; Mupangavanhu "Yet another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia Pty v Shoprite Checkers (Pty)* Ltd [2011] ZACC 30" 2013 *Speculum Juris* 153.
53 *K v Minister of Safety and Security* 2005 6 SA 419 (CC).
54 *K v Minister of Safety and Security supra,* (CC) 429B-C
55 *Stransham-Ford v Minister of Justice and Correctional Services* 2015 4 SA 50 (GP) 70G.
56 S 36 of the Constitution of the Republic of South Africa, 1996.
57 *K v Minister of Safety and Security supra*, 429B-C.
58 *S v Bogaards* 2013 1 SACR 1 (CC).
59 *S v Bogaards supra*, 24D-E.
60 *S v Bogaards supra*, 16G.

Similarly, in *H v Fetal Assessment Centre*,[61] the court had to determine whether "wrongful life" claims should be recognised in South Africa. "Wrongful life" refers to a claim by a child against the doctor based on his failure to adequately inform the child's mother of the risk of the child being born with a disability.[62] The child alleges that, but for doctor's negligence, it would not have been born to experience pain and suffering attributed to the disability.[63] The Constitutional Court held that the development of the common law at stake here is of the kind where a new rule is introduced and that it was in favour of allowing the common law to be developed as no there were no other rules which could give effect to the concerned rights.[64]

In *Stransham-Ford*, the court could not have developed the common law by introducing a new legal rule. This is because existing rules of criminal law could be adapted so as to give effect to Stransham-Ford's constitutional rights. Such an approach would be in line with the principle that judicial intervention, when it cannot be avoided, should be incremental.[65] An introduction of a new rule conceivably would mean that PAS and PAE are regulated outside the scope of criminal law as we know it. This would constitute an unnatural and illogical development of the common law, which is outside its own dogmatic framework. No court may do this. Furthermore, developing the common law in this instance by introducing a new rule usurps the constitutionally mandated power of the legislature, since the development is beyond what is required to give effect to the rights at issue.

4 2 2 Significantly changing an existing rule

Superior courts have constitutionally authorised power to change longstanding principles of the common law through section 173 of the Constitution. The power is conferred on them because they are the

61 *H v Fetal Assessment Centre* 2015 2 SA 193 (CC).

62 Loggerenberg "The Tenability of the Constitutional Court's arguments in Support of the Possible Recognition of Wrongful-life Claims in South Africa" 2017 South African Law Journal 163.

63 *Friedman v Glicksman* 1996 1 SA 1134 (W) 1138A.

64 *H v Fetal Assessment Centre supra*, (CC) 200F-201A. The court also reasoned that where a rule is changed altogether, it would have been capable of deciding the development of the common law on exception. However, it decided that the case involved an introduction of a new rule, and it is better for the High Court to make a final decision after hearing all the evidence and considering all the relevant factors. Jabavu et al confirm this by saying that "if the High Court follows the Constitutional Court's lead and recognises the new course of action, it will amount to the introduction of a new legal rule." See Jabavu, Linscott, Mukheibir *The Law of Delict in South Africa* (2018) 60.

65 *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 886D.

"protectors and expounders of the common law".[66] A court may do so in order to give better effect to the rights in the Bill of Rights.[67]

In *Du Plessis v Road Accident Fund*,[68] Du Plessis sought damages from the Road Accident Fund for loss of support due to the death of his long-term partner resulting from a motor vehicle collision. In response, the Road Accident Fund argued that the claim was not maintainable in law.[69] The court had to determine whether the common law action for compensation for loss of support should be developed to include persons in same-sex relationships. The court re-alliterated the growing position of the legislature and the courts to confer greater rights on persons such as Du Plessis and found that Du Plessis's right to support was worthy of protection. To afford such protection the court changed the common law in relation to who can claim for loss of support to include persons in a same-sex permanent relationship. In a unanimous decision, Cloete JA, held:

> "First, the extension is in line with the common-law principles formulated in *Henery (supra)* and *Amod (supra).* Second, the extension is in accordance with the behest of the Constitution."[70]

And:

> "… the plaintiff, as a same-sex partner of the deceased in a permanent life relationship similar in other respects to marriage, in which the deceased had undertaken a contractual duty of support to him, is entitled to claim damages from the defendant for loss of that support."[71]

In respect to principles of criminal law, a physician or any person who engages in assisted suicide will be guilty of murder. They are guilty because they intentionally and unlawfully caused the patient's death. Significantly changing this common law rule would mean that the definition of murder is amended so as to limit the scope of liability for physicians who act at the behest of patients. However, the High Court in the case of *Stransham-Ford* would have been precluded from significantly changing an existing rule of common law by replacing an existing definition of the crime of murder because:

> "There should if possible be a high rigidity in the definition of crimes; the more precise the definition the better … it is not for the Courts to create new crimes; nor is it for the Courts to give an extended definition to a crime in order to provide a new protection for property [or person], even if modern

66 Cheadle, Davis and Haysom "The development of all law under the shadow of the foundational principle" in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2004) 33-11.
67 Currie and De Waal Chapter 3–61.
68 *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA).
69 *Du Plessis v Road Accident Fund supra,* 369A.
70 *Du Plessis v Road Accident Fund supra*, 376C-D.
71 *Du Plessis v Road Accident Fund supra*, 378B.

> conditions indicate that in some instances such protection might be desirable [author's own emphasis].'[72]

Courts are precluded from doing so by the principle of legality which, *inter alia* requires that definitions of common law crimes be reasonably precise and settled.[73] It must be observed that this principle does not prohibit the courts from adjusting the way in which rules are applied in order to meet changed social conditions.[74] In the words of Lord Dilhorne, "To say that there is now no power in judges to declare new offences does not, of course, mean that well-established principles are not to be applied to new facts."[75]

Furthermore, it would be undesirable for the court to extend or restrict the definition of the crime of murder as there is no lacuna in the law. The scope of criminal liability for a person engaged in PAS and PAE can be dealt with in terms of existing principles of criminal law.

4 2 3 Adjusting the way an existing rule is applied

What may be needed in circumstances of a particular case is an adjustment of the way in which long-standing common law principles are applied.[76] This method of developing the common law was first applied in *Minister of Safety and Security v Van Duivenboden*[77] and was later echoed in *Carmichele v Minister of Safety and Security*[78] and further cases relating to negligent omissions. Without traversing on well establish facts of *Carmichele*, the issue was whether the failure by the prosecutor and the investigating officer to oppose bail was wrongful. The High Court and the Supreme Court of Appeal had decided that no legal duty rested on the prosecutor and the investigating officer to prevent harm to Carimichele by opposing bail. In reaching the conclusion, the High Court and the SCA had established that the criteria for determining whether a legal duty existed depended on a proportionality exercise – that is the balancing of the conflicting interests of the parties and the community in accordance with what is considers to be society's notions of what justice demands.[79]

The Constitutional Court however noted that the High Court and the SCA had erred in their decision by assuming that the proportionality exercise was still appropriate in the determination of wrongful omissions. Writing in a unanimous decision, Ackermann and Goldstone JJ held:

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72 *R v Sibiya* 1955 4 SA 247 (A) 256G-257A.
73 Burchell *Principles of Criminal Law* (2016) 35.
74 Ramosa "The limits of judicial law-making in the development of common-law crimes: Revisiting the *Masiya* decisions" 2009 SACJ 359-360.
75 *Director of Public Prosecution v Withers* [1975] A.C 842 at 859.
76 Brand "Influence of the Constitution on the Law of Delict" 2014 *Advocate* 43.
77 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA).
78 *Carmichele v Minister of Safety and Security* 2004 3 SA 431 (SCA).
79 *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA) 494F.

> "However, both Courts assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied. In our respectful opinion they overlooked the demands of s 39(2)."[80]

This passage shows that the Constitutional Court had considered that the High Court and the SCA had overlooked the demands of the Constitution and that the common law had to be developed beyond existing precedent. What had been required in the determination of whether a legal duty existed was an adjustment of the application of traditional factors – that is the weighing and balancing of the interest of the parties and the community against a consideration of society's notion of justice. The Constitutional Court further held that this proportionality exercise, owing to the establishment of a constitutional state, must now be infused with the values of dignity, equality and freedom.[81]

As stated previously, PAS and PAE will constitute the crime of murder if it is proved that in the circumstances there was an intentional and unlawful causing of death of another person. This definition of murder is not unconstitutional to the extent that it criminalises behaviour which is socially and morally reprehensible. Invalidating the definition of murder because it is over-inclusive or under-inclusive is, in the words of Nkabinde J, "to throw the baby with the bath water".[82] What may be required in the instance is an adaptation of conceptual principles which underlie the existing definition to cover new factual situations.

The court in *Stransham-Ford* could have considered whether the principle that consent is not a defence to criminal responsibility to a charge of murder should be changed. In developing the common law in this manner the court would have to define the scope and ambit of the requisite departure from or exception to existing principles. It could be argued that the law in relation to the principles of consent should be developed in such a way as to re-enforce the dignity and protection of terminally ill patients before the law and to uphold the rights of these patients and the values in the Constitution. This would be in keeping with the principle of *Carmichele*, which is when determining wrongfulness, the court must balance the interest of patients, the state and the community in accordance with the objective value system embodied in the Constitution. Thus, in a constitutional democracy, pervaded by the spirit of *ubuntu* and the values of compassion and human dignity, public policy recognises as being lawful, the agreement by a physician and a terminally ill patient to inflict harm to the latter so as to end suffering and bring about a quick, painless and dignified death.

80 *Carmichele v Minister of Safety and* Security *supra*, 955B-C.
81 *Carmichele v Minister of Safety and* Security *supra,* 957B-C.
82 *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) 45D

5 Conclusion

This paper examined the missteps arising from the High Court decision in *Stransham-Ford.* In particular, it assessed the manner in which the court sought to develop the common law crime of murder in relation to PAE and PAS. By way of introduction and background the research analysed the available avenues for persons whose death draws near and who may wish to end their intractable suffering. Although lawful, it has been demonstrated that these avenues are of little respite as they do not provide an assurance that the dying process will be quick, painless and dignified. In some instances, these avenues may even lead to protracted suffering.

This paper highlights that this is what prompted Stransham-Ford to approach the North Gauteng High Court for an order that would in effect develop the common law so that assisted suicide and assisted euthanasia become lawful. The High Court accepted that the common law requires development so as to give effect to Stransham-Ford's constitutional rights. However, the manner in which it does this has been shown to be erroneous. The court was too ready to assume that the approach in *Carter,* a foreign court, can readily be transplanted into our legal system. In doing so, the court overlooked the demands of section 39(2) read with section 173 of the Constitution.

Once the court had determined that the common law is inconsistent with the Constitution in so far as it prohibits PAE and PAE, it concluded that to remedy the situation, just as occurred in *Carter*, there must be notional severance of the impugned law. This paper in turn argued that notional severance is a device that is available under section 172(1)*(b)* of the Constitution and which empowers a court to sever unconstitutional provisions from a statute. In *Carter*, the Supreme Court of Canada had been dealing with provisions of a statute and hence was able to use notional severance, whereas in *Stransham-Ford*, the High Court was dealing with common law rules. It is section 173 read with section 39(2) of the Constitution that empowers superior courts to develop the common law – taking into account the interests of justice.

The jurisprudence suggests that there are three ways in which common law rules may be developed. A court may introduce a new rule, significantly change an existing rule or adjust the manner in which long-standing principles are applied. After critically analysing the different approaches, it became clear that the most appropriate remedy in the circumstances would have been to adjust the manner in which principles of criminal law in relation to PAE and PAS are applied. The court in *Stransham-Ford* could have considered whether the principle that consent is not a defence to criminal responsibility to a charge of murder, should be changed. In developing the common law in this manner, the court would have to define the scope and ambit of the requisite departure from, or exception, to existing principles.

MT v Road Accident Fund; HM v Road Accident Fund [2021] 1 ALL SA 285 (GJ)

Adverse findings against experts and legal practitioners without evidence or a hearing

1 Introduction

The conversion of settlement agreements into court orders have existed for a long time, with a strong tradition in law [*Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) 95]. Substantive law favours a contract of compromise and courts generally accommodate settlement-based orders [*Ex parte le Grange* 2013 (6) SA 28 (ECG) para 37 & 41] which avoids protracted litigation, save costs and scarce court resources [*Eke v Parsons* 2016 (3) SA 37 (CC) para 19-23].

2 Court's *imprimatur* in settlement agreements

A court must adjudicate a matter that it is seized with unless the parties withdraw the matter [*PM obo TM v RAF* 2019 (5) SA 407 (SCA) para 14]. When parties seek the *imprimatur* of the court, the court's jurisdiction is not terminated: The court has a discretion to make the agreement a court order [*PM obo TM supra* para 14 &16] with due regard to: (1) the settlement order must be competent and proper [*Eke supra* para 25-26], (2) relate directly to the *lis*, (3) not be legally or practicably objectionable [*Eke supra* para 25-26] and conform to the Constitution and law [*Airports Company v Big Five Duty Free* 2019 (2) BCLR 165 (CC) para 13]. An order must not offend public policy or be *contra bones mores* [*Fagan v Business Partners* 2016 JDR 0317 (GJ) para 19 & 26].

In making settlement orders, the court must act as stewards of resources: Its institutional interests are not subordinate to preferences of litigants and the court may reject a settlement outright [*Le Grange supra* para 47]. There is a need for courts to retain a degree of control and to scrutinise such agreements to ensure that the terms of the agreement take up the status of an order where the court's discretion must be exercised on a case-by-case basis so as to strike a balance between considerations relevant to the court's discretion [*Le Grange supra* para 41]. In doing so, the court must consider the wider impact the order may have [*Buffalo City Metropolitan Municipality v Asla Construction* 2019 (4) SA 331 (CC) para 37] on the public when public funds are disbursed [*PM obo TM supra* para 33]. In matters involving public funds, such scrutiny is essential and the courts are enjoined by the Constitution [s173] to ensure that the process is not abused [*PM obo TM supra* para 35].

The Road Accident Fund ('RAF') is an organ of state and bound to adhere to the basic values underlying governing principles and public administration underscored by the Constitution [*PM obo TM supra* para 34]. Settlements involving organs of state must be transparent and

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accountable [*Khumalo v MEC of Education KZN* 2014 (5) SA 579 (CC) para 62; *Mvoko v SABC* 2018 (2) SA 291 (SCA) para 32-35]. A high standard of professional ethics, and the efficient economic and effective use of resources are apposite [Constitution, s195(1)(a)-(b)].

3 Summary *MT v RAF; HM v RAF*

In *MT v Road Accident Fund; HM v Road Accident Fund* [2021] 1 All SA 285 (GJ), two claimants, Taylor and Matonsi settled their RAF claims and asked the court to remove their matters from the roll as opposed to making it an order of court [para 2]. Fisher, J held the parties and their attorneys, dubiously, in concert with each other [para 1] endeavoured to escape the court's *imprimatur* and oversight, in what Fisher, J described as the latest gambit in the RAF fraud milieu [para 2, 15 & 18]. Fisher, J held the conduct was becoming a trend, despite the court's attempt to foster and maintain judicial oversight [para 3], to safeguard against venality and incompetence in a public body, the RAF [para 14 & 17].

This scathing judgement joins a chorus. In *Mzwakhe v RAF* [(2017) ZAGPJHC 342] the court expressed concern over a large settlement divorced from the proven injuries [para 23-25]. In *Ketsekele v RAF* [2015 (4) SA 178 (GP)] the actions of attorneys were held to lack *prima facie* probity where honesty towards the court and the interest of the client were sacrificed on the personal-enrichment-altar [para 36].

In her judgement, Fisher, J heeds a cautionary tale (in the context of the survival of the RAF) to vulnerable South Africans reliant on it [para 1]: The RAF compensates victims for damages caused by motor vehicle accidents [RAF Act 56 of 1996, s4(1)(b)]. The RAF is thus a critical organ of state that provides fair and effective social security [para 5] in protecting and fulfilling the state's constitutional duty of security of a person [*RAF v Mdeyide* 2011 (2) SA 26 (CC) para 66 & 80; *LSSA v Minister of Transport* 2011 (1) SA 400 (CC) para 54].

Fisher, J held that courts work tirelessly to stem the tide of fraud [para 15] and corruption [para 17]. In terms of the practice directive courts are compelled to interrogate every settlement to ensure its premise is justified [para 22 & 68]. Fisher, J held that in the two matters before her, the RAF would have been better off not settling with the Plaintiffs and allowing the court to consider the merits of the case on a default judgement basis [para 124]. Fisher, J was concerned that the RAF ignored her contentions and conducted litigation recklessly under insolvent circumstances [para 128]. The RAF, on the verge of total collapse, terminated the service of their legal representatives in May 2020, to save legal costs [para 9 & 32], which deprived the RAF of the resources and assistance that these firms offered [para 32 & 46]. Being unrepresented exposes the RAF to a larger scope of malfeasance, incompetence [para 10] and manipulation [para 17], a notion that does not escape the realm of exploiters of the RAF, where the two matters *in*

casu is a gleaning example of this [para 17] and of a failing system when scrutiny is not applied by the RAF [para 47].

Fisher, J held [at para 33] that:

> "… there had been a general instruction from superiors in the RAF to settle all trials. It seems that this may be preparatory to a new regime which is hoped for in the form of the RABS. However, as these cases show, such an approach, if not properly managed, is a recipe for abuse of the Courts' process, the provisions of the RAF Act, the PFMA and ultimately of the Constitutional prescripts to which the RAF and those that serve and interact with it are bound."

This directive is dependent on claim handlers, where the command chain is as strong as its weakest link [para 46], to approving copious settlements daily, and who must rely on the settlement motivations prepared by the Plaintiff attorneys, for accurate information [para 47 & 73] in order to decide on the conduct of the matter.

Fisher, J held that claims handlers ought to rely on proper facts, free from the attorney's machinations [para 54], which accord with the evidence: It should not be false, a courtesy that the court too should be afforded [para 47 & 73]. Plaintiff's attorneys should maximize the amount for the Plaintiff, but not by resorting to chicanery [para 47] as was the case *in casu,* [para 54] in breach of the attorney's duty, as officers of the court, not to mislead the RAF [para 97]. The incentive for the attorney lies in the contingency fee agreement: The higher the settlement, the bigger their fee [para 31].

Although Fisher, J did not express her comment on RABS, she pointed out that RABS is an attempt to rectify a universally deplored unjust and inefficient RAF [para 13]. RAF litigation is vulnerable to corruption owing to people litigating with a seemingly endless supply of state funds and not their own money, a fact which makes litigants careless while broadening the scope for malfeasance [para 15]. The RAF is an attractive target for fraudulent syndicates and individuals [para 16]. The claim for general (non-pecuniary) damages provides a wider scope for misrepresenting facts [para 30]. The RAF usually has no version to the facts and assessors are not used, to curb fees, allowing the claimant's version to be accepted on face value [para 45].

In casu, Fisher, J held that the same attorney in both matters submitted a detailed written proposal to the RAF containing both a significantly inflated proposal [para 73 & 101] and a deliberate misrepresentation of facts [para 85, 97 and 101], something that the court found important in the achievement of the settlement [para 59].

4 No factual basis for the Court's findings

Fisher, J relied heavily on the RAF's Annual Report [fn 4 – 5 & 13, para 12, 16 & 30 – 31], an affidavit deposed to by the RAF's CEO [para 11], news reports [para 13] and documents in the court file, none of which

amounted to admissible evidence before the court. Notwithstanding the court's findings and/or inferences not being premised on admissible evidence and despite no formal hearing being held, the following baseless findings were made:

i. Attorneys in general employ touts to source clients, in exchange for cash such as ambulance and tow-truck drivers, paramedics and police officers [para 24].

ii. Of the RAF disbursements, 28% goes towards Plaintiffs attorneys as opposed to their clients [para 31].

iii. Experts are employed by parties on the basis that fees of experts are contingent on the outcome of the trial [para 36].

Additionally, Fisher, J [at para 63] was not at liberty to rely, as she did, on collateral facts contained in the Defendant's unconfirmed [para 66] expert report [para 61]. Even if this unconfirmed expert opinion was tendered as evidence (it was not), the collateral information encapsulated therein amount to inadmissible hearsay evidence [*Coopers v Deutsche Gesellschaft* 1976 (3) SA 352 (A) 371G; *Reckitt & Colman v SC Johnson* 1993 (2) SA 307 (A) 315E; *Lornadawn Investments v Minister van Landbou* 1977 (3) SA 618 (T) 623; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) 772I].

The judgement made by Fisher, J, closely resembles the dicta of *Motswai v RAF* [2014 (6) SA 360 (SCA)], where the SCA took a dim view of the findings of the court *a quo* (per Satchwell, J) who relied on inferences and submissions from counsel in chambers [para 30] and made findings without any evidence [para 46]. As in *Motswai*, Fisher, J made sweeping findings against the professionals who rendered services, without a proper hearing or a factual basis [*Motswai supra* para 22 & 26]. It is trite law that in making findings which carries serious consequences, such as fraud, the clearest satisfactory evidence is indispensable [*Motswai supra* para 46; Christie *The Law of Contract in South Africa* 5ed 295; *Gates v Gates* 1939 ASD 150 155; *NDP v Zuma* 2009 (2) SA 277 (SCA) para 27]. The documents before Fisher, J at best raised efficacy and cost related questions, but the court was not entitled, without more, to draw inferences and reach conclusions, obvious as they may seem, from these documents [*Motswai supra* para 46].

5 The *audi ad alteram partem* rule

The law is strewn with examples where apparent open-and-shut cases are not open-and-shut, unanswerable charges are competently answered and inexplicable conduct explained [*John v Rees; Martin v Davis* [1969] 2 All ER 274 309]. It is for this reason that the *audi ad alterem partem* maxim is apposite. Peach [*The Application of the Audi Alteram Partem Rule to the Proceedings of Commissions of Inquiry* (LLM dissertation 2003 UP) describes this maxim [page 8] to imply:

> *"that a person must be given the opportunity to argue his case. This applies … to any prior proceedings that could lead to an infringement of existing rights,*

> *privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party."*

Fisher, J made *inter alia* the following adverse findings against experts and legal practitioners without heeding the maxim, as the persons who are implicated in the adverse findings were not given an opportunity to put their version of events before the court:

i. Legal representatives acted under circumstances strongly suggestive of dishonesty and gross incompetence [para 3].

ii. The firm that represents both claimants has a business pattern [para 18].

iii. Attorneys are generally guilty of exploiting the RAF, learning tactics from each other [para 18].

iv. Legal practitioners were well acquainted with the force of the contents of the settlement proposal and its (mis)representations [para 74 and 97].

v. Dr Scheepers grossly overstated injuries [para 80].

vi. Mr Kramer, the actuary, used patently false information in his calculation and misstated objective facts in his report [para 89].

vii. Legal practitioners extracted an offer from the RAF [para 96] which was significantly inflated [para 70].

viii. Dr Berkowitz's opinion was inaccurate if not deliberately false [para 117].

ix. The RAF conducts its business recklessly [para 128].

The professionals on the receiving end of the adverse and scathing findings by Fisher, J had a right to provide an explanation to the allegations, with the benefit of legal counsel, with the right not to self-incriminate themselves and to heed attorney and client privilege [*Friedemann v RAF* (2459/12) [2017] ZAKZDHC 44 (13 December 2017) para 39].

The reputation and integrity of various professionals have undisputably been tarnished by the court's judgement without their respective submissions being heard. In *Motswai v RAF* [2013 (3) SA 8 (GSJ)] Satchwell, J [pages 34-36], held that an attorney acted dishonestly and fraudulently, that he fabricated a claim, made misrepresentations in pleadings, specifically that the injured suffered a fractured ankle whereas the injuries were less severe, all with the intention to enrich his firm and himself, and to benefit the experts in abusing the RAF compensation system [see *Motswai (SCA) supra* para 6, 15 & 17). That case, just like the matters *in casu*, entail serious consequences for those involved and received wide press coverage [*Motswai (SCA) supra* para 7].

