PRETORIA STUDENT LAW REVIEW

(2018) 12

Pretoria Tydskrif vir Regstudente
Kgatišobaka ya Baithuti ba Molao ya Pretoria

Pretoria University Law Press
PULP

2018

(2018) 12 Pretoria Student Law Review

Published by:
Pretoria University Law Press (PULP)
The Pretoria University Law Press (PULP) is a publisher, based in Africa, launched and managed by the Centre for Human Rights and the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

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Printed and bound by:
Minit Print, Hatfield, Pretoria

Cover:
Design by Adebayo Okeowo

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ISSN: 1998-0280

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EDITORS' NOTE

It is with great joy that I, along with the editorial committee, present to you the reader, the 2018 *Pretoria Student Law Review*. In the past twelve years, the journal has gone from strength to strength and nowhere is this more evident than in this year's edition. We have received more submissions and published more articles than previous years. We have expanded the reach of the journal by including authors from not only outside UP but also outside the borders of South Africa.

Fittingly, the wide range of articles in this year's edition are topical, engaging and critical of the law. Most importantly, the articles spark conversation. If this is the quality of writing that Africa as a continent can produce, we as law students, young scholars and future legal practitioners can only reach new heights.

I am proud of the work that the authors have put into their articles, but especially I am proud of the editorial committee and the work they have done to ensure that the *PSLR* delivers quality articles. The role of an editor is difficult, time consuming and often thankless and therefore I would like to thank the 2018 editorial committee – Primrose E.R. Kurasha, Agnes Matasane, Vaughn Rajah and Kirstin Swanepoel. Without your hard work and dedication to this journal, nothing would have been possible, it has been a privilege to work with all of you.

Furthermore, I would like to thank Prof Karin van Marle for her guiding hand that shepherded us throughout the highs and lows of this year. To Lizette Hermann, thank you for your dedication to the *PSLR*.

About the cover, I would like to thank Adebayo Okeowo for his submission. The cover and back page compliment the Year of the Women as celebrated throughout the year by the Law Faculty and UP Law House in particular.

Turning to the future, it is with pride that I can say that I leave the *PSLR* in the custody of strong hands and even sharper minds.

To you future author, I implore you to continue writing. To you the reader I say expand your mind, question all that is in front of you — for this is the only way we, as scholars, grow.

Jurgen Zwecker
Managing editor
2018

NOTE ON CONTRIBUTIONS

We invite all students to submit material for the eleventh edition of the *Pretoria Student Law Review*. We accept journal articles, case notes, commentary pieces, response articles or any other written material on legal topics. You may even consider converting your research memos or a dissertation chapter into an article.

Please visit our website at www.pslr.co.za for more information.

You may submit your contribution to:
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Dean's Office
Faculty of Law
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Law Building
University of Pretoria
Pretoria
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PRECARIOUS LIFE, JUDGMENT AND A STORY OF A STORK

*by Karin van Marle**

In this short reflection I focus on a number of notions and issues that for me are of value and relevance within the time and space that we find ourselves at present. I consider what meaning a life in the university could have and what kind of space the university should be to make this meaning and life possible.

1 Precarious life

Judith Butler in her work *Precarious life. The powers of mourning and violence* published in the aftermath of September 11 argues that the event raised the 'question … as to what form political reflection and deliberation ought to take if we take injurability and aggression as two points of departure for political life.'[1] After another year filled with events and actions that showed aggressions and caused injury on global, national and sometimes on a local level very close to home we might consider exactly the question invoked by Butler. She hopes for the 'chance to imagine a world' with less violence and where interdependency is deemed necessary and foundational to all relations.

A theme coming to the fore in the first essay of *Precarious life* is the rise of censorship and anti-intellectualism in the US after September 11.[2] For students and academics these issues should be of a big concern. To what extent are the media, artists, authors and closer to home students and academics free to express their views — even if not censored in strict legal sense, are we silenced, dis-encouraged, dissuaded to speak up and speak out? Maybe even a bigger concern is not only the absence of intellectual engagement, conversation and discussion at the university but the active anti-intellectualism that comes in many guises.

* Karin van Marle served the University of Pretoria, Faculty of Law, Department of Jurisprudence from 1 February 1999 - 31 January 2019. She will continue her service to legal scholarship and academia at the University of the Free State from 1 February 2019.

1 J Butler *Precarious life. The powers of mourning and violence* (2004) xii.

2 As above 1-18.

2 The banality of evil and judgment

Hannah Arendt in her report on the trial of the Nazi, Adolf Eichman used the term the 'banality of evil' to describe him.[3] As Young-Bruehl notes, Arendt regarded Eichman as a 'superficial person, thoroughly conformist to his thoroughly banal society, with no independent sense of responsibility.'[4] The only thing that motivated Eichman was his own ambition to be promoted. Arendt perceived him as being 'thoughtless' and by this she means that he didn't have 'common sense or the ability to think.'[5] Apparently Eichman could recite moral rules, even the categorical imperative as developed by Immanuel Kant, but he couldn't think for himself. Later in her life Arendt reflected on the notion of judgement, the feature so lacking in Eichman.

Judgement of course as the ability to think and act responsibly is of utmost importance to all people, but maybe in particular to those in legal scholarship. Arendt believed that judgment should take place in relationship with others. Following Kant's notion of aesthetic judgement she believed that when one judges one imagines the perspectives of as many others as possible and enters into a conversation with them. Young-Bruehl explains that what is needed in judgement is 'an enlarged mentality' a 'communicative experience' that could allow one to 'transcend' one's own subjectivity and reach 'common sense.'[6]

> … judging presupposes being able to see what the world is like from another's perspective. This does not mean adopting another's judgment or agreeing with another's opinion, or even emphathizing with another's experience or reading his or her mind. It simple means using your imagination to see things from another's standpoint.[7]

Arendt noted that: 'The more people's positions I can make present in my thought and hence take into account in my judgments, the more representative [my judgment] will be.'[8]

Following form the above I believe the university and the faculty of law should be a place that encourages this kind of judgment - meaning a place where a plurality of perspectives could be considered. Thinking should be central to all teaching and learning and research in order not to allow more Eichmans into the world.

The *PSLR* received many submissions this year covering indeed a plurality of perspectives and topics including medical law, adultery,

3 H Arendt Eichman in Jerusalem. A report on the banality of evil (1963).
4 E Young-Bruehl *Why Arendt matters* (2006) 3.
5 As above.
6 As above 166.
7 As above.
8 Arendt 'Some questions of moral philosophy' in J Kohn (ed) *Responsibility and judgment* (2003) 49 as quoted by Young-Bruehl n3 166.

prostitution, tax, socio-economic rights and many more. Articles were submitted by students from within and outside the University of Pretoria and include submissions by undergraduates and postgraduates. We are honoured to publish also an article by a visually impaired student this year.

3 Taking stock

Coming to year end we often take stock of what we've been doing during a year, what aims or milestones have been achieved and we pose those existential questions of who are we and where are we going? Below I share briefly some of the thoughts that I shared in a seminar hosted by Law House related to their theme of the year, Year of the woman. I started by recalling the following story as told by Danish author Karen Blixen:

> A man, who lived by a pond, was awakened one night by a great noise. He went out into the night and headed for the pond, but in the darkness, running up and down, back and forth, guided only by the noise, he stumbled and fell repeatedly. At last, he found a leak in the dike, from which water and fish were escaping. He set to work plugging the leak and only when he had finished went back to bed. The next morning, looking out of the window, he saw with surprise that his footprints had traced the figure of a stork on the ground.[9]

Adriana Cavarero responds to the story by asking if one will be able to see a stork at the end of one's life — is there a design that has a meaning to be recognised? Following Hannah Arendt, Cavarero insists on the importance of *who* someone is rather than *what* someone is.[10] *Who* someone is can only be revealed by stories. The tendency in philosophy and, of course, law is to give prominence to the *what* rather than the *who*. In my work over many years I have attempted to think about and suggest a jurisprudence that strives to be attentive to the *who*, that could be open to the possibility of interconnectedness and relations. As Cavarero states, the extent to which a design, meaning could be recognised is not something that can be foreseen, projected or controlled. The man in the story did not intend anything more than to find the reason for the noise and fix it — the design, meaning at the end, the trace of a stork, happened without any preconceived plan, design or project. What stands out in Blixen's story and Cavarero's engagement with it, is the emphasis on being attentive to the story of *who* someone is, and the possibility of meaning coming to the fore, interconnection and relationality recognised.

9 A Cavarero *Relating narratives. Storytelling and selfhood* (2000) 1.
10 As above 2.

For me after more than three decades at the university initially as a student and later as lecturer it is interesting to stop and wonder for a moment about the picture/image/design that has been, and is being, and will be traced. What I really appreciate about Blixen's story is that there is nothing grand or monumental about it, nothing is lasting, when the sun rises the design created by the footsteps will disappear, but what makes it complex and therefore interesting is that at the same time there is not nothing …

During my talk to Law House I shared some observations in line with their theme, 'Women in academia' but my sense is that it applies over a broad spectrum. I recall only two here. Firstly the idea that a life at the university, the life of the mind, intellectual endeavours are beyond and totally different from the steps (promotion/ achievements) that are often held to be what should be strived for. To connect with the story of the stork mentioned it is who one is and not what one is that counts.

Secondly, what kept me sane (more or less) but also what kept me here at UP for so many years was the extent to which different places and spaces within the university became a *home* for me. And of course as a feminist I know that the home is often the most unsafe, violent and unhappy place for a woman - at the same time I believe that a home, symbolic or material, can be a source of strength and imagination and hope — a place or space from where one can think and read and write and speak.

Let me end this reflection by making reference to a recent article in which I reflect on the neoliberal university.[11] The main objective of the article by drawing on work on atmosphere, affect and complexity, is to reflect on the way in which a certain neoliberal logic and rationality have become a kind of common-sense — but of course exactly not in the Arendtian understanding of common-sense reached after taking into account a plurality of perspectives — at the university. I contemplate the possibility of a different aesthetic: one that acknowledges bodily-presence, sensory experiences, complexity and the need to slow down, to step aside from counting, competitiveness and suffocation. This kind of aesthetic could influence the idea of the university as a public space, may make it a space of inhabitance and could offer an alternative to present day campuses where one is allowed only if biometrics are captured; where interdicts reign, preventing any form of protest or dissent. My sense is that a different aesthetic could transform the curriculum, disclose opportunities for ideas and reflection and produce more than functionaries to further the machine. Crucially, it will enhance the

11 K Van Marle 'Life is not simply fact': Aesthetics, atmosphere and the neoliberal university' (2018) *Law and Critique*.

world outside the university if graduates could contribute to a life-world that is not one of mere instrumentality.

Of course when one thinks and writes about the university it is important to note both the Western and masculine nature of the university. In the words of Mahmood Mandani '[most universities] are local instantiations of a dominant academic model based on a Eurocentric epistemic canon.'[12] The implication of a Western canon is that it values only Western/ masculine notions of the truth and rejects all other forms of knowledge. An important feature of many Western epistemic traditions is their reliance on a certain division between 'mind and world', 'reason and nature', and on a detachment between the 'knower' and the 'known'. This point doesn't speak only to epistemology, ways of knowing, but also ontology, ways of being. Achille Mbembe notes that the main problem of this form of epistemology and ontology is that they become hegemonic and do not acknowledge other ways of understanding, being in and inhabiting the world.[13]

I would like to draw on Mbembe's invocation in the preface to the African edition of *On the postcolony* of the words of W.E. Du Bois that 'Life is not simply fact.'[14] He highlights the role that African music played in the writing of the book. He says that the traditions of the African novel and late 20th century African music taught him 'that to think is to experiment … To think … is also to recover and rescue the figurative power of allegory as it applies to specific realms of human experience'.[15] Lastly he says that to think is 'to embark on a voyage of the mind.' He comments also on critical thinking, saying that it means 'to work with the fault lines, to feel the chaotic touch of our senses, to bring the compositional logics of our world to language.'[16] He further describes critique as 'witnessing' and as 'endless vigilance, interrogation and anticipation.' Echoing the words of Du Bois that 'life is not simply fact' Mbembe declared the role that art and music and literature play in disclosing multiple aspects of life that 'objective knowledge' couldn't reveal.[17]

Like the man running up and down to fix his pipe this reflection is not designed to leave you with a worked out message or lesson. But it is also not mere words stringed together. Take a moment and connect the dots between Butler's thoughts on politics in the time of aggression and injury; anti-intellectualism and censorship as response

12 M Mamdani 'Between the public intellectual and the scholar: decolonization and some post-independence initiatives in African higher education' (2016) *Inter-Asia Cultural Studies* 17 68-83.
13 A Mbembe 'Decolonizing the university: New directions (2016) *Arts & Humanities in Higher Education* 15 29-45.
14 A Mbembe *On the postcolony* (2015) xiii.
15 As above xv.
16 As above.
17 As above xvi.

to complexity; and Arendt's description of Eichman as thoughtless, banal, a follower of rules to serve his own ambition. Go further and think about the notion of judgment as something that occurs by taking into account a plurality of perspectives and positions. Bring all of this to the university, but also to your life design. Are we open for Du Bois's insight that life is about much more than facts; ethics and morality about much more than a mere following of rules; humans about much more than what we do, and what we are, but rather who we are? Do we honour the interdependence of humans, fundamental connection and relationality?

I have had the privilege to work with a team of editors committed to the continuance of the university and the faculty of law as an intellectual space where the pursuit of ideas is encouraged and celebrated. We had numerous meetings where we deliberated and imagined a plurality of perspectives to guide us in making decisions. I want to thank everyone of you, Primrose ER Kurasha; Agnes Matasane;, Vaughn Rajah; Kirsten Swanepoel and Jurgen Zwecker for your dedication to the journal and for keeping the intellectual life of the faculty going in this way. A special word of thanks to Jurgen who in a calm and wise manner kept things together and worked hard to finalise the volume. A thanks also to Adebayo Okeowo for the care he took in putting together the back and front pages of the journal. Thanks also to Lizette Hermann for her enthusiastic support and technical savvy. To all the authors who submitted articles and to those whose articles have been taken up in the journal in this volume — congratulations to all of you. All the best to the 2019 editorial board and hereby an invitation to all of you reading this edition to write and to submit to the journal. Happy writing!

TOWARD AN ETHICALLY ORGANIC JURISPRUDENCE: A PARADIGMATIC RE-IMAGINING OF SOUTH AFRICAN CONSTITUTIONALISM*

*by Louis G. Hennop**

1 Introduction

The law is not a *holy cow* which rests upon an intellectual pedestal. In fact, this essay seeks to demonstrate that the law, by its very nature, is a paradigm of thought and social expression within the interconnected system of human society. The focus of this essay will be on jurisprudence, or 'legal philosophy', which concerns the nature, origins, scope and values of the law as a whole.[1] A discussion of these various elements of the law, when seen as a thought paradigm rather than an untouchable draconian system of control, will provide the substance of the argument to follow.

I have chosen to place my focus on jurisprudence for two reasons: First, it is precisely the emphasis on the many sub-disciplines of the law, as opposed to the underlying philosophy of the law, and their indisputable power in society that places the law on a pedestal in the minds of legal scholars, legal practitioners as well as society at large. Second, as argued by Douzinas and Gearey, jurisprudence can be seen as both the 'consciousness' and 'conscience' of the law and so may offer insight into its foundational assumptions and functioning.[2]

* This essay constitutes an adapted version of a submission by me in completion of the subject JUR 420, under Professor K Van Marle.
** BA (cum laude), BsocSci, Final year LLB student, University of Pretoria.
1 J Webb 'Jurisprudence' in J Webb (ed) *Dictionary of Law* (2009) 296.
2 C Douzinas & A Gearey *Critical jurisprudence. The political philosophy of justice* (2005) 5.

The goal of this essay will be to posit an adapted conception of jurisprudence particular to the contemporary South African context and the needs incumbent on a post-apartheid transformative society. Constitutional jurisprudence has succeeded in many endeavours since the inception of the final constitution in 1996, taking great strides in the promotion of a fair, just and equal society. Through transformative adjudication [3] in the judiciary, see the decisions of the courts in cases like *Fourie*[4] and *Grootboom*[5] as examples of the judiciary intervening to promote the values of the constitution in the application of the law. As well as legislative practices like the enactment of the PAJA[6] and Employment Equity[7] acts, which endeavour to bring the wide values set out in the constitution into the ambit of everyday legal practice.

However as argued in the text by Zikode, considering the plight of the members of the Abahlali Mjondolo movement, the law on paper does not always translate to justice in practice.[8] The argument to follow will illustrate how an adapted conception of jurisprudence as an ethically organic entity functioning within contemporary South African society can offer the law a chance to grow and transition from an ethereal *holy cow* to a real world, adaptive system striving to achieve transformation in every facet of society. In this way, by addressing the underlying paradigmatic methodology of jurisprudence which itself forms the intellectual basis of the law, such a conception may well address the prevailing legal inadequacies as identified by Zikode and others.

This essay assumes the following structure: The first section considers the nature of jurisprudence as a social thought paradigm, considering its varying underlying methodological structures and values. It evaluates the limits of the law, its progression from a 'general' to a 'specific' jurisprudence and how a legal mentality based on a specific jurisprudence acts as a restraining force in the pursuit of justice and in fact creates the potential for the law to act as a tool of oppression and injustice. The second section considers the potential of the law to return to a general jurisprudence. I propose a re-imagining of jurisprudence itself, based on the model of an ethically driven, organically functioning organism, founded in the contemporary South African constitutional dispensation.

3 For a detailed description of the term 'transformative adjudication' consider the text by D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 209-221.
4 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).
5 *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC).
6 Promotion of Administrative Justice Act 3 of 2000.
7 Employment Equity Act 55 of 1998.
8 S Zikode (2011) 'Poor people's movements and the law' http://abahlaliold.shackdwellers.org/?q=node8551 (accessed 10 September 2018).

2 From a general to a specific jurisprudence: the limitations and dangers of the law

2.1 Theoretical foundations

The term 'paradigm' will be used throughout this essay to refer to jurisprudence as well as other intellectual phenomena. When mentioning a thought paradigm, I refer to the following: a system of thinking, often but not necessarily exemplified in intellectual disciplines, deriving from certain basic epistemic assumptions and manifesting in a prevalent methodology within a human society at any particular time. Koons conceptualises this in terms of moral concerns by using the term 'moral language' and defines it as a means by which humanity seeks to understand itself, its place in existence, and the various questions of right and wrong and real and false that present themselves to the human mind in said contemplations.[9]

Douzinas and Geary introduce the terms 'general jurisprudence' and 'specific jurisprudence' in reference to legal thought paradigms and define them as follows: A 'general jurisprudence' is derived from and dependant on the process of intellectual reflection on the relationships and dynamics inherent in society as having begun with the early 'legal' philosophers, Plato, Aristotle and their contemporary moral philosophers, and their contemplation of the social bond between the sources of power in society and the subjects of that power.[10] They contend further that this initial contemplation of the rules and regulations relating to values and norms lead to the emergence of other disciplines of study related to human society and the functioning of said societies and the individuals within, which we now refer to as the 'humanities' disciplines.[11] A 'specific jurisprudence' is categorised by Douzinas and Geary as a legal paradigm concerned principally with contemplation of the law in and of itself, seeking an answer to questions like 'what is the law?', 'how can the law be categorised and sub-divided?' and 'how can the sub-divisions of the law be conceptualised and defined as specifically as possible?.[12] In short, general jurisprudence does not implicitly elevate the law above a contemplation of its interaction with society while the various historical reincarnations of specific jurisprudences tend to alienate the law from the dynamics of the societies it finds itself existing in.

9 J Koons 'Earth jurisprudence: The moral value of nature' (2008) 25 (2) *PACE Environmental Law Review* 265-266.
10 Douzinas (n 3) 3.
11 As above.
12 Douzinas (n 3) 10.

2.2 From general to specific

Throughout modernity the law has been commonly regarded as elevated above the status of the 'humanities'. Thus, the law is seen as separate, higher than or purer than, for example, the fields of psychology (the study of the human mind and behaviour), sociology (the study of the functioning of social structures and dynamics) or political science (the contemplation of the power dynamics within society and how they impact those beneath them) to say nothing of the study of art, literature and philosophy. Koons postulates the reason for this as being the rise of modernity, that is to say the paradigm of positivistic truth finding, determined by the scientific mentality of the 17th and 18th century Western enlightenment thinkers.[13]

Before contemplating the effect that modernity had on jurisprudence, let us first consider the nature of jurisprudence as outlined by Douzinas and Gearey and extrapolated on in this essay. They frame jurisprudence as both the consciousness and conscience of the law.[14] When referring to consciousness they contend that jurisprudence reflects the basic intellectual framework and contemplative elements of the law. As its conscience, jurisprudence assumes the role of moral guide, reflective of inherent values of society at a given time and mirrored by Koons' term, 'moral language' used above. The law can thus be said to not only be an intellectual paradigm, but also morally guided and determined, that is to say operating according to a moral mandate. Both these elements of jurisprudence are important in this essay as it faced challenges and evolved in manners detrimental to society along both these axes, and the proposed solution to the challenges of jurisprudence must consequently be addressed along both axes.

2.3 The law's consciousness

First in relation to the consciousness axis, I refer back to the influence of the enlightenment and scientific positivism, during modernity, on jurisprudence. The influence of the broader societal thought paradigms on the law, and its influence on them amounted the law being seen as a truth finding endeavour, dependant for its legitimacy on objectively determinable facts and systematic evaluation thereof akin to the methodological process witnessed in the sciences.[15] The human element was removed as far as possible form the law, and it was envisioned to be a technical discipline based on the dispassionate

13 Koons (n 4) 266.
14 Douzinas (n 3) 5.
15 Douzinas (n 3) 6, consider in particular the 'Science of the Law' as considered by Kelsen and Hart's *Positivism*.

application of codified and crystalised legal principles, narrowed and honed over time, to individual legal matters which according to Douzinas and Gearey critically impoverished jurisprudence.[16]

Such a change in the methodology of the law resulted in further impoverishment of the moral aspects of jurisprudence, its conscience, as will now be illustrated. The process entailed the rather straightforward logical inference that if the law was legitimate due to an evaluation of objectively verifiable facts, operating along the principles of dispassionate logic and reason in order to determine moral truth, then any result of the legal process must be regarded as both true and fair.[17] Such a manner of thinking, whereby notions of truth and fairness were determined in accordance with the principles of objective logic and reason, was not confined to the law but saw parallels in other intellectual paradigms occurring in the same general time period in Western thought. Philosophical examples may be found in the prevalent moral and ethical theories of the time, as seen in the Kantian *Critiques* of reason and morality,[18] and the utilitarian philosophies of Bentham and Mill.[19] The net effect of the prevalence of this positivistic paradigm can be seen in the fact that along with the human element being pushed to the side-lines, notions of pluralistic values and morals, stemming from the diverse elements within society were also marginalised and set aside in favour of pure logical principles.

However, the notion of individualism in interpretation of the law continued to be a problem for proponents of positivistic law. While the law may be codified in a manner so as to be consistent with the above principles, and thus 'fair', on a case by case basis. It remained down to an individual or group to make a substantive determination as to how the law applied to the facts. This lead inevitably to the intrusion of values, morals and individual or group perspectives and opinions on the *pure* evaluation of legal principles.[20] Additionally it remained a hypothetical exercise alone, that is to say an intellectual opinion contradicted by a common sense observation of society, to see the law as operating within a vacuum, unaffected by social and political realities, as protests and uprisings against established legal orders have been a constant throughout human co-existence and continued to be at the time.

16 As above.
17 Douzinas (n 3) 6.
18 Douzinas (n 3) see the discussion on pg 50.
19 Koons (n 4) discussed in footnote form by Koons on pg 268.
20 Douzinas (n 3) see the discussion on 'individual discretion' on pg 7.

2.4 The law's conscience

An attempt to acknowledge the contextual elements within the law came about in the form of jurisprudential hermeneutics, which saw the application of the law as an act of active interpretation, by an individual or group, existing within a specific context in space and time, based on a framework of textual interpretation.[21] This succeeded in introducing an element of plurality or multiplicity of potential meaning into the data being analysed by the law, allowed for differing systems of value deriving from social context and individual perspective, as well as offering a potential explanation for the problem of individual discretion.[22] However, this solution was not beyond reproach, the main point of contention coming in the form of post-modern notions of power dynamics. Beginning with philosophers like Nietzsche, and his notion of a 'Will to power'[23] and culminating in the work of the great existentialist philosophers such as Foucault in his critique of historicism.[24] The role of *power* came to the fore in both critical philosophy as well as critical legal theory, a trend that has persisted in the present day in the paradigms of Marxist critique,[25] the black consciousness movement[26] and feminist legal philosophy.[27]

In the above mentioned intellectual traditions, the emphasis was not placed on the methodology with which the law operated but rather on those who benefitted from its operation, in other words the law was brought down in a sense form its pedestal and opened to scrutiny. The heart of this endeavour lay in the exercise of regarding the law as not somehow above and separate to society but functioning as an element thereof, in this way it was possible to see the law as both a tool of oppression as well as a potential tool for liberation. The problem presented by such a hermeneutic jurisprudence was however that any critique of jurisprudence following such a methodology still fell into the same trap that claimed legal positivism, the quest for truth in law. Such a quest implied that if the values of society at any

21 Douzinas (n 3) 8.
22 As above.
23 Douzinas (n 3) discussed on pgs 49-50.
24 Whereby the notion of an emphasis on the recording of history necessarily created one coherent account of truth and several disputed accounts thereof see Douzinas (n 3) 53-56.
25 Establishing the power base in society as resting with those who control the economic means of production, which is contended to be the white minority in South Africa by Nash, see A Nash 'The double lives of South African marxism' in P Vale et al (eds) *Intellectual Traditions in South Africa* (2014) at 52-53.
26 As discussed by More, referring to the notion of the black 'other' forming a reactionary consciousness in response to oppression by the racial power elite, see MP More 'The Black Consciousness Movement' in P Vale et al (eds) *Intellectual traditions in South Africa* (2014) at 180.
27 Consider K van Marle 'Towards a politics of living' in K van Marle (ed) *Sex, gender, becoming: A post-apartheid reflections* (2006). For a detailed account of the difficult birth of the female identity in a society governed from a legal and political foundation of patriarchy.

given time were seen as the source of legitimacy of the law, and the law functioned according to a logically and rationally fair process stemming from a consideration of such values, then any determination made by the law must be both fair, logical and ethical.