Similarly, to *Motswai* where Satchwell, J took the view that predatory legal practitioners, administrators and medico legal experts enriched themselves at the expense of the RAF [*Motswai SCA* supra para 22], FISHER J too made sweeping adverse finding against similar professionals. In doing so, Fisher, J ignored *NPA v Zuma* [2009 (2) SA 277 (SCA) para 19] where the court held:

> "The independence of the judiciary depends on the judiciary's respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood' this does not mean that it is entitled to pontificate or be judgemental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues".

Fisher, J should have followed the directive in *Motswai* and postponed the matters and ordered the legal practitioners (and the experts) to address the court's concerns regarding the propriety and management of the claims under oath in a formal hearing. Her judgement was irregular and unfair: for the mere fact that sweeping findings are made against individuals who had no chance to defend themselves, the judgement cannot stand [*Motswai SCA supra* para 45]. The adverse finding flies in the face of:

i. The *Chief Justice's Judicial Norms and Standards* [GN 37390, GG 28/2/2014 issued in terms of s165(6) of the Constitution and s8 of the Superior Courts Act], which aims to affirm dignity to court users [para 2]. Judicial officers should be courteous and accord respect to all with whom they come in contact [para 5.1(vii)].

ii. The *Chief Justice Service Delivery Charter* [available at file:///C:/Users/ferdi/Dow nloads/OCJ-Service-Delivery-Charter_Booklet%20(4).pdf, accessed 29 April 2021], which requires of the judiciary high levels of courtesy by adhering to norms and standards [para 1.7(d) & 5.3(d)]. Courts are to deal with people professionally and accord fair and equal treatment [para 5.3(a)], with due regard to human dignity [5.3(c)], where people are to be heard by an accountable and impartial presiding officer that has integrity and free from bias [para 5.3(c)].

iii. The *Code of Judicial Conduct* [GN 35802, GG of 18 October 2012], which notes that courts must at times express critical views of others, but harsh language should be avoided, and a judge may not under the guise of judicial functions make defamatory and/or derogatory statements [note 9(v)]. A judge must act honourably in a manner befitting the office and avoid impropriety [art 5(1)], uphold independence and integrity [art4(a)], act courteous and respect the dignity of others [art 7(c) & 9(b)(iii)], refrain from bias and prejudice [art 7(d)] and remain impartial [art 9(a)(ii)]. A judge must ensure a fair trial and resolve disputes based on facts with a duty to observe the letter and spirit of the *audi ad alteram partem* rule [art 9(a)(i)]. Before adversely commenting on the conduct of a practitioner, that practitioner must be afforded an opportunity to address the allegations [art 16(2)].

6 General damages

(a) The legislative framework

A third party wishing to claim general damages, must be submitted to a medical practitioner [RAF Act, s17(1A) read with Regulation 3(3)(a)] to obtain a serious injury assessment report [Reg 3(3)(a)] defined as an RAF 4 form [Regulation 1(x)]. A medical practitioner is one who is registered under the Health Professions Act 56 of 1974 [Regulation 1(viii)]. In completing the RAF 4 form, the medical practitioner must have regard to the American Medical Association Guideline in completing the Evaluation of Permanent Impairment [Reg 3(1)(ii) & 3(1)(v)] to establish if the third party reached a 30% Whole Person Impairment (WPI) to qualify for general damages [Reg 3(1)(b)(ii)].

If the claimant's WPI falls below 30%, the medical practitioner must have regard to the '*narrative test*' [Reg 3(1)(b)(iii)]. The principles set out in the HPCSA Narrative Test Guidelines is apposite [Edeling *et al* "HPCSA serious injury narrative test guideline" 2013 South Africa Medical Journal 103(10) 763-766] as the RAF Act and Regulations gives no guidelines on the narrative test [Slabbert & Edeling "The Road Accident Fund serious injury: The narrative test" 2012 Potchefstroom Electronic Journal 23]. Guidelines include: the relevant and altered circumstances of the injured [para 2.2 & 2.3], changes in performing basic and advanced activities of daily living [para 2.4.4], impact on life roles such a parenting [para 2.4.4], the impact on independence [para 2.4.4], impact on educational status [para 2.4.4] and employment status [para 2.5].

The *Edeling Guideline* stresses that the variable and subjective suffering of claimants are not tangible and objective but abstract and difficult to measure: General damages relates to pain, suffering, loss of enjoyment, all subjective and abstract attributes [para 2.4.5]. The guidelines are clear: the RAF 4 must include the judgement of the medical practitioner as to the credibility, congruence and consistency of subjective complainant and the nexus with the accident [para 2.4.5].

(b) Qualifications of RAF 4 medical practitioners

Both Dr Scheepers and Dr Berkowitz, both registered medical practitioners, were well qualified to complete the RAF 4 forms, owing to their status as medical practitioners as defined by the RAF regulations and the court erred to suggest that they were underqualified [Para 80 & 123].

(c) The RAF and not the Court decide on the seriousness

Fisher, J held that Taylor*'s* representatives disregarded the orthopaedic surgeons' joint minute, finding her injuries non-serious [para 64 & 79] connoting the end of any general damages claim [para 64]. Taylor*'s* reliance on a qualifying RAF 4 by a general practitioner [para 80] did not find favour with Fisher, J holding he is no expert in urology or

orthopaedic injuries, he grossly overstated the injuries, and his findings are at odds with other expert reports [para 80]. Fisher, J held that there is no basis to rely on his report to establish the quantum [para 80].

Mathonsi relied on a qualifying RAF 4 by the same GP and a plastic surgeon [para 116]. The court held that the report by the plastic surgeon was inaccurate if not deliberately false because a different expert opined that there was '*no disfigurement*' [para 117]. In the court's *opinion*, the injury did not amount to serious disfigurement, and held that *Mathonsi* does not qualify for general damages [para 117 & 122].

The court's finding that the injuries of both claimants were not serious amount to judicial overreach. It is the RAF that must be satisfied that the injuries have been correctly assessed [Reg 3(3)(c)]. The SCA in *RAF v Duma* [2013 (6) SA 9 (SCA)] held that the model which the legislature chose in deciding whether the third party's injuries are serious or not, confer the decision on the Fund and not the court [para 19]. The SCA in *RAF v Faria* [2014 (6) SA 19 (SCA)] at para 34 held:

> "*In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts*".

The RAF, in offering general damages in both matters, administratively accepted the fact that the Plaintiff's injuries are serious. Fisher, J could not competently interfere with an administrative decision by the Fund, amounting to judicial overreach [Kehrhahn "RS v Road Accident Fund (49899/17) [2020] ZAGPHC (21 January 2020)" 2020 De Jure 188 192].

(d) Employing piable experts to secure a RAF 4 qualification

Fisher, J held that pliable medical practitioners are employed by claimants to reach the general damages qualifying threshold [para 123]. Fisher, J disregard the flip side of the coin: legal practitioners who omit to thoroughly investigate a third-party claim by *inter alia* appointing the necessary experts, face professional negligent and damages suits [*Motswai SCA supra* para 52] and unethical investigations. There can be no culpability on the part of a legal practitioner in soliciting a further RAF 4 assessment where another practitioner held injuries to not meet the qualifying criteria, (perhaps from a different discipline), if the practitioner reasonably believes a medical practitioner to have erred or provided a limited RAF 4 form. This conduct is in fact prudent.

The affiliation between experts and litigants are complex: litigants must employ all reasonably available means to adduce the best evidence to advance its case [Gross "Expert testimony" 1991 Wisconsin Law Review 1113 1125 & 1130], even if this means seeking an expert whose views conform with that of the litigant [Malsch & Frecelton "Expert bias and partisanship: A comparison between Australia and the Netherlands"

2005 11(1) Psychology, Public Policy and the Law 42 48], a notion that Fisher, J accepts [para 47]. In an adversarial system, lawyers must advance their client's interest and will instruct experts who will support their case [Meintjies van der Walt "Experts testifying in matters of child abuse: The need for a code of ethics" (2002) 3(2) Child Abuse & Research in SA 24 24]. Legal practitioners must prepare the evidence and it will be partial, intelligent and cunning: the system cannot provide legal practitioners with this role and then cripple their ability with restrictions. [Gross *supra* 1137.] Lawyers can do anything in preparing witnesses short of buying the witness, suborning perjury [Gross *supra* 1137] or committing a crime.

(e) All injuries must be considered in assessing seriousness

Specialists often complete RAF 4 forms exclusively from their specialist discipline. GP's tend to follow an all-encompassing approach. In the matter of *Skosana v RAF* [Unreported judgement of the High Court of South Africa, Gauteng Division, Pretoria (case number 3204/2015)], Sardiwalla, J held that once a claimant's injuries qualify as serious, the court must consider all the injuries in assessing the quantum for general damages, and not only the individual qualifying injury. Even injuries on the non-serious list must then be considered [Regulation 3(1)(b)(i) lists these injuries].

7 The settlement agreements sunject to review: No injuries suffered

Fisher, J held that when the RAF (a public administered body) litigates, it constitutes an exercise of public power, which must be constitutionally compliant, uphold the maxim of legality and the rule of law [para 128]. The RAF's settlements must be lawful, compliant with the RAF Act [56 of 1996, as amended] and the Constitution [para 127]. Disbursements of funds must be efficiently, economical and effective [para 127]: The Public Finance Management Act [Act 1 of 1999] applies to the RAF [para 130] with all its onerous prescripts [See s2, 50, 51 and 57].

Fisher, J held that it stands to reason that without loss or damages, the RAF have no power to settle a matter and to do so would be *ultra vires* [para 8]. *In casu* however, there can also be no rational finding that there were no damages *in casu*. Even if a claimant cannot prove a claim for general damages or loss of earnings, the undertaking to compensate for future medical expenses [RAF Act 56 of 1996, s17(4)(a)] allows a claimant to recover whatever is paid for treatments, even in private medical care [*Motswai SCA supra* para 56]. A litigant cannot be criticized for prosecuting a claim, even for an undertaking for future medical costs, and by implication consulting experts to make a case for future medical expenses [*Motswai SCA supra* para 56].

The net result of the judgement is that Fisher, J left the Plaintiffs in a quandary by finding the settlement agreements void *ab initio* [para 129],

unenforceable and worthless [para 130] owing to the RAF's officials unlawful conduct and collusion on the one hand, where payments of the settlement amounts would amount to irregular expenditure on the RAF's part [para 130], whilst on the other hand finding that the court cannot interfere with the settlements unless they are before her for review, which it was not [para 131].

There was no evidence before the court that the RAF acted unlawfully, and the court misdirected herself in declaring the settlement agreements null and void. In an *obiter*, Fisher, J suggest an audit may reveal similar unlawful settlements which will be subject to review [para 130]. The unlawfulness of the RAF's conduct was not before the court. Parties determine the issues before the court in the pleadings: it is impermissible and contrary to the court's character to pronounce upon a claim or defence not raised in pleadings [*Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 898; *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) para 13 & 14].

8 Nexus

Fisher, J erroneously held that Taylor's knee injury, diagnosed by Dr Volkersz, an opinion under oath [para 66] was not-accident related [para 80] owing to the absence of any evidence of a knee injury, but for Taylor's *ipse dixit* [para 78]. It is contentious when an injury is not recorded in the hospital records [*M v RAF* (55471/2012) [2017] ZAGPPHC 561 (24 August 2017); *Ndlovu v RAF* 2014 (1) SA 415 (GSJ) at 438], however *in casu* there was no evidence that the knee injury was pre-existing, and hospitals may omit injuries from the records. In *Mkhonta v RAF* [(20703/12) [2018] ZAGPPHC 471 (29 March 2018)] the court relied on a missed injury [para 7.12].

9 *Jones v Kaney*

Just as Hodgkinson and James [Expert Evidence: Law and Practice (2007) 13-010], Fisher, J, encourages the abolishment of expert's witness immunity against professional negligent lawsuits, to achieve '*a chastening effect on experts*' [para 37]. The rationality for such an immunity against suit has its foundation in the fact that an expert's duty towards the court may be in conflict with their client's interest which provide the expert with deserving protection from suit [*Re N* [1999] EWCA Civ 1452 (20 May 1999) 17]. In the UK dicta of *Jones v Kaney* [2011 UKSC 13] this immunity was abolished. In *Jones,* an expert was sued for professional negligence by the same litigant that instructed the expert, for making a joint minute concession to his detriment.

Fisher, J seems not to have considered that abolishing this immunity can have the effect that experts will not give reasonable and objective opinions or will not make reasonable concessions to the detriment against the instructing litigant and will instead stick to their proverbial guns out of fear of conviction and lawsuits: immunity of suit may encourage greater pre-trial conferment among experts [*Stanton v*

Callaghan [1998] EWCA Civ 1176 (8 July 1998)]. This is a matter for further research.

10 Belated Rule 28 amendments

Fisher, J held the late '*significant*' amendment of the amount claimed was designed to inflate the claims [para 61]. The service of the amendments was contentious [para 94 & 108], considering it was electronic service, the lay RAF official did not have the assistance of an attorney [para 109] and the amendment came *ex post facto* to the judicial certification [para 122]. The amendment was held not effected [para 94], a finding devoid of cogent reasoning on the part of the court who simply held that the amendment was *beset with complexity both procedurally and on the merits* [para 94]. Fisher, J should have given reasons for this finding. In *Strategic Liquor Services v Mvumbi* [2010 (2) SA 92 (CC) at 96G] the court held:

> "It is elementary that litigants are ordinarily entitled to reasons for a judicial decision … written reasons are indispensable. Failure … will usually be a grave lapse of duty, a breach of litigants' rights ..."

It is common practice for RAF attorneys to claim nominal amounts when drafting pleadings [*Motswai SCA supra* para 19] only to quantify a claim after *litis contestatio*: a notion not inherently objectionable [*Motswai SCA* supra para 50].

Pleadings may be amended at any stage before judgement [Theophilopoulos *et al* Fundamental Principles of Civil Procedure (2006) 261]. The RAF terminated the services of its legal representatives, leaving service of the amendment on the RAF directly. In law, the claims handler, just like any other litigant, need not be qualified or be authorized to receive such processes as suggested by Fisher, J [para 94]. Electronic service is authorized by the Uniform Rules [Rule 4A(1)(c)]. The Gauteng Division COVID 19 Practice Directive allows a party to effectively serve a document by merely placing it on Case Lines (the court's electronic court file) which will be deemed proper service and filing, alternatively transmitting service via e-mail [Directive 117.2.1-.117.2.2]. This directive was extended indefinitely on 2 August 2020.

11 Courts' opinion on RAF'S inner workings

Fisher, J held the RAF system is unworkable, unsustainable and corrupt [para 13], and expresses the following: '*In my view, the fund should be liquidated and/or placed under administration as a matter of urgency. This is the only way that this hemorrhage of billions of rands in public funds can be stemmed …*'

The judiciary, as the judicial arm of state [*PM obo TM supra* para 14] have the constitutional right to freedom of belief and opinion [s15] and expression [s16]. Judicial speech, such as the court's personal views on the RAF's future is complex: Convictions and opinions expressed by the court (who represent ideas of the rule of law) is deemed conferred with

characteristics of honesty, integrity and wisdom and carry authoritative weight and meaning when compared to opinions of others [Dijkstra "The freedom of the judge to express his personal opinion and convictions under the ECHR" 2017 13 Utrecht Law Review 1 1]. The constitutional rights of the court are not unlimited, especially considering the potential it has to adversely affect the efficiency of the judiciary and the rule of law [Dijkstra *supra* 1]. Judges are not to do anything that they cannot in principle justify: even though courts may rely on personal moral convictions, they have an institutional responsibility of integrity [Dworkin "The judge's new role: Should personal convictions count" 2003 1 Journal of International Criminal Justice 4 11]. Courts should avoid advocacy and put aside emotions and personal feeling in judgements, free from contention where humility is the mark of objectivity and fairness [Chief Justice Malaba 'Judgement writing and draft order' (2019) 25].

The RAF was created by the RAF Act [56 of 1996]. This Act makes no provision for the RAF to be liquidated or being placed under administration. There is no legal basis for the liquidation or administration of the RAF. It is unjustifiable for Fisher, J to adopt such a view if the RAF Act makes no provision for the liquidation or administration. If the court's opinion were to be realized, section 21(1)(a) of the RAF Act [56 of 1996] will mean that the common law liability of drivers and owners of vehicles will be reinstituted, in contradiction of the court's view that the safeguard of the RAF is important [para 1]. This may create a social catastrophe.

12 Conclusion

The lengthy judgment is strident and evangelical [*Motswai SCA supra* para 22]. The subtext of the court's *dicta* adopts in general a suspect, cautionary and accusatory tone, wherein RAF litigation in general and its role-players are castigated of a myriad of suspicious wrongdoings. The court was scathing in her trenchant critique of how RAF claims are approached with perhaps an attempt at a remedy and deter the abuse [*Motswai* SCA supra para 22]. Fisher, J conceded her general sense of dishonesty and cavalier conduct [para 118] by various role-players, which warrant investigation [para 132]. The fact that further investigations are warranted support the fact that the court's findings were premature and without evidence.

The judgment is fraught with an undertone (by direct findings of wrongdoing and innuendos) of fraud, deception, corruption and ill-discipline. The court seems to take a proactive step in accepting a responsibility to eradicate all wrongdoing in RAF litigation by naming and shaming such wrongdoers. While the court's concerns may be legitimate and real in general there was no evidence to justify the court's findings *in casu*.

An injustice was caused against the professionals who were censured and castigated who may be condemned and will face serious repercussions by the adverse judgement: It may threaten their livelihood (financial damages) and reputations [*Motswai SCA* supra para 59]. The Constitution [s165(1)] vest judges with tremendous power but the court's function must be exercised judicially and within the ambit of the law [*Motswai SCA supra* para 59].

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The role of clinical legal education in developing ethical legal professionals

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SUMMARY

Training in legal professionalism and ethics is a vital part of any legal education. Teaching these aspects according to the Socratic method generally proves to be ineffective in producing the desired result. A lawyer's actual life experience, which include happiness and career satisfaction, is rarely included. This article will explore on what it means to be an ethical human being and consider the teaching of professionalism and ethics by way of the clinical legal education methodology. Clinics have particular riches to offer and discussing professionalism, values and ethics in a clinical setting can assist students to begin to identify their own professional sense. University law clinics serve as a role model in legal practice about how a legal practitioner should behave and what ethical decision-making means. The link between culture and ethics, which informs a person's sense of morality and ethics, is explored, with application to diversity and multiculturalism. In clinical context, students assume a high degree of responsibility by taking instructions from clients and they will benefit from cooperative learning where they will begin to develop a deep understanding of professionalism and ethical practice. Through tutorials and debriefing sessions and later in their reflection assignments, students discuss and reflect on aspects of the law, the legal system, their own interviewing skills and the experience of the client. In their reflection assignments, students readily identify areas for improvement but also refer to what they are able to achieve in their interview, building their motivation and sense of autonomy. Ongoing reflection and constructive feedback thereon will support a commitment to ethical and professionally competent, self-directed and autonomous lawyering. Clinical training affords students the opportunity to explore their legal professional and ethical behaviours and values, allowing them to develop in capable, self-directed and independent practitioners who will not only assume responsibility for their individual clients, but also contribute to their communities.

1 Introduction

Teaching legal professionalism, values and ethics according to the Socratic method generally proves to be ineffective in producing the desired result.[1] Universities globally, since the second half of the 19th

1 Krieger "The inseparability of professionalism and personal satisfaction: perspectives on values, integrity and happiness" 2005 *Clinical Law Review* 425. See discussion in paragraph 3.

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century,[2] apply the Socratic method as an inexpensive form of professional education,[3] focusing on classroom lectures, which involves little or no practical training. Lecturers refer students to textbooks as a guide towards solutions to legal questions posed,[4] viewed as a process by which students arrive at the answer to the questions themselves,[5] as guided by lecturers' responses. Although proponents of a purely theoretical and traditional Socratic pedagogy may view this methodology as participatory,[6] this method deprives students of valuable practical training. The Socratic teaching method was furthermore criticised as having a destructive psychological effect on students, enforcing a sense of inferiority to lecturers regarding their skills and abilities.[7]

Lawyers are human beings with human identities and actual life experiences informing their actions.[8] Therefore, the interplay between being professional as a lawyer, and one's values and sense of ethics in private life is important.

This article will explore what it means to be an ethical human being and consider the teaching of professionalism and ethics by way of the clinical legal education methodology. University law clinics have particular riches to offer and discussing professionalism, values and ethics in a clinical setting can assist students to begin to identify their own professional sense.

In clinical context, students assume a high degree of responsibility by taking instructions from clients. Therefore, it is necessary to explore the link between culture and ethics, which informs a person's sense of morality and ethics and how to apply these to diversity and multiculturalism.

Therefore, practical clinical experiences will serve as an important role model for legal practice where students will have the opportunity to learn how a legal practitioner should behave and what ethical decision-making means.

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2 Regassa "Legal Education in the New Ethiopian Millennium: towards a law teacher's wish list" 2009 2(2) *Ethiopian Journal of Legal Education* 53-56.

3 Regassa 2009 *Ethiopian Journal of Legal Education* 56.

4 Dickinson "Understanding the Socratic teaching method in law school after the Carnegie Foundation's Education Lawyers" 2009 31(1) *Western New England Law Review* 97-98.

5 McQuoid-Mason "Methods of teaching Civil Procedure" 1982 *Journal for Juridical Science* 162.

6 McQuoid-Mason 1982 *Journal for Juridical Science* 162.

7 McQuoid-Mason 1982 *Journal for Juridical Science* 164, who indicates that this may result in students having doubt about their own intelligence and personal worth.

8 Webb 2007 *International Journal of Clinical Legal Education* 136; Mnyongani "Whose morality? Towards a legal profession with an ethical content that is African" 2009 *SA Public Law* 131, indicates "the code of professional ethics regulates the life of a lawyer only in his or her professional life," but does not equate to cultural norms, turning lawyers into moral schizophrenics attempting to integrate the ethics in their professional and private lives.

This article will furthermore consider the teaching of professionalism and legal ethics by way of student collaboration, classroom instruction, clinic duties, tutorial discussions, which include debriefing sessions and reflection assignments, where students learn and reflect on aspects of the law, the legal system, their own interviewing skills and their experiences with fostering professionalism and legal ethics.

2 Legal professionalism,[9] values and ethics

Clearly defined goals on teaching ethics are often lacking, as "written ethics are found in what are essentially disciplinary, as opposed to aspirational codes".[10] Therefore, the teaching of legal professionalism and ethics tends to focus on rules set by professional bodies. Lawyers may, in seeing themselves as accountable to the Legal Practice Council and the courts, lose sight of the community they represent and therefore, also the reason why their profession exists.[11] When teaching ethics, there should instead be a discussion on the sort of lawyers law schools want to produce. An ethical framework should be used in decision-making.[12] There is an interplay between being professional as a lawyer, and your values and sense of ethics in your private life. Personal tension can come into play when you argue the law on behalf of a client where your personal values clash with the position you are arguing.[13]

Webb,[14] in discussing the importance of measuring who you are, as well as what you do, as a lawyer, notes that we are faced with a theoretical debate that demands that you must choose "whether the best question to ask is 'what, as lawyers, are we morally required to do', or 'what kind of lawyer should we be?'"[15] Webb states that, because we see ourselves as human beings, not human doings, the question of being is

9 Legal professionalism was defined as 'appropriate behaviors and integrity in a range of situations; the capacity to deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client's objectives'. Stuckey et al *Best practices for legal education* (2007) 79.

10 Webb "Conduct, ethics and experience in vocational legal education" in *Ethical Challenges to Legal Education and Conduct* (1990) quoted in Kerrigan ""How do you feel about this client?" A commentary on the clinical model as a vehicle for teaching ethics to law students" 2007 *International Journal of Clinical Legal Education* 11.

11 Mnyongani 2009 *SA Public Law* 132.

12 Cody "What does legal ethics teaching gain, if anything, from including a clinical component?" 2015 *International Journal of Clinical Legal Education* 3. She indicates that students who often say that they want to be 'professional' are unable to describe what they mean when probed.

13 For a full discussion, see Parker and Evans *Inside Lawyers Ethics* (2014).

14 Webb 2007 *International Journal of Clinical Legal Education* 130–151 for an in-depth discussion on the concepts or 'ethics' and 'being', who you are as a lawyer and what you do.