The problem with this seemingly adept solution was that by creating such a view of the law, as having been subjected to critical evaluation, and thus producing ethically sound judgements, the impression was created that again legal truth could be obtained. The unintended consequence being that if only one legal truth existed, all other accounts must by definition be untrue or at the least, inferior. In her work on 'curating community' Douglas posits a similar argument regarding the way history is remembered in museums, to the way laws are enshrined in constitutions.[28] She makes the argument that by seeking to preserve or 'curate' history or knowledge, the ones doing so in effect advance the view that there exists an official version of history or law, and thus relegates any 'unofficial' accounts to the periphery, this destroys plurality of truth and furthers the construction of the 'other' i.e. that which exists outside the officially correct and thus occupies a lower status.[29]

One could argue that post-constitutional South African legality falls into this same trap. The effect of the entrenchment of the Constitution as the supreme law of the Republic along with the supremacy of the rights contained in the Bill of Rights in matters of legal interpretation,[30] creates the impression that any ruling shown to be in line with the Constitution is by inference also in line with the multiplicity of values in existence in South Africa. Such a view has been consistently criticised by legal academics as limited, in that the Constitution is accepted as the protector of all South African groups and furthering the use of the law as a tool of oppression. Any jurisprudence which could be so criticised, could be said to fall within a specific jurisprudence, limited as were the positivistic jurisprudences of the 'modern' period. The goal in contemporary jurisprudential theory seems to be a move away from this and back to a view of general jurisprudence, where the law itself is seen as not higher than but stemming from the interconnected system that is society. When the law is seen as elevated above other fields of study contemplating the nature and dynamics of society and those within it, it fails to learn from them. In short when the current constitutional dispensation is lauded as inherently representative, then by extension any legal ruling stemming from it is also seen as both fair and representative.

28 S Douglas *Curating community. Museums, constitutionalism and the taming of the political* (2017) 5-7.
29 As above.
30 Section 39(2) of the Constitution of the Republic of South Africa, 1996.

3 The way forward: An ethical and organic general jurisprudence

As explained by Douzinas and Gearey, original 'general' jurisprudential thought was not seen as higher than or separate from thought regarding other aspects of society and the relations of individuals therein. As such, jurisprudence often learned and borrowed from other systems of thought. It is contended here that such a view of jurisprudence must be as possible now as it was then, and that the move towards such a general jurisprudence is the key to avoiding the trap outlined above. It must be stated that any such attempt to rethink the methodology of jurisprudence must be done with a substantive goal in mind; that is to say with the intention to attain justice. This is because jurisprudence, unlike other fields of intellectual enquiry, does not seek simply to generate knowledge and understand a subject matter but seeks to protect those whom it seeks to understand. In other words, jurisprudence must operate with a moral mandate - it must serve as conscience.

Despite the highly refined and patently value based Constitution of South Africa, there seems to be a clear gap between the protection promised and that enjoyed by the proverbial 'man on the street'.[31] As to how jurisprudence may move closer to such a general and inclusive structure, we can have regard to the following sources for a potential answer: Manderson mentions the reading of a novel and literary analysis as a potential avenue from which the law can learn.[32] It is theorised that when a novel is read it is constantly recreated, that the impression of the novel is formed by a complex interplay between the work, the intention of the author, the reader and the context within which each of the above occur, and that meaning is recreated each time that an attempt at meaning is sought.[33] This allows for both an active process of meaning formation, as well as an attitude that embraces the plurality and interconnectedness of society.[34]

While providing an avenue as to the potential methodological changes required of the law in relations to its functioning, this hermeneutically derived approach does not address the trap set by the inherent *will to power* in the law, and so a further perspective is required. This may be found in the perspectives of Barr,[35]

31 Zikode (n 9).
32 D Manderson 'Michael Bakhtin and the field of law and literature' (2016) *Law, culture and the humanities* 12.
33 Manderson (n 25) 25-26.
34 As above.
35 O Barr 'Legal footprints' (2017) *Law Text Culture* 21 at 217.

Van Marle,[36] and Koons.[37] Each author posits a slightly different critique of jurisprudence, however they each focus on the purpose behind jurisprudence, that is to say its *aim* or methodological focus, and emphasise how an awareness and thus an adaptation thereof can direct jurisprudence toward a state better able to function as a conscience of the law that leads it towards justice. Barr conceptualises a minor jurisprudence which regards the law in the same way that those exposed to it regard art, that is to say with an emphasis on the fact that art invokes the emotions of its viewer, and also acts as a reminder of the history of its subject, it must be interpreted in the moment and when seen after the time of its creation, in relation to the subsequent context of the viewer and the subject. In this way it serves as a 'memory' of the social context in which it is viewed.[38]

Van Marle stresses the 'slowness' of legal interpretation, referring to the ideal that an emphasis should be placed on the present and past, so as not to lose sight thereof in a relentless pursuit of the goals of the future or a fixation upon an achievement at the expense of a continual endeavour.[39] Koons states that humanity must not be assumed to be at the heart of any question of morality, as both the sole subject matter and arbiter of the moral questions inherent to the law, but must acknowledge the nature of humanity as but one part of the 'earth' as an interrelated and interconnected whole.[40]

Each of the above thinkers emphasises a basic problematic assumption or tendency of contemporary jurisprudence and offers potential solutions, I would tie them together in the following: an ethically organic South African jurisprudence, as general jurisprudence and way forward. I propose a conception of the *consciousness* of jurisprudence as modelled on an organic entity, functioning according to the *conscience* provided by a post-modern idea of ethical inclusivity.

In terms of the consciousness or functioning of jurisprudence, organic here refers to the dynamic, constantly evolving nature of any living entity. In order to remain in existence any living organism must pass the twofold test of evolutionary biology: it must constantly adapt to the environment in which it finds itself, retaining the qualities that aid its survival and discarding the elements that would endanger it. Furthermore, it must function as part of an interconnected whole, in harmony with the environment in which it exists. Jurisprudence must thus function in a constant state of adaptation, responding to the

36 K Van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* at 255.
37 Koons (n 4).
38 Barr (n 28) 234.
39 Van Marle (n 29) 240-242.
40 Koons (n 4) 264.

needs and context of society, and being revaluated in terms of any potential weaknesses discovered within it. This process of evaluation could only occur by an acknowledgment of the necessarily dynamic nature of jurisprudence and a commitment to its constant and endless review and reconstruction (by both legal academics, members of the public and other interdisciplinary thinkers). Furthermore, such a jurisprudence must function as part of a paradigmatic whole, taking from other systems of thought (including all those identified above) and in that way better reflecting the changing needs of society as well as its own shortcomings.

By functioning in the way envisioned above, an organic jurisprudence might better acknowledge any inherent biases or stagnation within itself and adapt accordingly. However, a revision of the functioning of jurisprudence is not enough, as stated above it must always exist with a moral goal in mind. Thus, the next step is to consider the conscienc*e* aspect to jurisprudence, as it cannot simply understand and act retrospectively, but must also act proactively. The law must function in the interests of those entities it concerns. This is possible through the integral incorporation within the nature of the newly conceived jurisprudence or an ethical orientation. I look here to the theorists above and conceive of a jurisprudence exemplified by a constant regard for the plurality of voice within South African society; that is to say that avoids the trap above by not seeking truth but rather seeking representativeness.

While the law cannot function in an endless state of contemplation and must at some point act and reach conclusions in order to function in the interests of society. The constant emphasis on the need to slow down and consider the events of the past and the needs of the plurality of voices found in the present, would ensure that the act of legal implementation not fall into the trap outlined above. This is done by entrenching the need for representative inclusivity of all stakeholders in legal matters, and where this is impractical, a constant emphasis on the accountability of the law to society. This will be best assured with regard to the interconnected intellectual paradigmatic environment present in society. If such an approach is to be followed, its representative value i for the South African society and its needs should be an acceptable endeavour not only in a piece of legal scholarship such as this but in any court of law.

4 Conclusion

The progression of jurisprudence as contemplated by Douzinas and Gearey was considered, beginning from the general jurisprudence which emerged in the early philosophical contemplation of society. Such a jurisprudence differs from that seen in modernity in several crucial respects, most importantly in the sense that jurisprudence and

legal thinking is not seen as separate to, or more pure than other forms of social or aesthetic thought and so can learn from these fields. Jurisprudence however changed to what may be seen as a specific jurisprudence when it split substantively from other paradigms and adopted an essentially narrow positivistic methodology. The result of this was the creation of the jurisprudential 'other' and the use of the law as a tool of oppression rather than a tool for justice.

The law itself stagnated and was often behind the times as far as meeting the needs of society, a situation not improved by the emergence if jurisprudential hermeneutics. While this advent may have addressed the methodological shortcomings of the law it did not pay sufficient heed to the inherent power dynamics at play whenever legal codification and interpretation occurred. I refer in this context to the trap placed on jurisprudence by the very fact that legal protection and the centrality of a value based system, in the absence of constant scrutiny and evaluation, still amounts to the emphasis of a higher or more pure legal truth.

The result of this perceived legitimacy is a tendency to miss potential omissions and thus potentially divergent voices and so to continue the process of legal 'othering'. As a solution I proposed a general jurisprudence as an ethically organic South African jurisprudence, modelled on the constantly evolving and adaptive living organism, subject to constant ethically inclusive scrutiny. The utilisation of such a model is not only in keeping with the notion of transformative constitutionalism as a never-ending bridge[41] but does not require abandoning the Constitution as supreme law either. Rather, it requires constant vigilance of the potential trap of complacency and arrogance, and the necessity of listening to the voices of the society in which the law operates.

41 The metaphor in play here, featuring the constitution as a historic bridge moving from a past founded on abuses of equality, freedom and human dignity to a transformed future is taken from the 'Epilogue' or 'Post-amble' of the Interim Constitution, Constitution of the republic of South Africa, act 200 of 1993.

THE COGITATION OF THE VALUE OF EPISTEMIC DIVERSITY IN SOUTH AFRICAN JURISPRUDENCE, AS INFLUENCED BY THE PROJECT OF INTELLECTUAL HISTORY: LESSONS FROM RHODES MUST FALL — 'ALL "RHODES" LEAD TO THE COLONISATION OF THE MIND'

*by Tshepo K. Twala**

* Third year LLB student, University of Pretoria. I dedicate all my writings to my late mother, Gugile Isabella Twala (1965-2002). This article examines the ideal epistemic aims of a critical jurisprudence in South Africa. It explains that epistemology is concerned with giving an account of knowledge and suggests that if legal scholars ought to aim at having their students acquire knowledge then their epistemic aims should be related to this goal. I contend that the epistemic aims of the law do not necessarily concern curricular subjects but with the way the work of a legal scholar should be guided by an understanding of the nature of knowledge itself. This paper not only deals with the historical development of political traditions but also gives attention to religious and communal intellectual practices. This paper also mulls the development of a South African critical race theory with reference to the thought of Steve Biko. In a wide sense, the purpose of this paper is also to bring the insights of the Black Radical Tradition to bear on the study of law and jurisprudence, with attention placed on the predicament of 'post'-apartheid South Africa. In essence, this paper demonstrates that: 'Only by rethinking the ideas that made us can we re-imagine the world'. My thanks to Professor Karin van Marle for explicate comments and perspicacious discussions. I must also thank Nikeliwe Vilakazi, Nikithemba Monakali, Adv Mayuri Pillay, Mduduzi Twala, Muzi Mgabhi, Siphiwe Nkwanyana and Kagiso Mathebula for inputs, support and editorial suggestions to the final draft of this article. Lastly, I thank Dr Joel Modiri and Dr Tshepo Madlingozi for the inspiration towards the journey of legal writing.

1 Introduction

The project of intellectual history is to reconsider the traditions and ideas and unearth suppressed knowledges that shaped (and are shaping) South Africa.[1] Critical Jurisprudence offers an ethics of law against an aesthetics of existence and the nihilism of power for the melancholic lawyer.[2] Douzinas and Gearey describe the history of jurisprudence 'as the movement from general to restricted concerns, where thinking about the law of the law' was substituted and overhauled by 'a professional and technical approach'.[3] This essay reflects on how critical legal theories (i.e. legal pluralism, Black Consciousness (BC), feminist legal theory, Marxism, power and Critical Race Theory (CRT)) could offer critical interventions in the development of a critical jurisprudence and the fundamental paradox of 'post'-apartheid South Africa, namely the escalation and continuation of racial inequalities and social hierarchies produced through over 350 years of white colonial domination in a 'new' constitutional order that embraces egalitarian and non-racial ideals.[4] This will be done through an investigation of the above-mentioned theories in relation to the evolution of intellectual traditions in South Africa and how they perpetuate(d) epistemicide. The calls for a 'race conscious' and general jurisprudence shall be advanced through the epistemological paradigm of BC, CRT, Critical Race Feminism (CRF) and classism which offers a political account of the law through the acknowledgment of the centrality of race in law.[5] I also reflect on the Rhodes Must Fall Movement (RMFM) and how it purported to advance the development of a feminist jurisprudence, eradication of intellectual eclipse and class and the need to build the power of the poor from below.[6]

1 K Van Marle 'The complicity of language, knowledge and justice' (2017) 49(1) *Acta Academia* 107.

2 C Douzinas and A Gearey *Critical jurisprudence: The political philosophy of Justice* (2005) 3-5.

3 J Modiri 'The crises in legal education' (2014) 46(3) *Acta Academia* 3.

4 JM Modiri 'The jurisprudence of Steve Biko: A study in race, law and power in the "afterlife" of colonial-apartheid' (2017) unpublished PhD thesis, University of Pretoria 1.

5 N Nhleko 'Positioning race at the centre of legal discourse in post-apartheid South Africa: Dissecting *Cliff v Electronic Media* (Pty) Ltd and the land reform crisis' (2016) 10 *Pretoria University Law Press* 112.

6 S Zikode, 2 December 2011, 'Poor people's movements and the Law', http://abahlali.org/node/8551 (accessed 26 May 2018).

2 The project of intellectual history: The shift Towards a critical jurisprudence, intellectual activism and the possibilities for epistemic diversity and epistemic justice

> What's her name? Charnell? She is a kitchen assistant in Observatory and now she's an expert. She doesn't know what the budget of the City Council is; she doesn't know what money they get. She doesn't know this stuff. She is a kitchen assistant.[7]

The quote above refers to the — racial, sexist and classist — comment made by Judge Leslie Weinkove during an eviction case in Cape Town. This quote reflects that the views of the marginalised as well as the dominant are distorted by relationships of domination and oppression.[8] In accordance with the notion of 'listening to the spirit from (un)expected places' by De Beer,[9] the themes discussed below demonstrate the epistemic value of diversity and the need for intellectual activism in the advocacy of a critical jurisprudence. Vale argues that '[p]eople who understand everything get no stories'[10] — He uses this quote to demonstrate the importance of rejecting a past and present that insists on the grand narrative as it denies the multiplicity of voices and stories.[11]

2.1 Black Consciousness (BC): A study of the jurisprudence of Steve Biko

Steve Biko echoes the calls for race consciousness through the ideology of BC which centres upon the idea that the mental emancipation of the Black man is essential to the realisation of *de facto* liberation.[12] One cannot understand the intellectual or political ideas of BC in isolation without taking into account the philosophical,

7 News24, 31 January 2017 'Bromwell Street judge stuns with court comments', https://www.news24.com/SouthAfrica/News/bromwell-street-judge-stuns-with-court-comments-20170131 (accessed 20 May 2018).

8 S Freire *Pedagogy of the oppressed* (2000) 31-35.

9 SF De Beer 'Urban social movements in South Africa today: Its meaning for theological education and the church' (2017) 73(3) *Aosis* 2.

10 P Vale (2014) 'Of ships, bedraggled crews and the miscegenation of ideas. Interpreting intellectual traditions in South Africa' in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* 1.

11 As above.

12 S Biko *I write what I like* (1987) 29. In Biko's writings, we find what could be called a 'materialist' or 'realist' account of social identity — in contrast to a discursive or idealist account. Most fully elaborated in the work of Linda Martin Alcoff, a materialist or realist conception of identity proceeds from the belief that the social identities of humans have 'constitutive power' and are 'epistemically salient and ontologically real'.

social and political milieu from which they originated.[13] BC is both a philosophy and a movement that demands the black person's coming into consciousness of herself as black.[14] BC suggests that there should be a realisation that racism is not a mistake but an intentional act and a strong solidarity among blacks as the victims of white racism.[15] According to Biko, BC is the realisation, by the black man with his brothers, of the need to rally together around the cause of their oppression and to operate as a group in order to rid themselves of the shackles that bind them to perpetual servitude.[16] Biko portrays that, while the injustice of excluding members of marginalised groups from knowledge production and dissemination has been widely accepted, the epistemic relevance and role of marginality and greater inclusiveness in creating more justified knowledge claims are imperative in the advocacy of intellectual activism and stimulation of epistemic diversity.[17]

Echoing Biko, I contest for the embrace of a race conscious jurisprudence that inspires a culture that is antagonistic towards institutions that perpetuate racist ideology.[18] BC is not a movement to 'enter' the white South African polity but to (re)create it and 'establish a completely new system'.[19] In accordance with the dictates of the African existential philosophy, black existential philosophy is a systematic existential-phenomenological approach to the lived experience of black people in an intrinsically anti-black space(s).[20] In such spaces, anti-black racism plays a supreme role in the lived experiences of blacks. Douzinas and Gearey formulate CRT as an approach to law, society, politics and discourse that repeatedly stages a confrontation between 'Black power' and 'white law'.[21] The shift from a general jurisprudence to a restricted jurisprudence is described as a story of decline because it has resulted in the cognitive and moral impoverishment of legal theory.[22] To comprehend how anti-black spaces were created and maintained, CRT relies on the historical analysis, social science insights and multidisciplinary

13 MP More 'The intellectual foundations of the Black Consciousness Movement' in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 173.
14 More (n 13) 177.
15 S Biko 'Black Consciousness and the quest for a true humanity' in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 79.
16 Biko (n 15) 53.
17 E Robertson 'The epistemic value of diversity' (2013) 47(2) *Journal of Philosophy of Education* 299. The principles of black consciousness should be employed by black people so as to empower black people to remove themselves from the position that they have been placed in through centuries of oppression.
18 Nhleko (n 5) 123.
19 GM Gerhart *Black Power in South Africa: The evolution of an ideology* (1978) 276.
20 More (n 13) 179-181.
21 Douzinas (n 2) 259.
22 Douzinas (n 2) 4.

thinking for the general jurisprudence to gain this understanding.[23] Such reliance perpetuates the confrontation of the 'hermeneutical injustice' — a form of epistemic injustice that leaves its victims without a conceptual framework for articulating their experiences either to themselves or to others as a result of the forced implantation of colonial epistemology in the black society.[24] South Africa, Biko suggests, will not return to itself and to the African people to whom it belongs if the concept of reality, knowledge and reason imposed by the white settler-colonialist was not dislodged from epistemic legitimacy and authority.[25] Thus, it is fair to say that the resurgence of Biko's call for racial consciousness is accounted for by the paucity of intellectual thought in the prevailing social and political climate in South Africa.

Biko critiqued Christianity, arguing that it was largely irrelevant in its present form to young people: too passive in its dealing with oppression, too accepting of the status quo and too bureaucratic.[26] According to him, the rise and influence of black theology in the Black Consciousness Movement (BCM) represents the need for individuals to foster a sense of pride and the capacity to question authority – in other words, the biblical interpretations and messages, especially Christianity, had to be re-interpreted and redefined and rather preach that it is a sin to allow oneself to be oppressed.[27] He claimed that BC had to be connected to black theology so that religion would not become an obstacle to liberation.[28] Judge Weinkove's comment towards Charnell represents the perpetual role of marginality in South Africa, 'post'-apartheid, and its exclusion of voices from unexpected places because of being black. The manifestation of his comment is two-fold: (i) those, such as Charnell — a black woman, that are thought of as 'unexpected places' is because their spaces are poor, disenfranchised, delegitimised and seen as unable to think for themselves, to hold wisdom that could contribute to the greater good or to be clear and incisive;[29] and (ii) there is a dire need to challenge the dominant framing of 'post'-apartheid law with alternative theorisations of race, power and law — thereby widening the intellectual space that can be made audible to the present moment.[30] Judge Weinkove's remark(s) reinforces Biko's notion that race is a

23 J Modiri 'The colour of law, power and knowledge' (2012) 28 *South African Journal on Human Rights* 420.
24 Robertson (n 17) 302.
25 Modiri (n 4) 188.
26 A Egan 'Christianity as an intellectual tradition in South Africa: Les Trahisons des clercs' in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 262.
27 C Esterhuizen 'South African Social Theory: steve biko' unpublished msocsci thesis, university of cape town, 2015 36-37.
28 Egan (n 26) 251.
29 De Beer (n 9) 1.
30 Modiri (n 4) 234.

proxy for power and privilege in the South African society and demonstrates why it is necessary for the African society to view acceptance of oppression as a sin so as to challenge this proxy.[31] His comment towards Charnell demonstrates how racism was used as a tool to uphold epistemic violence towards blacks in apartheid as they, blacks, especially woman, were considered as lacking the intellect to introduce certain ideas in order to develop a tradition of valuing epistemic diversity.

Figure 1: photograph by Ashraf Hendricks[32]

This picture was captured in 2015 during the 'Rhodes Must Fall Movement' (RMFM), where students demanded that education must be free from Western epistemological domination, epistemic violence, Eurocentrism and worldviews that were designed to exploit, subjugate and degrade Africans and other formerly colonised peoples.[33] The notion 'all Rhodes lead to … colonisation mind' illustrates the students' critical introspection and declaration of their rejection of the oppression and exfoliation that the legacy of Rhodes

31 Esterhuizen (n 27) 36. The comments made by Judge Weinkove during this matter are in direct conflict with the Constitution and could easily lead to an erosion in confidence in the judicial system.

32 In this photo, Ashraf Hendricks demonstrates epistemic value of diversity and the need for intellectual spaces where 'fallism' feeds off the attempted epistemicide of African thought such as decoloniality and Afrocentricity and decoloniality.

33 International 360°, 13 November 2016 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa', https://libya360.wordpress.com/2016/11/13/decolonisation-of-higher-education-dismantling-epistemic-violence-and-eurocentrism-in-south-africa/ (accessed 22 May 2018).

in many ways embodies.[34] Students called for the end of domination by 'white, male, heterosexual, Western capitalist, European world views' in higher education and incorporation of other South African, African and global 'perspectives, experiences and epistemologies' as the central tenets of the curriculum, teaching, learning and research in South Africa.[35] The RMFM was a collective mobilisation by staff, students and workers at the University of Cape Town (UCT) against institutional racism practised at the institution.[36] The Students stressed that; although policies might be there, the willingness to implement them is lacking — thus, the higher education system 'remains a colonial outpost' up to this day, reproducing hegemonic identities instead of eliminating hegemony.[37] The reproduction of Eurocentric epistemic hegemonies in the South African education system is signified by the fact that most South African academics who teach about Africa rely primarily on Western interpretations of the continent.[38] The students' demands/arguments epitomise Biko's call for the development of an antagonistic attitude towards institutions that perpetuate racist ideology in order to dismantle the reproduction of Eurocentric epistemic hegemonies that have dominated South Africa because if, for example, the higher education is not free from Western epistemological hegemony as its central tenet and unwillingness to implement a curriculum that invigorates South African and African epistemologies, the culture of producing students that are racially nonconscious will endure. The project of deracialising/decolonising the higher education system by the RMFM activists is about the consciousness and rejection of norms, customs, values and worldviews imposed by the [former] colonisers to accelerate the call for reclaiming the indigenous knowledge systems of Africa in the higher education system.[39] However, it is imperative to take into cognisance that the purported decolonisation of the curriculum will not neglect other knowledge systems and the global context - institutions still have to develop graduates knowledgeable about the world and all its complexity, however, the education must

34 See *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para 165 for a similar illustration by the judiciary on colonial symbolism.
35 International 360° (n 33).
36 P Du Preez 'Critical transformation in higher education: Ethical reflections on #MustFall movements and concomitant gender-based violence' (2017) 31(6) *South African Journal of Higher Education* 99.
37 As above. This position has been exhibited by the Department of Basic Education of the Eurocentric History curriculum that has continuously defended the colonial propaganda and its proposed for the establishment of an Afrocentric History curriculum.
38 As above.
39 As above.

be free from Western epistemological domination that has continuously defended colonial-apartheid propaganda.[40]

2.2 Feminist jurisprudence: A movement to end sexism, sexist oppression and exploitation

> 'Feminism demands the enlarged mentality that allows the imagination to run free'.[41]

In this essay, contrary to Smart's warning against the quest for a feminist jurisprudence,[42] I exclaim for a feminist jurisprudence that approaches questions concerning women and the law in more dynamic ways by engaging with all cultural forms and spaces that influence women's subjective experience in terms of how they are perceived, portrayed and ultimately, treated.[43] Such a jurisprudence could seek ways in which to investigates implicit reinscriptions and invocations of gender injustice and identify the gender implications of laws that claim to be neutral.[44] The substantial endowment of feminist jurisprudence to legal theory includes: (i) the construction of the female subject in the language of law; (ii) explicit feminist questions involving the exclusion of women from certain areas of law; (iii) speculations of manners through which legal space be transformed to better reflect women's interests and experience. In other words, feminism signifies an intellectual and political movement that investigates patriarchal social structures and agitates for women to be treated as full human beings deserving of equal rights.[45] It should be noted that I am not saying males are not capable of being custodians of feminist jurisprudence but I demonstrate the need for the total transformation of thinking from the parasite of whiteness to transform the world to be free of patriarchy, anti-blackness, self-hating white systems in various research and study fields in order to demonstrate why it is intellectual obscuring to entrench their dominance, that fails to combat/eradicate imperative

40 International 360° (n 33). The current Eurocentric curriculum, coupled with epistemic violence, does not contribute to a much-needed reimagining of the past and shaping of the present and future on the African continent. This can only be achieved through a curriculum that 'reconstructs' Africa from the civilisational, historical, political standpoint and political economy perspectives. However, this will not happen until the Eurocentric institutional cultures and staff demographics at universities fundamentally change.