15 Webb 2007 *International Journal of Clinical Legal Education* 130.

fundamental to your human identity and your actions,[16] even though through history, Western philosophy's of self and of identity are alienated therefrom.[17] Menkel-Meadow holds that the Western philosophy compartmentalises knowledge,[18] distinguishing between a lawyer's professional and private life. However, the public does not draw this distinction and assess lawyers' morality according to ordinary standards. In practice, they are guided by professional codes, whilst they are guided by their cultural ethos in their private lives.[19] On what it means to be an ethical human being, Webb suggests three connected commitments. First, to authenticity, which means, to accept who you are with your limitations before you can choose who you want to be (or not) in life.[20] Secondly, responsibility, where authenticity demands that we take responsibility for our moral decisions and ourselves.[21] The third commitment is choice, which is fundamental to responsibility as it does not determine who we are, but rather who we are being shaped by what we do.[22] He indicates that an authentic ethic of responsibility requires us to be fully responsible for the entirety of our representation, not just to our clients, but also others who may be affected by the representation.[23] Salinas further emphasises the effect of the impact that our legal work may have on other people, organisations and companies.[24]

Researchers identified a link between culture and ethics, acknowledging the role of culture in informing someone's sense of morality and ethics.[25] In understanding professional ethics, Mnyongani suggests that the profession "embark on a journey of 'decolonising' their minds," by debating what it means to be African in a profession with a Western approach, ethos and orientation.[26] To treat all others as universally the same is a travesty of responsibility.[27] An authentic ethic

16 Webb 2007 *International Journal of Clinical Legal Education* 136; Mnyongani 2009 *SA Public Law* 131 indicates, "the code of professional ethics regulates the life of a lawyer only in his or her professional life," but does not equate to cultural norms, turning lawyers into moral schizophrenics attempting to integrate the ethics in their professional and private lives.

17 Webb 2007 *International Journal of Clinical Legal Education* 136.

18 Menkel-Meadow "Excluded voices: New voices in the legal profession making new voices in the law" 1987 *University of Miami Law Review* 31.

19 Menkel-Meadow 1987 *University of Miami Law Review* 31.

20 Webb 2007 *International Journal of Clinical Legal Education* 141-142.

21 Authenticity demands that we take responsibility for our moral decisions and ourselves. Webb 2007 *International Journal of Clinical Legal Education* 142.

22 Webb 2007 *International Journal of Clinical Legal Education* 142.

23 Webb 2007 *International Journal of Clinical Legal Education* 148.

24 Salinas *Effective client interviewing and counselling* (2016) 21, 175.

25 Fataar "Decolonising Education in South Africa: Perspectives and Debates" 2018 *Educational Research for Social Change* vii.

26 Mnyongani 2009 *SA Public Law* 133-134. Indigenous law was relegated to a subordinate role with the imposition of Roman Law, Roman-Dutch Law and English Law into South African Law. See Van Niekerk "The status of indigenous law in the South African legal order: A new paradigm for the common law?" 2002 *Codicillus* 5-6.

27 Webb 2007 *International Journal of Clinical Legal Education* 148.

of responsibility is that it is primarily sensitive to the needs and situation of a specific person.[28]

The nature of being, as suggested in Webb's three connected commitments, must be more prevalent when teaching ethics within an authentic legal education programme. Students must understand the constructed nature of their ethics before they can authentically act on them.[29] Therefore, "in order to ensure a happy, well-functioning legal professional, the person you are as a lawyer is also important, in line with what you do."[30]

Looking at ourselves as not only lawyers, but also law teachers, Macdonald describes our careers as a calling.[31] He believes that true teaching involves qualities, skills and actions that are the opposite of the notion equating teaching with authority in a one-way projection of expert knowledge from instructor to student.[32] We should direct our attention to who we are as teachers, not what teachers do - the human dimension.[33] Our actions as human beings arise from our experiences and our reflections thereon. He reflects on how he has learned through the words and deeds of a number of his inspiring law teachers in the past,[34] concluding that we ought to live our lives as both students and teachers of the law.[35]

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28 Webb 2007 *International Journal of Clinical Legal Education* 148.
29 Webb 2007 *International Journal of Clinical Legal Education* 150.
30 Cody 2015 *International Journal of Clinical Legal Education* 3.
31 Macdonald "Everyday lessons of law teaching" 2012 *Canadian Legal Education Annual Review* 1.
32 Macdonald 2012 *Canadian Legal Education Annual Review* 3. This serves as an indication of the inappropriateness of the Socratic method in skills training.
33 Macdonald 2012 *Canadian Legal Education Annual Review* 3.
34 Macdonald 2012 *Canadian Legal Education Annual Review* 3. Macdonald, in discussing what is means to teach and learn law, as he was inspired by his own teachers in the past, he came to the following conclusions: 1) to see living law in action, understanding that education is not inculcation; 2) liberating one's self-learning, learning how to learn law; 3) that legal education is a vocation with many dimensions; 4) that there are no hard boundaries to a discipline; 5) 'that you can *book-learn* what something means, but you can only *experience* what something has meant'; 6) that you are never off-the-job; 7) that without vulnerability there is no learning; 8) that an assignment is an occasion for learning and the assessment thereof is a further occasion for learning; 9) that we should learn as much from being wrong as we learned from being right; 10) that teaching is a shared activity between teachers and students; 11) that scholarship is teaching, learning is research; 12) that we need to weave epistemology and ethics into the design of classroom problems, that students realise that their answers are the result of their moral choices (in specifically referring to students looking on the internet for quick answers; and 13) there is always more to learn.
35 Macdonald 2012 *Canadian Legal Education Annual Review* 11-13. He holds that if one is not learning, one is not teaching. "Teaching and learning are *not* about mastering the known. They are about confronting the unknown".

Hyams echoes that law teachers should have an ongoing commitment to lifelong education, over and above that which is necessary.[36] This would require two things, first, an understanding that good lawyering and professionalism require an ongoing process of understanding personal limitations and a commitment to remain fresh, innovative and knowledgeable in professional work; and secondly, it requires the tools to put this understanding and commitment into action.[37]

Professional identity includes creating competent legal professionals who are not only responsible to individual clients, but to also contribute services to the community.[38] The Carnegie Report discusses "professional formation toward a moral core of service to and responsibility for others".[39] The MacCrate Report identified key values that are essential to lawyers,[40] including the provision of competent representation, striving to promote justice, fairness and morality, striving to improve the profession and professional self-development.

Requirements for a professionally responsible lawyer were indicated as someone who:[41] fulfils the duties attached to a fiduciary relationship; is competent in the work they perform; communicates often, openly and clearly with their client; does not encourage the use of law to bring about injustice, oppression or discrimination; identifies, raises and discusses ethical issues with current and potential clients; seeks to enhance the administration of justice and actively engages in serving the community;[42] is able to work in an autonomous way in an independent, self-sufficient and self-directed fashion; is able to exercise judgment, not only relating to how to resolve a client's problems, but reflective judgement of their own behaviours and actions; and should have an ongoing commitment to lifelong education – over and above that which

35 He concludes "the greatest celebration one can feel as a teacher … lies in the celebration of one's students and the projects they have made of their lives".

36 Hyams "On teaching students to 'act like a lawyer': What sort of lawyer?" 2008 *International Journal of Clinical Legal Education* 23.

37 Hyams 2008 *International Journal of Clinical Legal Education* 23.

38 Cody 2015 *International Journal of Clinical Legal Education* 4; Hyams 2008 *International Journal of Clinical Legal Education* 21 confirms this understanding that all professionals have an obligation to contribute to the community in some form. In South Africa duties towards the poor in the form of access to justice, forms part of the requirements of professional and ethical conduct. See De Klerk et al *Clinical law in SA* (2006) 50–52.

39 The Carnegie Foundation for the Advancement of Teaching. See Hamilton and Monson "Legal Education's Ethical challenge: Empirical research on how most effectively to foster each student's professional formation (professionalism)" 2012 *University of St Thomas Law Journal* 332.

40 Report of the Task Force on law Schools and the Profession, Narrowing the Gap: Legal Education and Professional Development-An Educational Continuum (American Bar Association July 1992).

41 Noone & Dickson "Teaching towards a new professionalism: Challenging law students to become ethical lawyers" 2001 *Legal Ethics* 144.

42 Noone & Dickson 2001 *Legal Ethics* 144.

is required by continuing professional development points.[43] Cody,[44] in discussing the above requirements, concludes that the key aspect is "working towards or contributing to justice, fairness and the improvement of the legal system and serving the community, as part of the role of a lawyer."[45] She continues with two further aspects, namely gaining a sense of autonomy and self- direction;[46] and ongoing reflection and continual improvement,[47] as fundamental to an ethically responsible lawyer.[48]

3 Negotiating the connection between individual values and professionalism

Despite much talk about professionalism in law schools and the legal profession, students tend to turn away from public service careers,[49] a crucial reason being the highly visible and commercialised segments of the profession. Law students tend to disregard the often-noble messages about professionalism, resulting in many of them failing to comprehend the foundations of their future working life.

Professionalism and ethics training is typically presented by way of the Socratic method,[50] which proved to be ineffective in producing the desired result. A lawyer's actual life experience, which include happiness and career satisfaction, is rarely included.[51] Students may then distance themselves from a discussion they perceive as theoretical rather than personal, alienating them from legal education and legal practice.[52] It was argued that "legal education and early lawyering experiences can tend to erode integrity by separating people from their personal values and beliefs, conscience, truthfulness, and intrinsic needs for caring and co-operation."[53] Therefore, it is important to find a "value-match" between a lawyer's own values and the values of their firm, or even

43 Hyams 2008 *International Journal of Clinical Legal Education* 23.
44 Cody 2015 *International Journal of Clinical Legal Education* 6.
45 Cody 2015 *International Journal of Clinical Legal Education* 6.
46 Cody 2015 *International Journal of Clinical Legal Education* 6. "[T]he ability to reflect on oneself, how you are and what you do as a lawyer, is vital to being able to improve and be a competent lawyer".
47 Cody 2015 *International Journal of Clinical Legal Education* 6. "Ongoing reflection on how a lawyer contributes to the legal system and its ability to deliver justice is also necessary for any lawyer to be able to contribute to the justice system and serve the community".
48 Cody 2015 *International Journal of Clinical Legal Education* 6.
49 Krieger 2005 *Clinical Law Review* 425.
50 Krieger 2005 *Clinical Law Review* 425. Applied, this basically amounts to telling law students that they should act in certain ways, for generally noble reasons including the high calling of the profession; "and that they'd better do so, for more coercive reasons including the potential for bar discipline".
51 For a full discussion, see Krieger 2005 *Clinical Law Review.*
52 Cody 2015 *International Journal of Clinical Legal Education* 7.
53 Krieger 2005 *Clinical Law Review* 432.

earlier, such as a match within the law school experience before entering practice.[54]

Clinics have particular riches to offer in the teaching of professionalism and ethics. Discussing professional values in a clinical setting can assist students to begin to identify their own professional sense. The clinical office will serve as an important role model in legal practice about how a legal practitioner should behave and what ethical decision-making means. Students will be able to, through their clinical experiences, assess in the future, whether a particular practice will suit their professional identity.[55]

When professionalism includes a responsibility to the community, it means that lawyers' sense of who they are, and what it means to them to be a lawyer, will be part of their professional values.[56] In has been stated in paragraph two above that professional identity also includes the understanding that all professionals have an obligation to contribute to the community in some form,[57] supported by the Carnegie Foundation's views on service to and responsibility for others,[58] echoed as a requirement of professional and ethical conduct in South Africa.[59] University law clinics, through their clinical courses, provide legal services to the indigent in their communities.

In clinical context, students are given a high degree of responsibility by actually taking instructions from clients, briefing their clinicians, researching the law, advise and proceed with drafting legal process. Through tutorial discussions, collaboration and reflection assignments students learn and reflect on aspects of the law, the legal system, their own interviewing skills and the experience of the client, building student autonomy. These are explored further below.

4 Embedding professional ethics through Clinical Legal Education

The clinical legal education (CLE) methodology promotes an understanding of ethics on a deeper level where a student is not limited

54 Cody 2015 *International Journal of Clinical Legal Education* 8.
55 Foley, Rowe, Holmes and Tang "Teaching professionalism in legal clinic - what new practitioners say is important" 2012 *International Journal of Clinical Legal Education* 17-19.
56 Cody 2015 *International Journal of Clinical Legal Education* 9. For a full discussion see Webb 2007 *International Journal of Clinical Legal Education*; also see Klein, Wortham and Blaustone "Autonomy-Mastery-Purpose: structuring clinical courses to enhance these critical educational goals" 2012 *International Journal of Clinical Legal Education* 105–147.
57 Hyams 2008 *International Journal of Clinical Legal Education* 21.
58 The Carnegie Foundation for the Advancement of Teaching; Hamilton and Monson 2012 *University of St Thomas Law Journal* 332.
59 De Klerk et al *Clinical law in SA* 50–52.

to understanding a theoretical ideal.[60] Therefore, the teaching of legal professionalism, values and ethics is particularly relevant in clinical courses where students are consulting with live clients. Law students will now have the opportunity, within the sheltered clinical environment, to interrogate the impact of their decisions specifically in relation to their clients, encompassing diversity on multiple levels, and the legal profession. Therefore, law students have the opportunity to develop their professional identities and to consider their roles within the legal profession.[61]

Clinical courses (referred to as CLE) are generally on offer during students' final year of LLB studies. As such, students will have a foundation in a number of substantive law courses. CLE can be offered as a capstone course or a capstone experience in which an environment is created where law students will gain new insight from their prior knowledge of the law and how that relates to society and other relevant disciplines.[62] Kift describes capstone experiences as referring "to the overall student experience of both looking back over their academic learning, in an effort to make sense of what they have accomplished, and looking forward to their professional and personal futures that build on that foundational learning."[63] Clinicians should weave key aspects of ethics into all the different components of students' clinical experiences.[64] Students can gain insight into the law's impact on the disadvantaged members of their community and they will gain a sense of autonomy when they understand how they can use their law degree to improve justice and the legal system. Students will be able to see how the law can sometimes impact harshly on the lives of specifically disadvantaged clients. This will create a framework for them to think about ethical decision-making, as well as their roles as future lawyers.[65]

60 On the development of the clinical teaching methodology, see Barry and Joy "Clinical education for this millennium: the third wave" 2000-2001 *Clinical Law Review 16-18*. For a detailed discussion of CLE used as a teaching methodology see Vawda "Learning from experience: the art and science of clinical law" 2004 *Journal for Juridical Science* 116–134.

61 Giddings *Promoting justice through clinical legal education* (2013) 14, 59-61.

62 Quinot and Van Tonder "The potential of capstone learning experiences in addressing perceived shortcomings in LLB training in South Africa" 2014 *Potchefstroom Electronic Law Journal* 1350-1390.

63 Kift et al *Curriculum renewal in legal education. Final Report: 1-143* (2013) 18. Available at https://eprints.qut.edu.au/64249/1/Final_Report%5B1%5D.pdf (accessed 18 August 2020).

64 Cody 2015 *International Journal of Clinical Legal Education* 12-13. The key aspects were identified by Cody as working towards or contributing to justice, fairness and the improvement of the legal system and serving the community, as part of the role of a lawyer; gaining a sense of autonomy and self- direction; and ongoing reflection and continual improvement, as fundamental to an ethically responsible lawyer.

65 Cody 2015 *International Journal of Clinical Legal Education* 12-13.

4 1 Cultural diversity and professional ethics

It was indicated that culture "is not something static and immutable, but is rather moving, dynamic, flexible".[66] Mnyongani holds that language and culture play a large role in preparing students to enter the profession,[67] suggesting that Western philosophy embraces individual autonomy, whereas African philosophy focuses its reality overall.[68] These two different views have an effect on students entering the profession, as all may not easily embrace Western norms.[69]

Cultural diversity in CLE extends across clinicians, students and clients frequenting the clinic.[70] This diversity provide rich learning for students around cross-cultural communication and professional ethics.[71] By observing the individual behaviours of their clinicians, students will witness a range of views on appropriate lawyering styles and approaches to legal practice.[72] This will provide students with ample material to critique, analyse and reflect on how to be an ethical legal professional.

The diversity in the South African multicultural society has an impact on students' receptivity to particular forms of CLE. Students encounter diversity and differences attributed to a "myriad of factors of race, gender, class, culture, religion and language [which] all impact on the

66 Smith and Tvaringe "From Afro-centrism to decolonial humanism and Afro-plurality. A response to Simphiwe Sesanti" 2018 *New Agenda* 42.
67 Mnyongani 2009 *SA Public Law* 125.
68 Mnyongani 2009 *SA Public Law* 125.
69 Mnyongani 2009 *SA Public Law* 125.
70 Du Plessis *Clinical legal education: Law Clinic Curriculum design and assessment tools* (2016) 146. Racial, cultural and religious differences may be challenging when clients are unable to distinguish between cultural or indigenous customs, religious practices and the law regulating the society during consultations with students. Students who do not know these customs and practices often have difficulty in advising clients, as some may withhold certain information from the students because of their cultural differences, such as issues relating to money or family. Sometimes confusion may be caused merely by the different use of language in different cultures.
71 For discussion see Lopez "Teaching a professional responsibility course: lessons learned from the clinic" 2002 *Journal of the Legal Profession* 149-158.
72 Cody 2015 *International Journal of Clinical Legal Education* 16. Parker and Evans *Inside Lawyers Ethics* 7-32 suggested four key frameworks within which lawyers make ethical decisions. They are 1) the 'adversarial advocate' in which a lawyer's role is to advocate zealously for the client's interests within the bounds of the law; 2) the 'responsible lawyer' who is seen predominantly as an officer of the court, responsible for making the law and the legal system work as fairly as possible; 3) the 'moral activist' of ethics who emphasises the importance of lawyers' position within society, their role in engaging in law reform and to also advise clients about a moral course of action; and 4) the 'ethics of care' lawyer, where it is his/her responsibility to others, to maintain relationships, and to avoid harm.

way students experience their world, and hence on the context in which their learning takes place."[73]

Studies on legal education identify cultural literacy as a core skill and student education in this regard is essential.[74] Learning theory shows that students learn well by viewing a problem through multiple perspectives and experience shows that cross-cultural examples can serve as particularly fascinating, revealing comparative models for learning core material.[75] Different perspectives can also reduce feelings of marginalisation among students with diverse backgrounds.[76]

Polistina identifies four key cultural literacy skills namely: 1) cross-cultural awareness which includes the ability to examine other cultures critically;[77] 2) local cultural awareness, the ability to accept and respect knowledge within local cultures and communities; 3) critical reflective thinking, a dialogue between students and clinicians on aspects of cultural or social discourse, where the experiences of the group as a whole is considered.[78] This includes students' accountability with reference to multiple perspectives as influenced by their diverse historical and socio-political contexts; and 4) developing personal skills in coping with cultural shifts and to be empowered to cope with unreceptive behaviours of people seeking to sustain the status quo.[79] Significant teaching tools, such as "the five habits of cross-culture lawyering" were developed by Bryant.[80] A multicultural environment provides students

73 Vawda "Lost in translation: Language and diversity issues in clinical law teaching" 2006 *De Jure* 296.

74 Polistina "Cultural literacy. Understanding and respect for the cultural aspects of sustainability" 1-6. Available at http://arts.brighton.ac.uk/__data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf. (accessed 29 October 2020). For a discussion on cultural literacy in view of globalisation see Shliakhovchuk (2019) 'After cultural literacy: new models of intercultural competency for life and work in a VUCA world'. Available at https://www.researchgate.net/publication/331453186_After_cultural_literacy_newmodels_of_intercultural_competency_for_life_and_work_in_a_VUCA_world (accessed 17 August 2020).

75 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 126.

76 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 126. Many clinical teachers have recognised the importance of teaching diversity issues in the clinic.

77 Polistina http://arts.brighton.ac.uk/__data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf. 1-6.

78 See discussion on cooperative learning and reflection in paras 4 2 and 6 below.

79 Polistina http://arts.brighton.ac.uk/__data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf. 1-6.

80 Bryant "The five habits: building cross-cultural competence in lawyers" 2001 *Clinical Law Review* 12–19. In brief, habit one gives students a framework within which to analyse how similarities and differences between the lawyer and client may influence lawyer-client interactions. In habit two students are asked to identify and analyse the possible effects of similarities and differences on the interaction between the client, the legal decision-maker and the lawyer – the three rings. This analysis is linked to the habit one analysis to explore all the ways in which culture may

with the diversity beneficial to both them and their clinicians,[81] a valuable learning experience for students as law clinics create safe environments for multicultural interaction.

4 2 Cooperative learning

Professional ethics, including challenges of diversity within law clinics,[82] can be addressed through cooperative learning, such as in small heterogeneous groups where students ideally work with partners or in "student law firms".[83] Respectful relationships and clear communication can be fostered in student law firms where professional values and ethics can be discussed, allowing students to identify their own professional sense and identity.[84] In forming the student law firms, students are likely to partner up with friends or at least with others with whom they are acquainted. Chavkin is of the opinion that "[t]he appropriate balance is probably best struck by clinician pairing of students."[85] He cautions that although race, gender, sexual orientation, ethnicity, extreme diverse backgrounds and socio-economic status are some of the factors that may impede meaningful interaction between students,[86] clinicians can use this diversity to create certain pairings in student law firms, to encourage effective collaborative learning and to better facilitate interaction with

influence a case. Habit three is that of "parallel universes" thinking which invites students to look for multiple interpretations, especially at times when the student is judging the client negatively. Habit Four focuses on cross-cultural communication, identifying some tasks in normal attorney-client interaction that may be particularly problematic in cross-cultural encounters as well as alerting students to signs of communication problems. Habit five encourages the student to create settings in which bias and stereotype are less likely to govern. The Habit promotes reflection and change of perspectives with a goal of eliminating bias. It recognises innumerable factors that interact with bias and stereotype to negatively influence an attorney-client interaction.

81 The multiracial component also affects clinicians. Some progress was made in the USA since1995 when issues of race in clinical context was lamented as a critical concern, specifically relating to certain unique issues clinicians of colour confront when applying generally accepted modes of clinical supervision and instruction. It was later stated that the fact that the CLE community at last became a racially diverse community was welcomed in assuring that the validity of clinical theories and practices from truly multicultural and multiracial perspectives can be re-examined. See Ellmann, Gunning and Hertz "Why not a clinical lawyer-journal?" 1994-1995 *Clinical Law Review* 6. For a full discussion on this topic, see Jacobs "Legitimacy and the Power Game" 1994 *Clinical Law Review* 187-198.

82 Randall "Increasing retention and improving performance: Practical advice on using cooperative learning in Law Schools" 2000 *Thomas. M. Cooley Law Review* 201–273.

83 See Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 110-116 for a discussion on student law firms.

84 Foley, Rowe, Holmes and Tang 2012 *International Journal of Clinical Legal Education* 17-19.

85 Chavkin "Matchmaker, matchmaker: Student collaboration in clinical programs" 1994-1995 *Clinical Law Review* 199–244.

86 Chavkin 1994-1995 *Clinical Law Review* 211-212.

clients.[87] Advantages will include some students having a better understanding of clients' circumstances and positioning their problems within a specific cultural context,[88] the opportunity to converse in a language that clients feel comfortable with,[89] and to share with their student partners. Randall suggests that cooperative learning increases "critical thinking, betters attitudes toward subject matters, increases social support, improves social adjustment and increases appreciation for diversity."[90] Cooperative learning offers students the benefit of observing first-hand the different lawyering styles adopted by their peers and the supervising clinicians. They will then begin to develop a deep understanding of ethical practice.[91]

5 Application of CLE towards cultivating professional ethics

CLE uses three basic pedagogical components consisting of clinic duty, classroom teaching and student tutorial sessions with their clinicians.[92] Evans and Hyams refer to some intrinsic belief that students will learn certain skills simply by seeing a real client with a legal problem, assuming that they may find a solution to a problem "on the run". They argue that, although there is evidence that many things are learned in this manner, this "osmotic" exposure model may not be the best way in which to learn lawyering skills, advising clinics to run a seminar and tutorial programme alongside the live-client work.[93]

87 Chavkin 1994-1995 *Clinical Law Review* 211-212.

88 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 144-145. Some students are unable to position the problem within the social and/or business environment within which the client's legal problem manifests. Some students will therefore have the advantage of being better equipped to understand the circumstances surrounding clients' problems than others.

89 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 132-135 for a discussion on the challenge of language barriers.

90 Randall 2000 *Thomas. M. Cooley Law Review* 226-227. Randall uses the Academic Excellence Programmes (AEP) as foundation for cooperative learning which specifically focus on students in need. The AEP was designed to assist minority students or other students that were considered to be at risk. The AEP has 6 major themes: it is based on psychological and cultural adaptations NOT compensatory education; it emphasises encouragement and empowerment, never sending a message of incompetence; it is highly structured; promotes confidence; encourages risk- taking in the classroom or clinic; and encourages students to articulate their analysis in writing."

91 Noone, Dickson and Curran "Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice" 2005 *International Journal of Clinical Legal Education* 111.

92 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 26.

93 Evans & Hyams 2008 *Griffith Law Review* 63.

CLE is relevant as to its content, as students, diversely grouped, are required to apply prior knowledge of substantive and procedural laws in a practical context in solving problems of a collection of culturally diverse clients, whilst maintaining professional ethics. The application of the clinical legal education methodology is indicated below.

5 1 Classroom teaching

Classroom instruction runs in tandem with students' clinic duties to support and expand the legal skills learnt in the clinical environment. The classroom component is essential, because the clinician often has to "teach things students should have learned before enrolling in client representation courses, such as the rules of evidence and professional conduct and basic lessons about lawyering skills".[94] Classroom content must support a focus on legal professionalism and ethics, which can include ethical skills exercises.[95] In teaching on legal professionalism and ethics, clinicians must also address diversity issues and multiculturalism, including the respect for diverse customs, traditional education values, the diversity in religions and observing relevant protocols.[96] The role of the clinician is critical in raising diversity issues in the classroom through the experiences of students,[97] allowing for interactive teaching.[98] More focused teaching opportunities will present during clinic duties where students interact with live clients. These interactions will in turn form the basis for in-depth discussions during student tutorials.

5 2 Clinic duty

A live-client clinic enables students to scratch beneath the surface of the legal system and explore the hinterland of expectations, promises and goals engendered by the legal process.[99] In the clinic, students may be presented with, described by De Klerk as, what often amounts to an incoherent "mish-mash" of problems and they are required to distinguish between what would be relevant in law and what could be referred for

94 Stuckey 2007 *Best practices for legal education* 189.

95 For example: https://www.unodc.org/e4j/en/tertiary/integrity-ethics.html (accessed 28 October 2020). Vawda 2004 *Journal for Juridical Science* 119 suggests a classroom component of two hours per week where clinicians meet with all the students and offer instruction in the theory of clinical law, skills, ethics and values.

96 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 125. One should bear in mind that, although the clinic may be situated in an urban area, some clients travel from rural areas where certain customs are strictly adhered to. Students must also be instructed on how to explain to clients why the consultation may be different to what they are used to or expect.

97 Vawda 2006 *De Jure* 303.

98 What was taught in the plenary sessions should be constantly re-enforced during student tutorials.

99 Hall & Kerrigan "Clinic and the wider law curriculum" 2011 *International Journal of Clinical Legal Education* 34.

some other form of intervention.[100] The typical profile of a client was aptly described as:

> "(W)hen consulting, clinic clients 'tend to present to the clinic lawyer a rather large package of problems, half of which have nothing to do with the law and the other half so intertwined with poverty that their actual legal problems are often very hard to extract' and '(f)ormulating the mandate is only half the battle won' …"[101]

Aitken suggests, "[c]lients' cases rarely present simple facts that lend themselves to right and wrong answers. It is the complexity and unpredictability of working with real people that makes clinical legal education so rich."[102] This complexity provides fertile ground for learning about ethical decision-making.[103] Clinicians should not assume that the clinical experience alone would teach that to students. The teaching of professionalism, ethics and ethical decision-making has to be well planned and incorporated in the entire CLE pedagogy.[104]

Cultural diversity will be most apparent during clinic duties, specifically where students work in pairs or in student law firms. This diversity extends to the clients frequenting the clinic. Significant losses in meaning can occur when communicating across diversity lines, highlighting cultural and linguistic inequivalences.[105] This diversity provide fertile ground for teaching professionalism and professional ethics.[106]

5 2 1 Clinic interviews and student autonomy

As it is impossible for clinicians to attend all client interviews, students are mostly left to their own devices.[107] Therefore, students' understanding of professionalism and ethics are tested during client interviews, as they do not observe client interviews, they actually

100 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 136.
101 De Klerk "Unity in Adversity: Reflections on the Clinical Movement in South Africa" 2007 *International Journal of Clinical Legal Education* 97.
102 Aitken "Provocateurs for Justice" 2001 *Clinical Law Review* 292.
103 Cody 2015 *International Journal of Clinical Legal Education* 15.
104 Barry and Joy 2000-2001 *Clinical Law Review* 57–65.
105 Vawda 2006 *De Jure* 302. Nuances of "different cultural groups can result in misunderstanding or … a serious breakdown in communication". Apart from language barriers, students may be required to identify problems not solely based in law, but often of a social nature, rooted in poverty, which in turn may have strong customary and/or cultural elements. Students with different cultural backgrounds may not understand these. See Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 146. Also see Du Plessis *Effective legal interviewing and counselling* (2019) on how to conduct effective legal interviewing and counselling.
106 Further teaching will follow during tutorial sessions. See discussion below in 5 3.
107 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 122.

interview real clients.[108] This experience supports a sense of purpose in their lives. Students experience autonomy when interviewing clients in a supportive environment,[109] leading to positive motivation and helping them to thrive. Cody indicates that for many students these interviews are their "first experience of seeing how law can help people and how impenetrable the legal system can be for disadvantaged people."[110] She notes that most students indicated that they feel a sense of accomplishment after the interviews.[111] Such unsupervised client interviews, the details of which can be elaborated on in a supportive environment during tutorials and debriefing sessions, discussed below, strengthen students' sense of professionalism.

5 3 Student tutorials

Weekly tutorial sessions are geared towards guiding students through the stages of learning.[112] Students must be democratically engaged when legal professionalism and ethics are applied during tutorials.[113] This must include discussions relating to language barriers, diversity and multiculturalism.[114] It was argued that discussion builds positive social attitudes and a sense of belonging where students are taught that different views should not only be respected, but also indeed welcomed.[115] This is in harmony with the discussion in paragraph two above on Webb's views on the importance of measuring who you are, as well as what you do, as a lawyer.[116] The tutorials are also well suited for re-enforcing plenary instructions on diversity issues and incorporating other students' experiences during clinic duties.

108 Students generally consult without a clinician in attendance during the actual interview. The interviews and statements taken are usually discussed during their tutorial sessions. See Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 122-128. For a full discussion on legal interviewing and counselling, see Du Plessis 2019 *Effective legal interviewing and counselling* and Du Plessis "Clinical legal education: Interviewing skills" 2018 *De Jure*.

109 Klein, Wortham and Blaustone 2012 *International Journal of Clinical Legal Education* 113.

110 Cody 2015 *International Journal of Clinical Legal Education* 24.

111 Cody 2015 *International Journal of Clinical Legal Education* 24.

112 This "is an active pedagogy in which students are required to perform certain tasks and draw lessons from those experiences." Vawda 2004 *Journal for Juridical Science* 120.

113 Harriger "Deliberative dialogue and the development of democratic dispositions" 2014 *New Direction for Higher Education* 55.

114 This may include the training of students according to Bryant in the five habits of cross-culture lawyering See Bryant 2001 *Clinical Law Review* 1–62.

115 Clark and Starr *Secondary and Middle School Teaching Methods* (1991) 239.

116 See para 2 above. Webb 2007 *International Journal of Clinical Legal Education* 130–151 for an in-depth discussion on the concepts or 'ethics' and 'being', who you are as a lawyer and what you do.

5 3 1 Debriefing sessions

Debriefing is a key element of students' learning processes.[117] Debriefing sessions normally occur during tutorials. As clinicians are not present during client interviews, many issues may arise during the post client interview debrief which include: racial, cultural, language and religious differences encountered and whether students captured the instructions correctly. When communicating with clients with disabilities certain questions arise, such as:[118] What constitutes a disability? How are disabled clients impacted within the legal system?[119] Cody provides a range of possible issues that may arise during debriefing sessions, such as:

> "Who are the legal profession? Who are clients? Does the limited diversity of the legal profession impact on the experience of disadvantaged clients seeking legal help? What are conflicts of interest? How should a legal practice manage conflicts of interest within families? What does acting on instructions mean? What is a lawyer's responsibility when asked for advice about doing something, which is illegal? What is the role of a lawyer and the limit on students who cannot give legal advice? How much information should lawyers give clients about why they do not have a good case, taking into account issues of client autonomy issues versus complexity/paternalism/ disadvantage?"[120]

These issues, all having an impact on professional ethics, should be discussed during the tutorial debriefing sessions.[121]

5 3 1 1 Strengths and weaknesses of debriefing

Clinicians' backgrounds in legal practice and their types of practices may vary and each one may have a unique approach.[122] Therefore, students will experience debriefing sessions differently. Furthermore, students will add views that are characteristic to their own backgrounds, as well as what they may have learnt during the preceding years of study. Students may observe disagreement and robust discussion amongst clinicians as to how to deal with an issue.

117 Cody 2015 *International Journal of Clinical Legal Education* 12, 15.
118 Cody 2015 *International Journal of Clinical Legal Education* 19 indicates that clients' ability to give instructions may be challenged in some way. Guidance to students are therefore imperative.
119 Cody 2015 *International Journal of Clinical Legal Education* 18. She poses the question whether a psychiatric disability has an impact on a client's ability to give instructions and how students perceive the disability.
120 Cody 2015 *International Journal of Clinical Legal Education* 18-19.
121 For further discussion, see Webb 2007 *International Journal of Clinical Legal Education* 7-26.
122 Cody 2015 *International Journal of Clinical Legal Education* 19-20.

Although some may perceive this as a weakness, the strength lies in the fact that it allows students to see that lawyers have to grapple with issues individually and that there is not always a readily right answer to ethical issues.[123] Students are able to discover that there are a range of ways to deal with ethical issues when they are not clear-cut.[124] A weakness is that the issues are often not made available to all the students in the clinical course. It is suggested that individual issues be shared within the student law firms during their combined tutorials. Ethical issues must be shared with all students during debriefing conferences, discussed below.

5 3 1 2 Debriefing conferences

Clinicians should ideally also consider debriefing conferences with the full cohort of students in the clinical course to discuss issues that became apparent during individual tutorials as indicated above.[125] Students can share their experiences during interviews by way of oral presentations. This may lead to the discussion of broader ethical issues such as, the duty of confidentiality or fiduciary relationships, allowing for deepened individual experiences and peer learning.

6 Reflection

Reflection, a key element of the learning process,[126] is the intentional consideration of an experience in light of particular learning objectives.[127] Reflection will allow students to discover methods for merging their personal and professional identities without the need to compartmentalise views and perspectives.[128] For a student to learn what makes an ethical legal professional, reflection is as essential as debriefing to the learning process. After debriefing sessions, or even after discussing their interviewing experiences with one another informally, students should reflect on their experiences in their reflective journals.[129] Reflection on their interviews should ideally take the form of self-

123 Cody 2015 *International Journal of Clinical Legal Education* 20. Students may observe disagreement and robust discussion amongst clinicians as to how to deal with an issue. Students are able to discover that there are a range of ways to deal with ethical issues when they are not clear-cut.

124 Cody 2015 *International Journal of Clinical Legal Education* 20.

125 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 131. The diversity in the student populations furthermore serve as authentic cross-cultural exchanges between students and clinicians. See Vawda 2004 *Journal for Juridical Science* 127–129.

126 Cody 2015 *International Journal of Clinical Legal Education* 15.

127 Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 74. See Moon *Reflection in Learning and Professional Development, Theory and Practice* (1999) for a full discussion.

128 Levy-Pounds and Tyner "The principles of Ubuntu: using the legal clinical model to train agents of social change" 2008 *International Journal of Clinical Legal Education* 18.

129 For a discussion on reflection and reflective journals, see Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 74-77.

reflection, where students discuss issues that arose and how he or she addressed them. This part should also address identified areas for improvement. A further part of the reflection should address ethical issues that were encountered or broader issues around the law, the legal system, and the client's participation within it.

South Africa comprises a diverse and multicultural society, reflected in the composition of the students, clients and clinicians. Issues relating thereto are not unique. Lopez,[130] in referring to her clinical practice in New Mexico, where she observes students struggling to represent clients who are members of minority groups,[131] she has come to see the need for diversity and cross-cultural competence among members of the profession.[132] Lopez uses reflection, where students are required to pen their thoughts and views on issues encountered, as a valuable tool in achieving cross-cultural competence.[133] A further strength of reflection lies in students' adaptation to the globalisation of the profession, where the need for diversity in the profession is also a professional issue, in terms of diversifying society to open the doors of opportunity to all ethnic and racial groups.[134]

Written reflection provides evidence of a student's learning journey. Assessing reflective work provides a structure for feedback.[135] It is important to assess reflection using clearly defined criteria that focuses on both the reflective process, the content of the reflection, and the linkage to learning outcomes.[136] It is essential to provide students with feedback on the assessment of their reflective journals, whether such assessment is formative or summative, as it will increase their understanding of professionalism and ethical conduct, which in itself is a valuable pedagogical tool. Timely and effective feedback will increase students' skills as insightful learners, developing autonomy.[137] Clinicians in turn, should focus on gaining much from their individual experiences and from the reflections of students across the student cohort to strengthen effective feedback and the CLE programme in general.

130 Lopez 2002 *Journal of the Legal Profession* 155-158.
131 Lopez 2002 *Journal of the Legal Profession* 156. She states that the client cohort presents "with its mix of Latino cultures, Native American cultures, Anglo cultures, African-American cultures and Asian cultures", and that "cross-cultural competence is very important to a successful practitioner."
132 Lopez 2002 *Journal of the Legal Profession* 156.
133 Lopez 2002 *Journal of the Legal Profession* 156.
134 Lopez 2002 *Journal of the Legal Profession* 157.
135 Hyams 2008 *International Journal of Clinical Legal Education* 30.
136 Cody 2015 *International Journal of Clinical Legal Education* 28. See Du Plessis 2016 *Clinical legal education: Law Clinic Curriculum design and assessment tools* 181-186 for assessment rubrics to use for reflection assignments.
137 Hyams 2008 *International Journal of Clinical Legal Education* 30.

7 Conclusion

Clinics have particular riches to offer in the teaching of legal professionalism, values and ethics. One cannot overrate the role of a university law clinic being a role model in legal practice about how a legal practitioner should behave and what ethical decision-making means.

From the discussion above, it is apparent that training in legal professionalism and ethics is a vital part of any legal education curriculum. Students can come to realise the importance of who they are as lawyers, in line with what they do, to be well-functioning legal professionals and that having a professional identity will include creating competent legal professionals. Rather than focus on disciplinary consequences of malpractice, it is key to recognise that an ethical lawyer will identify their responsibility to contribute to the community, to the legal system and to improving justice for the community.

CLE provides students with the opportunity to explore and cultivate their professionalism, values and ethics as they interact in the cultural diversity that extends across clinicians, students and clients frequenting the clinic. Students benefit from cooperative learning where they will begin to develop a deep understanding of professionalism and ethical practice. They assume a high degree of responsibility by actually interviewing and taking instructions from clients in the clinic, briefing their clinicians, researching the law and writing up the advice given. Through tutorials and debriefing sessions and later in their reflection assignments, students discuss and reflect on aspects of the law, the legal system, their own interviewing skills and the experience of the client. In their reflection assignments, students readily identify areas for improvement but also refer to what they are able to achieve in their interview, building their motivation and sense of autonomy. Ongoing reflection will support a commitment to competent, self-directed and autonomous lawyering. An important advantage of CLE that students can explore professionalism and ethical issues in a context where they can reflect and consult with clinicians. Hopefully, this will affect their future behaviour as lawyers.[138]

138 Lopez 2002 *Journal of the Legal Profession* 156.

Is English becoming a threat to the existence of indigenous languages in institutions of higher learning in South Africa?

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SUMMARY

This article provides a critique of the judgment of the Constitutional Court of South Africa in *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch*[1] with specific reference to the concept of transformative constitutionalism and the use of indigenous languages in tertiary education. The discussion further highlights the significant role played by one's own language in his or her day-to-day life encounters and argues that the wait has been too long to have one of the indigenous languages fully utilised in one of the tertiary institutions, amongst others. Finally, the paper recommends that the use of indigenous languages at institutions of higher learning needs to be given urgent attention by all stakeholders and can no longer remain at the mercy of those who are tasked with language policies at tertiary institutions.

1 Introduction

Over the past nine years, the courts have been called upon several times to decide on issues that involved access to education, language barriers, culture and the need to transform a society from the wrongdoings of the pre constitutional era.[2] According to Majidi, "[e]very language (either minority or majority) carries a part of human culture, identity, history and civilisation, thus their maintenance and revitalisation is significant".[3] Majidi's view is tenable in that language plays a significant role in one's life and therefore needs to be promoted at all levels.

1 2019 (12) BCLR 1479 (CC).
2 See for example; *Governing Body of the Juma Musjid Primary School & Others v Essay N.O.* 2011 (8) BCLR 761 (CC); *Afriforum v Chairman of the Council of the University of South Africa* (54450/2016) [2018] ZAGPPHC 295*; Afriforum and Another v Chairperson of the Council of the University of Pretoria* (54451/2016) [2016] ZAGPPHC 1030; [2017] 1 All SA 832 (GP).
3 Majidi "English as a Global Language; Threat or Opportunity for Minority Languages?" 2013 *MJSS* 37.

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Language is a unified system of words that enables people to think, share meaning, define reality, and affords them an opportunity to express emotions, ideas, experience and evaluate surroundings.[4] Colonialism in Africa and apartheid in South Africa prevented the development of indigenous languages in both primary and tertiary education.[5]

In South Africa, the use of and dominance of Afrikaans as a primary language of instruction in universities has prevented those who are unable to communicate in Afrikaans from accessing and learning in certain universities.[6] Afrikaans is one of the minority languages.[7] A minority language is often associated with demography and it is a language spoken by fewer people than those in other groups.[8] From a broader perspective, a minority language may also be understood as a language containing characteristics grouped in terms of ethno-social parameters, which are namely;

a Self-categorisation
b Common descent
c Distinctive linguistic, cultural or historical traits related to language
d Social organisation of the interaction of language groups in such a fashion that the group becomes place in a minority position.[9]

In post-apartheid South Africa, the dominant languages are English and Afrikaans.[10] These two languages are "the languages of the socio-economically prevailing white minorities' at the expense of other African languages",[11] to which the latter continue to remain or are perceived as societally inferior and insignificant. The consequence of this predicament is that other African languages are subjected to being utilised in domestic and informal domains in the social lives of their speakers, whereas education in higher education continues to be dominantly offered in English and Afrikaans.[12]

4 Steinberg *An Introduction to Communication Studies* (2007) 115.
5 Mosweunyane "The African Educational Evolution: From Traditional Training to Formal Education" 2013 *HES* 55.
6 *AfriForum v University of the Free State* 2018 (2) SA 185 (CC) para 45.
7 Le Cordeur *Afrikaans as medium of instruction within a transformed higher education system in South Africa with special reference to Stellenbosch University* in Wolhuter, CC (red.). SAERA Konferensieboek: *Educational Research in South Africa: Practices and Perspectives* (2013) 62.
8 See Cenoz "Minority language and sustainable translanguaging: Threat or opportunity" 2017 *JLIE* 901.
9 Owens *Arabic as a Minority Language* (2013) 2.
10 See Ridge "Mixed Motives: Ideological Elements in the Support for English in South Africa" in Ricento, *Ideology, Politics, and Language Policies: Focus on English* (2000) 153; and Zegeye and Harris, *Media, Identity and the Public Sphere in Post-Apartheid South Africa: An Introduction* (2003) 14.
11 Tshivenda, Xitsonga, IsiXhosa, IsiZulu, IsiNdebele, Sepedi, SeSotho, Setswana, Sign language, SiSwati.
12 Prah, "The Challenge of Language in post-apartheid South Africa" (2018-03-22) *Litnet* https://www.litnet.co.za/challenge-language-post-apartheid-south-africa/ (accessed 2019-12-30).

The last university to offer education fully in Afrikaans on all academic streams is the Stellenbosch University (the University). The challenges that arose in this instance was that Afrikaans negatively affected access to higher education, as it is a language spoken by the minority group amongst others. In our view, under the current constitutional dispensation, it is no longer tenable for Afrikaans to be retained as the primary medium of instruction.

The main purpose of this paper is to critically discuss the challenges associated with the use of one language, Afrikaans, as a primary medium of instruction in the higher education sector, with specific reference to the case of *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch*.[13] The discussion is divided into seven sections. Part 2 provides an overview of the facts of the case in the High Court, part 3 discusses the Constitutional Court judgments and part 4 is an analysis of the Constitutional Court judgment, with reference to the concept of transformative constitutionalism. Part 5 evaluates how the courts have dealt with the issue of using indigenous languages and the extent to which the use of indigenous languages was promoted. Part 6 is an evaluation of the cases. Part 7 evaluates the measures taken by the government in the promotion of indigenous languages. Part 8 is the recommendations and conclusion.

2 The case before the High Court

The applicants in this matter are a voluntary association, which promotes Afrikaans and other indigenous languages, together with diverse students at the University who wish to receive education in Afrikaans. The respondent is the University.

According to the 2014 Language Policy, Afrikaans and English were languages of learning and teaching.[14] However, during the course of 2015 and 2016, the 2014 Language Policy resulted in the apparent exclusion of the majority of Black students who were not proficient in Afrikaans.[15] Given the aforesaid exclusion of Black students, the University decided to adopt the 2016 Language Policy which would result in a "100% English offering, but would not similarly increase the Afrikaans offering".[16] The applicants are aggrieved by the decision of the University to adopt the 2016 Language Policy, because they are under the impression that it will "cause the 'virtual exclusion' of Afrikaans".[17] They therefore wanted the High Court to review and set aside the 2016 Language Policy and to reinstate the 2014 Language Policy.

13 2019 (12) BCLR 1479 (CC).
14 *Gelyke Kanse vs Chairman of the Senate of the Stellenbosch University* 2017 JDR 1687 (WCC) para 50.
15 Para 50.
16 Para 52.
17 Para 53.

The issues before the High Court were *inter alia* whether adopting the 2016 Language Policy constituted an administrative action,[18] and if so, whether the decision was substantively irrational.[19] Further, whether the 2016 Language Policy violated section 29(2) of the Constitution, which *guarantees everyone the right to receive* an education in the official language or languages of their choice in public educational institutions where it is reasonably practicable?[20]

The University *inter alia* contended that the applicants were mistaken in that the 2016 Language Policy, "does not reduce the Afrikaans offering" at the University.[21] Rather, the objective of the policy "is to maintain and if possible increase the Afrikaans offering subject to demand and resources".[22] In other words, the 2016 Language Policy creates three provisions for language of learning namely; parallel medium, dual medium and single medium. The parallel medium of learning through the use of both English and Afrikaans can only be used "where reasonably practicable and pedagogically sound". All in all, English enjoys preference over Afrikaans.[23]

The High Court dismissed the applicant's application on the basis that the University's obligations, under section 29(2) of the Constitution, only allow the provisions of Afrikaans education where it is reasonably practicable to do so.[24] The Court further held that to determine whether it is reasonably practicable to provide education in one's official language of choice, the State must consider "what is fair, feasible and satisfies the need to remedy the results of past discriminatory laws and practices".[25] According to the Court, reasonably practicable includes the consideration of the availability of resources and other factors.[26] The Court found that the 2014 Policy was not in line with the Constitution, as it prevented Black students who were not conversant in Afrikaans access to the University.[27] Finally, the Court held that the 2016 Language Policy was consistent with the Higher Education Language Policy, which *inter alia* ensures that "that the existing languages of instruction do not serve as a barrier to access and success".[28] Unsatisfied with the High Court judgement, the applicants appealed to the Constitutional Court.