41 D Cornell *Just cause: Freedom, identity, and rights* (2000) 7.

42 K van Marle '"We exist, but who are we?" Feminism and the power of sociological Law' (2012) 20(2) *Feminist Legal Studies* 156.

43 J Modiri 'Popular culture, law and our "sexed and gendered lives": Feminist reflections on "refusal" and "sisterhood"' (2012) 23 *Stell LR* 132.

44 As above.

45 H Moffet 'Feminism and the South African polity' in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 225.

issues such as gender oppression, in academia.[46] Mere entrenchment of women's rights does not liberate them from the impotent intellectual spaces they find themselves in — rather, what is needed is a commitment, through legal pluralism and other critical legal theories, towards the development of feminist jurisprudence in the society.[47]

Accordingly, during RMFM, students called for the institutional change at universities which must include 'demasculanising and degendering' the institutions. In other words, by continuously endorsing male-dominated academia that fails to address gender oppression in their research and respective fields of study, the patriarchal norms will continue to devalue the importance of epistemic diversity as it leads to the continuous gender-based intellectual 'obscuring' and reproduction of students who are not gender-sensitive/gender nonconscious — thus returning to a restricted jurisprudence. This demonstrates why the shift from a general jurisprudence to a restricted jurisprudence is narrated as a story of decline because it has resulted in the cognitive and moral impoverishment of legal theory.[48] This impoverishment is signified by the lack of the advocacy of a feminist jurisprudence in most fields of legal academia in order to facilitate a return to a general jurisprudence because no effective transformation will occur if legal theory is cognitively and morally impoverished.[49] In other words, various research and study fields should strive to educate students that the mere fact that human bodies are designed to perform certain procreative functions, biological elements need not dictate intellectual function of woman. In this way, the reproduction of students who are gender nonconscious can be eliminated and degendering or demasculanising of institutions can be achieved as they will be able to contest for a female-inclusive jurisprudential dispensation.

bell hooks explains feminism in her book as 'a movement to end sexism, sexist exploitation and oppression'.[50] Feminism demands a non-essentialist theory of human sexuality and desire to achieve an understanding of the power relations between the sexes.[51] A

46 See A Nyamnjoh 'The phenomenology of Rhodes Must Fall: Student activism and the experience of alienation at the University of Cape Town' (2017) 39(1) *Strategic Review for Southern Africa* 256.

47 See *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) BCLR 1 (CC) where the court progressively demonstrated the importance of having a female-inclusive jurisprudence.

48 Douzinas (n 2) 4.

49 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 177-180.

50 N Goba 'Queer women of colour: The intersection of culture and identity' (2016) 10 *Pretoria University Law Press* 52.

51 T Moi *The feminist reader: Essays on gender and the politics of literary criticism* (1989) 117.

discipline which focuses on intersectionality and non-essentialism, CRF, was born out of the feeling that feminist jurisprudence did not thoroughly acknowledge the racial element of sexism and gender oppression and that CRT did not intimately address feminist concerns and gender issues.[52] CRF acknowledges the racial element of gender oppression, which is very relevant in South Africa where black women not only experience epistemic violence/oppression for being female, but also for being black; therefore to simply categorise their experience on the basis of sex would not be staying true to the actual oppression they experience.[53] Thus, the challenge of achieving equality within this transformation project involves the eradication of systemic forms of discrimination and material disadvantage based on race, gender and other forms of inequality towards women.[54] From a Christianity perspective, although feminism was regarded as 'divisive' by many struggle leaders in the 1970s and 1980s (including Biko), feminist theologians contended that if theology (i.e. Christianity) was a discourse for freedom of oppression, it had to address gender oppression, particularly since the Constitution declared it unconstitutional.[55] This means that 'post'-colonial biblical studies would have to focus on the inequalities and complexities of the post-colonial (and post-apartheid) society in which they find themselves in.[56]

Feminist jurisprudence at present, it would appear, needs larger audiences and more participants, more listeners and more sections to discuss and debate.[57] This can primarily be done through an engagement with a general jurisprudence within the academy.[58] This assertion does not necessarily mean that such a dialogue should be strictly done through terms dictated by traditional general jurisprudence; if so, this engagement would not only be futile but could be possibly counterproductive.[59] This engagement would, however, mean posing questions which are deemed general and universal such as what an ideal feminist jurisprudence would entail and come up with general articulations relevant to feminisms as well as other related concerns of marginality and intersectionality; as such, the methodology and concerns of a general jurisprudence would also widen.[60]

52 Modiri (n 23) 418.
53 Goba (n 50) 45.
54 Klare (n 49) 185.
55 Egan (n 26) 262.
56 Egan (n 26) 263.
57 N Thayyil 'Feminist jurisprudence and navel grazings' (2008) *UCL Jurisprudence Review* 324. A feminist jurisprudence that engages with normative ideas of justice, tempered by social differentiation, is necessary.
58 D Plunkett and S Shapiro 'Law, morality, and everything else: General jurisprudence as a branch of metanormative inquiry' (2017) 128(1) *Ethics* 37-68.
59 Douzinas (n 2) 3-8.
60 As above.

2.3 Marxism: The connection between material production and the control of intellectual production and the democratisation of access to knowledge

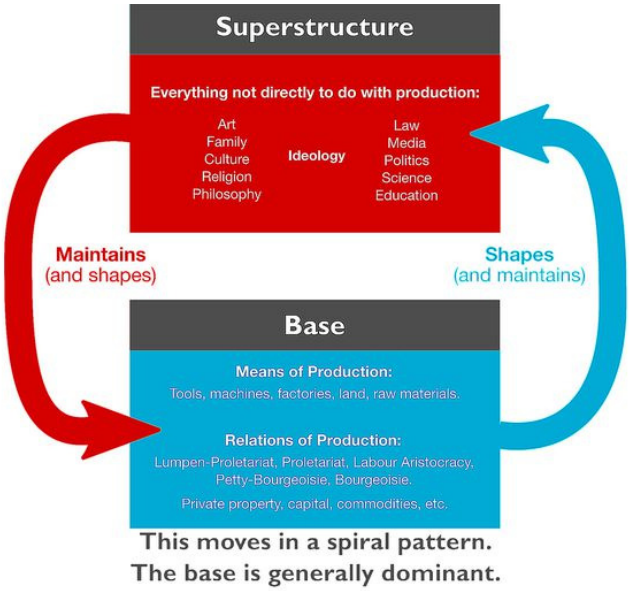


Figure 2: diagram by The Narratologist[61]

Defenders of the epistemic value of diversity maintain that what passes for 'knowledge' in many fields is not in fact universally valid but rather represents the interests and perspectives of the typical knowledge producers.[62] Marxism is a system of sociology, a philosophy of man and society and a political doctrine — it is a method of socioeconomic analysis that views social conflict and class relations using a materialist interpretation of historical development and takes a contentious perspective of social transformation.[63] Marxism, as a critical theory, emphasises and tries to expose the law's ideological

61 In this diagram, The Narratologist focuses on the theoretical concepts of the 'base' and 'superstructure' developed by Karl Marx (hereafter, Marx).
62 Robertson (n 17) 299.
63 T Tsikata 'The Marxist Theory of law and its critique of idealist legal theory' (1977) 14 *University of Ghana Law Journal* 165-170.

effects.[64] The central focus of Marxist law is on the development of the form of law that emerges in the capitalist mode of production.[65] Thus, for Marxism, the presentation of socialism does not tum principally on distribution but on production.[66] Marx used the metaphor of the 'base' and 'superstructure' to describe the social structure (as illustrated in figure 2 above), which he refers to as the totality of social relations by which humans produce and re-produce their social existence.[67] The mode of production forms the base of every society, determining its shape and institutions, while the organisation of our economic activity is located amongst the institutions of the superstructure — thus, these institutions determine the type of legal, political and cultural institutions we have.[68]

The dominion of the economy as determining the shape and function of all institutions in society has led some Marxists to underrate the significance of law in the working of capitalism.[69] Foucault presents the notion of governmentality as a specific and complex form of power which has its target population, as its principal form of knowledge political economy and its essential technical means apparatus of security.[70] He argues that notion of governmentality addresses both the practices by which modern governments exercise control over their populations (it encompasses practical and ideational components), and the rationalities by which these practices appear 'normal'.[71] An analysis of governmentality opens up the possibilities of tracing not only policies and practices, but also actors and their subject positions in the discourses that form them.[72] In RMFM, the students contested for the revisiting and revision of the Freedom Charter with a special focus on realising free education through the total destruction of economic and political legacies of colonial domination.[73] However, this contestation resulted in rubber bullets and stun grenades fired on UCT student protesters and this is where we see how governmentality is practiced in order to control the population thereby intellectually 'obscuring' them from addressing their concerns over the policies and practices of the

64 S Veitch et al *Jurisprudence: themes and concepts* (2012) 230. See A Nash More 'The double lives of South African Marxism' in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 55.
65 EB Pashukanis *The general theory of law & Marxism* (2003) xi.
66 Pashukanis (n 65) 19.
67 Veitch (n 64) 227.
68 As above.
69 B Smart *Foucault, Marxism and critique* (2010) 32-52.
70 Veitch (n 64) 240.
71 P Christie 'Changing regimes: Governmentality and education policy in post-apartheid South Africa' (2006) 26(4) *International Journal of Educational Development* 374.
72 Christie (n 71) 378.
73 The DailyVox, 30 September 2016 'Revisiting The ABCs Of The Decolonial Paradigm Of Fallism', https://www.thedailyvox.co.za/wandile-ngcaweni-revisiting-abcs-decolonial-paradigm-fallism/ (accessed 25 May 2018).

government that deny them, the marginalised, the opportunity to participate in the economic development and policy of the country. In other words, the marginalised, forming the base, are deemed to be too poor to determine the type of governmental, legal, political and cultural institutions we have — thus, frustrating the democratisation of knowledge. Marx observes that '[t]he class which has means of material production at its disposal, has the control at the same time over the means of intellectual production.'[74]

Klare argues that the Constitution expresses a particular solicitude for and commitment to assist and protect especially vulnerable groups in the form of participatory governance: Put differently, the Constitution envisages inclusive, participatory, accountable, transparent and decentralised institutions of governance and contemplates that government will actively promote and deepen a culture of democracy.[75] Similarly, legal pluralism challenges the centrality of state law.[76] However, despite the abovementioned constitutional commitments, the government and/or organs of state continuously endorse epistemicide and underestimate the epistemic value of generating knowledge from the social location of unexpected places or marginalised groups. This is exhibited by the rise of 'Fallism' where citizens (mostly, those that form the base) are subjected to violence when they 'voice' their concerns or attempt to contribute to the epistemology as a result of them being in the periphery in terms of class system. Thus, there is minimal accountability, if any, on the part of the state as this reaction, i.e. shootings towards the fallist movements' activists, has been normalised by the superstructure, coupled by its policies that maintain exclusive institutions of public knowledge by way of diverting the struggle of the poor to courts because it is known that this is where the poor are weak — for as long as the legal system is commodified, it will be strongly biased towards the rich and powerful because they can afford the fees required by the top law firms in the country for a better legal representation.[77] In essence, the shootings that take place at the fallist movements symbolise the destruction of knowledge from the marginalised in that they are denied the opportunity to contribute to the public epistemology and therefore shape the policies that govern them in a manner that will, at least, address their social concerns. Judge Weinkove's statement that: 'She doesn't know what the budget of the City Council is; She doesn't know this stuff. She is a kitchen assistant' is an example of how classism has been utilised to resist the marginalised form contributing to the public epistemology.

74 Veitch (n 64) 233.
75 Klare (n 49) 155.
76 Veitch (n 64) 236.
77 Zikode (n 6).

3 Conclusion

The demand for epistemic diversity challenges a priori and the individualistic nature of traditional epistemology and prepares citizens for their role in supporting policies that maintain credible inclusive institutions of public knowledge.[78] Epistemic violence persists in 'post'-apartheid South Africa, where, for example, the higher education system, rooted in apartheid and colonial exploitation and racism, has obliterated nearly all the linkages that black students may have with the prescribed texts, propagated narratives, debates and learning on the one side and their history, lived experiences and dreams on the other side.[79] Through education, they are expected to learn to 'speak well' and gain skills and Eurocentric knowledge that will allow them to enter the marketplace but not allow them to fundamentally change the status quo in society and the economy.[80] In this essay, I demonstrated how critical legal theories could offer critical interventions into the development of a critical jurisprudence and reflected on the fundamental paradox of 'post'-apartheid South Africa. I used the RMFM to show why we need to, and how we can, reconsider and unearth suppressed knowledges that shaped, and are shaping, South Africa. I also established that the theoretical legal understanding need not be seen oxymoronic but as one that perpetuates the jurisprudence of generosity.[81]

78 Robertson (n 17) 299.
79 International 360° (n 33).
80 International 360° (n 33).
81 P Williams 'The alchemy of race and rights' (1991) *Harvard University Press* 8.

‘WAR IS NOT ALWAYS VIOLENT AND VIOLENCE IS NOT ALWAYS WAR.’ — AN ANECDOTE ON HOW LANGUAGE AND ULTIMATELY THE LAW IS USED TO PERPETUATE EPISTEMIC VIOLENCE IN SOUTH AFRICA

*By Thato Maruapula**

1 Introduction

The focus of this paper will be how linguicide is used as a mechanism to perpetuate epistemic violence in South Africa and how epistemic diversity is needed in order for those who find themselves ‘below the law’ to ascertain access to justice. Firstly, I will define the concepts ‘linguicide’ and ‘epistemic violence.’ Secondly, I will offer a critique on how the English language is not neutral but rather a socio-economic tool that shapes power relations within society. Thirdly, I will introduce the critical theories of Black Consciousness and Marxism to show how the law is complicit in perpetuating racial and

* Third year LLB student, University of Pretoria. This article discusses how linguicide perpetuates epistemic violence and the need for epistemic diversity therein. I would like to thank Dr Joel Modiri for his critical engagement and advice. My colleagues Tshepo Twala, Nelsie Siboza, Keneilwe Molaudi and Vaughn Rajah for their feedback and patience while I was writing this article. All errors and shortcomings are undoubtedly my own. *Pula*!

class inequalities in South Africa. I will then conclude with how access to justice can become a reality through the paradigm of decolonisation ('of the mind') as understood by various African authors and provide recommendations of an imagined alternative.

2 Understanding linguicide and epistemic violence

My main argument revolves around the idea that language and indeed the law, is not neutral but rather mechanisms to perpetuate imperialism and oppression in the 21st century. It is thus important to define concepts that form the nucleus of my argument, namely linguicide and epistemic violence. The term 'linguicide' refers to the death of a language from either natural or political causes.[1] Since language is a social practice that determines power relations and shapes subjectivity, it cannot be said that language is a politically neutral medium of communication.[2] It can therefore be said that a particular language and the culture it carries are the most crucial parts of that naming system by which Europe subjected the colonised to its memory.[3] Ngugi argues that the more 'educated the colonial subjects are in the culture of the coloniser, the more severe the subjugation.'[4] The consequence of such 'education' is the oppressor's culture being the death of indigenous languages, used in this context interchangeably with culture, by political causes.

On the other hand, the abstract concept of epistemic violence refers to the 'suppression, rejection and in some cases literal destruction (wiping out) of indigenous knowledge.'[5] I thus contend that the term epistemic violence is a theoretical umbrella that is broad enough to encapsulate linguicide. As a result, epistemic violence and its various manifestations suppress indigenous knowledge by inducing a 'historical amnesia' on the colonised by mutilating the memory of the colonised and where it failed, by remembering it with the coloniser's memory.[6] Throughout the course of this paper, the reference to linguicide should be understood against the backdrop of epistemic violence.

1 http://www.yourdictionary.com/linguicide (accessed 23 September 2018).
2 A Parmegiani 'Language, power and transformation in South Africa' Stellenbosch Papers on Linguistics (2008) 74.
3 W Ngugi *Something torn and new: An African Renaissance* (2009) 114.
4 Ngugi (n 3) 114.
5 K Van Marle 'The complicity of language, knowledge and justice' (2017) 49(1) *Acta Academia* at 104.
6 Ngugi (n 3) 108.

3 Oppression in a post-democratic era: A proudly South African anecdote

Having defined what linguicide entails and its interplay with the broad notion of epistemic violence, I will now demonstrate its effects on the South African society. The Constitution is the 'supreme law' of the land.[7] Furthermore, as the somewhat 'tourist attraction' of our new legal system, the Constitution starts by unequivocally stating that the people 'recognise the injustices of the past.'[8] One would assume that these 'injustices' are not limited to, colonisation and then later apartheid that still continues to this day, albeit in a different form. This new manifestation of apartheid is oppression based on language rather than the colour of your skin. Of all the 11 languages recognised by the Constitution, English is by far the most dominant in all spheres of the South African society, even though the vast majority of South Africans do not consider English as their mother tongue (including white Afrikaans speakers). Furthermore, English is often seen as mandatory for professional employment, political participation and even academic success.[9]

The dawn of 'democracy' in 1994 signalled an end in overt racial discrimination but the dominance of the English (as a product of colonialism) remained hegemonic in key areas of our society as an important mechanism for '(re)producing social stratification'[10] and ensured that South Africa has transitioned from a racist to a 'linguistic'[11] socio-economic system.[12]

Parmegiani identifies three metaphors that show how the use of English as a medium of instruction can serve as an obstacle to progressive socio-economic transformation.[13] Firstly, English is compared to a 'poacher' that is responsible for linguicide genocide: because of its hegemonic powers in key areas, other languages (in particular indigenous languages) are pushed to the periphery of society and moved closer to 'extinction.'[14] Secondly, English is described as a 'gatekeeper' that ensures that society remains 'highly stratified: with a lack of proficiency in English used as a subtle mechanism to exclude people from education and employment'

7 The Constitution of the Republic of South Africa, 1996 (the Constitution, 1996) sec 2.
8 The Constitution, 1996 (n 7) preamble.
9 Parmegiani (n 2) 75.
10 Parmegiani (n 2) 75.
11 Parmegiani (n 2) 75.
12 Parmegiani (n 2) 75.
13 Parmegiani (n 2) 79.
14 Parmegiani (n 2) 79

rather than the colour of their skin, which was the hallmark of apartheid.[15] Lastly, English is described as 'a coloniser of the mind:' the learning and acquisition of English results in the inculcation of Euro-centric views that instil a sense of psychological inferiority of the colonised subject.[16] This metaphor that English is a 'coloniser of the mind' is discussed later in this paper.

4 Black Consciousness and the Marxist theory as critical paradigms to show how the law is complicit in perpetuating racial and class inequalities

4.1 Black Consciousness

> 'Being black is not a matter of pigmentation — being black is a reflection of a mental attitude.'[17]

Black Consciousness (BC) was not a political party formed in the 1970s but rather a philosophy about 'an attitude of mind, a way of life' that would liberate black aspirations and Black people.[18] In essence, BC advocated for the need of black people to rally together against the root cause of their oppression — their black skin and to demonstrate the lie that black is an 'aberration from the normal' which is of course is white.[19] Biko traces the origins of discrimination against black people to the days of colonisation which resulted in 'nothing more sinister than cultural or geographical fusion at best or language bastardisation at worst.'[20] Biko further contends that white people derive security and pleasure from exploiting the minds and bodies of unsuspecting black masses, hence why in no point in history has white people exploited other white people on a scale remotely close to how black people were exploited in South Africa and the African continent.[21]

Apartheid served as the global blueprint to legitimise racism and made it a sin to be black in South Africa, even though the overwhelming majority of the population was, and continues to still be, black. Because being black was considered as some form of taboo, even the so called 'poor whites' during apartheid distanced themselves from black people and showed a 'reactionary attitude,' even when the Marxist theory called upon them to join black people

15 Parmegiani (n 2) 75.
16 Parmegiani (n 2) 79.
17 D Hanekom *Steve Biko voices of liberation* (2012) 99.
18 Biko (n 17) 102.
19 Biko (n 17) 99.
20 Biko (n 17) 100.
21 Biko (n 17) 100.

in their quest for economic emancipation.[22] Biko uses the Hegelian theory of dialectic materialism, with the thesis being white racism and the only valid antithesis being black solidarity which can serve to counterbalance white racism in South Africa.[23] During apartheid South Africa was characterised by overt racist laws designed to humiliate black people and now, since section 9(3) of the Constitution[24] has outlawed discrimination based on race, racism now rears its ugly head through the dominance of English as the *de facto* medium of instruction in all spheres of society.

4.2 Marxism

> 'For Marxists, there is nothing mysterious about the state: it is a weapon of the ruling class to be used in the class struggle.'[25]

It is often said that modern constitutions are a product of revolution, counterrevolution, compromise or even debate.[26] Accordingly, Marxist scholars view constitutional laws as 'a set of rules that are required to guarantee the independence of this [bourgeoisie] state from one individual or group of capitalists and to guarantee loyalty to the capitalist system as a whole.'[27] If we closely examine today's society, the state can be seen as the most 'refined and perfected tool' of the ruling class as it is made up of countless capitalist interests.[28] For example, the notorious 'revolving door' between big business and the government ensures that civil servants and government ministers slide easily between government regulators and the very companies that they are supposed to be regulating. [29] Billionaire mining-mogul turned state president, Cyril Ramaphosa is all but one example of the beneficiaries of this revolving door.

Marx uses the metaphor of a 'base' and 'superstructure' to describe society, which he refers to as the totality of social relations by which humans (re)produce their social existence.[30] Biko argues that the 'real workers' (who find themselves in the metaphorical base) are black people who are exploited by the privileged white minority.[31] On the other hand, the superstructure is made up of, in Lenin's terms, the 'armed bodies of men' which are institutions such

22 Biko (n 17) 101.
23 Biko (n 17) 102.
24 The Constitution, 1996.
25 https://www.marxist.com/law-and-marxism-the-state-and-the-constitution.htm (accessed 24 September 2018).
26 As above.
27 (n 25).
28 As above.
29 As above.
30 S Veitch et al *Jurisprudence: themes and concepts* (2012) 230. See A Nash More 'The double lives of South African Marxism' in P Vale; L Hamilton and EH Prinsloo (eds) *Intellectual traditions in South Africa. Ideas, individuals and institutions* (2014) 227.
31 Biko (n 17 above) 101.

as the law, the courts, prisons, police and even the army to control the means of production and ultimately, maintain 'order.'[32] In a South African context, this description becomes quite literal when you take into consideration our history of police brutality and blatant disregard for the human rights of those in the base, even with a Constitution that promises a future that's very different to our painful past.[33]

The 'race versus class' debate has been a (re)occurring theoretical problem in which BC developed.[34] Modiri contends that this debate concerns the question of 'whether it is race or class that is the primary determinant, variable or organising principle of social and economical inequality in the South African context.[35] Put differently, whether the nature of social conflict in South Africa is a national-racial struggle (between the indigenous black people and white settlers) or a class struggle between workers and the ruing economic class.[36] To Biko, the idea of class being more important than race in the South African context amounts to something he described as 'twisted logic' as although the capitalist system cannot be ignored (taking into account its highly racialised nature), there are aspects of black subjugation that cannot be reduced to the economic.

5 Access to justice through the paradigm of decolonisation 'of the mind'

Gramsci argues that there is a 'difference between the legal country and the real country.'[37] This is particularly true in South Africa as on paper, the law protects you from eviction and oppression but in reality, landlords and the police (as 'armed bodies of men') treat the poor as if they are below the law — as if the poor are somehow below the ambit of the constitution's protection.[38] In many ways, poverty is criminalised and even treated 'as treason.'[39] Zikode advocates for a society where everyone is equal before the law and the only way that this can become a reality, is if the law is de-commodified.[40] The only way to effectively de-commodify the law, is to change the logic of law by means of a process called decolonisation.

32 (n 25).
33 Reference here is made to the 1960 Sharpeville massacre, the 1976 Soweto uprising and more recently, the Marikana massacre in 2012.
34 JM Modiri 'The jurisprudence of Steve Biko: A study in race, law and power in the "afterlife" of colonial-apartheid' unpublished PhD thesis, University of Pretoria, 2017 at 145.
35 Modiri (n 34) 145.
36 As above.
37 S Zikode, 2 December 2011, 'Poor people's movements and the law' http://www.abahlali.org/node/8551 (accessed 24 September 2018).
38 Zikode (n 37).
39 As above.
40 Zikode (n 37).