18 Para 19.
19 Para 68.
20 Para 86.
21 Para 53.
22 Para 52.
23 Para 60.
24 Para 19.
25 Para 19.
26 Para 20.
27 Para 50.
28 Para 6.

3 The case before the Constitutional Court

The majority judgment dismissed the application for leave to appeal. Mogoeng CJ and Froneman J, both wrote separate judgments agreeing with the majority judgment. In the Constitutional Court, the applicants sought an order setting aside the 2016 Language Policy on the grounds that it violated sections 29(2), 6(2),[29] 9 and 6(4)[30] of the Constitution. The central issue that had to be decided by the Court was whether the University had "sufficiently justified the diminished role for Afrikaans in the 2016 Language Policy, as issued, and not as applied"?[31]

To advance their case, the applicants asserted that, under the 2016 Language Policy, they *inter alia* foresaw the weakening and the loss of primacy of Afrikaans at the University. The Court rejected this submission on the basis that "the process for adopting the 2016 [Language] Policy was thorough, exhaustive, inclusive and properly deliberated".[32] The applicants' primary contention was that, under section 29 (2) of the Constitution, they had a right to receive tertiary tuition in Afrikaans.[33]

In answering the question on whether the University had sufficiently justified the diminished role of Afrikaans, the Constitutional Court first addressed the applicants' contention that they had a right to receive tertiary education in Afrikaans. The applicants contented that section 29(2) of the Constitution allows for an enforceable right against the state to provide education in the language of their choice. In addressing this, the Court highlighted two aspects about the right to language namely;

> "… [R]espect for language preference, where appropriate and reasonable, entails no special concession or privileged treatment. It flows from fundamental rights and values. It is an embodiment of the right to be treated equally and without discrimination, which inheres in everyone. It requires no special pleading for its recognition."[34]

29 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2019 (12) BCLR 1479 (CC). Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

30 The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.

31 Para 19.

32 The Court rejected evidence by the applicants that the 2016 Policy was being implemented in a manner that warranted fear of side-lining Afrikaans. Moreover, it held that "the process for adopting the 2016 Policy was thorough, exhaustive, inclusive and properly deliberated". See *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* supra para 17.

33 Para 20.

34 Para 21.

> Second, it is established in international human rights law that the way in which that respect is practically realised must depend on what is appropriate and reasonable. Section 29(2) of our Bill of Rights recognises this. It accords the right to receive education in public educational institutions in a language of choice "where that education is reasonably practicable". In this, the Constitution accords with international instruments" (*footnotes omitted*).[35]

In light of the above, the Court highlighted that the test for determining "reasonable practicability" in ascertaining whether one may receive an education in his/her mother tongue language is "synonymous with the test of "appropriate justification" for cutting it back, once afforded".[36] These tests in essence deal with the duty to take positive measures to provide for the right to receive an education in ones' language and a negative duty not to take away the right that is already being provided. As was correctly highlighted in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* that:

> "[T]he reasonableness standard built into section 29(2)(*a*) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to … education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification".[37]

> "The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice. It is an injunction on the state to consider all reasonable educational alternatives which are not limited to, but include, single medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices."[38]

It follows from the above reasoning that the State is constitutionally mandated to create an environment in which students or learners are able to receive an education in their mother tongue language, provided that it is reasonably practicable to do so. Where a student is already receiving education in their mother tongue language, such as studying in Afrikaans under the 2014 Language Policy, the State cannot interfere with the enjoyment of such a right unless there is an appropriate justification.

Given the previous deliberation on the tests to determine practicably, the applicants presented new proposition which sought to "differentiate between the two tests".[39] They argued that "once the right had been

35 Para 22.
36 Para23.
37 2010 (2) SA 415 (CC) para 52.
38 Para 53.
39 Para 24.

afforded, "appropriate justification" was harder to surmount".[40] Relying on the High Court, and other similar cases,[41] the Court rejected this contention on the basis that the decision in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* "did not create two separate standards".[42] Determined to advance their cause, on the current scope and content of section 29(2) of the Constitution, the applicants developed their section 29(2) of the Constitution argument and included sections 6(2) and (4) of the Constitution. The aforesaid constitutional provisions outline the following, respectively:

> "Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."[43]

> "The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably."[44]

In light of the aforesaid constitutional obligations, the applicants submitted that the 2016 Language Policy lacked "meaningful guidelines… directly discriminates against Afrikaans-speaking students, and diminishes Afrikaans tuition at the University in a way not justified on any basis".[45] In response to the applicant's submission, the Court agreed with the applicant's contention that reasonable practicability has to be looked at objectively, including taking a particular approach based on the available evidence.[46] The Court nonetheless indicated that the evidence was, in many respects, against the applicants. In the Court's words:

> "The evidence shows that, near-universally, brown and white-Afrikaans-speaking first-year entrants to the University are able to be taught in English. Conversely, though most entrants are able to receive tuition in Afrikaans, a significant minority cannot."[47]

> "… First, most black (in contradistinction to brown) new entrants to the University are not conversant enough to be able to receive tuition in Afrikaans. Second, seen as a bloc, the new entrants for whom Afrikaans is an obstruction are not brown or white, but overwhelmingly black."[48]

In light of the aforesaid evidence, the Constitutional Court found that the "uneasy truth" was that the "primacy of Afrikaans under the 2014

40 Para 24.
41 *Gelyke Kanse vs Chairman of the Senate of the Stellenbosch University* supra paras 85-6. See also *AfriForum v Chairperson of the Council of the University of Pretoria* 2017 JDR 0150 (GP) para 54.
42 Para 24.
43 S 6(2) of the Constitution of the Republic of South Africa, 1996.
44 S 6(4) of the Constitution of the Republic of South Africa, 1996.
45 Para 25.
46 Para 26.
47 Para 26.
48 Para 27.

Language Policy created an exclusionary hurdle for specifically black students studying at Stellenbosch".[49] The Court *inter alia* highlighted that the evidence presented before it by the University, regarding the 2014 Language Policy, "made black students not conversant in Afrikaans feel marginalised, excluded and stigmatised".[50] All in all, black students felt that they were not a part of the institution in various respects, as they were effectively barred from receiving an education by the language barrier and socially excluded from other campus social events which were held in Afrikaans. The applicants did not dispute these facts.[51]

The applicants further urged the University to offer tuition in both Afrikaans and English for all undergraduate studies. In response to this, the University agreed that the idea was feasible. However, the University asked whether "it [was] reasonably practicable" to do so in the present circumstance.[52] The University answered this question in the negative on the basis that:

> "… that the cost of immediately changing to fully parallel medium tuition would total about R640 million in infrastructure (including additional classrooms), plus about R78 million each year thereafter for additional personnel costs. This would entail a 20% increase in fees, an additional R8 100 on top of the approximately R40 000 per year students on average pay now. Reasonably practicable? The University said No."[53]

The aforesaid information was not well received by the applicants. Instead, they contended that the cost issues did not form part of the processes that led to the adoption of the 2016 Language Policy.[54] The Court dismissed this claim and indicated that the cost factor was an unavoidable issue in any operations of the university business.[55] According to the Court, it was well within the rights of the University to show the monetary factor in defending its 2016 Language Policy and to demonstrate/illustrate that providing tuition in both Afrikaans and English would be too expensive.[56] The applicants were of the view that funds could be sourced elsewhere, such as from the wealthy alumni of the University who were against the "diminishing the place of Afrikaans".[57] The Court highlighted that the inquiry was not whether the University could source funds elsewhere to sustain both Afrikaans and English, but whether it was practicably reasonable to do.[58]

In response to the main issue on whether the University had "sufficiently justified the diminished role for Afrikaans in the 2016

49 Para 28.
50 Para 28.
51 Para 29.
52 Para 31.
53 Para 31.
54 Para 32.
55 Para 33.
56 Para 33.
57 Para 34.
58 Para 34.

Language Policy", the Court said that the implementation of the 2016 Language Policy was "to facilitate equitable access to its campus and to its teaching and learning opportunities by black students who are not conversant in Afrikaans".[59] The Court, through reliance on its earlier decisions[60], further found that the University's processes properly considered factors such as "racial equity, access and inclusiveness" in arriving to the decision not to *inter alia* make Afrikaans a primary language of learning.[61] Consequently, the Court found it difficult to overturn the Universities' 2016 Language Policy, because the evidence presented before it was clear in that "it was not reasonably practicable to introduce full parallel medium undergraduate teaching in order to avoid some diminution of Afrikaans".[62]

The applicants asked the Court whether it was possible, under section 29(2) of the Constitution, to take away a right that is already offered to in order to create access for those who are not conversant with Afrikaans because the University regards the cost of retaining such language as being too high.[63] The Court answered this in the affirmative on the basis that, unlike in the University of Free State, in this case Afrikaans was not abolished but reduced from its primacy.[64] According to the Court, this was constitutionally justified.[65]

The applicants had also argued that, since Afrikaans was an indigenous language, it had to be protected as an official language, and had to be treated equally to other languages.[66] As a result, the applicants asked the court to set aside the 2016 Language Policy on the basis that it was bringing an end of Afrikaans as a language of tertiary instruction.[67] While counsel's plea on behalf of indigenous languages other than Afrikaans may have seemed opportunistic, the dire entreaty compels reflection. The Court accepted that approving the University's 2016 Language Policy as constitutionally compatible with section 29(2) of the Constitution has consequences. According to the Court, such consequences include the seemingly global unfavourable approach to minority languages. Despite this cautious approach, the Court indicated that the "… dilemmas the global march of English poses is not the question before [it] …".[68] Therefore, this was the end of the matter.

59 Para 36.
60 See *University of the Free State v Afriforum* 2017 1 All SA 79 (SCA) para 27; *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 paras 45-7 and 51-3; *AfriForum v University of the Free State* supra paras 53-4.
61 Para 36.
62 Para 45.
63 Para 38.
64 Para 40.
65 Para 41.
66 Para 46.
67 Para 47.
68 Para 49.

In a separate but concurring judgment, Mogoeng J agreed that the 2014 Language Policy was not practicably reasonable as it prevented many people from accessing higher education.[69] He further acknowledged that, despite the controversies that surrounded the use of Afrikaans during apartheid, these "did not at all affect its original African DNA".[70] Interestingly, Mogoeng CJ further appealed to the private sector in the spirit of brotherhood to help in preserving Afrikaans and to "develop other indigenous languages, as essential tools for knowledge impartation and comprehension".[71] These development could take place through the establishment of private institutions of learning. However, Mogoeng J warned that such private institutions should "not be driven by any sinister agenda to discriminate against others on any unconstitutional basis".[72]

Ultimately, Froneman J also provided a separate but concurring decision. He nonetheless seemed to be concerned about the fact that English was being elevated and given dominance from primary school up to tertiary.[73] In his own words, "… it seems strange for this Court, the ultimate protector of minority language rights under the Constitution, to give its blessing to this result".[74] Froneman's J further concern was that the elevation of English ahead of other languages had dire repercussions. According to him, those who come from the poorest of the poor who are "mainly black and brown people" who "attend under-resourced and poorly staffed schools in rural and marginalised urban communities, will suffer most" as their already chosen language of instruction is English.[75] This is further worsen by the fact that they do not only "receive inadequate mother-tongue education when they start their education, but the education that they receive in English is also often of a poor quality".[76]

Froneman J highlighted that the evidence the Court showed that Afrikaans is a home language of many of brown people in the Western Cape and Northern Cape.[77] Additionally, it indicated that they are "predominantly working-class people and that many of them are not proficient in English".[78] The evidence further indicated that only a few brown people who make it to tertiary because of poverty related reasons. According to the judge, the unfortunate reality is that for those who may happen to get to tertiary and receive education in their mother tongue language, Stellenbosch University would be their destination. However, given the recent developments, when they get there, they will realise that

69 Para 60.
70 Para 61.
71 Para 62.
72 Para 62.
73 Para 75.
74 Para 75.
75 Para 77.
76 Para 77.
77 Para 78.
78 Para 78.

their mother tongue langue is not offered and "if they are [to] be accommodated, they need to grow out of poverty and learn English fast".[79] Froneman J stated that this problem applies to other marginalised and vulnerable poor people whose home language is not English.[80] Froneman J admitted that this was not a matter to be taken lightly. He categorically states that "[s]uccessful mother-tongue or vernacular language education is not easily attained, but it can be done."[81]

4 Analysis of judgments

In our view, the Constitutional Court in the present matter was not much placed in a difficult position as it had already dealt with cases of similar nature before.[82] In addition, it had the benefit of both the High Court[83] and the Supreme Court of Appeal decisions[84] as a foundation to start with. This is something that the Court itself acknowledged.[85]

We are further in agreement with the Court that this was a different case from that of the University of Free State, as Afrikaans was not abolished but preserved to be only applied subject to demand and availability of resources.[86] Therefore, in our view the applicants were incorrect to argue that "… upholding the University's policy change … would signal the end of Afrikaans as a language of tertiary instruction".[87]

In dealing with the applicant's argument that "once the right had been afforded, "appropriate justification" was harder to surmount",[88] we submit that the Court correctly rejected this argument. It appropriately relied on its earlier decisions on the scope and content of section 29(2) of the Constitution. The Court appropriately applied the test of determining whether it was "reasonable practicability" in ascertaining whether one may receive an education in one's mother tongue language. It considered the evidence brought before it by the university, such as the R640 million cost of infrastructure if both Afrikaans and English were to be fully implemented as parallel mediums of instruction. Additionally, there would be a further estimated R78 million annually for additional personnel costs, including a 20% increase in fees (about 48100.00 per annum).[89] Based on this, the Court found that it was within the

79 Para 78.
80 Para 79.
81 Para 91.
82 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* supra para 1.
83 *Gelyke Kanse vs Chairman of the Senate of the Stellenbosch University* supra.
84 *AfriForum v University of the Free State* supra.
85 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* supra paras 59 and 64.
86 Para 6.
87 Para 47.
88 Para 24.
89 Para 31.

University's rights to raise/highlight the cost implications of the applicants' proposals. Importantly, the Court found that the University took into account relevant factors and therefore complied with the "reasonably practicable" test in favouring English over Afrikaans.[90] The Court further concluded that the University's decision to introduce the 2016 Language Policy to "downward Afrikaans without by any means eliminating it" was *inter alia* driven by "equitable access to its campus and to its teaching and learning opportunities by Black students who are not conversant in Afrikaans".[91] We have reservations with the preceding statement and we address this below.

We also note, with admiration the approach taken by the Court to rely on its previous decisions regarding the scope and content of section 29(2) of the Constitution. This involves both a factual and normative (constitutional) element.[92] The Court reiterated that reasonable practicability is to be looked at objectively and requires an approach founded in evidence. It was on this basis that the Court found that the evidence presented before it showed that it was not reasonably practicable to keep Afrikaans as one of the languages of primary tuition, because of the inevitable cost implications and the inclination to increase access to University for those who are not conversant in Afrikaans.

Whilst we accept that Afrikaans was downgraded in order to facilitate access to those who were not conversant in it, we are of the view that this factor should have been looked at a different angle. We are also in agreement with the separate but concurring decision of Froneman J, who illuminated the fact that the global community has adopted and accepted English as a global language and highlighted that evidence showed that Afrikaans is a home language of many of brown people in the Western Cape and Northern Cape.[93] In fact 49.6 per cent of people speak Afrikaans in the Western Cape.[94] In our view, this is a matter that the Court ought to have not taken lightly. The poor and marginalised Afrikaans speaking people, who are mostly conversant in their own language, will miss the opportunity to receive education in their mother tongue language. According to the judge:

> "Now when they arrive at Stellenbosch, they will find that their choice of medium of instruction is not as comprehensive as those more privileged students who choose English. The grim message that seems to be sent to this segment of extremely marginalised brown people, is that, if they are be accommodated, they need to grow out of poverty and learn English fast."[95]

90 Para 36.
91 Para 36.
92 Para 26.
93 Para 78.
94 Statistics South Africa "Census 2011 Provincial Profile: Western Cape" (2011) http://www.statssa.gov.za/publications/Report-03-01-70/Report-03-01-702011.pdf (accessed 2020-02-17).
95 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* supra para 78.

This is an unfortunate reality faced by many other poor and marginalised communities. For example, Walter Sisulu University is located in Mthatha and most of its students come from surrounding areas where the spoken language is IsiXhosa. However, when they get to University, they are suddenly expected to master the English language.

It is unmistakable that the essence of the judgment is to shed light on the importance of language as a tool for sustaining relationships through communication, cultural identity and transmission. Most importantly, the judgment illustrates the significance of safeguarding and preserving indigenous languages, which have been and continue to be under threat, having due regard for South Africa's historical context. The practicability of the judgment is not straightforward. That is to say, historically, the country's black and brown majority has been subjected to protracted marginalisation and relegated to menial roles by virtue of their skin colour, traditions and cultural practices. This relegation/ assignment of inferiority was heightened by the institution of English and Afrikaans as the languages of instruction.

To remedy this historical error, there must be a vigorous promotion of the languages that were historically denigrated, and these unjustly deprecated languages must be given a platform to flourish. A pivotal question to ask is: how does one elevate or restore a historically disadvantaged language, for purposes of preserving that language, without undermining historically dominant languages that are protected by the Constitution? The process of preserving historically disadvantaged languages, will inevitably lead to increased resistance from the native speakers of dominant languages, who would understandably seek to preserve their own languages. This reality requires a balanced equilibrium for the protection of languages in their entirety. There is a need to find sustainable solutions to preserve and use historically disadvantaged languages.

In exploring mechanisms aimed at preserving languages, teaching may be seen as a tool to do so. The silent reality is that when institutions such as Sol-Tech[96] emerge, with the intention of using Afrikaans as a teaching medium of instruction, they run the risk of being perceived as discriminatory and intent on excluding other individuals. The arguments underlying such a risk should not be undermined, considering South Africa's history of systematic and institutionalised exclusion. Having said that, would the same sentiment be upheld, if for example, an institution emerged with the intention of using Sotho, Sesotho and Tswana as a teaching medium of instruction?

The approach of this analysis takes an Afrocentric perspective in an attempt to emphasise the importance of academic freedom. Generally, mother tongue, native or first language, is a language a person learns

96 A private vocational training institution founded on Christian values and uses Afrikaans as a medium of instruction. See https://sol-tech.co.za/ (accessed 2020-03-07).

from birth. According to Yadav, the ability to acquire a language is biologically linked to age, therefore becoming the basis for social identity and the medium of learning in school and society.[97]

The usage of mother tongue language in education has the ability to increase self-confidence in students, enhance their thinking skills and enable students to exercise their freedom of speech.[98] In a diverse society and multilingual context, one of the main issues that surround teaching and learning in one's native language is discrimination. In such instances, as stated by the High Court, "it will always be arguable that one or other language is subordinated relative to others".[99] In addressing such issues, and emphasised by the UNESCO's 1974 report, the elimination of discrimination between majority and minority students "is to use their mother tongue in education within a bilingual education model".[100]

In a study conducted by Ozfidan, the results reflected that the opportunity to use one's own language was vital for minority groups.[101] This is because such usage protects one's culture and identity as well as encourages participation in public life. In light of these results, language is therefore a crucial factor for the academic achievement of (minority) people.[102]

Taking into account the history of South Africa and the need to exercise caution, as articulated by Froneman J, perhaps the approach on language in South Africa's educational system should generally attempt to defy Eurocentric[103] methods of education and promote Afrocentricity,[104] since it (Eurocentric methods) weakens or undermines indigenous languages, knowledge and experience.

Two issues can be deduced in the case discussed.

i English vs Afrikaans: on a global scale, English is a widely spoken language and its growth can be seen in two contexts: (a) the growth of England as an imperial power; and (b) the spread of English as an imperial language.[105]Afrikaans on the other hand, is a language that

97 See Yadav "Role of Mother Tongue in Second Language Learning" 1 (2014) *IJR* 527-576.
98 Ozfidan "Right of Knowing and Using Mother Tongue: A Mixed Method Study" 2010 English Language Teaching 17.
99 *Gelyke Kanse vs Chairman of the Senate of the Stellenbosch University* para 13.
100 Ozfidan 2017 English Language Teaching 21.
101 Ozfidan 2017 English Language Teaching 21.
102 Ozfidan 2017 English Language Teaching 21.
103 Eurocentrism may be understood as the universal interpretation centred on Europe or the tendency of interpreting the world in terms of European or Anglo-American values and experiences. See Merriam Webster dictionary.
104 Afrocentricity on the other hand, is the thought process and action centred on African interest, values and perspectives. See Asante, *Afrocentricity: The theory of social change* (2001) 3.
105 Cummins and Davison, *International Handbook of English Language Teaching* (2007) 13.

many deem to be an African language. In light of this, the overwhelming use of English in society erodes indigenous language, and in general, this includes Afrikaans. In this instance, as an African language, and in the context of Afrocentricity, the use of Afrikaans as an indigenous language ought to be promoted.

ii Afrikaans vs other official South African languages. The playing field is skewed when one language is positioned and postured as pre-eminent and above all others. Despite Afrikaans having African origins, the language was developed during the colonial era in Southern Africa. In this context, the promotion of this language undermined existing indigenous languages at the time. With this in mind, and with reference to this case, it was crucial for the courts to determine what is in the best interest of black students who are not proficient in Afrikaans. Ideally, in an attempt to promote Afrocentricity and where it is reasonably practicable, black students should receive education in their language of choice (for instance, isiXhosa a dominant language in the region of the SU, and ideally, given availability of resources, it would be logical to provide tuition in isiXhosa).

One must realise that the persistent use of English language and the insufficient provisions on the usage of native languages in the South African education system gradually erodes native languages. To further buttress this point, Cameroon J (as he was then) has asserted that "All of our indigenous languages are under threat from this monster we are talking, the language that is the primary language of business and communication."[106]

The advancement of a language that is not indigenous to Africa was done at the expense of African languages. The irrefutable consequence of colonialism in Africa, through the introduction and facilitation of the colonial education system, has led to European or colonial languages becoming official languages of the African continent.[107] This has led to a hierarchy of languages, in terms of which the colonisers' language has been globally accepted and perceived as prestigious and dominate[108] in both private and public sectors. In our view, to remedy the injustices of colonialism, African States should obliterate the colonial legacy, particularly the education system that was imposed by the colonisers in an effort to weaken African languages.

It is evident from this case that the use of Afrikaans as a medium of instruction results in the marginalisation of Black students who are not proficient in Afrikaans. In the judgment, it was articulated that "… [b]lack and brown people from the lowest socio-economic rung, who attend under resourced and poorly staffed schools in rural and marginalised

106 702 "All of our indigenous languages are under threat from English-Justice Cameron" 702 (2019-10-11) http://www.702.co.za/articles/363503/all-of-our-indigenous-languages-are-under-threat-from-english-justice-cameron (accessed 2019-12-26).

107 For example English is one of the official languages in South Africa, Kenya, Nigeria, Ghana, and Zimbabwe.

108 Tsung *Languages Power and Hierarchy: Multilingual Education in China* (2014) 6-7.

urban communities, will suffer most from effectively having their language of instruction being limited to English". Efforts have to be made by public institutions, supported by the state, to find ways in which tertiary education could be provided in a language of a student's preference. As mentioned above in the judgments, it is the duty of the State to ensure that education is provided in a language one prefers, however, the realisation of this imperative is subject to reasonable practicability deduced in section 29(2) of the Constitution. In other words, considering that students in underprivileged societies are neither proficient in English or Afrikaans, language as a medium of instruction should therefore not be limited to English or Afrikaans. In essence, to address the "flood tide of English" as a threat to minority languages, decolonisation through language is essential because it has the capability of enhancing knowledge production and social transformation.[109] Lessons can be learned from institutions such as UNISA, which conferred a PhD in Setswana[110] and Rhodes University which conferred its first PhD in isiXhosa.[111]

The judgments attempted to facilitate access to education. It was held that, there is no ideal solution when addressing the Constitutional principles raised regarding the manner in which the University should accommodate – (a) the rights of the Afrikaans-speaking students to their language and culture; (b) the promotion of multilingualism; and (c) the rights of primarily Black (African) people who are not conversant in Afrikaans to access a tertiary education at the University. Furthermore, in the absence of a language policy that assigns equal weight to all eleven of the official languages in every subject of the curriculum, it will always be arguable that one or other language would be subordinated relative to others. Importantly, the reality of limited resources entails that any recognition of a linguistic or cultural right may be to the detriment of a competing and arguably more deserving right. To support this, Stoop pointed out that "the state has two obligations …: to ensure that the necessary attention and care are given to this right as well as to demonstrate that it is acting reasonably and practically in providing for the right to receive education in one's preferred language".[112]

In our view, the issue of the use of indigenous languages at institutions of higher learning requires a concerted effort from all the stakeholders. The emergence of private institutions to offer tuition in Afrikaans only

109 See Fataar "Decolonising Education in South Africa: Perspectives and Debates" 2018 Educational Research for Social Change.

110 Power 98.7 "Meet Unisa's first Setswana PhD graduate" (2019-11-25) https://www.power987.co.za/news/unisa-confers-first-phd-setswana/ (accessed 2019-12-30).

111 Skade "Meet the man who wrote Rhodes University's first isiXhosa PhD thesis" *Rhodes University* (2017) https://www.ru.ac.za/graduationgateway/graduationnews/articles2017/meetthemanwhowroterhodesuniversitysfirstisixhosaphdthesis.html (accessed 2019-12-30).

112 See Stoop, "Children's rights to mother-tongue education in a multilingual world: a comparative analysis between South African and Germany" 2017 *PELJ* 1-35.

will not solve the politics surrounding languages. Instead, the State has to be the driver of this transformative constitutionalism imperative[113] at public institutions. The notion of transformation cannot be ignored when interpreting the Constitution. Transformative constitutionalism is derived from the Constitution and is an indispensable element of legal and constitutional developments.[114] Given that there is no universal definition of transformative constitutionalism, Rapatsa provides three ways in which transformative constitutionalism is essential: it gives true meaning to democracy, it enriches human rights discourse and remodels social welfare.[115] Rapatsa's understanding of transformative constitutionalism to a large extent resonates with that of Klare. According to Klare, transformative constitutionalism means:

> "… a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law …"[116]

Indeed, the reconstruction of the society is not only the duty of the state or the courts alone, but that of all South Africans, united in their diversity, through meaningful engagement[117] with the affected groups in order to find lasting solutions.[118] An appreciation of transformative constitutionalism requires one to recognise that the apartheid system marginalised, exploited and oppressed people of African descent. Post-1994, a non-racial multi-lingual South Africa was brought with the political system transitioning to majority rule and democracy and constitutional supremacy.[119] Simply put, the essence of the Constitution is to recognise past injustices and provide guidance aimed at providing a better future for all. This, then, becomes the core idea of transformative constitutionalism. According to Langa, this core idea requires change, therefore, relevant questions such as "*how much [should/can] we change? How does the society on the other side of the bridge differ from where we stand today?*" (emphasis added).[120] In answering this, Langa pointed out

113 See *inter alia* the Preamble to the Constitution of the Republic of South Africa, 1996.
114 Rapatsa, Transformative Constitutionalism in South Africa: 20 Years of Democracy, *MJSS* 2014 (5) 889.
115 Rapatsa, Transformative Constitutionalism in South Africa: 20 Years of Democracy, *MJSS* 2014 (5) 887.
116 Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 150-151.
117 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC).
118 Mokgokong and Phooko "What has the Constitutional Curt Given us? *Afriforum v University of the Free State* 2018 (4) BCLR 387 2019" *Obiter* 239.
119 Pieterse "What do we mean when we talk about transformative constitutionalism" 2005 (20) *SAPR/PL* 157.
120 Langa "Transformative Constitutionalism" 2006 (3) *SLR* 352.

two important aspects: (1) that substantive equality has to be the basis of the new society; [121] and (2) the transformation of the legal culture.[122] In an effort to safeguard the principles of constitutional democracy, Rapatsa asserts that:

> "legal culture concerns the broader perspective of how the Constitution is interpreted, how the law is applied and practiced, and how it influences developments in the country. It is about the nature of characteristic legal values, expressions and arguments by legal practitioners, and those in other disciplines."[123]

Substantive equality, on the other hand, is a transformative approach that calls for laws or policies not to buttress or enhance the inferiority of groups that are already suffering social, political or economic disadvantage, through the treatment of individuals as substantive equals.[124] As a social and economic revolution, transformation calls for levelling the economic playing fields which the apartheid system significantly tilted. This transformative approach will, therefore, fulfil social-economic rights and also provide access to education and opportunities.[125]

In achieving substantive equality, transformation ought to be perceived as a permanent ideal and not a short-term concept that concludes when everyone has equal access to resources and basic services and when those in the legal fraternity embrace a culture of justification.[126] In other words, transformative constitutionalism calls for social change through nonviolent processes grounded in law.[127]

Against the above literature, the University in this case appears to have embraced the notion of transformative constitutionalism when they decided to adopt the 2016 Language Policy, which diminished Afrikaans in order to improve access to the institution for others who are not conversant in Afrikaans. Unfortunately in the process, an indigenous language was affected at the expense of the English language.

Overall, we submit that where South African public tertiary institutions are able to teach in all languages protected by the Constitution, respect for cultural diversity will be enhanced including social cohesion.

121 Langa "Transformative Constitutionalism" 2006 (3) *SLR* 352.
122 Langa "Transformative Constitutionalism" 2006 (3) *SLL* 353.
123 Rapatsa "Transformative Constitutionalism in South Africa: 20 Years of Democracy" 2014 (5) *MJSS* 889.
124 Smith "Equality constitutional adjudication in South Africa" (2014) 14 *AHRLJ* 613.
125 Langa "Transformative Constitutionalism" 2006 (3) *SLR* 352.
126 Langa, "Transformative Constitutionalism" 2006 (3) *SLR* 354.
127 Rapatsa "Transformative Constitutionalism in South Africa: 20 Years of Democracy" *MJSS* 2014 (5) 888.

5 What have the other courts given us?

This section discusses various decisions that have been made by the courts in attempt to resolve the issue of the use of certain languages over other languages within the education sector and before the courts.

5 1 *Afriforum v University of Pretoria*[128]

In 2016, the University of Pretoria, through the decision of Senate and Council, implemented a new language policy, which provided that English shall be the main language of learning and teaching. From the University's perspective, the new language policy was "aimed at removing segregation and facilitating social cohesion".[129] Afriforum sought to review and set aside the decision, arguing that the decision contravened Section 29(2) of the Constitution and further arguing that "it is reasonably practicable to offer tuition in Afrikaans".[130]

Language is more than a mere tool of communication, it plays a crucial role in human development and the construction of human identity. The unfortunate disadvantage of language versatility is that, as demonstrated by history, language can be used by the so called powerful elites "as a tool of domination, of subjugation and of exclusion".[131]

Section 29(2) of the Constitution provides that, in part, "everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable". In addressing this issue, the Court referred to the *Hoërskool Ermelo* case. The case concerned the right to be taught in one's official language of choice and addressing whether or not the Head of Department had the power to withdraw the function of the School Governing Body to determine the language policy of the school. In part and with reference to Section 29(2) of the Constitution, the Constitutional Court held that:

> "The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice … The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice'.[132] With reference to the first part, the Constitutional Court held that the right to be taught in one's language of choice, however, the element of *choice* 'is available only when it is reasonably practicable. When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. In short, the reasonableness standard built into section 29(2)(a) imposes a context-

128 *Afriforum and Another v Chairperson of the Council of the University of Pretoria and Others* [2017] 1 All SA 832 (GP).
129 Para 35.
130 Para 3 and 25.
131 Para 1 and 2.
132 Para 52 and 53.

> sensitive understanding of each claim for education in a language of choice."[133]

In its decision, the Court held that 'the new policy cannot be discriminatory simply because it ceases to offer Afrikaans as a language choice of instruction. The court in this regard was, to a certain extent, applying the test for unfair discrimination as laid down in *Harksen v Lane*.[134] In order to determine the presence or otherwise of unfair discrimination one must ask (1) Does the provision differentiate between groups? If yes, then the next question is (2) whether there is a rational connection between the differentiation and a legitimate governmental purpose it is designed to achieve?[135] Is the purpose consistent with the underlying values protected by the equality clause? Is there no evidence of arbitrariness or manifestations of "naked preferences" without legitimate government purpose? If yes, then it will be evident that it does not amount to a breach of equality but may nonetheless constitute unfair discrimination.[136] If one has regard to the overall effect of the policy decision to make English the sole language of instruction … then it may well constitute some levelling of the playing fields but in a constructive and forward-looking manner.[137] In light of this, one may ask whether or not we can talk about "levelling the playing field" when it is one colonial language (English) dominating indigenous languages? Furthermore, the Court held that the language policy was consistent with Section 29(2) of the Constitution and it (language policy) calls for the advancement of social cohesion.[138]

5 2 *Nkosi v Mrs Vermark and Durban High School Governing Body*[139]

The main issue before the Court in this case was whether the Afrikaans language policy adopted by the respondents during the course of 2007 unfairly discriminated against the complainants who are Zulu speaking.[140] The complainants *inter alia* argued that the effect of the policy "would be that proficiency would not be reached by such a learner in his or her home language".[141] They further contended that the failure to receive education in their mother tongue

> "at the correct level would lead to an alienation from one's culture, and a tendency to uphold other people's culture at the expense of one's own. In other words, the school used English as a primary mode of instructions.[142] Other languages such as IsiZulu were treated as additional languages.[143] In

133 Para 52.
134 1998 (1) SA 300 (CC).
135 *Harksen v Lane* para 42.
136 *Harksen v Lane* para 43.
137 *Harksen v Lane* para 51.
138 *Harksen v Lane* para 73.
139 77/2007 (Equality Court).
140 Para 1.
141 Para 3.
142 Para 3.

> answering the question of whether or not the complainants were unfairly discriminated, the court had regard to the notion of achievement of equality as a "constitutional imperative of the first order".[144]

It further considered the National Language Policy Framework whose aims include the promotion of "equitable use of the official languages at all levels of government and to facilitate equitable access to government services, knowledge and information, to ensure redress for the previously marginalised official indigenous languages", amongst other factors.[145] Based on these, the court found that the complainants unfairly discriminated against all leaners whose home language was isiZulu, by the offering of "Afrikaans as a subject at a higher level than the subject of isiZulu".[146] The Court utilised its ability to apply the Bill of Rights principles by promoting the use of isiZulu. The court also stated in passing that the realisation of the ideals contained in the Constitution into reality requires the "the necessary political will and courage by those entrusted with the duty of turning the ideals enshrined in the Constitution into reality to do so".[147] In other words, the right in the Constitution remain a dream if those who are elected are not taking necessary measures to ensure that other languages are also elevated to the same level as English or Afrikaans.

5 3 *S v Damani*[148]

This case concerned the magistrate's discretion to use isiZulu language to conduct the criminal trial.[149] The accused was convicted of assault with intent to do grievous bodily harm and subsequently sentenced to imprisonment with certain condition.[150] The case was submitted on automatic review. The reviewing judge *inter alia* asked what had motivated the magistrate to conduct the entire trial in isiZulu.[151] The response of the magistrate was that it was his decision to conduct the trial in isiZulu, because the majority of the people of Mahlabathini are Zulu speaking and that all of the participants in the trial spoke isiZulu.[152] The magistrate further indicated that the Constitution requires the recognition of the equality of all 11 official languages. Following the aforesaid responses from the magistrate, the reviewing presiding officer sought inputs on the matter from the chief magistrate of Pietermaritzburg and thereafter found that "the use of any of the 11 official languages in courts is no doubt a constitutionally noble idea and the measure would go a long way towards realising and facilitating the people's right of access to courts and to justice".[153] He further stated that

143 Para 3.
144 Para 7.
145 Para 7.2.
146 Para 11.
147 Para 10.
148 2016 (1) SACR 80 (KZP).
149 *S v Damani* para 1.
150 *S v Damani* para 2.
151 *S v Damani* para 3.
152 *S v Damani* para 5.

"all attempts and efforts that are aimed at elevating, promoting and advancing the status and the use of indigenous languages in courts, particularly the lower courts at this stage, are to be welcomed and encouraged".[154] However, he warned that such an approach should be taken with extreme caution and in consideration of various factors such as resources and structures that would enable the use of indigenous languages smoothly and expeditiously.[155] According to him, there was a need for proper planning in this regard. The reviewing judge ultimately certified the proceedings to have been in accordance with justice.[156]

5 4 *Lourens v Speaker of the National Assembly of Parliament and Others*[157]

The premise of the complainants' case was that national legislation enacted by Parliament was not published in all eleven official languages, "thereby undermining the official status of the official languages (other than English) and effectively elevating English to the status of 'super official language".[158] The applicants' main argument was that the eleven official languages must always be treated equally.[159] According to the Court, this raised a question of whether the non-publication of national legislation in all official languages amounted to discrimination.[160] In addressing this issue, the Court acknowledged "that the non-publication of national legislation in all official languages does indeed amount to discrimination".[161] However, such discrimination was fair because "the Constitution permits the use by the national government and provincial governments of *any* particular official languages 'for the purposes of government", provided that they "must use at least two official languages".[162] The Court found that the predominant use of English in parliament was sufficiently explained and acceptable in that all parliamentarians understand English and can effectively participate in the work of Parliament in English something that is not possible with other languages.[163] Further, the Court found that there was no "constitutional or statutory duty on any of the respondents to publish all national legislation in all official languages, nor to translate all national legislation into all official languages".[164] This decision was subsequently confirmed by the Supreme Court of Appeal.[165]

153 *S v Damani* para 20.
154 *S v Damani* para 20.
155 *S v Damani* para 20.
156 *S v Damani* para.
157 2015 (1) SA 618 (EqC).
158 *Lourens v Speaker of the National Assembly of Parliament and Others* para 4.
159 *Lourens v Speaker of the National Assembly of Parliament and Others* para 26.
160 *Lourens v Speaker of the National Assembly of Parliament and Others para* 26.
161 *Lourens v Speaker of the National Assembly of Parliament and Others para* 27.
162 *Lourens v Speaker of the National Assembly of Parliament and Others para* para 29.
163 *Lourens v Speaker of the National Assembly of Parliament and Others para* para 30.
164 *Lourens v Speaker of the National Assembly of Parliament and Others para* para 32.

The above decision presents a case wherein it may be justifiable in certain circumstance to use two languages in the exclusion of other for the purposes of conducting the affairs of the government. In other words, if the discrimination serves legitimate governmental purposes, such discrimination or preference of one language over the other would be found to be constitutionally permissible.

5 6 *S v Damoyi*[166]

This case concerned absence of an interpreter who could interpret from English to IsiXhosa for the accused.[167] Despite several postponements, an interpreter could not be found. However, given the fact that both the Magistrate and the Prosecutor were also Xhosa-speaking, the Magistrate decided that the proceedings continue without an interpreter. The proceedings were recorded in IsiXhosa.[168] The accused was convicted as charged and sentenced. The matter was later referred to the High Court by way of an automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1997.

The approach of the Court is similar to that of the *Lourens v Speaker of the National Assembly of Parliament and Others* case in that the proceedings were in accordance with justice. However, the Court also cautioned that the issue of use of one's language should be approached in a holistic manner to prevent a situation where it could negatively impact on the administration of justice.[169] The Court further stated that the correct interpretation of section 35(3) of the Constitution is that an accused does not have the right to have trial conducted in the language of his/her choice, but simply in a language he/she understands, or if this is not practicable, the proceedings may be interpreted into such a language the accused understands. The Court further emphasised that the shortfall of this view is that it does not address "the issue of parity of the use of languages in court proceedings".[170] The Court was acknowledged the sensitivity of the use of languages in court. It said:

> "What clearly emerges from the few decisions in which the issue of parity of languages was considered is the divergence in views concerning the use of official languages in court proceedings. The burning issue still is which of the eleven of the official languages should be used as the language of record in court proceedings. The solution to problems such as the one raised in this matter could be the introduction of one language of record in court proceedings. I am of the opinion that the recommendation by Tshabalala, J in S v Matomela (supra) is the route to follow, and, in my view, such a course would not only be economical but would be in the best interest of justice. After all English already is a language used in international

165 [2016] 2 All SA 340 (SCA).
166 [2003] JOL 12306 (C).
167 *S v Damoyi* para 3.
168 *S v Damoyi* para 3.
169 *S v Damoyi* para 1.
170 *S v Damoyi* para 17.

> commerce and international transactions are exclusively concluded in the English language. Although some stakeholders would take it with a pinch of salt, sanity would tip the scale in favour of English as the language of record in court proceedings, particularly in view of its predominance in international politics, commerce and industry."[171]

We agree with the judge in that, it is unfortunate that many years into democracy there are still challenges regarding the use of indigenous languages in court. This somehow could be viewed as a lack of commitment from the government to ensure that there are resources to promote all official languages for use in the courts. There is also no clear guidance from the decisions, as each matter is decided based on its own unique circumstances. We, nonetheless, differ with the judge with regards to the nonchalant position that "[a]fter all English already is a language used in international commerce and international transactions are exclusively concluded in the English language". This is incorrect. There are countries, such as Angola and Mozambique, which do not use English as a primary mode of communication and conclude their transactions in other languages.

5 7 *S v Makwanyane and Mchunu*[172]

Section 6(1) of the Constitution outline the official languages of the Republic of South Africa. Notwithstanding debates of the term *official* in aforementioned section, it is clear that section 6(1), read with section 6(2), is a consequence of the recognition of language oppression and appreciation of indigenous languages. To buttress this, the Constitution goes further to provide "the right to receive education in the official language or languages of their choice in public institutions",[173] the key consideration of course is that provided that it is *reasonably practicable*. It is insufficient to justify the usage of English and/or Afrikaans as medium of instructions in public institutions on grounds that they are universally recognized, they are languages of conducting business, or simply that government does not have the necessary resources. Where active political will exists, measures and processes will be adopted to ensure that any other language can be conducted in education systems, failure to which, section 29(2) may be fairly limited due to, for example, lack of resources. To emphasis this, in the case of Makwanyane, the Court held that "the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality".[174]

Acknowledging that section 29(2), in its entirety, is dependent on the element of reasonable practicability, "there is no absolute standard which can be laid down for determining reasonableness and

171 *S v Damoyi* para 18.
172 1995 (6) BCLR 665 (CC).
173 *Ibid.*
174 Para 104.

necessity".[175] Therefore, it is imperative that, in the interpretation of this section 29(2) and acknowledgment of the language oppression in South Africa, different interests have to balanced and scale of language usage tipped. In doing this,

> "the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question".[176]

In other words, the court will consider whether there are any other means that can be used to limit the affected right without completely taking it away.

5 8 *Afriforum v UNISA* case[177]

The University of South Africa (UNISA) adopted a revised language policy which, amongst other things, identifies "English as the sole language of learning and tuition".[178] The matter before the High Court concerned the reviewing and setting aside of the revised aforementioned language policy on grounds that it is inconsistent with the Constitution.[179] The question before the Court was whether or not the policy can be justified under Section 29(2) of the Constitution.[180] Similar to the *Afriforum case v University of Pretoria*, the Court had to interpret Section 29 of the Constitution. In delineating what is reasonably practicable, as provided in the section, the court referred to *Afriforum v University of Free State*[181] where the Court held that

> "Reasonable practicability therefore requires not only that the practicability test be met, but also that considerations of reasonableness that extend to equity and the need to cure the ills of our shameful past, be appropriately accommodated. And that is achievable only if the exercise of the right to be taught in a language of a choice does not pose threat to racial harmony or inadvertently nurture racial supremacy".[182]

Additionally, the Court held that the element of reasonable practicability has to be appreciated as a polycentric inquiry, in other words, this element involves more than mere practicalities, in fact, key considerations of transformation and equity ought to be recognized.[183]

175 Para 104.
176 Para 104.
177 2018 ZAGPPHC 295.
178 Para 1.
179 Para 2.
180 Para 45.
181 2018 (4) BCLR 387 (CC).
182 *Ibid*, para 53.
183 Para 38.

The Court asserted that, the right to be taught in a language of choice is not only dependent on the question whether existing resources make this technically practicable or possible. In other words, "even if it is technically practicable to provide teaching in a language of choice, the right to receive it may nonetheless be curtailed by the broader societal and constitutional considerations of equity and the need to redress past discrimination".[184]

English has been accepted and a preferred language for communication, academia and business both locally and internationally[185] thus making language equality is very important amongst all indigenous language. Considering Section 29 of the Constitution, in the distant future, South African Universities ought to get to a point where tuition can be provided in any language of choice. It is unacceptable that English language continues to be promoted at the expense of other languages. School and Higher education system, through the existence of political will from government, ought to apply systematic solutions aimed at redressing the oppression of indigenous languages in South Africa, more importantly, these solutions will not only advance both language and culture but promote acceptance of different languages and language equality.

What can be deduced from the foregoing discussion is that the courts were engaged in a rigorous process of balancing two competing rights (e.g. the use of English, Afrikaans, IsiXhosa and IsiZulu languages). The Constitutional Court indicated that, in balancing the rights, various factors have to be taken into account such as "whether the desired ends could reasonably be achieved through other means less damaging to the right in question".[186] It was evident in some cases that if the courts were to use IsiZulu that would have brought more administrative challenges because of the lack of availability of resources such as transcribers from English to IsiZulu including interpreters.[187] However, where such right could be realised without further challenges, then such right could be readily provided for.[188]

184 Para 29.

185 Para 33.

186 *S v Makwanyane and Another* 1995 (6) BCLR 665 para 104.

187 *S v Makwanyane and Another* para 104

188 *S v Makwanyane and Another* para 104

6 What can be learnt from the cases?

The cases unfortunately do not provide a clear guidance about what should be done in the promotion of indigenous languages. Whilst some presiding officers have made initiative to make use of IsiXhosa in conducting the entire trial, there have been warnings from others that the use of other languages, other than English, may result in delays in the administration of justice because the resources to translate to other languages are not readily available.

Nonetheless, we are in support of the stance taken by the presiding officers who took an initiative to make use of indigenous languages, such as IsiXhosa, to conduct their trials. We submit that the Constitution can only be given effect to by individuals who are prepared to take unusual routes to ensure that the aspirations of the Constitution in so far as they relate to language are realised. We further submit that the language issue should not only be left at the hands of the courts, but the government also has a primary role to allocate resources for the fulfilment of her constitutional obligations.

We further applaud and encourage individuals and civil society organisations to stand up on matters that unfairly discriminate on the basis of language. In our view, all South Africans have been tasked with the promotion of languages.[189] The Constitution requires everyone to play their role in achieving the aspirations that are set forth in the Constitution.[190]

7 Efforts taken for the promotion of indigenous languages

This section briefly discusses some of the measures that have been adopted by the South African government in order to promote the use of indigenous languages. The said steps include:

7 1 Use of Official Languages Act 12 of 2012

One of the objects of the Act includes to "promote parity of esteem and equitable treatment of official languages…". The Act applies to, amongst other things, national public entities, whilst section 4(1) "Every national department, national public entity and national public enterprise must adopt a language policy regarding its use of official languages".

189 The Preamble to the Constitution states that "We the people of South Africa" something that indicates collective responsibility to rebuild the country.

190 See Preamble to the Constitution.

7 2 The Language Policy Framework for Public Higher Education Institutions, determined in terms of section 27(2) of the Higher Education Act 101 of 1997 (as amended)[191]

There are numerous South Africans who are unable to access higher education institutions due to language related barriers. The reality is that indigenous languages, despite their Constitutional recognition as official languages, have "not been afforded the official space to function as academic and scientific language".[192]

The underdevelopment and undervaluing of indigenous languages in higher education institutions is unacceptable, especially if these institutions "are to meet the diverse linguistic needs of their student population".[193] If the predominant language spoken by the student population is a consideration when choosing a specific language as a medium of instruction, it is justifiable for the University of Venda to have Tshivenda as one of the languages for learning and teaching or Tshivenda as a medium of instruction.