Ngugi writes that he was excited to visit the Eastern Cape when he came to South Africa as after all, it is the place where Sobukwe, Biko and Mandela and many more prominent figures of the African continent hail from.[41] Ngugi contents that he encountered a landscape called 'Port Elizabeth', 'King Williams Town' and 'Stutterheim' — a clear indication of conquers writing their own history on the landscape of our resistance memory.[42] Ngugi's thesis in 'Decolonising the mind' rests on the understanding that 'language is a carrier of culture' and he contends that Africa's cultural identity is threatened by a so called 'Western, imperialist cultural bomb' — that makes Africans see their past as 'one wasteland of non-achievement and makes them want to distance themselves from that wasteland.'[43] Zandile points out the arguments against having English as a national language also indicates that English is holding black cultures, values and ultimately their minds captive.[44] This links with the third metaphor identified by Parmegiani above, namely that the English language being the coloniser of the mind. According to Biko, the oppressor's greatest weapon is the mind of the oppressed.[45] We should therefore reject the notion that the English language is neutral, taking into account the manner in which it was violently imposed upon the indigenous communities in South Africa. What then is the alternative? Firstly, a reminder of where South Africa is geographically located in: Africa.

An imagined alternative to English being used as a cannon for both linguicide and epistemic violence is found in the notion of pluversity, which can facilitate a process of epistemic diversity.[46] First, attention should be given to understanding what Philipson refers to as a theory of English Linguistic Imperialism which is the idea that the dominance of English is asserted and upheld by the establishment of continuous reconstruction of structural and cultural inequalities between English and other indigenous languages.[47] Secondly, the Eurocentric canon, which only attributes 'truth to only the Western way of traditional knowledge' needs to be rejected.[48] An imagined alternative sees Africans having pride in themselves, their cultures and their traditions (including languages).[49]

The University of KwaZulu-Natal seems to be taking the initiative as it has embarked on a journey some call 'ambitious' to develop

41 Ngugi (n 3) 113.
42 Ngugi (n 3) 113.
43 Parmegiani (n 2) 82.
44 Parmegiani (n 2) 82.
45 S Biko *Black consciousness in South Africa* 1977 in M Arnold (ed) xix.
46 AJ Mbembe 'Decolonizing the university: New directions' 15 (1) Arts & Humanities in Higher Education (2016) 37.
47 Parmegiani (n 2) 84
48 Mbembe (n 46) 35.
49 Biko (n 17) 99.

isiZulu as a language of teaching and learning which will one day have the same 'institutional and academic status as English.'[50] The University of Pretoria has identified Sepedi as one of the official languages of the institution, along with English and Afrikaans. However, to date, very little has been done to facilitate the development of Sepedi as an academic language that can one day be recognised in class rooms and academic texts. Every year the Oxford English Dictionary recognises new words in the English language, yet African languages are rarely developed.[51] Institutions of higher, and indeed basic, education needs to do more to promote African languages and dialogue. This will have positive ramifications on race-relations in South Africa and may even lead to people knowing what they are saying when they sing the African parts of the national anthem. The only mechanism to effect this is through the law and in particular, legislation making African languages compulsory in institutions of higher and basic education and then later, in the workplace. Once this has been implemented, we will be on the road to epistemic justice.

6 Conclusion

This paper has shown how the use of language has been an agent of epistemic violence in South Africa. Black Consciousness reaffirms that black people should take pride in their own languages and history and reject 'White racism' in any of its manifestations.[52] While the Marxist theory rejects the conception of 'justice being blind' and states that in a socialist state Lady Justice's eyes are wide open to the injustices of society.[53] Decolonisation rejects the 'historical amnesia' induced by colonisers and places Africa at the centre of an envisaged alternative that is pluriversal and can lead to epistemic diversity and ultimately ensure access to justice to even those deemed to be 'below the law.' I do concede that I foresee the law continuing to aid and abet the English language as a means to further divide our already divided society. However, I hope that this article will start a conversation, the same way a group of students started a conversation in the 1960s and 70s about the inherent injustice of apartheid which gained momentum and ultimately saw one of the world's great racist regimes collapse, at least on paper.

50 Parmegiani (n 2) 92.
51 https://public.oed.com/updates/new-words-list-january-2018/#new_words (accessed 1 November 2018).
52 Biko (n 17) 99.
53 (n 25).

EXPOSING THE TRUE ARGUMENT, A STUDENT'S RESPONSE TO DR WILLEM GRAVETT: 'PERICLES SHOULD LEARN TO FIX A LEAKY PIPE'*

> 'The difficulty, my friends, is not to avoid death, but to avoid unrighteousness … If you think by killing men you can prevent someone from censuring your evil lives, you are mistaken; that is a way of escape which is neither possible or honourable; the easiest and the noblest way is not to be disabling to others, but to be improving yourselves.'**

*by Antonie Klopper****

1 Introduction

The purpose of this article is to respond to Gravett as a way to ask what he is really criticising. Gravett proposes in his article that he wishes to address the critiques of a practical course or trial advocacy

* The purpose of this article is not to come to the defence of the individual academics that Gravett has decided to criticise, for they can surely defend themselves. I wish only to make clear the importance of the work they are doing as a way to point critics of the current system away from their colleagues and onto the legal education system at large, which is the real obstacle standing in the way of Trial Advocacy. This article superficially only argues that the there is no real threat to a destruction of the antithesis between theory and practice and that few oppose this position. Subsequent articles will hopefully answer to the underlying concerns Gravett poses to the critical thinking, constitutionalism and transformative constitutionalism are possibly breaking down the rule of law etc; WH Gravett 'Pericles should learn to fix a leaky pipe — Why trial advocacy should become part of the LLB curriculum (Part 1)' (2018) 21 *Potchefstroom Electronic Law Journal (PER/PELJ)* at 4.

** 'The death of Socrates' in Plato's *Apology*.

*** BCom (Law) graduate, final year LLB student, University of Pretoria.

course in South African law schools, which he sees as the *Pretoria Crits*.[1] He sees the *Pretoria Crits* as being the main antagonist. The reason for this is that he believes that the best way to cure the South African law curriculum is to add a course in trial advocacy. What I, however, fail to see is how the transformation of existing legal education and the way in which it is taught to a more critical approach has any effect on the addition of a trial advocacy course. The main concern of the *Pretoria Crits* would be to advise Gravett to not fall slave to the demands of practice, but to implement the course in a manner that also appreciates the transformative agenda that the Constitution has put forward. In the words of previous Chief Justice of the Constitutional Court Pius Langa: 'We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of authority'.[2] The *Pretoria Crits* wish to make clear that lawyers should be educated in a manner that does not make them complicit in repeating the mistakes of the past.[3] The *Pretoria Crits*, when advocating for critical thinking are not advocating for less practice but the way in which it is practiced. Gravett, therefore, sees this questioning of the manner of practice as an attack on practice. The truth, however, is that the formalist approach to law is not reconcilable with what is expected of lawyers by the Constitution. In the days of apartheid, lawyers were held accountable only to their conscience and the law, their conscience sometimes negated by an over-reliance on parliament. Today the Constitution has created a new moral yardstick.[4] Practice might have continued with its machine-like resoluteness after 1994, but that does not mean it is correct in doing so. This line of questioning is what Gravett is opposed to. He is opposed to the disturbance of the machine-like resoluteness, the *status quo*.[5] The *status quo*, fortunately, was changed with the approval of the 'new' legal order by Act 108 of 1996, more properly known as the Constitution of the Republic of South Africa, 1996. Any discussion wishing to limit the influence of humanities or the influence of politics on the law risks complicity in possible future

1 Gravett (n 1); The *Pretoria Crits*, Gravett names as those scholars in the Department of Jurisprudence at the University of Pretoria's Faculty of Law.

2 P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* at 351.

3 K van Marle 'Reflections on legacy, complicity, and legal education' (2014) 3 *Acta Academia* at 197.

4 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 140-141; The Constitutional Court showed that the sphere of Private Law must also look at the values enshrined in the Constitution, even the sanctity of contract and the once holy maxim *pacta sunt servanda*.

5 T Madlingozi 'Legal academics and progressive politics in South Africa: Moving beyond the ivory tower' (2006) *Pulp Fictions* at 5. Madlingozi refers to it as 'legal vending machines that chuck out a solution when one inserts a case'.

atrocities.[6] The main argument made in the articles referenced by Gravett is not an attack on practice as Gravett would make it seem. They are more a warning against teaching and educating students who are complicit in atrocities, such as our recent history proves to be close to home. Gravett removes the context of the articles and proclaims them to be enemies of practice.[7] The main argument by Gravett, rather, is a broader attack on a seeming agenda of the *Pretoria Crits*. He conflates this agenda as an attack on his idea to include a course in trial advocacy. Instead of arguing directly on the issues of constitutionalism, the Constitution as monument or memorial, transformative constitutionalism or any other concepts regarding the 'new' legal order, he superficially discusses and quotes the *Pretoria Crits* by antagonising them in an arena they never entered in the first place.[8]

2 Department or individual academics?

Each part of the Faculty of Law at the University of Pretoria must play their part and so too Critical Legal Studies (CLS) has its part to play.[9] It would be strange and irregular for a department to not support and encourage their field of research in the said discussion. This is the main point I try to make. There remains the question if Gravett is improving or disabling? My contention, respectfully, is that Gravett is misrepresenting the articles,[10] and is thereby purely disabling others and not improving himself or the Law Faculty as a whole. The articles do not pose a threat to his goal of more practical training, but rather the way in which it might happen or is already happening. The discussion by the *Pretoria Crits* is focused around the effect the power dynamic in the law has toward freedom of thought and intellectual discovery.[11] I contend that if Gravett's intentions of improving

6 K van Marle & J Modiri 'What does changing the world entail? Law Critique and Legal education in the time of post-Apartheid' (2012) 129 *South African Law Journal* at 217. The machine-like resoluteness that Gravett is advocating for is dangerous. 'It was his lack of the imaginative capacities that would have made the human and moral dimension of his activities tangible for him that was the problem'.

7 Gravett (n 1) 7.

8 It is important to note that the main arguments, that are absent in the *PER*/*PELJ* article (n 1) can be found in the *SALJ* article written also by Gravett (n 11). It is in that article that Gravett truly argues against the *Pretoria Crits* and I would advise that all arguments made against the *Pretoria Crits* be ignored in the *PER*/*PELJ* article (n 1) and that readers rather refer to the *SALJ* article (n 11) which is a much better article for read regarding the *Pretoria Crits*.

9 WH Gravett 'Of "Deconstruction" and "Destruction" — why critical legal theory cannot be the cornerstone of the LLB curriculum' (2018) *South African Law Journal* at 295.

10 I state once again that this phenomenon seems to be restricted to Gravett's *PER*/*PELJ* article.

11 K van Marle 'Jurisprudence, Friendship and the University as heterogeneous public space' (2010) *South African Law Journal* at 643.

practice are true, the *Pretoria Crits* are not his enemy but rather a valuable asset in the development of a truly post-apartheid law practice where attorneys, in their work, are never complicit with injustice and are skilled at writing, not just by reading the law, but beyond the law. As will be seen in this article, the use of quotes by Gravett are taken out of context and are used in a superficial way and upon closer inspection are not antagonising toward practice as a lawyer or elitist for that matter. Gravett states in his abstract that the legal academics, later branded 'the *Pretoria Crits*' agree with the antithesis that is proposed by Twinning.[12] I find Gravett's argument toward this point uncompelling. My contention in this article is that the *Pretoria Crits* do not support the antithesis, but rather have little opinion on the matter at all and are more concerned with the discussion of the way in which both theoretical and practical legal professionals are complicit by way of not understanding their responsibilities toward humanity, morality and justice.[13] Van Marle's discussion, for example, focusses on the changes that are necessary to not only correct the mistakes of the past, but to prevent them from ever happening again.[14] The discussion surrounding constitutionalism, transformative constitutionalism, complicity in atrocities and responsibilities toward justice are made to sound like discussions surrounding theory vs practice. If Gravett wishes to argue that the principles mentioned above are detrimental to 'legal certainty' or the efficiency of practice he must do so rather than beat around the bush by funnelling all the discussion of the theories as support for the antithesis proposed by Twinning. Therefore, by saying in the abstract and introduction that the legal academics see the law school not as a 'trade school' he is losing sight of the forest for the trees.[15]

3 Are the proposals made by Gravett modern enough for South Africa practice?

The question that must be asked is what exactly Gravett is proposing when he argues that the LLB has already been shortened to four years but must also make space for a course that will 'gird' the graduates for practice?[16] What part of the now shortened four-year course must be taken away? This is the question on all of the students' minds. It is

12 Gravett (n 1) 1.
13 The same argument is made in Gravett's SALJ article (n 11). The true intention of the some of the *Pretoria Crits* are to deconstruct the law and practice along with it. Others like Van Marle only asks questions regarding the current construction and the question lies as Gravett's title suggests between 'deconstruction' and 'destruction'.
14 van Marle (n 5) 209; van Marle & Modiri(n 8) 211-213.
15 For a true discussion of the 'forest' instead of the trees please see Gravett's SALJ article (n 11).
16 Gravett (n 1) 7.

indisputable that theory is essential for practice. I will argue in this article that there is little dispute between Gravett and the *Pretoria Crits* as he wishes to call them, in this context. The fundamental change Gravett wishes to bring to the curriculum is not opposed. The three pillars that will form the LLB curriculum will be: first the theory, which is already present, second the discussion of the truth and the true world behind the theory, which is currently the department of jurisprudence, and thirdly a course in trial advocacy, which will be made available to those who need it, or it could be made available as mandatory if unnecessary or outdated theory can be replaced. The question therefore, arises where the conflict between Gravett and the *Pretoria Crits* comes from? I would argue that most of it stems from the misunderstanding of the philosophical arguments on both sides. The confusion and frustration arise from some in the Department of Jurisprudence adding too much politics to the discussion of philosophy. Each writer has his/her own opinion and it is therefore, also improper for Gravett to bundle them together as the *Pretoria Crits* or the *Crits*. I will argue that some of the arguments made by Gravett in 'deconstruction' and 'destruction' have merit.[17] My contention is that if he had not funnelled the *Crits* together, the solution might have presented itself. Van Marle's inaugural address also brings some light to the subject. Van Marle states that to remove philosophy, or critical legal theory in this case, might seem to encourage growth in practice, but the destruction of the truth will lead to the destruction of practice.[18] That is why van Marle argues for the truth and theory of law for she strives to be a true philosopher who does not wish to merely show jurists the light but let them know the truth as to protect the law from attacks to its foundation, whilst admitting the truth will always remain a façade.[19] Van Marle proposes a way in which to promote the lawyer as not complicit. If the discussion is truly regarding the curriculum than questions like the removal of outdated theory and promotion of critical thinking (within the context of the 'new' legal order), legal reasoning skills and modern practical training must be discussed. The interpretation of van Marle's words differently would entail that she supports the training of students, but by 'practitioners' not by 'academics' in practice. Whether they receive such education at university or in practice is not important. The academics, however, must stick to their field and teach their theory. It would be ludicrous for a professor who is not a practicing attorney, not just admitted but practicing, to teach students of the realities of practice.

17 Gravett (n 11).
18 van Marle (n 13) 645; Arendt is quoting Nietzsche.
19 'The true philosopher' in Plato's *Republic*, Plato differentiates between the True Philosopher, Socrates describes true philosophy as the ascend to the top, out of the Cave and into the true light. Therefore, the allegory of the cave is the questioning of truth.

As a student I look forward to that discussion. Unfortunately, as I contend, Gravett strayed from this discussion toward a superficial jurisprudential discussion criticising the need for a critical approach toward law, which is enshrined in the principles of transformative constitutionalism and the 'new' legal order. With the constitutional changes to the legal order and the Constitutional Court's recent way of writing judgements, how will the traditional trial advocacy course prepare students for the changes in the legal order that are to come trickling down from the Constitutional Court? Will the focus on legal skills incorporate the transformative constitutionalism as Langa proclaims? In other words, will Gravett's legal skills courses also take into account the developments and changes that need to take place in order to truly be a post-apartheid society? If these questions cannot be answered, then there is still a lot more to learn from the so-called *Pretoria Crit*s. Therefore, the advocation for legal skills without taking into account the constitution and its structural changes to the law, would be detrimental to practice itself.

4 Pretoria Crits?

I will start with van Marle, included as one of the *Pretoria Crits*. Her main argument is not that no-one should teach a practical course, but that if it is taught it must not be taught by the normal academics at a university which is currently the *status quo*.[20] Van Marle is purely stating that the current academics at the university have been teaching theory and know only theory and should not gamble with fields or educate students on that which they are not versed in as will be shown in this paragraph. Van Marle and Modiri mention the impact US CLS and Brit-Crits have had on South African critical thought.[21] They also include criticisms against both schools of thought.[22] What should be emphasised is that both US CLS and Brit-Crits informed and still informs South African Jurisprudence but does not encapsulate it in the least. South African Jurisprudence is very much focussed on the discussions around the Constitution and its effects. It is true that some have criticised the Constitution and see the Constitution as memorial.[23] This does not mean that they are correct in this opinion and Gravett rightly criticises this view and gives reasons why. One of my major concerns with Gravett's critique is its inclusion of all *Crits*. As van Marle and Gravett clearly state there are those who see the Constitution as monument, for example Emile Zitske, who is included in this brand of *Pretoria Crits*.[24] The difference between seeing the

20 van Marle (n 13) 644.
21 van Marle & Modiri (n 8) 215 – 216.
22 As above.
23 Gravett (n 11); van Marle (n 13) 637-638.
24 Gravett (n 11) 301.

Constitution as memorial or as monument is cardinal for the discussion of 'destruction or deconstruction' as Gravett proposes. The direction of Critical Legal Theory in South Africa might be troubling, but this does not mean that there are not supporters of a philosophical way of looking at it, instead of a political one, tending toward a viewpoint of the Constitution as memorial. The *Pretoria Crits* and *Crits* branding negates the broader argument surrounding the Constitution and negates the fact that there are supporters of the Constitution as monument. In order for Gravett to truly stop the so-called 'radicalisation' of Critical Legal Theory in South Africa, he needs only look at some of the articles written by those he believes to be radical and discuss how a true philosopher would question the authenticity of the truth proclaimed.

4.1 Pretoria Crits in context

The use of van Marle's 2010 article or speech is also taken out of context. The main argument van Marle was making could be summarised as this: 'The elimination of the "true", referring to abstract contemplation, will result also in the disappearance of the "apparent", meaning practical concerns'.[25] In further context the concern for the separation of training and education is done within the context of letting all students be educated in a heterogeneous environment and the view of a future democracy that discusses matters amongst each other in a free and intellectual way.[26] The freedom of students to not be boxed into a specific path, but to choose that path for themselves. If this path entails practice, then the university is the place to make that choice. Van Marle is merely advocating for the freedom to make a choice. The freedom to not be kept in the dark, but to rise and pursue truth instead of being manipulated into believing the shadows to be the reality. The complexities of truth must not be ignored, and van Marle is concerned with the duty of the true philosopher to pursue truth, but also to understand and accept your inevitable failure. What matters is the freedom and resources to pursue the truth. Van Marle, as a true philosopher, is advocating that the university is such a place. To quote Derrida: 'but one should never simplify or pretend to be sure of such simplicity where there is none'.[27] The use of van Marle's words seemingly creates opposition, where the advocacy of theory through the eyes of Nietzsche is in fact an advocacy for practice. It is within the context of philosophy that her words must be used. Van Marle is proposing a free university with the right of students to educate

25 F Nietzsche *'How the "true world" at last became a myth' in "The twilight of the idols, or, how to philosophize with a hammer"'* (1889).
26 van Marle (n 11) 629.
27 Derrida *Limited Inc*, (1988) 119.

themselves and to know the truth. It is within this context that van Marle also advocates for the survival of 'practical concerns'.[28] In the words of Nietzsche: 'We have abolished the true world [the world of theory and philosophy that van Marle advocates]. What has remained? The apparent one perhaps? [the practical concerns Gravett is advocating for] Oh no! With the true world we have abolished the apparent one.'[29] In this context without the truth behind practice or the truth behind the law, there will neither be practice nor will there be law.[30] With reference to Gravett saying that van Marle argues for practice to be after university, this is not the case. Her exact words are: 'Our students, or at least those who will enter the legal profession as lawyers or advocates, will undergo practical legal training after, *or sometimes even while completing their degrees'*.[31] Contrast the quote given above with Gravett's paraphrasing: '"practical training", claims van Marle is apparently what students should undergo after graduation.'[32] The conflation of the entire degree with theoretical education is not what van Marle did. She is advocating for the truth to be taught, ergo for the true world to be made known or at least not abolished before the students are put into the 'apparent' world. For otherwise the 'apparent' world will crumble with the abolishment of the truth.[33]

Viewed within this context, Gravett is criticising the truth. The pursuance of truth before being placed in the world of practice, he wishes students would be forced into the box of practice whilst not having decided anything yet, whilst they may pursue courses, as van Marle points out during the LLB curriculum and two years after that. Van Marle clearly isn't against practical experience during the degree as she never criticises the current situation where some students as she puts it:' undergo practical training … even while completing their degrees'. She is merely fighting for the truth and the true world to be shown to the ignorant jurists in the 'cave'.[34] She wishes not to impede or abolish the 'apparent' world or the prevention of the entering of the students into the 'apparent' world. She wishes only to succeed in educating the students of the true world. If they have the freedom to do that then the LLB curriculum can be filled with all the practical training Gravett wishes to import whilst keeping in mind the theory necessary to practice law. This concern is made clear in Gravett's article in the *South African Law Journal (SALJ)*. The concern that if students are to see the true world, they might fall into nihilism.[35] This

28 van Marle (n 13) 629.
29 Nietzsche (n 27).
30 As above.
31 van Marle (n 13) 644 (my emphasis).
32 Gravett (n 1) 6.
33 Referring back to Nietzcshe and Van Marle's main argument.
34 The Cave is a reference to the 'allegory of a cave' that can be found in Plato's *Republic*.
35 Gravett (n 11) 316.

is also a common critique of the Euro-British CLS.[36] It is possible that knowing the truth might result in nihilism, but rather than hiding the truth from students, the cure for nihilism must be found. This cure cannot continue to be the absence of truth.

4.2 Pretoria Crits as individual academics

The *Pretoria Crits*, as Gravett refers to them, cannot be thrown together. Each scholar has his or her speciality or area of theoretical knowledge as do all academics. The definition of Jurisprudence as per the Concise is: 'the theory or philosophy of law'.[37] It is therefore, interesting to see Gravett charge the *Pretoria Crits* with teaching and promoting the theory and philosophy of law when the dictionary definition of Jurisprudence asks them to do exactly that. The Pretoria Crits work and teach within the department of Jurisprudence. They, as many academics, stick to what they know. It is surprising to see Gravett criticise them for not addressing problems that are beyond their field of study. He states: 'The Pretoria Crits view the problem in jurisprudential terms, because jurisprudence is all they know'. Is Gravett criticising the jurisprudence department for practicing jurisprudence? The main argument against van Marle and Modiri as part of the '*Pretoria Crits*' is their insistence on theory. This remains again their prerogative as scholars in jurisprudence. The reality as Gravett refers to is that the Faculty of Law and the architects of the curriculum have designed the existing legal curriculum to be theoretical. What Gravett proposes is a change to what has been the *status quo* since even before the end of apartheid. An advocate was and is taught to cross examine whilst doing his pupillage or through other courses. An attorney was and is a candidate attorney before being admitted. In other words, the training is made provision for in the two years of study that follows after law school. If Gravett believes that the existing South African system is inadequate, then it seems appropriate to criticise the system. However, he chooses not to focus on the past practice of South African legal education. In van Marle's 'Reflections' she discusses the fact that previous academic scholars of the apartheid-era used CLS as a way to critique apartheid where the Constitution now provides a new legal framework and every critique must be adapted to include African philosophy with the likes of Ramose to discuss the Constitution as either monument or memorial.[38] It is true that many in the jurisprudence department wish to directly critique the remaining formalistic legal culture by using CLS to keep fighting against the remaining elements of apartheid. The difference between the individual academics who have been thrown

36 van Marle & Modiri (n 8).
37 *South African Concise Oxford Dictionary* (2007).
38 van Marle (n 5) 200.

into a group named the *Pretoria Crits* is stark. Modiri and Madlingozi might see it as Memorial and Zitske might see it as Monument.[39] This difference of opinion is of cardinal importance and creates for a diverse and informed discussion. The act of grouping these diverging opinions together as the *Pretoria Crits* is not an accurate depiction of the reality of intellectual discourse in the Jurisprudence Department of the University of Pretoria. The difference of opinion is better emphasised and admitted in Gravett's *SALJ* article.

Gravett spends a whole paragraph discussing the author of one of the several quotes used by van Marle and Modiri in 2014. Gravett goes on to discuss Kennedy some more in his footnotes: 'as a "cross between Rasputin and Billy Graham"'. [40] The relevance of the discussion of personality traits when discussing an argument is questionable at best.[41] The whole discussion on Kennedy was provoked by a quote that flows into a discussion on South African legal discourse. It is therefore, once again an example where Gravett uses the worst side of American Critical Legal Studies to take the articles written by van Marle and Modiri out of context. Will these references to Neo-Marxist ideologies become clearer after reading a broader political discussion by Gravett in the *SALJ* article? The answer is yes. The superficial reading of the articles written by the *Pretoria Crits* would make it seem as if the *Pretoria Crits* are against the law as practical craft.[42] This is, however, not the case. The *Pretoria Crits* have from the articles referenced by Gravett purely been the discussion of critical thinking and how it should help the legal profession not repeat its complicity in immoral behaviour or unjust behaviour as it had done in the past.[43] This is also what the Constitution of the Republic of South Africa asks when it enshrines a bill of rights.[44] Proof of the 'new' legal order can also be found in the Constitutional Court and its cases.[45] This is why the so-called 'new' legal order cannot be ignored when discussing practical skills for lawyers.