Any language policy must take into consideration fundamental facets of the Constitution including, but not limited to, access, equity and inclusivity.[194] Overall, it is the responsibility of government to create conditions for development and strengthening of indigenous languages, particularly for academic purposes.[195]

7 3 Pan South African Language Board

In an effort to develop previously marginalised languages, the Pan South African Language Board Act 59 of 1995 established the Pan South African Language Board (hereinafter the Board).[196] The Board was established to promote respect for and ensure the implementation of the constitutional principles in section 3(9); to create condition for development and for the promotion of equal use and enjoyment of all official languages in South Africa; to prevent the use of any language for the purposes of exploitation, domination or division; to develop official languages in South Africa, promote respect for and the development of other languages used by communities in South Africa; promote the utilisation of South Africa's language resources.[197]

191 National Gazette No. 43858, 30 October 2020, Vol. 664.
192 *Ibid*, para 1.
193 *Ibid*, para 3.
194 *Ibid*, para 15.
195 Para 3.
196 Pan South African Language Board Act 59 of 1995.
197 Pan South African Language Board Act 59 of 1995.

7 4 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

The Commission is established by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002. The aims of the Commission include: promoting respect for and protection of rights of cultural, religious and linguistic communities; fostering mutual respect among cultural, religious and linguistic communities; and promoting the right of communities to develop their historically diminished heritage.

7 5 Language Task Force

Post-1994, it may be argued that not much has changed in the usage of indigenous languages, particularly in the education system. This lack of change is due to the justification of lack of state resources when there is a call for an indigenous language to be used as a medium language of instruction, particularly in communities where such language is widely spoken in the community. Furthermore, with all the admirable efforts by the state in establishing agencies and developing framework, these efforts must be accompanied by active political will. Additionally, snail-paced progress in indigenous language development hinders the promotion of indigenous languages.

It is acknowledged that the government has taken various measures to promote indigenous measures. However, we submit that such measures have not improved much, as indigenous languages, such as IsiZulu or IsiXhosa, are not being used as primary modes of teaching in high schools and tertiary education. Instead, teaching and learning in most subjects and modules is offered in English.

8 Conclusion and recommendations

This decision is testimony that indigenous languages, such as IsiXhosa and Sesotho, at institutions of higher learning will take time to emerge and fully develop as they can only be offered provided that it is reasonably practical to do so. It must be noted that the use of Afrikaans in this present case was not put to an end. Rather, it is limited to certain circumstances such being applied only at undergraduate level. The State has a primary duty to develop indigenous languages at public institutions.[198] The decision has also revealed that English continues to be given preference over indigenous languages.[199] This is a major concern and a threat to the development of indigenous languages in

198 See s 6(2) of the Constitution of the Republic of South Africa Act 108 of 1996.

199 Languille "Affordable private schools in South Africa. Affordable for whom?" 2016 *Oxford Review of Education* 528.

South Africa.[200] Therefore, there is an urgent need for the State to develop other indigenous languages at institutions of higher learning.

In an effort to afford equal opportunities to the marginalised or disadvantaged people in society and enhance socio-economic conditions, one has to recognise and make usage of the contents of the South African Bill of Rights as a transformative document "aimed at achieving a society where people will be able to live their lives in dignity …".[201] Moreover, Jajbhay J made reference to the case of the *Government of the Republic of South Africa and Others v Grootboom and Others* judgment[202] asserting that the judgment:

> "[c]onfirms that the full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context. There are vast social and economic inequalities between different groups that leave many people extremely vulnerable and even desperate, far removed from the ideal of a life lived in dignity and respect. This approach acknowledges that people cannot live with a semblance of human dignity and cannot fulfil their full potential as human beings where structural inequality prevails and where the State fails to take steps to address such structural inequality and its causes."[203]

In light of the above, it is in our view unacceptable that twenty five years into constitutional democracy there is still little or no progress in having one of indigenous languages such as Sesotho or IsiXhosa as a primary language of tuition in one of the institutions of higher learning. In our view, this is a matter that needs to be addressed and cannot forever remain at the mercy of those who are tasked with driving language policies in institutions of higher learning.

The Constitution is clear in that all stakeholders, Black, White, and Brown united in their diversity, have a collective responsibility to build a South Africa that belongs to all wherein people can fully realise their potential through the enjoyment of their human rights including the protection and promotion of their indigenous languages.[204]

Perhaps, the time has also come wherein the Constitutional Court will issue its judgments in other indigenous languages. In our view, the Court should not only be seen in advocating for indigenous languages in theory but should also deliver its judgments in other indigenous languages.

200 Languille 2016 Oxford Review of Education 528.
201 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169.
202 *Government of the Republic of South Africa v Grootboom supra*.
203 See *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) para 51.
204 See Preamble of the Constitution of the Republic of South Africa, 1996.

The Treaty on the Lesotho Highlands Water Project and the principle of "equitable and reasonable utilisation"

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SUMMARY

The principle of "equitable and reasonable utilisation" has been proposed as a tool to resolve a conflict of uses since it advocates for fair and sustainable utilisation of shared water resources. This paper examines this proposition with a specific focus on the Treaty on the Lesotho Highlands Water Project, which regulates the use of the Orange River. To this end, it is my view that the principle of "vital human needs" as an incidence of the principle of "equitable and reasonable utilisation", proffers the most effective tool to resolve the anticipated conflict of uses in the Orange River basin.

1 The factual and legal framework of the Treaty on the Lesotho Highlands Water Project

The Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (LHWP) ensures the supply of water by Lesotho to South Africa from the Orange River in return for royalties, which are used to construct dams that produce electricity.[1] The Orange River originates in the Maluti mountains of Lesotho and is South Africa's largest river.[2] It has tributaries in Botswana, Namibia and South Africa.[3] Therefore, the Orange River is a "shared" or "transboundary" or "international" watercourse, which means rivers, lakes, or groundwater sources that are shared by two or more countries.[4] These "watercourses" will either "form or straddle an international boundary, or in the case of

1 See Art 4.1 read with Art 12 of the Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa 1986.

2 Department of Water Affairs "Development of Reconciliation Strategies for Large Bulk Water Supply Systems Orange River: Quality and Effluent Re-Use Report" (2013) 7 http://www.dwa.gov.za/Projects/Orange%20Recon/Docs/final/8%20Water%20Quality.pdf (accessed 2020-06-14).

3 Department of Water Affairs "Development of Reconciliation Strategies for Large Bulk Water Supply Systems Orange River: Quality and Effluent Re-Use Report" 3.

4 See Birnie, Boyle and Redgwell *International Law and the Environment* (2009) 536.

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rivers, they may flow through a succession of states".[5] Thus the Orange River is a "shared" or "transboundary" or an "international" watercourse.

In this regard, the LHWP is managed through the Lesotho Highlands Development Authority (LHDA) based in Lesotho and the Trans-Caledon Tunnel Authority (TCTA), which is located in South Africa as stipulated by Article 6 of the LHWP. The LHDA has the duty supply precise quantities of water to South Africa.[6] The TCTA has the duty to administer facets of the project in South Africa.[7] The LHWP is divided into four phases.[8] Phase I had two sub-phases: Phase I led to the construction of the Katse and Mohale dams and the Muela hydropower plant.[9] Phases II, III and IV will encompass the building of the Mashai, Tsoelike and Ntoahae reservoirs.[10] Phase 1 was completed in 1997 with the provision of water to South Africa commencing in 1998.[11]

Subsequently, the Agreement on Phase II of the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (hereafter, Phase II Agreement) has been concluded, which manages Phase II as well as the maintenance of both Phase I and Phase II of the Project.[12] The construal of a term in the Phase II Agreement does not apply to the interpretation of the LHWP.[13] However, the provisions of the LHWP remain applicable unless amended by the Phase II Agreement.[14] Thus, the LHWP is the umbrella treaty regulating the project and the Phase II Agreement constitutes a protocol to the LHWP. This means that any meaning attached to provisions of the LHWP invariably applies to the Phase II Agreement, to the extent that they are not amended by the latter agreement as stated by Article 3 of the Phase II Agreement.

5 Birnie, Boyle and Redgwell 536.
6 Art 7.1 read with Art 7.2 of the LHWP and Art of the Protocol VI System of Governance to the Treaty on the Lesotho Highlands Water Project: Supplementary Arrangements Regarding the Systems of Governance for the Project, 4 June 1999 (hereafter, Protocol VI); See s 20 of the *Lesotho Highlands Development Authority Order, 1986* https://www.ecolex.org/details/legislation/lesotho-highlands-development-authority-order-no-23-of-1986-lex-faoc128641/ (accessed 2020-06-14).
7 See Art 8.1 and Art 8.2 of the LHWP. Art 4 read with Art 8 and Art 8A of the Protocol VI.
8 Art 5 of the LHWP read with LHWP: Annexure I: Project Description. Thabane "Shifts from Old to New Social and Ecological Environments in the Lesotho Highlands Water Scheme; Relocating Residents of the Mohale Dam Area" 2000 *Journal of Southern African Studies* 635.
9 LHWP: Annexure I: Project Description, par 2.
10 LHWP: Annexure I: Project Description.
11 LHWP: Annexure I: Project Description.
12 Art 2 of the Agreement on Phase II of the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, 11 August 2011.
13 Art 1.3 of the Phase II Agreement.
14 Art 3 of the Phase II Agreement.

The LHWP transfers water from the Katse Dam in Lesotho to the Vaal River in South Africa.[15] The transfer capacity has already reached its peak transfer quantity as agreed to by the signatories to the LHWP.[16] Phase II is projected to begin providing water to South Africa by 2022.[17] Water is Lesotho's largest source of non-tax revenue, contributing ten per cent to the overall Gross Domestic Product (GDP).[18]

However, there are plans to further abstract water from the Orange River, which include: the Karoo hydraulic fracturing project; Eskom has plans for a Solar Park at Olyvenhoutsdrift and several licences have been issued for minor solar power plants on the Lower Orange which require water from the Orange River; the Square Kilometre Array Radio Telescope (SKA) Development project for the construction of 64 Meerkat dishes in the Karoo and licences for groundwater have been acquired for this project, and there is possibility of hydropower projects at Augrabies.[19] Lesotho and Botswana also concluded an agreement to evaluate the feasibility of the transfer of water from Lesotho to complement water supply to Botswana.[20] Evaluating the probability of developing Lesotho's water resources for supply to the lowlands and other riparian countries could address water security for the southern African region.[21]

The Orange River is also the subject of another transboundary water agreement: The Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia and the Republic of South Africa on the establishment of the Orange-Senqu River Commission Agreement (ORASECOM Agreement). The existence of a multilateral regime in the Orange River basin does not dislodge existing bilateral agreements, nor does it prevent additional future bilateral

15 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – Current and Future Water Requirements" (2013) 27 http://www.dwa.gov.za/Projects/Orange%20Recon/Docs/final/4%20Current%20and%20future%20Water%20Requirements2.pdf (accessed 2020-06-11).

16 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligation" 27.

17 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligation" 28.

18 The Kingdom of Lesotho National Climate Change Policy 2017-2027 https://www.gov.ls/documents/national-climate-change-policy/ (accessed 2020-05-04).

19 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligation" vii.

20 Lesotho Long Term Water and Sanitation Strategy (2017) 151 https://www.water.org.ls/download/lesotho-long-term-water-and-sanitation-strategy/ (accessed 2020-11-14; See Memorandum of Understanding for Feasibility Study to Transfer Water from Lesotho to Botswana (2013).

21 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligation" vii.

agreements between any of the watercourse states.[22] Rather, it facilitates a wider framework for holistic dialogue and cooperation between the watercourse states for rational and integrated water resources development in the basin.[23] According to Article 1.3 of the ORASECOM Agreement, this agreement does not detract from the rights and obligations of the signatories arising out of agreements that were in operation before this agreement came into force. This means that in this regard, the LHWP supersedes the ORASECOM Agreement because it came into force before the ORASECOM Agreement.

Within this framework, the ORASECOM Agreement appears to partly be a concession by South Africa in respect to the dispute it has with Namibia over the boundary of the Orange River.[24] This augments the Agreement between the government of the Republic of Namibia and the government of the Republic of South Africa on the creation of a Permanent Water Commission, whose purpose is to regulate the allocation and utilisation of the Orange River.[25] In this regard, the Constitution of the Republic of Namibia states that the national territory of Namibia extends to the "middle of the Orange River".[26] On the contrary, South Africa argues that the "northern high-water mark" is the boundary as was agreed between Britain and Germany in an 1890 agreement.[27] This could lead to conflict between these two countries.[28] To this end, the ORASECOM Agreement provides for instruments to establish "the long-term safe yield" of the water resources in the Orange River and the equitable and reasonable utilisation of the water sources in the Orange River to ensure sustainable development in the territory of

22 Mahlakeng *An analysis of regime capacity and a nascent environmental conflict in the Orange-Senqu, the Nile and the Niger River basins* (PhD thesis 2017 University of the Free State) 130.

23 Mahlakeng 130.

24 Kistin and Ashton "Adapting to Change in Transboundary Rivers: An Analysis of Treaty Flexibility on the Orange-Senqu River Basin" 2008 *International Journal of Water Resources Development* 393; Demhardt "Namibia's Orange River Boundary-Origin and Reemerged Effects of an Inattentive Colonial Boundary Delimination Demhardt" 1990 *GeoJournal* 359; See also, Agreement between the Republic of South Africa and the Interim Government of the National entity of Southwest-Africa/ Namibia concerning the control development and utilisation of the water of the Orange River 1987; Agreement on the Vioolsdrift and Noordoewer Joint Irrigation Scheme Between the Government of the Republic of Namibia and the Government of the Republic of South Africa, 14 September 1992; Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Namibia on the Establishment of a Permanent Water Commission, 14 September 1992.

25 Art 1(a) of the Agreement between the Government of the Republic of Namibia and the Government of the Republic of South Africa on the Establishment of a Permanent Water Commission.

26 Art 1.4 of the Constitution of the Republic of Namibia 1990 https://laws.parliament.na/namibian-constitution/ (accessed 2020-06-14).

27 International Boundaries Research Unit "South Africa-Namibia boundary working group established" http://www.informante.web.na/south-border-dispute.15089 (accessed 2020-02-12).

28 Mahlakeng 116.

each party.[29] In the same breath, the ORASECOM Agreement advocates for the optimal use of water in the river by demanding a "long term safe yield".

However, the ORASECOM Agreement creates a necessary exception by providing that if the implementation of any proposed measures is of the "utmost urgency in order to save life, or to protect public health and safety, or other equally important interests as a result of an emergency situation, the party planning the measures may immediately proceed with implementation or execution: Provided that in such event a formal declaration of the urgency of the measures shall be communicated to Council".[30] This means that the ORASECOM Members may deviate from the prior notification procedures if the need requires and this avenue is broad such that any ground may be employed provided that it is "equally important" as public health or safety. This implies that the ORASECOM Agreement allows Lesotho in a conflict of uses, to divert water from the Orange River without giving prior notification to protect public health and safety. On the whole, the ORASECOM Agreement is significant in that it confirms that South Africa and Lesotho accept that they are bound by the principle of "equitable and reasonable utilisation" in respect of the Orange River. The ORASECOM Agreement also illustrates the pressure that the Orange River is under, to provide water for all these different riparian states.

Apart from the projected and current water uses, it is my view that climate change will also compound the pressure on the water in the LHWP to satisfy the needs of both South Africa and Lesotho. To this end, in 2017, Lesotho promulgated its National Climate Change Policy, which ensures a coherent response to the vulnerabilities posed by climate change.[31] The Lesotho National Climate Change Policy provides that climate change will negatively influence water resources in Lesotho as declining rainfall totals will reduce surface and aquifer resources.[32] This implies that at the present population growth rate and levels of service, pressure on water availability may occur earlier.[33] Thus, the government of Lesotho has stated that climate change models project that Lesotho will suffer from elevated temperatures and more unreliable rainfall trends in future and it is likely that current mitigation instruments are inadequate to address environmental degradation and to revive the delicate mountain ecosystems.[34] Already catchment yields have reduced

29 Arts 5.2.1, 5.2.2 and 7.2 of the ORASECOM Agreement, 3 November 2000.
30 Art 7.7 of the ORASECOM Agreement.
31 See The Kingdom of Lesotho National Climate Change Policy 2017-2027.
32 The Kingdom of Lesotho National Climate Change Policy 2017-2027 15.
33 The Kingdom of Lesotho National Climate Change Policy 2017-2027 15.
34 Lesotho National Strategic Development Plan 2012/13 – 2016/17 - Growth and Development Strategic Framework: "Towards an accelerated and sustainable economic and social transformation" (2012) 128 http://www.gov.ls/gov_webportal/important%20documents/national%20strategic%20development%20plan%20201213- 201617/national%20strategic%20development%20plan%20201213-201617.pdf (hereafter, NAPA) (accessed 2020-08-14).

to the extent that springs that used to be continuous, have run dry, and the once large rivers have severely dissipated.[35] The government of Lesotho has conceded that there are widespread water shortages in Lesotho.[36] Thus, it has been argued that climate change in the policy-making processes of the Orange River basin has not been given due consideration.[37] The utilisation of water resources has thus become a significant problem for the economic development of Lesotho.[38] It had been estimated that Lesotho would suffer water stress by 2019 and a period of water scarcity by 2062.[39] The commencement of climate change could accelerate this process.[40] It is then expected that water transfers to South Africa through the LHWP will be increasingly vulnerable in the coming decades with the analysis finding that in ten per cent of the climate scenarios, the average amount of unmet water transfers increases from about 500 million cubic metres in the 2016–2020 period to almost 2 billion cubic metres in the 2046–2050 period, in the absence of implementation of the additional phases envisaged.[41] On the basis of current data, it is possible that Lesotho's ability to comply with its water supply obligations under the LHWP will probably become an even bigger legal and resource-utilisation challenge than it is currently, and will lead to increased competition for water resources.[42] This implies that Lesotho may be unable to meet its water supply obligations to South Africa under the LHWP. This is termed a "conflict of uses". A "conflict of uses" denotes a situation whereby the "quantity or quality" of water in a transboundary watercourse is inadequate to meet the needs of all transboundary water states.[43] This means that climate change, droughts and the current and projected uses of water may compel Lesotho to choose between providing water to its residents or to comply with its obligation to supply water to South Africa under the LHWP.

35 NAPA 3.
36 Mutizwa "Lesotho's 'green drought' pushes thousands deeper into hunger" *The Guardian* (2016-02-18) https://www.theguardian.com/global-development/2016/feb/18/lesotho-green-drought-hunger-rain-malnutrition-disease (accessed 2020-06-14).
37 Mahlakeng 134.
38 NAPA 3.
39 NAPA 3.
40 NAPA 3.
41 World Bank "Lesotho Water Security and Climate Change Assessment 6" (2016) 4-6 https://openknowledge.worldbank.org/handle/10986/24905 (accessed 2020-06-01).
42 United Nations Development Programme "Development and adoption of a Strategic Action Programme for balancing water uses and sustainable natural resource management in the Orange-Senqu River transboundary basin (PIMS: 3243)" (2010) pars 36 and 45 https://info.undp.org/docs/pdc/Documents/ZAF/ORASECOM%20prodoc%204June2009.doc (accessed 2020-04-24).
43 Rieu-Clarke, Moynihan and Magsig "United Nations Watercourses User's Guide" (2012) (hereafter, User's Guide) 109 http://www.unece.org/fileadmin/DAM/env/water/meetings/Water_Convention/2016/10Oct_From_Practitioner_to_Practitioner/UN_Watercourses_Convention_-_User_s_Guide.pdf (accessed 2020-05-14).

More specifically, section 5(2) of the LWA provides that "domestic use" prevails over other uses in a conflict of uses. "Domestic use" under section 5 of the LWA includes the "taking", "impounding" and "diversion" of water from a watercourse as well as "altering" its course. In this respect, section 1 of the LWA defines "domestic water use" narrowly to mean water for "personal and household needs". In my view, "domestic use" and "domestic water use" should be used interchangeably because sections 1 and 5 of the LWA are complementary and must be read together. This is further justified by the fact that section 5 of the LWA does not define the term "domestic", and thus, section 1 is useful in this regard. Similarly, section 6 of the LWA protects domestic water uses in an "emergency" which denotes a conflict of uses. This resembles the impounding or diversion of the flow of a watercourse, which is stipulated as one of the "domestic uses" under section 5 of the LWA. This means that in a conflict of uses, the water uses of South Africa would be trumped by Lesotho's "domestic water uses" in the manner postulated by sections 5 and 6 of the LWA.

However, this right of election is nullified by the LHWP, which prohibits Lesotho from unilaterally suspending, altering, reducing or interfering with the amount of water that is to be supplied to South Africa. Articles 4.1, 5.2, 6.8 and 7 of the LHWP and more specifically, Annexure V of the Phase II Agreement, require that Lesotho must provide South Africa with specific water quantities in exchange for royalties and there shall be no unilateral variation of the terms of these agreements. This is bolstered by the Phase II Agreement which states that there must not be any impediment to the implementation of the project and that the domestic legislation of Lesotho and South Africa must align with this agreement and the LHWP.[44] This essentially nullifies Lesotho's discretion to choose whether to provide water to South Africa as required by the LHWP or to supply water for its domestic needs if the need arises. Thus, in my view, South Africa has virtually colonised Lesotho's water rights over the Orange River. This is what I term as "hydrocolonisation", which occurs when a state unlawfully appropriates another state's water resources.[45] This means that there may be a conflict over the water in the Orange River between South Africa and Lesotho, which is called a "conflict of uses".

The government of South Africa is of the view that if a conflict of uses occurs, watercourse states should find a fair and accommodating mechanism that may involve a diminution from existing, although as yet undeveloped, lawful rights and better use of water to the common

44 Art 18.2 of the Phase II Agreement.

45 See C. Vinti in R. Mabula "Whose Water is it Anyway? South Africa's Hydrocolonisation of Lesotho" (2018) 4 *Curiosity Magazine* 27 https://issuu.com/witscommunications/docs/curiosity_issue_4 (accessed 2020-05-14).

benefit of all of the watercourse states.[46] This submission is vague at best, but it accepts considerations of what is "equitable" and "sustainable" as encapsulated by the principles of "equitable and reasonable utilisation". It is with this proposition in mind that this paper assesses whether the principle of "equitable and reasonable utilisation" can address the anticipated conflict of uses in the LHWP.

2 The principle of equitable and reasonable utilisation as an instrument to address the "conflict of uses" in the LHWP

The Helsinki Rules constitute the earliest written pronouncement of transboundary water law. [47] The Helsinki Rules provided that each basin state has the right, within its territorial boundary, to a "reasonable and equitable share in the beneficial uses of the waters of an international drainage basin".[48] It is submitted that a comprehensive assessment of these elements requires cooperation between the riparian states.[49] This means that cooperation is a *sine qua non* of the fulfilment of "equitable and reasonable utilisation". Factors and circumstances are not fixed, and they may vary over time.[50] This is not a prerogative of a single state, as many will hinge on the understanding of the whole basin.[51] This is significant for the LHWP in that Lesotho should be permitted to participate properly in the identification of the factors that are relevant for the determination of which water use takes precedence if a conflict of uses occurs in the LHWP.

Nevertheless, it must be noted that the Helsinki Rules have no legal consequences.[52] However, until the advent of the UN Watercourses Convention, the Helsinki encapsulated the single most fundamental rules

46 Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligation" (2013) 36 http://www.dwaf.gov.za (accessed 2020-06-14).

47 Salman "The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law" 2007 *International Journal of Water Resources Development* 630. The Helsinki Rules on the Uses of the Waters of International Rivers 1966.

48 Arts IV and V.II of the Helsinki Rules.

49 Rieu-Clarke and Gooch "Governing the Tributaries of the Mekong—The Contribution of International Law and Institutions to Enhancing Equitable Cooperation Over the Sesan" 2010 *Global Business & Development Law Journal* 211.

50 Rieu-Clarke and Gooch 2010 *Global Business & Development Law Journal* 211.

51 Rieu-Clarke and Gooch 2010 *Global Business & Development Law Journal* 211.

52 Salman 2007 *International Journal of Water Resources Development* 630.

in respect of the utilisation of shared watercourses.[53] Unfortunately, a fatal flaw of the Helsinki Rules is that they provide that a use or type of uses is not regarded as having "any inherent preference" over other uses.[54] Since the Helsinki Rules do not permit "preferential use" of the shared watercourse in times of water scarcity, they would not be able to respond to the conflict of uses conundrum in the Orange River. Thus, while the Helsinki Rules provided a normative genesis of the principle of "equitable and reasonable utilisation", they do not offer a pragmatic solution on whether one water use prevails over another during a conflict of uses.