Gravett makes the argument that 'change comes about when theory is combined with doing'.[46] The theory, however, must be taught somewhere. If he wishes to prepare students for reality, then look at subjects that have little to no affect in practice. For example,

39 Gravett (n 11) 301.
40 Gravett (n 1) 9.
41 As above.
42 Gravett (n 1) 9.
43 van Marle (n 5).
44 As above.
45 See the part of this article on Constitutionalism. The use of quotes for 'new' is that the legal order is transforming and cannot be said to be a new legal order as the law and the system has stayed relatively the same, it has just been in a constant process of renovation or more aptly put transformation into a new legal order. Thereby the quotes are to suggest a process not yet complete.
46 Gravett (n 1) 1.

VHD, Payment Methods, at the University of Pretoria. It is a whole semester of learning about financial documents that are not necessarily used anymore. Replace VHD with trial advocacy and move IGZ, Intellectual Property Law, to electives. This creates space for the trial advocacy that Gravett is promoting. But how is it going to solve anything by focusing on the one subject that's purpose is to focus on theory and philosophy? The module wishes only to examine the law. To discuss its relevance, significance and purpose. In a practical sense it might be better to have more practice at the University. The question that remains is why the argument is not based on the reasons why theory needs to be combined with practice and the need for practical experience at the university. Why does Gravett need to 'piggy-back' off the theoretical arguments made by the Department of Jurisprudence. The arguments Gravett makes about the evolution of US law schools and their acceptance of trial advocacy cannot be more valid. The main opponent of Gravett, must be the deans of the university's and their legal academics.[47] The system must be changed, not the Department of Jurisprudence.

5 Philosophy as part of the LLB curriculum and a possible solution

Gravett's main concern with the *Pretoria Crits* can be found, not in the 'leaky pipe' article but in 'deconstruction'.[48] Gravett is concerned about the 'radical' critical legal theory practised by some in the Jurisprudence department. The answer for this lies in the argument made by van Marle.[49] The answer is the true philosopher and his/her search for truth. Truth is the work of the true philosopher. The discovery and understanding of the true world is the very foundation of the apparent world. To criticise a philosophical questioning of the law, will therefore cause the practical to crumble due to a lack of foundation in truth. Philosophy, therefore, is an integral part of all things. It encapsulates everything we as humans do. The fundamental questions of why we are on this earth or even alive. Philosophy and legal philosophy cannot be diminished to Critical Legal Studies. CLS is one part of many theories toward reaching a goal rooted in philosophy. However, he seems to not understand that it is not in a philosopher's nature to proclaim anything as perfect. There are many theories from African philosophy to Feminist theory to Queer theory to Positivism. All are theories, some have been accepted and practiced by those in practice, but the philosophers themselves are mostly observers of the present time, as well as questioning the

47 Gravett (n 1) 12.
48 Gravett (n 11).
49 van Marle (n 13) 632.

foundation of history in truth.[50] This is what Gravett accuses the Jurisprudence Department of. He therefore, is not attacking the Jurisprudence Department, but philosophy itself. The critique he has against the Department might be the answer to his 'radicalisation' concerns.

The definition of philosophy is: 'the study of the fundamental nature of knowledge, reality and existence'.[51] The legal branch of philosophy should be no different, but with a specific focus on legal knowledge, reality and the existence of the legal field. Gravett mentions that the '*Pretoria Crits*' 'refuse to grasp that theoretical and practical training or not incompatible'. To use an ancient but effective allegory to explain the role of the educator through the eyes of a philosopher, I use the allegory of the cave. Gravett is contemplating the problems and speculating about the 'images or shadows of images of justice' and wishes that students 'endeavour to meet the conceptions of those who have never yet seen absolute justice'.[52] As mentioned above philosophers seek true knowledge and questions existence. The philosopher as a teacher is much like the instructor Socrates speaks of when he says: 'the instructor is pointing to the objects as they pass … will he [the student] not fancy the shadows which he formerly saw are truer than the objects which are now shown to him?' and 'he is reluctantly dragged up a steep and rugged ascent … is he not likely to be pained and irritated'. The purpose of philosophy is to educate the 'minds eye'. To ensure that the truth is told. To teach legal philosophy or any philosophy is to teach the truth about the world and not let the students be left to discuss the relationship between shadows. It may be true that the Department of Jurisprudence has relied somewhat on critical legal theory as a field of legal philosophy in their articles, but to use one branch of legal philosophy to discourage the argument made by philosophers to teach, discuss and study knowledge and not practice it, is superficial. It may be true that the Department of Jurisprudence is guilty of relying too much on a 'radical' critical legal theory and the greatest critique toward this 'radical' critical legal theory might lie in philosophy itself. Any philosopher who proclaims to know the full truth is not a true philosopher, for a true philosopher will be preparing for death and will find nothing else to be of concern than that which concerns a dying man.[53]

50 This is a contentious issue, as will be made clear later in the article with the conflict between politics and philosophy as disputed by Plato and Aristotle. Voltaire was one of the first philosopher to question truth in history. In the first part of his *Essai sur les Moeurs et L'Esprit des Nations as titled the Philosophy of History.*

51 South *African Concise Oxford Dictionary* (2007).

52 Plato's *Republic* (Itunes version) 330.

53 van Marle (n 13) 634, quoting Minkinnen.

> Truth is the ultimate object of thinking, but because it is also the object of our desire, it must remain unsolved, an aporia. Thinking without desire and, by the same token, law as such, are authentic paradoxes.[54]

In this quote it becomes clear that those who may come the closest to the understanding of the true world can never be influenced by the needs of the apparent world. For the understanding of truth must never be defiled with anything other the thoughts of those concerning a dying man.

Philosophers and their search for truth, however, comes with its own caveat. The warning is that in the search for truth, your desire for the truth might prohibit you from ever finding it. The conflict or non-conflict between philosophy and politics has existed since the days of Socrates. Plato clearly advocates for politics to be part of philosophy's goal, where Aristotle tries to keep philosophy and politics away from each other and thus in conflict. It is up to the philosopher to decide, but the caveat remains that once the philosopher dives into politics by descending into the cave and dragging the others in the cave up the descent, he/she risks the truth to be nothing more than another façade as the truth cannot ever be said to be the truth but merely a truth from the perspective of the observer. Gravett makes the argument that some Critical legal theorists are promoting deconstruction but are in actual fact destructive of too much of the law, without providing an adequate replacement.[55] This may be true, as I see the philosophy behind the finding of truth in the law or exposing the truth might seem to be destructive, but the law must be able to withstand attacks on its so-called justice. Gravett himself expresses the reality of injustice in the law. The argument Gravett makes is that in order to counter the nihilism that comes with knowing that the law is not perfect is to focus on the parts, however small, that are just and promote justice.[56] This, he argues, is how legal education is currently avoiding nihilism in students and promote a positive image of the law.

6 The metaphor of Pericles and the leaky pipe

I would like to shortly discuss Gravett's use of Twinning's Pericles and the leaky pipe. Pericles was one of the greatest Greek statesmen of his time. Born 495 BCE, Pericles was the first politician to note the importance of philosophy. His discussions were of the state and the

54 P Minkinnen *Thinking Without Desire. A First Philosophy of Law* (1999) 187.
55 Gravett (n 11) 320.
56 Gravett (n 11) 320.

greater picture of the world in which Athens was the leading city.[57] If Gravett's metaphor is to be broken down into pieces: 'Pericles should learn to Fix a Leaky Pipe'. In order for a lawyer to be a Pericles as described by Twinning he must first be a: 'lawgiver, the enlightened policy-maker and the wise judge'.[58] If the metaphor mentioned above is to be interpreted in the way that the article suggests, which is to suggest that theory and practice is not mutually exclusive, then Pericles must first become Pericles. For that to happen Pericles must be educated in philosophy and the understanding of the humanities and the law before he may move on to learning about the leaky pipe. Pericles must first be educated and become a wise judge, as wise as possible before he starts to fix the leaky pipe. For in using Pericles and a plumber, Twinning chose two polar images as way to say we need to find a midway or choose one. The argument made by philosophers is that students must first try and come as close to Pericles as they can, before they may practice anything, whether it be the fixing of a pipe or replacement of the pipe. Therefore, the question remains what the right amount of theory would be. This is up to the Universities and their Curriculum discussions. However, it remains within the interest of the students of law, for the profession to remain a distinguished one.

7 The Law as part of humanities

Gravett himself has on occasion used Irving Younger's Ten Commandments of Cross Examination in his classes on trial advocacy. To quote Younger: 'In a word, read. Not law: there is too much law as it is, and most of it is better unread'.[59] Younger proposes this to experience the world that the law governs.[60] The world that the law governs consists of humanity. It consists of people and ethical problems. The law as part of humanities is not far-fetched in my opinion as all things are seen through the eye of Man and written down accordingly. The state exists for the people and in a democracy is governed by the people. The law forms part of this existence for the people and governance by the people. It is therefore, imperative to have a great amount of influence from humanities. The importance of the humanities must however, never be underestimated as the goal and raison d'être of the law. Especially in a constitutional democracy

57 Pericles' and his 'Funeral Oration' http://hrlibrary.umn.edu/education/thucydides.html (accessed 22 July 2018); 'It is true that we are called a democracy, for the administration is in the hands of the many and not of the few … a struggle transmitted to us their sons this great empire'.

58 Twinning 'Pericles and the plumber' abstract.http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198264835.001.0001/acprof-9780198264835-chapter-004 (Accesed 7 September 2019).

59 I Younger *Ten Commandments of Cross Examination* (1975).

60 As above.

such as ours. The line between the law and those who govern is very thinly drawn as the Constitution and the guardians of the Constitution are both situated in the hands of the law. The fact, however, remains that the judiciary forms part and parcel of the state. The law may not purely be a humanities study, but as mentioned above, the raison d'être for the law remains humanity and that is why the Department of Jurisprudence is so adamant to focus on humanities, for the discussion of the existence of the law will automatically take a study into the raison d'être of the law which leads one to humanities. Gravett suggests that law falls within the realm of engineering, medicine, management and accountancy.[61] I believe he is right. Law, just like engineering, medicine, management and accountancy would have no meaning if it was not for humanity. We would not need roads or planes or cars if there were no people to use them. We would not need medicine if there were no people to treat. We wouldn't need management and accountancy if there were no people doing business and trading interests. Humanity is not a discipline that can be contained. It is enshrined in everything we have accomplished. We see through the lens of our own humanity. Gravett refers to Medicine and I refer him to one of my favourite films:[62]

> What's wrong with death sir? What are we so mortally afraid of? Why can't we treat death with a certain amount of humanity and dignity, and decency, and God forbid, maybe even humour. Death is not the enemy gentlemen. If we're going to fight a disease, let's fight one of the most terrible diseases of all, indifference.

That same indifference is what a law school will reap when it rips humanity out of the law. Humanity cannot be packed into a neat box and named 'Humanities'. It follows and infects everything a human being touches, whether it be the law, medicine, engineering or accounting. Not only is it absurd to try and box humanities up, but to be indifferent is to walk on foundations of nothingness.

8 The Introduction of Constitutionalism

Questions keep arising among students studying law and reading case law from the Constitutional Court. Will the theory we are learning prepare us in answering questions from the Constitutional Court? Will I understand the impact of human dignity on every argument I make? The arguments made by Modiri regarding the introduction of the Constitution and the 'new' legal and political order and its absence in the discussion on transformation of the LLB curriculum is worth discussing.[63] It is true that the law and the legal profession is in a

61 Gravett (n 1) 10.
62 Patch Adams (1988).
63 J Modiri 'Crises in legal education' (2014) 3 *Acta Academia* 6.

transitionary phase, from the formalist neutrality that was expected from the previous legal order to the substantive constitutional approach of the modern Constitutional Democracy. Students who move into practice will, unfortunately, face both legal orders. It is, therefore, unreasonable to advocate for an advocate in the efficient and practical sense as Gravett proposes without educating students on the realities of decolonisation and transformative constitutionalism. The reality is that future attorneys and practitioners will face both legal orders. The fact is that both legal orders exist in practice. Gravett has provided evidence in the *Leaky pipe*, but I will provide some evidence of the 'new' legal order that was started by the Chief Justice of the Constitutional Court with the introduction of transformative constitutionalism. The Constitutional Court has ruled many times in the favour of the legal writer who can 'respond … to "disenchantment"'.[64] In the case of *City of Tshwane Metropolitan Municipality v Afriforum and another* (*Afriforum)*,[65] the court encouraged a way of reasoning that looks at the true world. The Court wants the attorney to show it the nihilist way in which the law has treated your client and then ask the court to deliver justice. In arguing the true world before the Court, the client wins. The Constitutional Court has shown itself to encourage a way of argument that looks to the humanities. The focus on human dignity as a cornerstone of the law is the shift toward a study of humanities that many legal professionals are afraid and sometimes unable to make. This shift can clearly be seen in *Afriforum*. To quote the court: 'fellow human beings deserving of human dignity and equality … even if what Afriforum says constitutes harm does in reality amount to harm'.[66] In the case of *SAPS v Solidarity obo Barnard* the court stated: 'So, plainly, it [the Constitution] has a transformative mission. It hopes to have us re-imagine power relations within society.[67] However much of the current legal profession objects toward this type of reasoning or the impact it has on legal certainty or on the rule of law. The Constitutional Court is the highest court in the country and its cases provide precedent that must be followed. It is, therefore, seminal that practitioners be taught to argue in the lieu of this 'new' legal order. The arguments are centred around harm to human dignity This is the argument van Marle made in her questioning of complicity and jurisprudence. It is also notable that van Marle uses the words of the former dean of Yale Law School where he notes

64 van Marle (n 5) 210.

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

66 *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (6) SA 279 (CC) para 58.

67 *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 29; Moseneke ACJ continues: 'In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination'.

> distinguished lawyer, the one who is recognised by his or her peers in the profession as an exemplary practitioner and whose work is marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill … when one lawyer wishes to praise the work of another, the compliment he [or she] is most likely to pay him [or her] is to say that he [or she] is a person of sound judgment.[68]

This ironically ties in with the teachings of Gravett when prescribing Irving Younger's ten commandments of cross-examination where Younger encourages the reading of novels and poetry outside the law. The same work prescribed by Gravett gives the means by which to become not a mere writer or drafter of the legal documents, but to become exceptional. This is the relevance of an understanding of humanities and the use of 'experience' as Younger would call it, is what makes a lawyer exceptional as he or she can persuade any judge by using not colourful language but understanding the world through poetry and literature and arguing and writing with the full understanding of the world and the reasoning behind your argument. The reading of literature is not to copy the language into your writing, but to understand the world and incorporate that understanding into legal writing and arguments. The question would be what the Constitutional Court expects of a legal practitioner? Are the students that receive an LLB prepared to argue before every court in the country, especially the Constitutional Court (as its precedent can and must be used in all subordinate courts)?

9 Conclusion

The different arguments made by different academics must be taken separately and critiqued separately. Gravett's method of defence for the apparent world [the world of practice] by questioning the true world [the world of theory and philosophy] may yet yield results, but if it is done without constraint it runs the risk of destroying the true world in its entirety and with it crumbles the apparent as well. For the true philosopher knows that the foundations of the true world are yet to be discovered. It might be foolish to question the search for truth rather than questioning the authenticity of those who proclaim to know it. Humanities are informing legal arguments more and more everyday with the introduction of human rights and the right to human dignity specifically as a focus of the highest court in South Africa, the Constitutional Court. As was shown in this article the Constitutional Court is driving the questions asked by the so-called *Pretoria Crits,* but the questioning of the law is and should be motivated by philosophical questioning. It was also made clear in this article that a true philosopher will drift toward nihilism and the truth,

68 A Kronman 'Living in the law' *The University of Chicago Law Review* 54(3) 861 – 2: as quoted in van Marle (n 13) 210.

so far, will be nihilistic in character but providing distractions or keeping the truth hidden is not the answer. Students have a right to know and search for a cure for the nihilism that seems to inevitably follow the excavation of truth. The cure cannot and should not always be the powerful authority that comes with a judgment from the Constitutional Court. The true power and character of the law must not be hidden, for otherwise it will never change into anything less meaningless than it already is. This does not mean, however, that the philosophers who have seemingly uncovered this authentic truth can easily delve into the cave and drag the 'pained' students with force out of the cave and risk destroying the protections, however false, with it. For the newly discovered truth might turn out to be just another shadow on a newly discovered cave. Let us question the truth together and with it not disable others but better ourselves and the legal profession in South Africa.

BLIND JUSTICE: AN ANALYSIS OF THE IMPACT OF THE SYMBOLIC LADY JUSTICE IN ADJUDICATION

*by Mpho Mogadime**

1 Introduction

The injustices of South Africa's past have necessitated the enactment of a value orientated approach to law. A value-orientated approach expands law's capacity to substantively contribute towards equalising uneven power relations between people and reconciling the law itself with society through a transformative approach to adjudication. The Constitution[1] clearly reveals this equalisation and reconciliatory potential through its goal to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

* Third year LLB and General Assistant at the Department of Jurisprudence, University of Pretoria. Debates amongst legal scholars concerning what law is and how it should be interpreted are perpetually ongoing. In South Africa's current constitutional dispensation, legal interpretation through the courts has enjoyed increased attention. This piece is an addition to that debate. It is a critique of the concept of 'justice' as perceived through the age-old image of *blindfolded* Lady Justice, and it suggests a value oriented approach to adjudication that is not blind — an approach that is able to look at, see, and respond to society's need for justice by utilising the values underlying and/or contained in the Constitution.

1 The Constitution of the Republic of South Africa, 1996.

> Improve the quality of life of all citizens and free the potential of each person.[2]

One of the main challenges to this constitutional goal is how neutrality and objectivity have often been portrayed through the symbol of Lady Justice when it comes to judges and adjudication.[3] This may have led to an understanding of adjudication that denies the political significance of law and does not allow the space for judges to express their own views where appropriate or to bring valuable insight to their adjudication.

This article serves as an analysis of the depiction of the neutrality and objectivity of judges through the image of Lady Justice. I will investigate whether this depiction is relevant under the current constitutional dispensation, bearing in mind a value-orientated approach to law. Firstly, I will discuss the historical development of the image of Lady Justice with regards to adjudication. Secondly, I will analyse the relevance of Lady Justice in a post-apartheid South African context. Thirdly, I will provide a discussion on the post-apartheid contextual meaning of reconciliation and the onus of a value-orientated approach to adjudication that the Constitution has placed on the courts.

2 The historical development of Lady Justice in adjudication

The image of Lady Justice, which originated from the ancient Greek goddess *Themis*,[4] and also known as the goddess *Justitia* during the early Roman period,[5] has often been depicted as a symbol of divine justice with scales in her left-hand for measuring the competing claims brought to her and a sword in her right-hand to punish the offenders of the law. In later developments within the legal community, her image has often been attached to the view of how judges should approach adjudication.

One particular feature is her blindfolded eyes, which *supposedly* symbolise fairness and equal justice;[6] that is, a manifestation of formal 'equality'. The notion of formal equality holds that all people

2 Preamble, the Constitution (n 1).
3 'Neutrality' and 'objectivity' are used synonymously in this article – though there is philosophical discourse on the differences between the two.
4 JA Schmid 'Cover the eyes of Lady Justice: An appeal for double-blind peer reviewing' (2003) 4 *EMBO reports* 734.
5 A Pulte 'Views from The Cathedral: Blindfolds, colour-blindness and other problems with justice's visual acuity' (2013) *The Journal Jurisprudence* 399, 420.
6 Schmid (n 4) para 1.

must be treated equally, and aspects such as gender, religion, and race should be disregarded.[7]

During the early Roman period, judges were familiar with the practice of adjudicating in conformity with the best interests of society, which stemmed from the *ius gentium* — the law that was based on the principles of equity and good faith.[8] Roman judges generally had discretion over particular cases, and at times the *ius gentium* was developed to meet the ever-changing needs of society, so as to remain relevant. Hence, the practice of considering the best interests of society through invoking societal values is not nascent, but dates as far back as the Roman law era.

I am of the view that the influence of formal equality is arguably one of the factors that have played a role in causing a shift from the objective to meet society's need for justice, to an approach that aims to purely interpret the intentions of the Legislature. This approach was known in its earliest form as 'interpretivism or intentionalism'.[9] The perpetuation of intentionalism further contributed to the imagery invoked behind Lady Justice. The main similarities between the idea of intentionalism and that of neutrality and objectivity is how they all *depict* the attitudes of judges in their approach to adjudication. Intentionalism expects of judges to be disengaged from societal needs, expressing extra-judicial moral reasoning or bringing personal life experiences during the performance of their judicial duties where appropriate — the latter being a practice which is inevitable and sometimes necessary.[10] Bonthuys correctly identifies this in her article, 'The personal and the judicial: Sex, gender and impartiality', as she opines that: [11]

> The image of Justice is blindfolded to prevent her from taking account of the particularities and circumstances of the parties which appear before her and thus to administer justice objectively and neutrally.

Although the perpetuation of Lady Justice might perhaps be rooted in a justified pursuit of fair and equal justice, its primary error lies in the denial of the reality that 'judges are [also] human' and cannot

7 See A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 609, 611.
8 PhJ Thomas et al *Historical foundations of South African private law* (2000) 216.
9 WE Nelson 'History and neutrality in constitutional adjudication' (1986) 72 *Virginia Law Review* 1237. According to Nelson, this concept dates back to the 1800s in American jurisprudence.
10 *President of the Republic of South Africa And Others v South African Rugby Football Union And Others* 1999 (4) SA 147 (CC) para 42.
11 E Bonthuys 'The personal and the judicial: Sex, gender and impartiality' (2008) 24 *South African Journal on Human Rights* 239, 253.

achieve absolute neutrality.[12] Lady Justice also assumes that parties appearing before a court stand on equal ground. This assumption fails to recognise that people come from different backgrounds, classes and statuses in society, and other circumstances. No two persons are the same, and the factors that differentiate them may play a vital role in the correct administration of justice. Hence, the combination of treating parties before a court in an absolutely equal manner (that is, formal equality), ever without question, and purely applying the intentions of the legislature is unreasonable and at times improper. It leaves justice as undone; that is, the true success of justice thereof is questionable.

The question, then, arises whether Lady Justice is relevant in a post-apartheid constitutional dispensation.

3 The relevance of Lady Justice in a post-apartheid legal context

Jeffrey Goldsworthy mentions in his article that, 'Without the support of intentionalism, legal positivism would probably succumb to one of its traditional rivals-either natural law or legal realism'.[13] This expression shows how the preservation of intentionalism has successfully perpetuated a culture of legal positivism.[14] Legal positivism is a school of thought where law is accepted as valid if it has been enacted by the appropriate authority, regardless of whether that law is just. In other words, the moral appeal of an enacted law does not affect its validity.[15]

This is very much related to a formalistic method of interpretation in adjudication, whereby a syllogistic combination of legal rules and facts are used to reach a conclusion.[16] According to formalist interpretation, the law, which is regarded as separate from morality and politics, is a 'system of self-determining rules that can be applied to the facts of the case in logical fashion'.[17] This ingenuine conception masks the obvious fact that legislation is enacted as law by subjective human beings who, in the eyes of the formalistic judge, are sacredly consecrated as 'The Legislature' who's laws dare not be

12 *South African Commercial Catering And Allied Workers Union And Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 3 SA 705 (CC) para 13. In this case, Cameron AJ differentiates between neutrality and judicial impartiality, the latter of which refers to the 'quality of open-minded readiness to persuasion — without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views'.

13 J Goldsworthy 'Legislative intentions, legislative supremacy, and legal positivism' (2005) 42 *San Diego Law Review* 493.

14 Goldsworthy (n 13) 495-496.

15 T Humby et al *Introduction to law and legal skills in South Africa* (2012) 203.

16 Humby (n 15) 203.

17 As above.

brought into question. Consequently, there is no or little acknowledgement and invocation of underlying values that inform (or *should* inform) the law within the process of adjudication.

Much to the contrary, however, every law and conduct is required to be in conformity with the Constitution in the current constitutional dispensation. This implies that the Constitution, including its underlying values, informs every law. Cameron J expressed this view in *My Vote Counts NPC v Speaker of the National Assembly and Others* (*My Vote Counts* case), where he stated that:

> Far from avoiding constitutional issues whenever possible, the court has emphasised that virtually all issues — including the interpretation and application of legislation and the development and application of the common law are, ultimately, constitutional. This is because the Constitution's rights and values give shape and colour to all law.[18]

The approach referred to in *My Vote Counts* especially includes judges' methods of interpretation within the process of adjudication.[19] A formalistic approach to adjudication inspired by Lady Justice and perpetuated by legal positivistic thought fails to show its relevance within the current constitutional dispensation, in that it manifestly proves to be incompatible with the value-orientated approach inspired by the Constitution. It fails to invoke the underlying values of the law in its approach, whether to merely interpret the law, or to develop it, or to even challenge it.

4 The meaning of reconciliation through adjudication in the current constitutional dispensation

Apartheid South Africa, often described as a 'rights pariah', with a 'wicked system of law',[20] was generally characterised by a form of adjudication that was formalistic in its approach. This approach was often justified by judges claiming to follow the (subjective) intention of the Legislature, under a system of parliamentary sovereignty. The judicial system of apartheid, through its disengagement, was ineffective in administrating substantive justice, which is informed by a substantive reasoning that entails taking the responsibility to invoke (or challenge where necessary) the 'underlying principles that inform laws themselves'.[21]

18 *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) paras 51.
19 Secs 2 and 39(2) of the Constitution of the Republic of South Africa, 1996.
20 Smith (n 7) 610.
21 P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 351, 357.

South Africa's unique past has created the need for a unique definition and goal of reconciliation. In a post-apartheid South African context, the main focus of reconciliation is not merely to 'harmonise' society, which would alone bare superficial results;[22] but it is to constantly define a society that acknowledges the injustices of its past and collaborates in taking the responsibility to redress those injustices, in order to form a South Africa based on freedom, human dignity, and substantive equality. Most importantly, a South Africa that continually engages with change, guided by the values that underlie the Constitution and subjecting the written document itself to any higher demands of justice where necessary. The former Chief Justice Pius Langa referred to this process as 'transformative constitutionalism', whereby there is a:

> … perspective that sees the Constitution as … transformative … because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.[23]

The constitutional goal of reconciliation should be seen as a mandate that creates an onus on the courts to invoke constitutional values in their methods of interpretation and adjudication,[24] which will help cultivate a legal culture of reconciliation. In *Matiso v The Commanding Officer, Port Elizabeth Prison,* Fronneman J held that:[25]

> The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution…The purpose now is to test legislation…against the values and principles imposed by the Constitution.

In fact, this imperative responsibility further necessitates an addition to the cornerstones of adjudication in a post-apartheid legal context — 'transformative adjudication'.[26] Transformative adjudication is a form of adjudication that allows judges to search for substantive justice by reconciling society with the values enshrined in the Constitution.[27] It should be noted that transformative adjudication as an 'addition' is not an autonomous principle on its own, but rather a tool that enhances the very core of independence and impartiality as the fundamental cornerstones of adjudication,[28] while at the same time still respecting and upholding the independent and impartial

22 N Valji 'Race and reconciliation in a post-TRC South Africa' (2004) *Ten years of democracy in Southern Africa* (available at http://www.csvr.org.za/archive/docs/racism/raceandreconciliation.pdf).
23 Langa (n 21) 354.
24 *My Vote Counts NPC (*n 18). In this regard, the constitution clearly stipulates that, '… obligations imposed by it must be fulfilled'.
25 *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Another* 1994 4 SA 592, 597.
26 D Moseneke 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309
27 Moseneke (n 26) 315.
28 Humby (n 15) 203.

discretion that judges have to apply in the performance of their judicial duties. This approach, therefore, acknowledges that law cannot entirely be separated from politics.[29] Rather, both law and politics should be seen as performing important roles in the activity of creating a truly democratic society; as opposed to the perspective that views law and politics as entities that are in opposition to each other.

The pursuit of reconciliation under the Constitution also facilitates the achievement of one of the major challenges to transformation — access to justice.[30] In this regard, Sibusiso Zikode, who brings a view 'from below', which is the perspective of the poor and marginalised regarding the substantive law itself, access to the law, and the power of the poor,[31] propagates in his article the idea that there needs to be reconciliation in the way the law confronts existing power relations, through a substantive application of the rule of law.[32] This will in succession contribute towards achieving the constitutional objective of access to justice through the courts,[33] which can be seen as one of the fundamental pillars that contribute towards the advancement of the wider constitutional goal of reconciliation.

5 Concluding thoughts

The view of the neutrality and objectivity of judges through the image of Lady Justice ultimately hinders access to justice, in that it incorrectly deems all parties before a court to be absolutely equal — having equal power or standing on equal positions. If there is no substantive access to justice or substantive equality, there cannot be a proper facilitation of reconciliation. Consequently, the need arises for the law and its administrators to align themselves with the values underlying the Constitution, so as to advance the interests of justice.

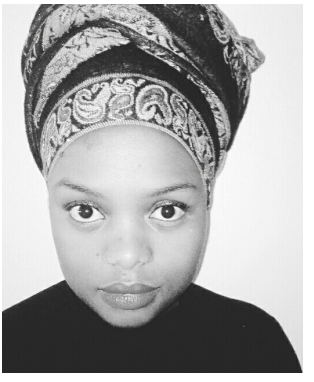
Therefore, the symbol of *Blind* Lady Justice and especially its role as the foundation that has for a long time informed the depiction of the neutrality and objectivity of judges, which perpetuates a culture

29 Langa (n 21) 353. 'This approach to adjudication requires an acceptance of the politics of law'.
30 Langa (n 21) 355.
31 S Zikode 'Poor people's movements and the law' (2011) *Conference on Social Movements and the Law* (available at http://abahlali.org/node/8551/).
32 G O'Donnell 'Why the rule of law matters' (2004) 15 *Journal of Democracy* 32. In addition, the rule of law should not be seen in light of formal equality, but as a tool that contributes to building a truly democratic society, when applied substantively.
33 Sec 34 of the Constitution of the Republic of South Africa, 1996. Zikode (n 31): 'We want a society where everyone is treated as equal before the law and everyone has the same ability to access the legal system'.

of blindness towards issues of society, is irrelevant in the current constitutional dispensation.

TOWARDS LAND RESTITUTION THROUGH AN AFRICAN PERSPECTIVE ON JUSTICE: A CRITICAL ANALYSIS OF LAND REFORM AND THE ROLE OF RE-IMAGINATION

*by Mathabo Mohwaduba**



1 Introduction

The issue of land reform lies at the heart of African pride and dignity. However, colonisation leads to the systematic deprivation of land among the conquered people, as Ramose calls them. Ramose states that colonisation and racism were a dehumanising product of an unjust system, land deprivation being a sub-product of that system.[1] Ramose calls it a double injustice in an unjust war. A system of injustice where the conquered was denied the basic courtesy of humanity by the conqueror. Apartheid and colonisation were the draconian systems that denied an entire people the ability to be regarded as an equal. However, the most tragic legacy left by apartheid and colonisation is the denying of conquered people their unique way of life and culture which is intertwined and dependant on land.

* LLM student, University of Pretoria. This article aims to serve as a contribution of sort towards African jurisprudence by provoking thought on the role of the re-imagination of property rights and justice, according to an African perspective.

1 MB Ramose 'An African perspective on justice and race' (2001) 3 *Polylog Forum for Intercultural Philosophy.*

The question of economic sustainability within the aims of land reform is a grave concern for many persons and for many different reasons, especially given the failed example of Zimbabwe. Zimbabwe implemented a land reform program that disabled the economy and left the stench of poverty permeated in the air. However, the matter of Zimbabwe is not as elementary as it is often diagnosed to be.

The idea of delaying the restoration of the dignity and honour of a marginalised and excluded people, so as not to potentially aggravate the economy and duplicate the example of Zimbabwe, is problematic.

The view of potential economic threat extends on the idea of perceived European cultural superiority, not opening one's mind to what actually qualifies as property outside a European context.[2] It is further a narrow and warped view of human nature, failing to account for the differences in human society and human existence. Differences that extend beyond European cultural contexts.[3] European cultural context often dictates a monistic view of what entails a good life.[4]

In this article, I will not be delving into the debate of Zimbabwe and in turn the debate of land and economics. This will consequently serve as a limitation in the subject at hand.

The focus of this article is ascertaining what an African perspective to justice is and why it is needed as the primary premise in resolving land reform matters. Most importantly I will be looking at case law to assess whether South African courts are starting to turn to an African perspective to justice when dealing specifically with land wars in post-apartheid South Africa. I will also emphasise the need for our judicial system to re-imagine land and reform outside from what it is ordinarily understood to be in European norms.

2 Defining an African perspective to justice

Ramose's approach to justice stems from an African perspective. The perspective dictates that *molato ga obole*.[5] Furthermore, it relies heavily on Ubuntu.[6] The idea of Ubuntu embodies a flexible, unformalised and reasonable structure that links to morality. The

2 S Sibanda 'Not quite a rejoinder: some thoughts and reflections on Michel Man's "Liberal constitutionalism, property rights and the assault on poverty"' (2013) *Stellenbosch Law Review* 3.
3 Sibanda (n 2) para 1.
4 Sibanda (n 2) para 2.
5 '*Molato ga o bole*;a Sotho term that can be translated to: Justice has no prescription'. Ramose (n 1) para 7.
6 Ramose (n 1) para 5.

term Ubuntu triggers the idea of truth and justice where 'justice assigns responsibility'.[7]

I share the same sentiments expressed by Ramose regarding what defines an African perspective to justice.

Land reform is a feature of Ubuntu; aiming to assign responsibility through truth and reconciliation; through an African perspective. Thus it goes without question that land redistribution programs ought to be approached with an African perspective to justice, prescription and property. Consequently employing what is commonly known as, 'an African solution to an African problem'.

In the transition to democracy in South Africa, the democratisation paradigm was consistent with the conqueror's claims.[8] This is evident in the major weakness illustrated by the property clause in the 1996 Constitution. The 1996 Constitution failed in its nature and form to include the indigenous conquered people.[9] In its aims to conquer apartheid, it failed to address the land question in an in-depth and thorough manner. The democratisation paradigm lost sight of the fact that land to African peoples was and remains a basic issue. When aiming to address the idea of property, including land wars, the Constitution failed to address the issue from an African perspective to justice. Section 25(7) briefly articulates in four lines a vague solution to over 100 years of land deprivation.[10] Of course subject to section 36(1) of the Constitution, the limitation clause.[11]

It is crucial to note that the issue of land among African peoples has long been an issue before colonisation and apartheid. Land among African people is the thread that ties the very being of the African peoples together.

Land is sanctity, it is dignity, it is culture, and it is heritage and belonging. Thus land restitution and reparation, through an African perspective to justice, arise as necessities of historical justice in a post conquest South Africa.[12]

The omission of justice in reconciliation has sprouted much resistance. In the *AZAPO* case Justice Mohammed stated in his judgment that 'Much of the unjust consequence of the past could never be fully reversed. It might be necessary in crucial areas to close the book'.[13]

7 MB Ramose 'Reconciliation and reconfilliation in South Africa' (2012) 5 *Journal on African Philosophy* 21.
8 Ramose (n 1) para 15.
9 Ramose (n 1) para 15.
10 The Constitution of the Republic of South Africa 1996.
11 Constitution (n 10) Section 6(1).
12 Ramose (n 1) para 27.
13 *The Azanian Peoples Orginisation v the President of the Republic of South Africa* (CCT 17/96).

The above statement by Justice Mohammed hints at the complacency post-apartheid South Africa has in dealing with heartfelt issues inherited from apartheid, *in casu*, land deprivation. The statement by Justice Mohammed stems from the false premise that the 1996 Constitution of the Republic of South Africa was the meeting ground of compromise and reconciliation of all parties. The negotiations that brought about the Constitution of the Republic of South Africa, Act 108 of 1996, was an undemocratic process of elitists.[14] Within these negotiations, De Klerk consulted Whites as a group yet the ANC did not extend the honour of such consultation to the Blacks, and the issue of land was underestimated and side-lined.[15] Thus land reform aims to address the lack of Black representation and perspective that is not afforded by the Constitution. The increasingly louder call for land, especially among the conquered people, is a call that was recognised by the Freedom Charter and denied by the Constitution.

The issue of nationalising land has long been swept under the carpet. Mandela in a 1956 publication, *Liberation*, expressly addresses the mining, banking and industry monopoly, but somehow is never found addressing land. Thirty years after Mandela's publication, at the 60th anniversary of the South African Communist Party, Tambo speaks of the need for 'economic emancipation' but somehow also fails to address the very urgent and grave issue of land.[16] This is an enigma of South African history.

The greatest hindrance to true reconciliation among South Africans is the absence of justice. Many South Africans lead landless and unvindicated lives. These are issues that need to be addressed with the urgency they deserve. Perhaps '[i]t is easy for Mandela and Tutu to forgive … they lead vindicated lives'.[17] In many South African's lives, nothing has changed with the transition to democracy. The majority remains marginalised, poor and landless.

3 *The Occupiers v Steele*[18]

The Supreme Court of Appeal case of *The Occupiers* is an exceedingly important case in the sphere of space and land issues.

Briefly stating the facts; the appellants are a group occupying a property situated at 11 Hendon Road, Yeoville in central Johannesburg.[19] The appellants have defaulted on their rental

14 Ramose (n 7) 26.
15 Ramose (n 7) 26.
16 Ramose (n 7) 27-28.
17 A Krog *Country of my skull: Guilt sorrow and the limits* (1999) 109.
18 *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* (102/09 and 499/09) [2010] ZASCA 28.
19 *The Occupiers* (n 18) para 1.

payments that were due to the respondent, and the owner of the property, Mr Steele. In the court of first instance the appellants received an eviction order against them and when they applied for a recession of the order, it was refused. The court *a quo*, consequently, granted the appellants leave to appeal to the Supreme Court of Appeal. The appellants and the respondent further stated that 'if the recession appeal was successful it would be determinative of the entire matter'.[20]

After an unsuccessful search for alternative and affordable accommodation by the applicants, the due date for the vacation of the premises found the appellants still occupying the property.

When approaching the court the applicants primarily relied on the common law of 'good cause' and Uniform rule 42(1). Generally the requirement of 'good cause' is understood as a *bona fide* defence which, *prima facie*, shows prospect of success.[21]

One of the occupiers, Mr Ngcobo, set out in the affidavit, his and the remaining appellants personal circumstances. Approximately 70 people reside on the property. The property comprised of four large flats that were subdivided into multiple units, as well as an additional three separate rooms, formally staff quarters.[22] The tenancy ran for a periodic monthly basis where the rental per flat amounted to R1 239 and R 266 per room. According to the respondent the property had become overcrowded and dilapidated to the extent that he decided to renovate it. Consequently terminating all the leases, with three months' notice.

Included among the residents of the property are persons with disabilities, women headed households and children. Mr Ngcobo himself has been residing on the property, namely the single room, since 1992 with his two wives and children. Ngcobo further illustrated the poor living conditions of the occupiers and their informal stalls where they sell sweets and cigarettes that serve as their primary income.[23] All in all the occupiers of the property are poverty stricken and from previously disadvantaged groups. Eviction would inevitably result in homelessness.

Section 4(6) and 4(7) of the PIE Act reads as follows:[24]

> 4(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances,

20 As above.
21 *The Occupiers* (n 18) para 4.
22 *The Occupiers* (n 18) para 2.
23 *The Occupiers* (n 18) para 5.
24 Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE).

> including the rights and needs of the elderly, children, disabled persons and households headed by women.
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

Important terms worth noting from the above legislation are the introduction of justice and equitability in the dealing of land issues. These are values added into the Act in order to facilitate a change in property rights and land issues in South Africa.

The change to a more value-laden approach to land, as opposed to a monistic approach, is in line with Constitutional values, and the idea of approaching land issues with the value-laden African perspective to justice.[25]

Evidently, the courts in themselves have moved towards a cause of re-imagining what property and land mean to marginalised and previously disadvantaged persons such as *The Occupiers* in Yeoville. The reiterated emphasis of the sentiment of a value-laden approach to land occupation is in line with the African perspective to justice. The ideas of justice and equity are ideas of Ubuntu. Justice and equity are an elaboration of acknowledgement. As Justice Sachs reiterated in *Port Elizabeth v Various Occupiers*, there's an obligation to 'have regard to the circumstances'. Knowledge and acknowledgement are key components of an African perspective to Justice and Ubuntu.[26]

It was thus concluded by the court of appeal that it would not be just and equitable for a court to grant an eviction that would render the occupiers of the property homeless. The court of appeal's decision is a fascinating stance to note especially because it affects the most comprehensive real right to property which is ownership, ownership which cannot be limited arbitrarily.[27] Perhaps the shift to a more African perspective to justice shows an act of recognition from the legislature and judiciary of the legacy of land deprivation in South Africa.

Undoubtedly the requirements of justice, equity and good cause are values that take on the responsibility of re-imagining land disputes

25 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 11.
26 A Sachs *The strange alchemy of life and law* (2011) 79.
27 Constitution (n 10) Section 25(1).

through an African perspective to justice which embodies Ubuntu; and which extends to recognition, dignity, humanity, and honour.

The idea of justice and equitability was also extended to the Extension of Security of Tenure Act as applied in the *Molusi* case.[28]

4 Prevention of Illegal Eviction from Unlawful Occupation of Land Act: the introduction of re-imagining an African perceptive on justice[29]

The case of *The Occupiers* becomes an important source of precedent for matters of land.[30] The PIE Act's introduction of 'justice and equality' are qualities of Ubuntu. It's an Act that recognises South Africa's sore past and the legacy of segregation Acts such as The Group Areas Act of 1950 which left many groups of people marginalised, and landless.

The Occupiers' judgment is important because it realises that land issues in South Africa cannot be treated in isolation to our draconian apartheid history. This is undoubtedly a type of recognition that should be carried through to all programs and spaces that address land disputes in South Africa.

5 The role of re-imagining when addressing issues of land

At face value, it appears as if the approach of resolving land disputes outside of European construct is beginning to take place in legislation such as the PIE Act and judgements such as *The Occupiers*.[31] However, as applaudable as it is, formal land reform programs still fail to see the need to address land issues through a value-laden African perspective to Justice. We have to come to a point of re-imagining what property means in an African setting among African people. Perhaps with that constant re-imagination, we will be able to produce solutions to land disputes that aren't divorced from the needs of the people.

Parekh embarks on a critical exploration between colonialism and liberalism. He does so through a specific focus on Locke's writings. Parekh profoundly states that:

28 *Molusi and Others v Voges N.O. and Others* [2016] ZACC 6.
29 PIE Act (n 24).
30 *The Occupiers* (n 18).
31 *The Occupiers* (n 18).

> The contradiction is not just between liberal thought and liberal practice, but within liberal thought itself. Liberalism is both egalitarian and inegalitarian, it stresses the unity of mankind and the hierarchy of cultures, it is both tolerant and intolerant, peaceful and violent, pragmatic and dogmatic, sceptical and self-righteous.[32]

Parekh concludes through Locke's writings that an egalitarian premise does not necessarily translate into an egalitarian conclusion or outcome.[33] Much like the Constitution's European approach to property and land reform; its premise is a noble egalitarian perspective. However, it does not translate into an egalitarian-oriented outcome.

Sibanda supports Biko's call for the decolonisation of the mind and he also brings in the important idea of re-imagining our understanding and approach to land disputes. The critique of section 25 extends to the colonial structure and idea of property that it embodies. The premise of the critique is based on critiquing in order to probe a new set of ideas. It is about re-imagining the future and not centralised around White guilt. We learn from the past, as well as present ideas, to reinvent and re-imagine the future.

A part of re-imagining is evaluating history. Evaluating history's patterns and asking the hard question as to why history keeps repeating itself. This extends to a critical understanding of history. In our process of re-imagination, we need to understand the why and how. Why the call for land reform and how will it be implemented. In our process of re-imagining the future and decolonising the mind, we need a clear theoretical and philosophical premise on the why and how or else the idea will collapse.

If the present ideological function of land reform is wanting, which it is, it should be re-imagined with an African perspective to justice and changed accordingly. Sibanda emphasises the pertinent role of re-imagining ideals and consequently forming foundations on the re-imagined future.

Ideas should be able to serve 'we the people'.[34] Ideas around land should be translatable into political and lived philosophy of the people as Constitutional values are neither self-evident nor eternal.[35] However, liberalism within this hegemonic liberal constitutionalism has dwarfed and disabled our imagination, in what it means to be African people in African spaces.[36]

The strength of democratic values lie in their ability to adapt and remain relevant and sensitive to the local histories and realities. [37]

32 Sibanda (n 2) 336.
33 Sibanda (n 2) 337.
34 Constitution (n 10) preamble.
35 Ramose (n 7) 15.
36 Sibanda (n 2) 340.

The call for the decolonisation of the imagination will answer the questions we have about land and economics. The idea of a democratic South Africa was in itself once an idea of a re-imagined world different from what was then understood and known. Thus what we know should not hinder the call for the re-imagination and creation of a new form of consciousness. What we know should not hinder a new way of life and approach to land and justice, an approach different from what we presently understand.[38]

6 Constitutional review of section 25

The year 2018 has seen the consequent action from the call for the constitutional amendment of section 25; the property clause, of the Constitution of the Republic of South Africa. It is a glorious scene to behold a democracy in action; a democracy and constitution that allows itself to adapt to the present convictions of the people.

Given the sanctity in which the South African Constitution is viewed, many people fear the idea of any sort of amendment and tampering with South Africa's sacred cow. However, in an effort to extinguish those fears, it is worth making it known that the Constitution as it presently stands has been amended 17 times, throughout the years. Thus, we should not fear constitutional review and active citizen participation in the redefining of principles and values for South Africa, as per the convictions of 'we the people'.[39]

Chapter 2 of the Constitution (applicable to section 25) may only be amended by means prescribed by in section 74(2).[40] The Constitution is *lex fundamentalis*, therefore, the process prescribed for its amendment is more onerous than ordinary legislation thus, compelling extensive public participation.

In one of the public hearings, the academics that spoke out expressed their view to the Constitutional Review Committee (CRC) that it is in fact not necessary to amend section 25 as a means of effecting land reform.[41] Booi of the University of Cape Town's Land and Accountability Research Centre argues that the Constitution already permits non-compensated expropriation.[42]

If the interpretation of Booi is correct, then the question asked by Hall of the University of the Western Cape's Institute for Poverty, Land

37 Sibanda (n 2) 340.
38 Sibanda (n 2) 341.
39 Constitution (n 10) preamble.
40 Constitution (n 10) Section 74 (2).
41 J Gerber 'No need to amend Constitution, academics tell constitutional review committee' https://www.news24.com/SouthAfrica/News/no-need-to-amend-constitution-academics-tell-constitutional-review-committee-20180904 (accessed 10 October 2018).
42 As Above.

and Agrarian Studies is well founded. Hall argues that the government is asking the wrong question. She further elaborates that the question government ought to ask itself is why hasn't section 25 been exploited to the benefit of the people in line with land reform?

Hall's question provokes introspection on the cause of land reform failure in South Africa. Is it due to the lack of constructive action that's disabled its effective implementation or the inherently impaired construct of section 25? Perhaps the former president Motlanthe chaired high level panel report recommendations answer the question raised by Hall. The high level panel report acknowledges that land reform 'lacks a vision for inclusive agrarian reform', resulting in many *lacunas*, consequently, the panel made recommendations for legislative clarity, restructure and review around the issue of land redistribution.[43]

Professor Bradley Slade from the University of Stellenbosch's law faculty is of the stance that the amendment of section 25, would result in the complete overhaul of the constitutional design.[44] If the implementation problem of section 25, is orientated around the ambiguity on the issue of expropriation without compensation, then perhaps the discussions around the amendment of the property clause should aim to clarify that conundrum.

On the contra, Dr Rick de Satgé of Phuhlisani; a non-profit organisation, is recorded saying that: 'Land remains a potent metaphor for dispossession — a signifier that South Africa does not yet belong to all who live in it.'[45]

To reiterate Sibanda's sentiments, the amendment of section 25 is a hope for many South Africans living in the congested stink and squalor of poverty, that the Constitution will finally problematise the issue of landlessness among the conquered. However, in the effort of thoroughly dealing with one problem at a time, *in casu*, exclusively with land reform, the possible amendment of the property clause must aim to distinguished land rights from other rights. The amendment must take into careful consideration the fact that 'property is not limited to land'.[46]

43 High level panel on the assessment of key legislation and the acceleration of fundamental change' https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed 10 October 2018) 81.
44 Gerber (n 41).
45 Gerber (n 41).
46 Constitution (n 10) Section 5 (4)(b).

7 Concluding thoughts and the way forward

South African history on property law is closely linked to the state's denial of land rights and the undermining of legal status and the citizenship rights of the conquered.[47] There are undoubtedly fundamental similarities in the *modus operandi* of past and present property laws that separate South Africa into two separate legal zones. South African property law and geography remain divided into Bantustans and the remaining 87 percent remains set aside for White ownership. An African perspective on justice is based on truth and justice. Where 'justice assigns responsibility'.[48]

Responsibility is taking knowledge into acknowledgement.[49] It actively aims to redress by taking an obligation to 'have a regard to the circumstances'. The circumstances around South Africa's dark past revolve around apartheid and colonisation that implemented the deprivation of land among the conquered peoples. Land among African peoples is inter-linked to their very identity. Land is dignity, heritage and belonging. Therefore restitution and reparation, through land reform, are necessities of historical justice in a post conquest South Africa.[50]

Our idea of wealth and property is European-orientated. It is narrow-minded to the sense that we fail to re-imagine, through Constitutional imaginary. We can no longer pretend that our present problems do not exist. South Africa's land and geographical planning remain colonial and contra to the ideals of transformative Constitutionalism. Thus here stems the urgency to re-imagine ideas that will be translatable into political and lived philosophy of the people. Although Michelman seems to believe that there is no need for a property clause, given the inherently protected rights as stated in the Bill of Rights, Sibanda disagrees. The main problem arising from section 25 is its lack of ability to problematise the current position of the conquered peoples in Africa, who still reside in Bantustans. Democratic values are not eternal, they require revision so they may remain relevant and translatable into lived change.

Franz Fanon speaks of a national conscience, a stature we must take on in order to redistribute without collapse and the cannibalising of self and society.