The Helsinki Rules were then supplanted by the UN Watercourses Convention. The UN Watercourses Convention firmly established the principle of "equitable and reasonable utilisation" and provides for a list of elements that are relevant for this determination.[55] These factors include, *inter alia*:

a Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
b The social and economic needs of the watercourse States concerned;
c The population dependent on the watercourse in each watercourse State;
d The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
e Existing and potential uses of the watercourse;
f Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect.[56]

Despite a difference in terminology in the articulation of the factors that determine whether a water use is "equitable and reasonable", it can then be seen that the UN Watercourses Convention mimics the Helsinki Rules in this respect.

As a point of departure, the UN Watercourses Convention reiterates the Helsinki Rules in that it stipulates that the value to be accorded to each element will hinge upon its value in comparison with the other factors, and this determination must be made holistically.[57] Some commentators have suggested that this method of the UN Watercourses Convention affords the latitude to be flexible in its application.[58] This method of the UN Watercourses Convention is also commendable in that it creates a holistic approach that uses natural, social, and economic factors to determine whether a use is "equitable" and "reasonable". The

53 Salman 2007 *International Journal of Water Resources Development* 630; United Nations Convention on the Law of the Non-navigational Uses of International Watercourses 1997.
54 Art VI of the Helsinki Rules.
55 Art 5.1 read with Art 6 of the UN Watercourses Convention.
56 Art 6 of the UN Watercourses Convention.
57 Art 6.3 of the UN Watercourses Convention.
58 Leb "The UN Watercourses Convention: the éminence grise behind cooperation on transboundary water resources" 2013 *Water International* 151.

UN Watercourses Convention's regime on "equitable and reasonable utilisation" is operationalised by the requirement to ensure the regular exchange of information.[59] This provision is augmented by the requirement to notify other riparian states in a shared watercourse of a planned activity that materially and negatively affects the watercourse.[60] This cooperation paradigm, which ensures the regular exchange of data that is crucial to the achievement of "equitable and reasonable utilisation".

However, the formulation of the principle of "equitable and reasonable utilisation" in the UN Watercourses Convention does not offer any direction as to the value to be given to the elements listed as relevant to "equitable utilisation" and thus, does not assist in resolving a conflict of uses.[61] It is unclear how these different factors can be harmonised to achieve "equity" and therefore, it has been argued that "equity" proffers no pragmatic guidelines for water allocation.[62] In the same vein, due to its normative ambiguity, some commentators have doubts about the utility of the principle despite its procedural value.[63] The lack of guidance on how the factors under Article 6 of the UN Watercourses Convention are to be interpreted and applied undermines the applicability of the principle in transboundary disputes.[64] Indeed, it is argued one would struggle to find mutual ground on what the relevant factors are likely to be.[65] This constrains negotiations.[66] The argument here is that Article 6 fails to direct how water must be allocated and has a vague reference to which need assumes priority or how the factors are ranked in the determination of water allocation.[67] In short, the UN Watercourses Convention does not clarify which factors under Article 6 pertain to "equitable use" and which factors would be applicable to "reasonable uses". This normative ambivalence plagues the Helsinki Rules, the UN Watercourses Convention and the Revised Protocol.

Furthermore, Article 6 of the UN Watercourses Convention has been criticised for not catering to the ecological component of the water resources and thus, does not afford due consideration to the provision of

59 Art 9 of the UN Watercourses Convention.
60 Arts 11 and 12 of the UN Watercourses Convention.
61 McIntyre "Utilisation of shared international freshwater resources – the meaning and role of 'equity' in international water law" 2013 *Water International* 120.
62 Vink "Transboundary water law and vulnerable people: legal interpretations of the 'equitable use' principle" 2014 *Water International* 749-752.
63 McIntyre 2013 *Water International* 120.
64 Beaumont "The 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses: Its Strengths and Weaknesses from a Water Management Perspective and the Need for New Workable Guidelines" 2000 *International Journal of Water Resources Development* 482.
65 Beaumont 2000 *International Journal of Water Resources Development* 482.
66 Beaumont 2000 *International Journal of Water Resources Development* 482.
67 Lankford "Does Article 6 (Factors Relevant to Equitable and Reasonable Utilisation) in the UN Watercourses Convention misdirect riparian countries?" 2013 *Water International* 141.

water for environmental integrity.[68] This is also termed the "Ecological Reserve". In the same vein, it is also argued that the factors listed are susceptible to numerically identical allocations.[69] However, it has also been submitted that the principle encompasses a harmonisation of needs, which considers the uses of each riparian state and thus, enjoys universal support.[70] Commentators have commended the fair and holistic nature of the language in Articles 5 and 6 of the UN Watercourses Convention.[71] However, the principle of "equitable and reasonable utilisation" assumes the propensity of riparian states to unite and work together to determine what constitutes "equitable" or "reasonable" use.[72] This evaluation process of Article 6 could be seen as idealistic, susceptible to subjective interpretation, and not affording due consideration to pragmatic factors such as "power asymmetry" in a particular basin. The impact of "power asymmetry", which denotes power imbalance is beyond the scope of this study. At this juncture, it is apposite to posit that the very absence of the principle of "equitable and reasonable utilisation" in the LHWP might be a consequence of this normative ambiguity.

The UN Watercourses Convention also requires that international watercourse states must utilise transboundary water in an "optimal and sustainable" manner taking into consideration the rights of the watercourse states, in line with proper conservation of the watercourse.[73] Thus, the UN Watercourses Convention regards "sustainable use" as an inherent component of "equitable and reasonable utilisation". "Equitable utilisation" and "sustainable utilisation" differ because a water use could be "equitable" between riparian states but still be deemed "unsustainable".[74]

The principle of equitable and reasonable utilisation has also received judicial endorsement. It has been submitted that the principle was implicitly accepted in the *River Oder* case and in the *Lac Lanoux* arbitration.[75] Firstly, in *River Oder*, the Permanent Court of International Justice found that when there is a shared watercourse between two states, a conflict of uses will be resolved according to the "community of

68 Lankford 2013 *Water International* 140.
69 Lankford 2013 *Water International* 139.
70 Birnie, Boyle and Redgwell 543; Salman "Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses" 2011 *Water International* 350–364.
71 Azarva "Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a Transboundary Water Regime in the Nile Basin" 2011 *Temple International and Comparative Law Journal* 478.
72 Azarva 2011 *Temple International and Comparative Law Journal* 478.
73 Art 5.1 of the UN Watercourses Convention.
74 Wouters "Legal responses to water scarcity and water conflict: The UN Watercourses Convention and Beyond", Paper presented at Summer Conference 2002 *Allocating and Managing Water for a Sustainable Future: Lessons from Around the World* 37.
75 Birnie, Boyle and Redgwell 542-543.

interest".[76] The "community of interests" connotes the "perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others".[77] This "community of interests" is employed in instances involving a shared watercourse and considerations of norms of justice and utility demand a "community of interests" of riparian states.[78] In simple terms, the "community of interests" encapsulates absolute "equality" between riparians and a prohibition of "preferential treatment".

Secondly, in *Lac Lanoux*, it was held that riparian states that share a watercourse must consider adverse interests and afford "reasonable" accommodation of all riparian states.[79] The *Lac Lanoux* Arbitration even held that a party to a water agreement is not relieved from this duty owing to the stubbornness of the other party.[80] Similarly, the International Court of Justice (ICJ) in the *Pulp Mills on the River Uruguay* held that the realisation of "optimum and rational utilisation" requires integrating the right to use the shared watercourse for economic activities with environmental protection.[81] "Optimal and reasonable utilisation" denotes the principle of equitable and reasonable utilisation.

By the same token, the ICJ in the *Case Concerning Gabcikovo-Nagymaros* explicitly affirmed the principle of "equitable and reasonable utilisation" in shared watercourses.[82] The court then held that recent advances in international law have entrenched this principle for shared watercourses as evinced by the conclusion of the UN Watercourses Convention.[83] McCaffrey opines that the findings of the court in *Gabcikovo* effectively rejects the Harmon Doctrine, which propagates the principle of absolute sovereignty over water.[84] This decision is also seen as confirming the rights of all states in a water basin.[85] Thus, this decision is regarded as an authoritative affirmation of the principle of "equitable and reasonable utilisation" as a norm of customary international law.[86] Salman reiterates this view, and he submits that the seminal principles of the UN Watercourses Convention embody

76 *Territorial Jurisdiction of Int'l Comm'n of River Oder (U.K. v. Pol.),* 1929 P.C.I.J. (ser. A) No. 23 (Sept. 10) (hereafter, *River Oder*) par 74.
77 *River Oder supra,* par 74.
78 *River Oder supra,* par 74.
79 *Lake Lanoux Arbitration (France v Spain)* (1957) 12 R.I.A.A. 281; 24 I.L.R. 101 (hereafter, *Lac Lanoux*) 34.
80 *Lac Lanoux supra*, 34.
81 *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, I.C.J. Reports* 2010, p. 14 (hereafter, *Pulp Mills*) par 175.
82 *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment, 1. C. J. Reports 1997, p. 7 (*Case Concerning Gabcikovo Nagymaros*) par 85.
83 Case concerning *Gabcikovo Nagymaros supra*, par 85.
84 McCaffrey "The contribution of the UN Convention on the law of non-navigational uses of international watercourses" 2001 *International Journal of Global Environmental Issues* 260.
85 McCaffrey 2001 *International Journal of Global Environmental Issues* 260.
86 McCaffrey 2001 *International Journal of Global Environmental Issues* 260.

customary international law.[87] Salman also submits that the ruling of the ICJ in this matter entrenched the principle of "equitable and reasonable utilisation" as the dominant instructional principle in transboundary water law.[88] To the contrary, Wouters opines that the decision in the *Gabcikovo Nagymaros* case is remarkable in that it accepted the UN Watercourses Convention as the fundamental statement of international watercourses law and entrenched the principle of "equitable and reasonable utilisation" although by that time the treaty did not enjoy any state support.[89] Nevertheless, this finding of the ICJ is significant for the LHWP in that it invalidates provisions that provide for "unilateral" and "preferential" utilisation of the water in the Orange River. In other words, the *Gabcikovo Nagymaros* decision endorsed the "perfect equality" of all riparian states in a shared watercourse such as the Orange River.

In addition, the ICJ in the *Botswana v Namibia* case has emphatically confirmed the principle of "equitable and reasonable utilisation" as part of the corpus of international law.[90] In the same vein, the court also expressly affirmed the principle of equitable and reasonable utilisation as stipulated by the ratio of the court in *River Oder*.[91] Significantly, Kooijmans J, in his Separate Opinion on the *Botswana v Namibia* case took it a step forward from the radical approach of the ICJ in *Gabcikovo* by holding that a provision in a treaty that is not in force can bind the parties who are not a party to it if it is a rule of customary international law.[92] Even more significantly, this finding means that a rule of customary international law can be read into a treaty. Regardless, the UN Watercourses Convention has now entered into force. This means that the provisions of the UN Watercourses Convention that constitute customary international law, especially the provisions on equitable and reasonable utilisation, are now part of customary international law.[93]

Kooijmans J further held that countries must be "guided" by the principles as provided by the UN Watercourses Convention and the Helsinki Rules.[94] Thus, Kooijmans J also held that countries that share a transboundary water resource must remember that the principle of equitable and reasonable utilisation is based on a cogent foundation and facilitates the equitable and reasonable participation of riparian states.[95]

87 Salman "The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?" 2007 *Water International* 14.
88 Salman "Legal Regime for Use and Protection of International Watercourses in the Southern African Region: Evolution and Context" 2001 *Natural Resources Journal* 1009.
89 Wouters 37; McCaffrey 2001 *International Journal of Global Environmental Issues* 260 in which he asserts that the ICJ's decision in this regard, effectively rejected the Harmon doctrine.
90 *Kasikili/ Sedudu Island* (*Botswana/Namibia)* Judgment, I. C. J. Report 1999, p. 1045 par 31-33.
91 *Kasikili/ Sedudu Island* (*Botswana/Namibia) supra*, par 27.
92 *Kasikili/ Sedudu Island* (*Botswana/Namibia) supra*, par 31.
93 *Kasikili/ Sedudu Island* (*Botswana/Namibia) supra*, par 32.
94 *Kasikili/ Sedudu Island* (*Botswana/Namibia) supra*, par 36.
95 *Kasikili/ Sedudu Island* (*Botswana/Namibia) supra*, par 36.

Therefore, this ratio implies that the use of shared watercourse is constrained by Article 5 of the UN Watercourses Convention and Article VI of the Helsinki Rules.

Kooijmans J also asserted that both the UN Watercourses Convention and the Helsinki Rules patently repudiate the so-called "Harmon Doctrine", which encapsulates the idea that a state has the absolute right to use the waters of a shared watercourse in its territory.[96] This view is shared by commentators who opine that the key principle of the UN Watercourses Convention: that of equitable and reasonable utilisation, is accepted as customary international law.[97] These submissions endorse the view of McCaffrey that the principle of equitable and reasonable utilisation "repudiates" the Harmon Doctrine.

However, as stated above, equitable and reasonable utilisation as espoused in international water law does not provide an adequate mechanism to resolve a conflict of uses. The solution can be found in the principle of vital human needs as an incidence of the principle of equitable and reasonable utilisation. In this regard, Article 10 of the UN Watercourses Convention proffers some guidance in the event of a conflict of uses. First, Article 10.1 of the UN Watercourses Convention provides that no use has intrinsic significance over another. This is in keeping with the Helsinki Rules, which denies a preferential right of use over shared watercourses. Despite its normative ambivalence, Article 6 of the UN Watercourses Convention provides an instructive starting point for the utilisation of shared watercourses. Article 10.1 of the UN Watercourses Convention appears to buttress Article 6 by according equal significance to all water uses in order to ensure the equality of all riparian states. It is presumed that Article 10.1 operates as a general rule in times when there is no conflict of uses and preserves the "perfect equality" and community of interests of all riparian states.

On the other hand, Article 10.2 of the UN Watercourses Convention provides that in the absence of an agreement between the parties, a conflict of uses must be resolved according to the principle of "equitable and reasonable utilisation" but with "special" consideration for the requirements of "vital human needs". This then means that Article 10.2 must be read together with Articles 5 and 6 of the UN Watercourses Convention, which embody the principle of "equitable and reasonable utilisation". Thus, Article 10.2 requires that a conflict of uses must firstly be resolved according to the principle of "equitable and reasonable utilisation". Whilst this approach is logical within the framework of the UN Watercourses Convention, it is unsound. This is because it has already been shown that Article 6 of the UN Watercourses Convention breeds normative ambiguity. Thus it appears that Article 10.2 creates a

96 *Kasikili/ Sedudu Island (Botswana/Namibia) supra*, par 33.

97 Heyns, Patrick and Turton "Transboundary Water Resource Management in Southern Africa: Meeting the Challenge of Joint Planning and Management in the Orange River Basin" 2008 *International Journal of Water Resources Development* 374.

two-tier approach to regulating a conflict of uses in that it requires that one must first have resort to the elements identified in Article 6 of the UN Watercourses Convention before moving on to according more weight to the "vital human needs". This is a futile exercise. Perhaps aware of this problem, Article 10.2 of the UN Watercourses Convention allows the according of "special" consideration to what it calls the "vital human needs" criteria. This construction is important. In this way, the UN Watercourses Convention subtly and tacitly elevates and accords more weight to the "vital human needs" criteria in the event of a conflict of uses. Thus, Article 10.2 of the UN Watercourses Convention provides a useful and effective mechanism to resolve a conflict of uses. It follows then that there must be an evaluation of the concept of "vital human needs".

The UN Watercourses Convention became the primary water-based agreement that gave prominence to the term "vital human needs", which are defined as the adequate water that is required to maintain human life, together with potable water and water needed to make food in order to stave off a famine.[98] The Berlin Rules define "vital human needs" as waters used for "immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household".[99] It is submitted that judicial pronouncements have long accorded primacy in domestic law to "'vital human needs'".[100] In this regard, the Revised Protocol provides that "domestic use" means "use of water for drinking, washing, cooking, bathing, sanitation and stock watering purposes".[101] "Vital human needs" must be uses that meet "natural wants" or "ordinary uses" instead of "artificial uses" or "extraordinary uses" on the other.[102] Thus, the International Law Association submits that "vital human needs" must incorporate water needed for "immediate human consumption" and these include drinking, cooking, and washing, and for other uses required for the "immediate sustenance of a household" including watering animals for household use.[103] All other uses, including using water for business enterprises such as mining or manufacturing, fall

98 User's Guide 129.

99 Art 3.20 of the International Law Association Berlin Rules on Water Resources 2004.

100 International Law Association Berlin Rules Commentary on Water Resources (2004) 12 and 22 https://www.unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_IV_Berlin_Rules_on_Water_Resources_ILA.pdf (accessed 2020-01-13); McCaffrey "A human right to water: domestic and international implications" 1992 *Georgetown International Environmental Law Review* 22.

101 Art 1 of the Southern African Development Community Revised Protocol on Shared Watercourses 2000.

102 International Law Association Berlin Rules Commentary on Water Resources 12.

103 International Law Association Berlin Rules Commentary on Water Resources 12.

outside of the concept of "vital human needs".[104] Thus, it seems sound to presume that "vital human needs" prioritise the most critical uses to avoid death by way of dehydration or famine.[105] The term "'special regard'" in Article 10.2 connotes that water for vital human needs enjoys primacy over other water uses.[106] This finding is in line with the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997), which provided that "vital human needs" refers to providing adequate water to "sustain human life, including both drinking water and water required for production of food in order to prevent starvation".[107] This approach is further validated by General Comment 15, which provides that any projects embarked on within a country's jurisdiction must never deny another state of the right to achieve the right to water in its territory.[108]

In this regard, Article 14 of the Berlin Rules on Water provides that in ascertaining an equitable and reasonable use, states must first prioritise water to satisfy "vital human needs" and that no other use must have an intrinsic significance over any other use. This nexus between equitable utilisation and the vital human needs criteria is aptly captured by the Berlin Rules, which provide that everyone has a right of access to adequate, clean, acceptable, physically accessible and reasonably priced water to satisfy vital human needs.[109] It is then submitted that Article 14 of the Berlin Rules clarifies what was implied in the Helsinki Rules.[110] The language of the Berlin Rules is much more emphatic in determining an equitable and reasonable use by providing that one has the duty to "first allocate waters to satisfy vital human needs".[111] Thus, the Berlin Rules resolve the ambiguity borne out of the tentative approach of the UN Watercourses Convention.[112] Regardless, it would be inconceivable to see how some uses will be regarded as "equitable" if they fail to prioritise vital human needs.[113]

This approach is emphatically buttressed by the Guidelines on the Right to Water in Africa which provide that states may export domestic

104 International Law Association Berlin Rules Commentary on Water Resources 12.
105 User's Guide 129.
106 User's Guide 130.
107 Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997) par 8 http://www.un.org/law/cod/watere.htm (accessed 2020-06-14).
108 Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002) par 31 https://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf (accessed 2020-09-14).
109 Art 17.1 of the Berlin Rules.
110 International Law Association Berlin Rules Commentary on Water Resources 22.
111 User's Guide 130.
112 User's Guide 130.
113 User's Guide 130.

water resources only if the right to water is fully enjoyed within the country.[114] These guidelines also provide that states shall adopt measures to ensure that an undisturbed supply of water is available for the personal and domestic needs of each individual.[115] States must also ensure the equitable and reasonable use of water resources through the allocation of and distribution of water resources to meet, as a priority, the vital human needs of the populations concerned, in particular equitable access to safe and clean drinking water in sufficient quantity and of good quality for personal and domestic uses, subsistence agriculture and other means of subsistence.[116] Thus these guidelines endorse the concept of vital human needs as taking priority, particularly in a conflict of uses in Africa.

There is also a view that the only instance where "vital human needs" may not enjoy "priority" within a specific watercourse is when there are alternative sources of water that could satisfy those vital human needs.[117] On this score, Agenda 21 provides that in utilising water resources, basic needs and environmental protection must be given priority.[118] This mimics the "Reserve" that comprises of the "Basic Human Needs Reserve", i.e. potable water and cooking and the "Ecological Reserve", i.e. water for maintaining the integrity or survival of an ecosystem. Agenda 21 represents a political commitment. Whilst Agenda 21 is not a binding agreement; it is significant in its recognition of "basic needs" which mirrors the "vital human needs" criteria of the UN Watercourses Convention and the Berlin Rules. Unfortunately, there is no clarification of the meaning of the term "basic needs" suffice it to say that it can be equated to the "vital human needs" criterion of Article 10 in the UN Watercourses Convention. Regardless, Agenda 21 implies that water for domestic uses and to preserve the ecosystem, trump all other uses in times of scarcity. This has the effect of resolving a conflict of uses in the LHWP.

Perhaps initiatives like the recent construction of the Metolong Dam in Maseru could be cited by South Africa as an alternative avenue to address a conflict of uses. Unfortunately, the Lesotho government has established that the Metolong dam will not solve the long-term demand challenges in the lowland (35 years +), nor for the greater Maseru area.[119] Ironically, it is argued that the "vital human needs" does not include the water required to augment traditional economic activity despite arguments to

114 African Commission on Human and Peoples' Rights Guidelines on the Right to Water in Africa 2019 par 13.5.
115 African Commission on Human and Peoples' Rights Guidelines on the Right to Water in Africa par 13.4.
116 African Commission on Human and Peoples' Rights Guidelines on the Right to Water in Africa par 13.1.
117 User's Guide 130.
118 Agenda 21 1992 par 18.8.
119 Lesotho Long-term Water and Sanitation Strategy (2014) 151 https://www.water.org.ls/download/lesotho-long-term-water-and-sanitation-strategy/ (accessed 2020-06-02).

the contrary.[120] Job creation and other advantages of improved economic activity are valid considerations, but those issues need to be integrated under Articles 12 and 13 of the Berlin Rules with comparable needs in other riparian states and against the duty of sustainable development.[121] It is my view that the construction of "vital human needs" in the Berlin Rules is the correct one and is in line with the "Basic Human Needs Reserve" which is a guaranteed water use in municipal law. For instance, the National Water Act 36 of 1998 (NWA) provides that the "Basic Human Needs Reserve" comprises water for basic potable use, personal hygiene, and food preparation.[122] By the same token, the Basic Human Needs Reserve also enjoys primacy together with Ecological Reserve in the Lesotho Water Act 15 of 2008 (LWA).[123] "Vital human needs" criteria could also include the "Ecological Reserve", which guarantees water to sustain the integrity of the aquatic water system, much like the broader concept of the "Reserve".[124] This approach is sound because, without water in the aquatic ecosystem, there would be no water to guarantee the Basic Human Needs Reserve.

Consequently, in this paper, it is accepted that the "vital human needs" concept refers to the water for potable uses, personal hygiene and for food preparation as well as preserving an ecosystem. As argued above, these water uses must be given priority in the event of a conflict of uses in the LHWP. This would mean that sections 5 and 6 of the LWA, which prioritise "domestic uses", i.e. water for personal and household needs, in a conflict of uses, would trump the LHWP water supply obligations to South Africa or at least, be accorded the same weight.

3 Conclusion

This paper has argued that the anticipated conflict of uses in the LHWP can be adequately addressed by the concept of "vital human needs" as an incidence of the principle of equitable and reasonable utilisation. The "vital human needs" concept refers to the water for potable uses, personal hygiene and for food preparation as well as preserving an ecosystem. This concept provides an equitable mechanism to resolve a conflict of uses in the LHWP that caters to the needs of both countries, thereby nullifying the unfair preferential access to water of one riparian over another.

120 International Law Association Berlin Rules Commentary on Water Resources 22.
121 International Law Association Berlin Rules Commentary on Water Resources 22.
122 S 16 of the NWA https://www.mylexisnexis.co.za/Index.aspx (accessed 2020-12-21).
123 S 13(2)(a) of the LWA https://www.water.org.ls/download/lesotho-water-act-no-15-of-2008/ (accessed 2020-12-14).
124 Ss 1 and 16 of the NWA, which encapsulate both the Human Needs Reserve and the Ecological Reserve.