Re-imagining requires critical analyses of history and a clear theoretical and philosophical premise for the way forward with regard

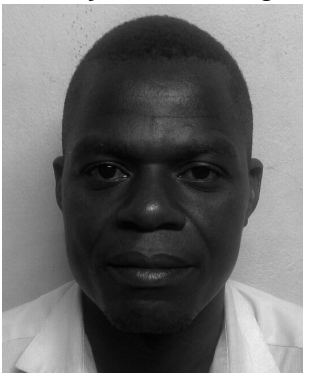
47 A Claassens 'Law, land and custom, 1913-2014: What is at stake today?' *B Cousins and C Walker (eds)* (2015) 68-84.
48 Ramose (n 1) 21.
49 Sachs (n 26).
50 Ramose (n 1) para 27.

to land wars. Re-imagining requires that we look beyond what we know and instead build foundations formulated from our ideals.

We must never underestimate the power of re-imagining our approach to land and property in South Africa, through an African perspective. Present day Democratic South Africa is in itself an idea once imagined.

RETHINKING SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK FROM THE PERSPECTIVE OF HUMAN AGENCY: REFLECTIONS OF A LAW STUDENT

*by Vuso Mhlanga**



Improve the quality of life of all citizens and free the potential of each person …[1]

The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part which is disgracefully racist, authoritarian, insular, and repressive …[2]

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1 The Constitution of the Republic of South Africa, 1996, Preamble.

2 *S v Makwanyane and another* 1995 (3) SA 391 (CC) 261.

1 Introduction

The South African Constitution is novel;[3] its express and implicit provisions, timbre, ethos and the general formulation is permeated by a transformative agenda. The Constitution leans toward a transformative jurisprudential trajectory.[4] It is a vehicle on which the prospects of restructuring South African society hinges on.

The foremost '… objective of the Constitution is that it facilitates the transformation of South African society'.[5] The South African Constitution has been lauded as a transformative tool which marks a complete departure with the past.[6] It is not a coincidence that the South African Constitution has a pervasive transformative trope if one bears in mind the racist, divisive and structurally oppressive apartheid context from which it sprang against. The Constitution is reactionary and remedial in its character. I aver that apartheid's structural edifice of seclusion and inequality is the mischief the South African Constitution strives to correct.

Although the Constitution contains a futuristic element of mapping a just and equitable society founded on the supremacy of the Constitution,[7] it also has '… a backward-looking aspect, the Constitution aims to facilitate the transformation of society by setting right the wrongs of the past.'[8] The foregoing is buttressed by the following observation:

> Our Constitution recognises that decades of systematic racial discrimination entrenched by apartheid legal order cannot be eliminated without positive action being taken to achieve that result.[9]

The Constitution embodies a trenchant commitment and promise to free the creative potential and harness the potential of all citizens but especially those whose voices have been muzzled by apartheid's years of ideological and material seclusion. The Constitution is also markedly different from other progressive constitutions such as that of the United States of America because of its comprehensive Bill of

3 Constitution (n 1).
4 For more on the transformative direction that the Constitution takes, see S Liebenberg 'South Africa adjudicating social rights under a transformative Constitution' in M Langford (ed) *Social rights jurisprudence emerging perspectives in international and comparative law* 2008.
5 Liebenberg (n 4) 75.
6 *Makwanyane* (n 2) para 261.
7 Constitution (n 1) Section 2.
8 S Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2016) 25.
9 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 7 BCLR 687 (CC).

Rights which contains justiciable civil, political and socio-economic rights such as the right to housing and education.[10]

In this article, I intend to focus on the notion of human agency. I argue that the ideologically laden concept of human agency should constitute an ideological and jurisprudential frame from which socio-economic rights as enshrined in the Constitution should be construed. I seek to ground my submissions on human agency on theoretical perspectives which challenge the present uneven structures of power in South Africa. This essay draws from a multiplicity of disciplines such as Law, Social Sciences and Development Studies.

Such a multipronged disciplinary approach to the notion of human agency furnishes a fresh jurisprudential angle to the manner in which socio-economic rights in the Constitution have been construed. The essay is alive to the March 2018 World Bank Report which sets out in clear detail the inequalities that stifle the agency of the majority of the population in South Africa.[11] The essay will reconceptualise the notion of human agency in view of socio-economic rights in the South African Constitution. The philosophical contours which undergird my formulation of the concept of human agency will be discussed. In the end, I will provide some reflections regarding the way forward in an effort to engender agency on many South African citizen.

2 Conceptualising the notion of human agency

I argue that the notion of human agency is the philosophical trope that permeates the Constitution. The notion of human agency, in its proper formulation, must inform the nation's policy.

The term agency generally carries the thought of being in charge, empowered, and endowed with the ability to participate in the affairs of life as a complete citizen. The foregoing formulation of the notion of human agency carries the implication that a person who has agency vindicates his worth or dignity through his engagement with the environment and engages with the world and everyone from a point of an active participant in the processes of life. I should mention that representative and participatory forms of democracy which the Constitution contemplates remain a mirage if it is not grounded in an economic base. Participation and agency require material and intellectual goods or resources to facilitate involvement. This notion finds support in the apt submission of JE Stewart '… for democracy to be realistically attainable it had to be located in a sound and

10 Constitution (n 1) Section 8 and section 38 thereof on the various groups of litigants who have *locus standi* to adjudicate their rights.

11 'Overcoming Poverty and Inequalities in South Africa an Assessment of Drivers, Constrains and Opportunities' http//www.Worldbank.org/curated/en/530481521735906534/pdf/124521-REV-ous.sc (accessed 8 July 2018).

independent economic base'.[12] The constitutional jurisprudence of the courts, especially the Constitutional Court, has stressed the centrality of participation in all facets of life. In *Doctors for Life International v Speaker of The National Assembly and others*[13] the Constitutional Court spelled out the thrust of participation or agency as embodied in the Constitution:

> The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken into account.[14]

The above buttresses my submission to the effect that agency as embodying notions such as dignity and participation, runs to the heart of the South African constitutional scheme and is the nexus between equality, human dignity and the quest for a vibrant democracy as borne by the following quotation:

> Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[15]

The concept of human agency from a transformative jurisprudence standing, ushered in by a supreme Constitution in South Africa contests structural inequalities that lie deep within the South African society. The foregoing notion is alive to the dialectical relationship that exists between human agency and the material conditions in which the majority of people in South Africa find themselves. This formulation of human agency challenges liberal conceptions which view human agency as a static concept.

On the contrary, the notion in its proper construction is concerned with people in their societies in a process of engagement and renegotiating the conditions which impact on their ability to participate meaningfully in all aspects of life, especially materially. This resonates well with the following submission:

> Negotiations between individuals and their perceived (social and physical) environments and also between people are always informed by relations of power. Not only structures and actors act upon one another, but also the production of agency in various domains of society

12 J Stewart 'Zimbabwe: formal structures for sustainability and democracy versus grounded reality' in G Hollands & G Ansell (eds) *Winds of social change civil society interaction with the African state proceedings of multilateral workshops on good governance, sustainable development and democracy. Gaz, Austria 1995-Kampala, Uganda 1998* (1998) 76.

13 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 12 BCLR 1399 (CC).

14 *Doctors for life* (n 13) para 115.

15 As above.

> generates different power (im-) balances. In this process, new inequalities are produced and social hierarchies established.[16]

The above quotation is alive to the fact that unequal power relations produce structural inequalities and uneven geopolitical and economic relations. The uneven economic power and economic dynamics in South Africa, owing to historical imbalances and persistent reproduction of the unequal conditions, affect the potential of those marginalised. It is against this background that the South African Constitution and the jurisprudence on socio-economic rights seek to redress the '… trajectories that move out of, mediate or negate these states of being.'[17] The concept of human agency thus seeks a jurisprudential trajectory that is embedded in the historical and material context in which the Constitutional provisions especially those that impinge on socio-economic entitlements are construed and applied to facts. This feeds into the scope of Karl's pacesetter thrust on transformational constitutionalism which bears quoting:

> [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.[18]

There is a sharp resonance with Klare in the bulk of the Constitutional Court's jurisprudence.[19] Klare's conception of a transformative constitution fits clearly into the notion of human agency. His formulations measure the transformative nature of a constitution using the yardstick of how it enables the previous marginalised to participate or to have agency, especially in the economic sphere. Klare buttresses the foregoing in the sense that his conception is steeped in law, politics and economics and how these should be analysed within the historically-specific circumstances of a people, in this case, South African society.

The marginalised, as shown by the quotation above, are especially the ones who must, through meaningful and substantive steps by the state, be empowered to find their voice that has been muzzled by dispossession and want. The historically disempowered should be empowered to creatively express themselves as active participants in all areas of life, especially in the economic space. It is the desperate,

16 M de Bruijin, R van Dijk and J Gewald 'Social and historical trajectories of agency in Africa: An introduction' in M de Bruijin, R van Dijk and J Gewald (eds)*Strength beyond the structure social and historical trajectories of agency in Africa* (2007) 7.

17 De Bruijin (n 16) 6.

18 K Klare 'Legal culture and transformative constitutionalism' in S Liebenberg; (n 8)24.

19 See *Makwanyane* (n 2) para 261 and *Bato star* (n 9) para 73 and 74.

the vulnerable, termed as people inhabiting 'at the bottom of the world economy…'[20] by P Collier who, through the provision of decent housing, respectful amenities, access to relevant education and skills, among other pertinent initiatives, must regain their agency through active participation.

It must be note that the engendering of meaningful agency does not only presuppose the state doing things for the disparate such as social welfare. Engendering agency substantively connotes the notion of people gaining the means of production such as land, material wealth, requisite skills and capacity to do things themselves. When the vulnerable gain their capacity to alter, especially materially, the conditions or the circumstances of their being they could be said to have acquired agency. On the other hand, a conception of development and agency that only stresses what the government can do to the disparate is limited and impoverished. The Constitution contemplates people who have access to the means of production, who have the capacity to alter and renegotiate their conditions of existence.[21] Ndulo's quotation strikes a similar cord:

> The best form of government is that which tends to foster in the people such qualities as initiative and inventiveness, and to steady improvement in their overall intellectual and moral qualities, since on these depends in turn the success of government in promoting economic development and the well-being of the society.[22]

It is clear that the role of the government should be creating an even playing ground which enables people who are historically disadvantaged to get traction and to ground their actions in initiative, inventiveness and innovation.

3 Mapping the contours of the philosophical terrain

I now focus on mapping the philosophical contours on which my arguments are premised-that is, the theoretical and ideological base which render a perspective to my conception of socio-economic rights formulations.

I ground my understanding of Socio-economic Rights on a metaphorical ideological picture formulated by Moore called Traction. Moore's theoretical perspective is apt to my topic because it is based on the entanglement between history, economic

20 P Collier *Wars, guns & votes democracy in dangerous places* (2010) 1.
21 The Preamble to the Constitution entrenches the Constitution's commitment to 'improve the quality of life of all citizens and free the potential of each person'.
22 M Ndulo 'Good Governance: The rule of poverty alleviation' in M Ndulo (ed) *Democratic reform in Africa its impact on governance and poverty alleviation* (2006) 3.

imbalances and uneven playing field; this grounding resonates with South Africa's circumstances in which disparate people try to ground their agency or traction in 'an uneven geography of power'[23] and where 'conditions of possibility of traction shift across uneven landscapes, historical moments, and the differential abilities of specific subjects to establish footholds that gain ground'.[24] The preceding point is laden with thoughts that it calls for unpacking in the context of South Africa's uneven and slippery power and economic geography.

The World Bank Report (March 2018) on South Africa has laid it bare that South Africa is one of the most uneven countries in the world and much of her problems are deep and structural grounded in history and unequal access to enablers such as education and the means of production.[25] The following statement from the report drives the conception home:

> South Africa's structural transformation is well advanced, but factors of production are not always allocated to their most productive use.[26]

The disparate in South Africa fail to gain traction owing to the little or no access to the tools or the enablers of transformations such as a respectable material space. I advance the argument that enabling the poor to get firm footholds on land, clean water, dignifying amenities, sound and relevant education, among other enablers, will tilt the unjust terrain in their favour and enable agency.

Moore's conception falls into the same trope with A Sen's conceptual framework which locates agency within the domain of its symbiotic relationship with freedom of choice in an environment where material goods are distributed evenly. The averment as quoted in S Friedman's critical work on positive duties imposed by all rights runs:

> This approach draws on the insights of modern theorists, in particular of Armatya Sen, who see freedom not as the absence of coercion, but as agency, or the ability to exercise genuine choice and to act on the choices.[27]

The formulation by Sen is in sync with the recurring thread of argument in this essay to the effect that agency should be premised on a sound economic base which enables one to make choices and to act on the choices made. The new perspective emerging from the foregoing is that even the idea of participatory and direct democracy in South Africa does not really place substantive choices among the

23 DS Moore *Suffering for territory race, place, and power in Zimbabwe* (2005) 281.
24 As above.
25 *World Bank report* (n 11) 3.
26 As above.
27 S Fredman *Human rights transformed positive rights and positive duties* (2008) 11.

citizens due to the fact that most people are not conscious of the choices they purport to be making. They lack the real power and the material and political goods to effect informed choices and hence the freedom of many is curtailed and restricted, because if we go by Sen's conception of freedom, freedom exists in the ability or the cogency to make informed choices.

This viewpoint finds favour with the recent unanimous judgment of the Constitutional Court in relation to the nexus between the need for disclosure of political parties and the right to vote to get cogency. In the said case called *My vote counts NPC v Minister of Justice and correctional services and another,*[28] the Constitutional Court shed light on the right to vote as enshrined in Section 19 of the Constitution and its relationship with Section 32 which provides for the right to information and which enjoins parliament to make laws with regard to access to information. What is pertinent about the said case is the reasoning of the unanimous court regarding the right to vote which is an exercise of participatory democracy. The court held that if the information regarding the funding of political parties is not reasonably made available then the right to vote is meaningless and impoverished. It will remain an elusive dream. What is interesting and which bear on the issue of human agency is what the court said regarding choice:

> Choice is of its own a loaded concept. And much more is required of a choice-maker if the choice is to be made is political in character and affects important national interests.The gravity of the choice is more pronounced in relation to the right of an adult citizen to participate or vote in the elections for any 'legislative body'.[29]

Choice, is at the heart of human agency. The choice, however, must be informed and ought to be engendered by having access to information. This requires material and intellectual goods as explained by the World Bank report:

> As people gain middle-class status, they tend to accumulate savings and acquire secondary and tertiary education investments in the future. Members of the middle class are likely to support accountable government and rule of law.[30]

The point is that the ability to act and take charge is premised on sound social, material and intellectual goods. That, in turn, result informed choices economically and politically.

It is clear that the concept of human agency should be understood in a complete sense involving the totality of a person's resources, mainly economic, to adequately get traction in a given society. This

28 *My vote counts NPC v Minister of Justice and Correctional Services and another* CCT249/17 (2018) ZACC 17.
29 *My vote counts* (n 28) para 17.
30 *World Bank report* (n 11) 35.

speaks to Marx and Engels who ground an economic base as a sine qua non of political, social and cultural participation as evidenced by their quotation which follows as gleaned from R Moyana's book:

> The class which has the means of production at its disposal, consequently also controls the means of mental production, so that the ideas of those who lack the means of mental production are on the whole subject to it. The ruling ideas are nothing more than the ideal expression of the dominant material relations which make the one class the ruling one, therefore, the ideas of its dominance.[31]

What is pertinent from the above is that to establish agency among the disparate, vulnerable and dispossessed, their material conditions must be improved. A clear causal nexus exists between material force and cultural and intellectual force. The dominant voices in every epoch are those of the structural powers who have access to economic goods and the corporate global media machinery at its beck and call. The amalgamation of the philosophical underpinnings I have delved into amount to one point; agency is the sum-total of the goods that a person has and the enabling conditions that result from such a base that emplace participation and initiative. This frame of thinking is also supported by Fredman who problematises the superfluous distinction between negative rights (as in civil and political rights) and positive rights as encapsulated in Socio-Economic rights. Her quotation is illuminating:

> Transforming human rights, therefore, requires a greater focus on positive duties to which all human rights give rise. It entails moving beyond artificial distinctions between civil and political rights, to recognising that all rights give rise to the whole range of positive duties.[32]

4 Socio-Economic rights in South Africa

4.1 A brief history

The Constitution was meant to break away from a painful past of exclusion of the majority of people for the benefit of one race. It is instructive, with the aim of establishing a context in which to locate the necessity of Socio-Economic rights in South Africa, to sketch a brief background of the alleged exclusion dispossession of the majority.

South Africa's past is tainted by the sceptre of racism which still remains buried in the economic and social structures and ingrained in the hearts of a considerable number of people, though formally, steps

31 R Moyana *Reading our past: an historical study of the white authored novel in Zimbabwe CA 1890 to 1914* (2017).
32 S Fredman (n 27) ix.

have been taken to address the matter. When the National Party came into power in 1948 (although the indigenous have already been colonised and dispossessed dating back from 1652) racism was taken to a new level by the introduction of its ideology of 'separateness'.[33] That is the heartland of Apartheid in which black people mainly and other disadvantaged such as Indians and other enclaves of Orientals in South Africa, were discriminated upon and treated as low class citizens as they were driven into the margins of social and political life.

Practically all whites had access to the material goods, the best residential areas, amenities, access to education and sophisticated skills, and access to political resources and power. The situation (as South Africa was, and to some extent still is) is aptly captured in the following quotation:

> South Africa cannot be described as a democracy. It is more aptly described as pigmentocracy in which all political power is vested in a white oligarchy, which is in turn controlled by an Afrikaner elite.[34]

I submit that although it appeared that the apartheid ideology was influenced by race and bigotry, its main object was economic hegemony. From the Marxian perspective delved into earlier on as a philosophical premise on which this essay proceeds from, the economic basis is the foothold on which ideological superstructure of racial exclusion was premised on. The feelings and perceptions of white superiority were bolstered by an actual superiority in the ownership of the means of production. It is when we understand the philosophy of racism and apartheid as an ideology grounded in economic accumulation, that we begin to confront the embedded structures of racism and strive to gain footholds that enable many of the marginalised to gain traction in the true and substantive sense. That is when the South African notion of a constitutional democracy will begin to have a substantive hue.

The struggle for freedom in South Africa, as elsewhere in the continent, was grounded in a quest for freedom and economic and material emancipation. Emancipation and the improvement of the squalid conditions in which many South Africans found themselves. The freedom fighters contemplated freedom in its substantive sense in which many would be able to participate in all the realms of life and in which bread and freedom would be complementary to each other in the symbiosis of agency as succinctly captured by Sach's averment:

> Our experience, in fact, demonstrates that instead of undermining each other, freedom and bread were interrelated and interdependent.[35]

33 J Dugard *Human rights and the South African legal order* (1978) 5.
34 J Dugard (n 33) 7.
35 A Sachs *The strange alchemy of life and law* (2009) 172.

It is now 24 years after the dawn of democracy in South Africa. Several steps have been taken to address the economic imbalances in South Africa and the nation prides itself as having one of the most enviable and progressive constitutions in the world, yet the triad of uneven economic conditions, inequality, and unemployment continue to batter the fortunes of an economically well-endowed adolescent democratic country in the tip of the Southern African part of the continent.

4.2 The South African constitution and Socio-economic Rights

Chapter 2 of the South African Constitution,[36] commonly known as the Bill of Rights, is a compendium consisting of a myriad of rights entitlements and is the bedrock of the democratic space in South Africa. It is the 'cornerstone of democracy in South Africa'.[37] The said compendium of rights contains a panoramic sphere of entitlements which are justiciable before a competent court of law. The Bill of Rights contains what has been termed civil and political rights such as the rights, to equality,[38] to human dignity,[39] life,[40] and freedom and security of the person.[41]

These rights are couched as absolute rights and they are not subject to internal qualifiers that postpone their enjoyment, they are perceived as immediately capable of realisation. They impose, as the dominant conception, which I problematise as faulty thinking, negative duties mainly on the state to leave the individual on his own to enjoy his or her freedom unencumbered by encroachment as a free moral agent capable of steering his or her course of life to freedom. The compendium of rights also contains what are often called Socio-Economic Rights which, like all rights, (in a true and substantive exegesis) impose positive duties on the state for their gradual realisation. These rights are subject to internal qualifiers which subject them to a gradual realisation and enjoyment. Their enjoyment is linked to the material resources that the state has, and in its reasonable discretion, sees fit to deploy toward their realisation. These rights, among others, contain entitlements to: property,[42] have access to adequate housing,[43] Healthcare, food, water and social security,[44] and Education.[45]

36 Constitution (n 1) Chapter 2.
37 Constitution (n 1) Section 7.
38 Constitution (n 1) Section 9.
39 Constitution (n 1) Section 10.
40 Constitution (n 1) Section 11.
41 Constitution (n 1) Section 12.
42 Constitution (n 1) Section 25.
43 Constitution (n 1) Section 26.
44 Constitution (n 1) Section 27.
45 Constitution (n 1) Section 29.

Socio-Economic Rights seek to create enabling conditions that result in the attainment of human dignity and should be located within the context of an attempt to bridge and redress the past. They seek to emplace traction on the previously disadvantaged and attempt to confront structural inequality and nip at the bud the conditions which perpetually breed the same outcome; the conditions of illiteracy or poor skill, dispossession and inequality.

4.3 Breaking away from a befuddled conception of rights

I have already indicated by discomforts and reservations with a formal and befuddled conception of human rights into either those which give rise to positive duties or those perceived as giving rise to negative duties. That purported differentiation is an ill-conceived formulation which is intellectually insipid. I am in favour of the plausible conception by Friedman who avers correctly that:

> The first step is to recognise that there are important interactions between the two sets of rights. Without basic socio-economic entitlements, civil and political rights cannot be fully exercised.[46]

Fredman's thrust of argument is alive to the interwoven nature of all rights in enabling human agency and sees all rights, as complementary to each other. The foregoing conception also treats all rights as in the same plane and giving rise to positive duties. The Constitutional Court has hinted to the matter in the recent *My vote counts case* where the right to make a political choice was tied to the right to access to information about the private funding of political parties.[47]

The judgment acknowledges the nexus between political participation and economic agency. This is buttressed by the following insightful observations by Liebenberg in which she avers that a plausible conception of all human rights 'entails a critical examination of economic and social institutions and relationships to ascertain their impact on the participation of disadvantaged groups in all spheres of our young democracy'.[48] The cogency of Liebenberg's intellectual thrust lies in the realisation of the inseparability of rights and in the awareness that the end of all human rights is to enable traction in the form of participation in all areas of life by those disadvantaged and disparately poor.

I have attempted to show the nexus between agency and rights. Further to show the illusory and futility of attempting to classify rights into generations especially within the context of South Africa because, the entanglement of the structural inequalities require a holistic approach. Otherwise, many will continue to have an empty

46 Fredman (n 27) 67.
47 *My vote counts* (n 14 above) para 17.
48 Liebenberg (n 8) 98.

shell or a mere formality of political freedom without a material substance attached to it.

4.4 On the adjudication of Socio-economic rights in the South African Courts: the *Grootboom* case

Adjudicating socio-economic rights is not an easy task that is placed on the shoulders of the nation's judiciary. Theirs is a difficult task of trying to juggle competing justiciable claims or entitlements in an environment of modest and at times, scarce material means. The courts are also always alert to the need to avoid encroachment into the domain of other arms of the state. The judiciary is keenly aware also of its institutional modesty when it comes to matters of allocation of resources.The question of economic rights also straddles, more often than not, in the domain of politics and sentiments are often high. The task of the judiciary then is to stay clear of unnecessary encroachment into the institutional competence of the other arms of the state, unless constitutional necessity bids them along such a terrain. In figurative language, their task is often lonely and they often have to swim against the tide of sensationalism and the mistake of acquiescing to the pressure of the politicians on the one hand, and the pouring demands of the civil society and the drowning clamour of the tired and impoverished masses on the other hand.

Government of the Republic of South Africa and others v Grootboom and others is a seminal case in socio-economic jurisprudence in South Africa and the world over.[49] It is a milestone in adjudication of socio-economic rights jurisprudence. The case buttressed that these socio-economic rights are not mere directives in the context of South Africa but are justiciable by the courts. The case also supported the conception of rights which views all rights as 'inter-related and mutually supporting'.[50] *Grootboom* also touched on the tightrope that the judiciary had to tread in trying to preserve the institutional integrity of each relevant arm of the state.[51]

Grootboom centred on Section 26 of the Constitution. Specifically it drew attention to the extent to which it is enjoined by the Constitution to take significant measures toward the gradual realisation of the right to housing. The case focused on the plight of the desperate homeless people residing in the margins of the society without meaningful access to the national cake in the form of decent housing, respectful amenities, and land. The 'Grootbooms' in this

49 *Government of the Republic of South Africa and others v Grootboom and others* 2000 11 BCLR 1169 (CC).
50 *Grootboom* (n 49) para 23.
51 *Grootboom* (n 49) para 41.

case, to employ an analogy, had their fragile houses demolished in their absence. They desperately moved to a new area where they were also required to move away from because it was private property. The elements were at their most hostile and inclement and they sought interdictory relief in the high court which was successfully upheld. The matter then wound up to the Constitutional Court on appeal.

The Constitutional Court using the reasonable test standard, found the measures taken by the government in addressing housing problems as falling foul of the constitutional muster of reasonableness. This because it failed to have measures in place to address the housing needs of those who are most desperate.[52] One of the plausible findings of the court is its grounding of the nexus between human dignity and the provision of adequate decent housing.[53]

Where I have difficulties with the judgment of the Constitutional Court, is its refusal to adopt what has been termed the minimum core. That standard imposes a minimum threshold on the state to fulfil in the progressive realisation of socio-economic rights. The Court's major ground of departure from the minimum threshold, it averred, lay in the impossibility of determining the minimum threshold 'without first identifying the needs and opportunities for the enjoyment of the right'.[54] I argue that the ethos of the Constitution and the substantive need for equality and the need to create a favourable traction among the disadvantaged offers a threshold in which to view the reasonableness of the government's action.

The Constitution contemplates an inclusive society where previously marginalised groups are enabled to fully participate in all spheres of life. The standard, in simple, lies in assessing whether the poor will be able to participate in a dignified manner, and to a reasonable level, in the affairs of life. Viewing the provision of the access to socio-economic rights using the threshold of human agency will yield a different result. The merits of each case will then have to be viewed differently. Of course, that may offend legal certainty, but the benefits would outweigh the impediments.

52 *Grootboom* (n 48) para 65.
53 *Grootboom* (n 48) para 2.
54 *Grootboom* (n 48) para 32.

5 Toward engendering human agency: Key enablers

5.1 The land issue

No other issue is evocative as the issue of land. In South Africa, just like what took place in Zimbabwe, the question of land tends to straddle into the domain of race. The issue divides people mainly along the lines of race and class. In my premises, I used the traction metaphor which I said the marginalised are failing to establish firm footholds of traction. The main problem of the poor is their inability to access the chief means of production-land. Madeley expressly articulates the conditions in which the poor find themselves:

> Many of the poor are either landless or have tiny plots, with poor soil … many are poorly educated and in poor health, their housing and shelter are meagre, they have few resources at their command. They may go hungry even when food in the area where they live is relatively plentiful. Their poverty means that they do not have the land to grow the food they need, nor the money to buy food. The life expectancy of the poor is short and shortening in some countries. Many are jobless and voiceless; many have their livelihoods damaged by the increased severity of environmental conditions.[55]

Madeley, touches on the structurally-entangled existence of the poor. The poor are mainly poor because they lack the means of production chiefly land. This is what renders the land question in South Africa an unavoidable one, because it is at the centre of the Constitution's commitment to redress the uneven terrain of the past. However, I must point out at this juncture that, while it is desirable and inevitable to restore the dignity of the disadvantaged by enabling access to the means of production, the issue has to be dealt with in a calm, phlegmatic and considered manner because it has the inadvertent problem of further disadvantaging the poor if not handled carefully.

The question of bankable titles given to the previously advantaged has to be considered also. Land without proper titles would be of little benefit because it is ineffective for the purposes of collateral. The needs of the market also ought to be considered. The question of land has to be dealt with in a manner that does not offend the rule of law. I also make the submission that the poor of resources have to be gathered to equip the new farmer before the process of appropriation; this will, no doubt, include the skills and technical know-how. The government must also leave farms held by White farmers as they are critical for the furtherance of food security in the

55 Madeley J *Big Business poor people's how transnational corporations damage the world's poor* (2008) 6.

land. It is a tough conundrum of contemplating land expropriation without compensation whilst at the same time contemplating attracting foreign investment. A delicate balance has to be found.

I must also mention the potential pitfall of elite capture of the land by those in control. The land must be redistributed in a manner that is free from the elite capture of the resources and focuses more on the disadvantaged and desperate. Having noted the constraints and cautions, it bears mention that access to land is linked to granting agency to the disadvantaged in South Africa. This is supported by the following quotation:

> Through a redistribution of land and other resources, agrarian reform seeks to restructure and democratise the oppressive relations of production which constitute the agrarian question.[56]

From the submissions tendered thus far, it is a irrefutable proposition that land is at the heart of the nexus between the means of production and human agency. I now turn to address the issue of education as another enabler.

5.2 Access to relevant education

Access to education is one of the key enablers of agency which the Constitution contemplates. Access to relevant skills is at the heart of empowerment. Education that is relevant and practical gives a pertinent voice to the disadvantaged. The education, however, should have a bias toward the attainment of skills. It should make South Africans stake a proud place among the citizens of the globe as equals.

Smith adds her voice on the importance of a pragmatic education which grounds theory and practice when she submits 'The pedagogical implication of this access to alternative knowledge is that they can form the basis of the basis of alternative ways of doing things'.[57] The nature of education, which is at the heart of emplaced agency, is built on a pedagogical framework that is multidisciplinary especially within the field of law. A pedagogy which is aware of the past whilst not bound by it, and exceedingly forward-looking. Education should strive to create new tools in the form of theoretical underpinnings which are grounded mainly in African Philosophy. The crux of my argument is that we should harness theoretical tools that speak to our specific condition as Africans.

56 L Tshuma *A matter of (In) justice: Law, state & the agrarian question in Zimbabwe* (1997) 2-3.
57 LT Smith *Decolonising methodologies research and indigenous peoples* (1999) 34.

6 Concluding reflections

This essay has focused on socio-economic rights in South Africa from a philosophical notion of human agency. My argument is that if human agency is used as a jurisprudential yardstick which the Constitution strives toward, better results will emerge. The main thread which permeates the entire essay is that material goods and human participation and agency are complementary aspects and that is what the socio-economic provisions in the Bill of Rights of the Constitution contemplates. The essay has rejected as befuddled thinking, a conception which seeks to group rights into duties which are either positive or negative.

One may think of the right to vote which is mainly conceptualised as a right which is immediately enjoyed by every adult citizen. However, without access to information, adequate education and decent amenities, the voter will not participate and enjoy the right in a substantive sense. The essay has focused on land and education as key enablers of agency, among other tools of inculcating agency. These are simply reflections of a law student.

TOWARDS A SEXUALLY FREE SOUTH AFRICA: A FEMINIST AND CONSTITUTIONAL DEFENCE IN FAVOUR OF LEGALISING PROSTITUTION THROUGH THE RIGHT TO BODILY INTEGRITY

*by Thabang Manamela**

1 Introduction

In 2017 the South African Law Reform Commission (hereafter the Commission), published a Report in terms of which, the Commission recommended that prostitution should remain criminalised in South Africa.[1] This position is justified with reference to economics-based arguments, and the high rate of physical and sexual abuse endured by women in South Africa.[2] The Commission posits that decriminalisation will make women more vulnerable in light of the reasons outlined above.[3]

* Final year LLB student at the University of Pretoria. This article makes the argument that prostitution should be legalised, despite recommendations made against legalisation. It argues that legalisation will improve the protection provided to prostitutes. The article is premised upon the idea that women must be included in the 'moral community of persons' and that women must be independent enough to freely determine their sexual lives.

1 South African Law Reform Commission Sexual Offences Adult Prostitution Project 107 Report first published in 2017.

2 As above.

3 South African Law Reform Commission Sexual Offences Adult Prostitution Project (n 1).

However, Section 12(2)(b) of the Constitution states that everyone has the right to security in, and control over his or her body.[4] It is in light of this right to bodily integrity, that I intend to argue that prostitution should be legalised.[5] Any constitutional order that affords the right to bodily integrity, should refrain from defining realms of acceptable sexual conduct or relations.[6] Drucilla Cornell identifies three essential elements, which she believes are basic minimum conditions for individuation, without which one can never embrace one's personhood to the fullest.[7] These conditions are:

(1) Bodily integrity,
(2) Access to means by which one can differentiate oneself from others, and
(3) The protection of the imaginary domain.[8]

For purposes of this article I will focus on the first element, bodily integrity, and the last element, the protection of the imaginary domain. The protection of these two elements is a prerequisite to achieving sexual freedom.[9] Sex and sexual freedom are formative to human personality.[10] The imaginary domain mentioned above refers to a proverbial space 'of the as if in which we imagine who we might be if we made ourselves our own end'.[11] In other words, the imaginary domain is a space in our minds, where we contest everything society teaches and imposes; it is a space where we continually strive to come up with our identities, and how to live out those identities in society.[12] Therefore, the call for its protection should be understood to be a legal and moral obligation on all of us.[13] In this article I will argue that the decision to go into prostitution should be understood to have been made behind the proverbial veil mentioned above, whose intrusion would amount to the violation of one's imaginary domain.[14] For purposes of this article, sex in the sexual freedom mentioned above refers to an activity in which all human beings engage as sexual beings.[15]

Furthermore, I will argue that legalising prostitution can improve prostitutes' access to basic services, such as healthcare, the police and the courts. Moreover, I will argue that, based on the moral obligation to protect the imaginary domain, prostitution is another

4 The Constitution of the Republic of South Africa 1996 (hereafter the Constitution).
5 D Cornell *The imaginary domain: Abortion, pornography and sexual harassment* (2016) 3.
6 As above.
7 Cornell (n 5) 4.
8 As above.
9 Cornell (n 5) 5.
10 Cornell (n 5) 6.
11 D Cornell *At the heart of freedom: Feminism, sex, and equality* (1998) 7.
12 As above.
13 Cornell (n 11) 9.
14 Cornell (n 11) 5.
15 Cornell (n 5) 7.

way to manifest sexual freedom, and should form part of the moral community of all persons.[16] Throughout this article I will argue that women demand inclusion and recognition into the 'moral community of persons, as a matter of right'.[17] The aim of this article is to argue that when recognised as persons, women can be independent enough to have the freedom to determine their sexual lives, including what meaning and benefit to derive from their sexual relations.[18] Granted that Section 9 of the Constitution enshrines all of our rights to be treated equally as persons, women must be given rights and resources in line with them being equal persons.[19]

I will further argue that Section 12(2)(b) of the Constitution, to the extent that I relate it to prostitution, imposes a negative obligation on the state to refrain from refereeing sexual conduct.[20] This negative obligation applies only to the extent that the sexual conduct in question involves adults who freely consent thereto. Throughout this article, I will argue that women's vulnerability in prostitution is perpetuated by a continued criminalisation, and the Commission's recommendation to maintain the *status quo* does not help to improve the plight of women involved in prostitution. On the contrary, criminalisation victimises prostitutes, and endorses a social stigma associated with prostitution.[21] The Commission should have rather devoted its attention to finding solutions on how South Africa can undertake a process of legalising prostitution, and simultaneously address the exploitative nature of prostitution. I will also argue that by virtue of being a politically free society, women involved in prostitution should organise themselves politically, and not rely solely on legal remedies to advance their problems, but rather use political representation as their primary means by which to represent themselves. Have the remedies offered by the South African legal order been exhausted to provide utmost security for sexual freedom?

2 Constitutional rights versus public interests

Below I caution against over-reliance on legal action as a means of advancing the cause for legalising prostitution. However, it is still important to assess the efficiency of existing legal remedies in order to point out the flaws, and secondly suggest a way forward. In particular, I will assess whether women enjoy sexual autonomy and freedom any more than they did before the constitutional era. I will

16 Cornell (n 5) 14.
17 Cornell (n 11) 62.
18 As above.
19 The Constitution (n 4); Cornell (n 11) 62.
20 The Constitution (n 4).
21 Cornell (n 11) 12.

base my argument on the Constitutional Court judgment of *S v Jordan*.[22]

There is a qualitative difference between rights and public interests.[23] This is even more significant in South Africa, because we have a Bill of Rights, which gives special protection to particular individual rights.[24] The Bill of Rights affords this special protection while recognising their non-absolute nature, hence the Bill contains a limitations clause (Section 36), in terms of which these special rights may be limited.[25]

Section 36 provides:

> 1 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
>
> (1) The nature of the right;
> (2) The importance of the purpose of the limitation;
> (3) The nature and extent of the limitation;
> (4) The relation between its nature and its purpose; and
> (5) Less restrictive means to achieve the purpose.
>
> 2 Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[26]

Section 36 recognises that rights are a strong card, and thus cannot simply be taken away merely because doing so is in the general good to advance public interests.[27] This is not to suggest that the rights contained in the Bill of Rights can never be limited, not even to advance greater public interests.[28] Section 36 simply seeks to ensure that rights are not limited purely on the basis of a cost-benefit analysis.[29] This section reflects an understanding of the non-absoluteness of rights, in a way that accommodates their superior character.[30] This is why the Bill of Rights protects individuals from being coerced to sacrifice certain interests, even if that happens at the expense of some social cost.[31] This is why individuals cannot have their personal and sexual relations be interfered with, for the general good.[32] Therefore, when women demand to be sexual as they see fit, the demand is based on the understanding that they will still be

22 *S v Jordan* 2002 (2) SACR 499 (CC).
23 D Meyerson 'Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan*' (2004) 1 *Acta Juridica* at 138.
24 Meyerson (n 23) 139.
25 As above.
26 The Constitution (n 4).
27 Meyerson (n 23) 138.
28 As above.
29 As above.
30 As above.
31 Meyerson (n 23) 138.
32 As above.

accorded self-respect, as worthy members of society.[33] The delegitimisation of someone's sex curtails that individual's freedom, by imposing behavioural standards which do not accord with one's efforts aimed at individuation.[34]

The South African Constitution not only identifies rights entrenched in the Bill of Rights as being human rights, but democratic values as well.[35] This holistic approach is intended to prevent the reduction of democracy to a mere majority rule, to the detriment of minority groups.[36] It must be noted that minority does not only refer to numbers of a certain group in society, but the influence such a group has in determining its identity as a group, and that of its constituent individuals.[37] Given the holistic nature of the Bill of Rights, it is likely that its provisions may have to be enjoyed by individuals, even though that may cause discomfort with certain public interests.[38] Similarly, these rights cannot be limited simply because there is a legitimate state purpose to be advanced.[39] Even if it is found that there is a legitimate state purpose at stake, it may still be unjustifiable to limit a provision of the Bill of Rights.[40] Section 36 imposes a high standard to be met, before limiting a provision of the Bill of Rights.[41] Having established that the provisions of the Bill of Rights amount to trumps in their character, I now turn to assess the *ratio* of the *Jordan* case, in light of sexual freedom.

3 Does the Constitutional Court understand sexual freedom and sexual equality?

The *Jordan* case involved the challenge of the constitutional validity of the provisions of the Sexual Offences Act of 1957 [42] (hereafter the Act), which outlaws commercial sex.[43] I will focus on Section 20 (1A)(a) of the Act which criminalises providing sex for a reward.[44] In particular the challenge was that the Act unjustifiably infringed upon the constitutional rights to equality, privacy and dignity.[45] This case was decided in terms of the interim constitution, however, in this

33 Cornell (n 5) 72.
34 As above.
35 R Robson 'Sexual democracy' (2007) 23 *South African Journal of Human Rights* at 409.
36 Robson (n 35) 412.
37 As above.
38 Meyerson (n 23) 144.
39 As above.
40 As above.
41 Meyerson (n 23) 143.
42 Sexual Offences Act 23 of 1957.
43 Meyerson (n 23) 145.
44 As above.
45 Meyerson (n 23) 144.

article, I will use the 1996 Constitution since the clauses in question are similar.

The majority and the minority decisions were based on the understanding that Section 11 is directed at the prostitute and not the customer.[46] The majority held that the section does not unfairly discriminate against women, nor infringe the right to privacy.[47] Given that the majority of prostitutes are women, it was argued that on that basis the section amounts to unfair indirect discrimination against women.[48] However, the majority held that the provision is justifiable, bearing the qualitative difference regarding the conduct of the merchant and that of the customer.[49] The court further held that, because the Act pursues an important and legitimate constitutional purpose (to outlaw commercial sex), whatever discrimination may occur as a result of this provision is not unfair.[50] However, the court did not apply the test it has always applied regarding equality challenges.[51]

The test was that the court firstly distinguished between mere differentiation and discrimination.[52] Direct discrimination occurs when there is express differential treatment on a specified or unspecified ground; indirect discrimination occurs when differential treatment on neither a specified ground nor unspecified ground amounts to discrimination on specified or unspecified grounds. Direct or indirect discrimination may or may not be unfair, depending on the impact of the discrimination, considering factors such as the position held by the complainant in society, and whether it has impaired their dignity.[53] Mere differentiation will not amount to an infringement of the right to equality, if there is a rational nexus to a legitimate government purpose. However, this does not apply when coming to discrimination; discrimination breaches the right to equality, unless it is found to not be unfair.[54] The preceding analysis makes it clear that the enquiry into whether there is discrimination is conducted apart from the enquiry to determine whether the discrimination is unfair, and the enquiry into whether such unfair discrimination is done separately to determine whether the unfair discrimination can be justified with reference to Section 36.[55] Rights are used instrumentally to serve an underlying purpose, and may suffer from being under-inclusive and over-inclusive in relation to their

46 As above.
47 Meyerson (n 23) 145.
48 As above.
49 As above
50 As above.
51 As above.
52 As above.
53 Meyerson (n 23) 145.
54 Meyerson (n 23) 146.
55 As above.

rationale.[56] By this I mean protecting certain rights is only probabilistically related to a certain identified purpose, it does not mean that protecting that right will always result in that identified purpose.[57] However, certain interests are given special treatment even if interfering with them would be reasonable. Secondly, these interests get special protection, even when it is known that protecting them, will not always lead to the intended purpose.[58] This is so because judges, like all other decision-makers, are prone to err.[59] They will not always be in a position to accurately determine whether a particular restriction on a right is or is not consistent with the purpose of recognising that right in the first place.[60] Hence, the best way to promote underlying values of certain rights is to disable judges from conducting that enquiry.[61] Regarding sexual freedom, the judges should be weary of romanticising different sexuate beings into model minorities.[62] In *Minister of Home Affairs and Another v Fourie and Another*[63] this is exactly what happened. The judgment starts by saying: 'Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up a home together.'[64] In this case homosexual couples are presented as coupled, committed and domesticated into alternative but content families.[65] Homosexual couples are idealised versions of sexuality and relationships.[66] The danger with this development is that the jurisprudence regarding sexual freedom pivots around couples who, but for being lesbian or gay, are perfect.[67] The problem with this development, is also that it runs a risk of creating a separation from those who are deemed to be acceptable, from those who are not acceptable.[68]

The danger I spoke about in the paragraph above, is illustrated in the *Jordan* case. The court attempted to contrast sex work and sex workers with homosexual people.[69] It is noteworthy to point out that in this case, the court upheld the provisions of the Sexual Offences Act, in terms of which criminal sanctions are levelled at the prostitute, as an attempt to outlaw commercial sex.[70] The court upheld the heteropatriarchal practise of holding women responsible

56 Meyerson (n 23) 147.
57 Meyerson (n 23) 146.
58 As above.
59 As above.
60 Meyerson (n 23) 147.
61 As above.
62 Robson (n 35) 420.
63 *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).
64 Robson (n 35) 420.
65 As above.
66 As above.
67 Robson (n 35) 421.
68 As above.
69 Robson (n 35) 422.
70 As above.

for their sexual conduct in a way that men are not.[71] A demand for sexual freedom is a demand for women to obtain sexual happiness, without being concerned with some indignation from society and its institutions.[72] Women using their sexuality to obtain some economic advantage is as a result of gender inequality.[73] However, this is just one side of this multifaceted coin. Many young women consider their ability to use their sexuality as agentive.[74] Many women view their sexuality as a positive resource, and again, this is just one side of the narrative.[75] The principled argument here is that we live in a society wherein people lack resources to satisfy some or other of their desires. This can range from getting money to buy groceries, to money to go to expensive clubs, wear expensive branded clothes etc. therefore, women's sexuality serve as a means for many to attain all of these.[76] Thus, a sexual encounter need not take place simply between people who intend to make other life decisions together.[77] Therefore, the court erred in holding that prostitutes enjoy a diminished constitutional status, not because of the legislative provision, but because of their own unconstitutional sexual intercourse.[78]

Given that feminist thinkers have always dedicated their work towards understanding and "transforming the erotic relations that lie at the root of all social and political formations,"[79] the existence of heteropatriarchal practices and laws make it impossible for truly ethical relations to exist.[80] Laws that aim to transform society in the name of justice, need to have at their core, the ethical duty to transform erotic relations, as part of a broader process of democratisation.[81] The sexual exploitation of women needs to end, and it can only end if, firstly, women are no longer made to account for their sexual conduct in ways not expected of men, and secondly, if they are given the social, economic and political autonomy to determine the realms of their sexual conduct.[82] The transformative aspirations of our Constitution, are hampered by its own failure to address and transform the exploitative and discriminatory erotic relations.[83]

71 Cornell (n 5) 173.
72 Cornell (n 5) 172.
73 D Smith 'Promiscuous girls, good wives, and cheating husbands gender inequality, transitions to marriage, and infidelity in southeastern Nigeria' (2010) 83 *Anthropological Quarterly* 123-152.
74 Smith (n 73).
75 As above.
76 Smith (n 73) 15.
77 Robson (n 35) 422.
78 Robson (n 35) 415.
79 D Cornell & SD Seely *The spirit of revolution: Beyond the dead ends of man* (2016) 23.
80 Cornell & Seely (79) 23.
81 As above.
82 Cornell & Seely (n 79) 24.
83 As above.

4 How can we best undertake a process of legalising prostitution, but simultaneously recognise the exploitative nature inherent in prostitution?

4.1 Introduction

The primary focus of this section is to point out that women involved in prostitution need not be reduced to being regarded as helpless victims who need to be defended, nor are they mere 'bad' girls who have deliberately positioned themselves in a position to enjoy a diminished constitutional status. In this section I argue that legalising prostitution is but one aspect of a much broader undertaking to democratise our country and ensure equal and equitable access to rights, resources and all other means necessary for citizens to enjoy the benefits of democracy.[84] I contend that political representation, rather than legal action, should be the primary means of intervention in improving the plight of all the women involved in prostitution.[85] I will briefly outline submissions made to the Commission tasked with investigating the feasibility of legalising prostitution in South Africa.

4.2 Overview and analysis of submissions to the Commission

Relating to recognising prostitution as work, Sex Worker Education Advocacy Taskforce (SWEAT) argues that sex workers' vulnerability will be protected by the provisions made available by labour law.[86] This submission reflects an appreciation that the plight of sex workers can only get worse. It also indicates that it is a mockery of our constitutional aspirations, to deny legal protection to those members of our society who are so vulnerable.[87] SWEAT further contends that criminalisation infringes on prostitutes' dignity in two respects: Firstly, it does not respect the choice of a woman to use her body to earn an income, and secondly, criminalisation denies what is often a vulnerable and poor group a means by which they can see to their livelihood.[88] This submission is reflective of two important arguments. Firstly, it relates to the ownership of women's bodies (autonomy), and supports the argument I make throughout this article, that it should be left to individuals to determine what pleasure to derive from their various sexual relations, and so too it should be up to the individual to decide what value (financial or

84 The Constitution (n 4).
85 Cornell (n 5 above) 96.
86 South African Law Reform Commission Report (n 1).
87 As above.
88 As above.

otherwise) to attach to their various sexual activities. Secondly, this submission relates to the economic independence derived from prostitution. Women involved in prostitution use the money they earn to fulfil a variety of their needs, ranging from buying basic necessities, to buying luxurious clothing.[89] What is important is that they are able to fulfil some or other need from their earnings, which they otherwise would not have been able to afford.

On the other hand, the Family Policy Institute contends that if prostitution is chosen from a limited range of options, it cannot be considered to have been made freely and voluntarily.[90] This may be true, but the purpose of this article is to argue that those women making the choice to go into prostitution, are very much members of our society, and are entitled to constitutional protection.

The Christian Lawyers Association of South Africa argues that legalising prostitution, and even referring to it as sex work, does nothing to address the violence and exploitation endured by women, and the related stigma surrounding prostitution.[91] The Association contends that legalising prostitution runs the risk of institutionalising sexism and sexual harassment.[92] In the Association's view, prostitution is paid rape and thus dehumanises women.[93] I agree that prostitution is inherently exploitative and violent, however, I disagree that this violence and exploitation will occur as a result of legalisation. As things stand, women have no legal recourse for any violation they endure while at work. Designing a legal framework to cater for women in prostitution will only improve the situation, such as by improving access to courts, health facilities, pension fund schemes and other benefits provided by labour law.[94]

The Islamic Forum Azadville posits that any proposal to legalise the prostitution industry is not practical.[95] Therefore, more stringent measures should be introduced to further outlaw the industry. The Forum argues that arguments in favour of legalisation are based on economic-based reasoning, but all other crimes are committed with an economic motive.[96] According to the Forum, car hijackings and bank robberies are committed to improve the offender's economic position, however, the potential economic gain does not make the crimes more desirable.[97] This submission equates a conscious decision to use one's body sexually to earn an income, to that of robbers who hijack other people's belongings. What is problematic about this is

89 South African Law Reform Commission Report 107 (n 1).
90 As above.
91 As above.
92 As above.
93 As above.
94 As above.
95 As above.
96 South African Law Reform Commission Report 107 (n 1).
97 As above.

that to have sex for financial purposes does not rob anyone of their belongings. This submission does not appreciate that having sex gives expression to some of the decisions made in one's imaginary domain and has nothing to do with stealing from other citizens. Furthermore, this submission does not establish a *nexus*, to indicate how transactional sex is similar to, or comparable to car hijackings

Some people made submissions that by legalising prostitution, the state abdicated its responsibility to provide basic services, and empower its citizens.[98] I disagree with this contention, because legalising prostitution will improve prostitutes' access to already existing services. Furthermore, legalisation will ensure that more citizens enjoy constitutionally enshrined rights to equality, dignity, bodily integrity and privacy.

My response to these submissions is that women, who are currently barred from enjoying constitutional protection, will have a safer environment to work in if prostitution is legalised.[99] Furthermore, women involved in prostitution are held sexually liable differently from men, simply because they are women. This is partly why legalisation will create a more just society.

4.3 Recognising the agency of women in a politically free society

Granted that women form part of a free and democratic society, they need to be recognised as a source of their own evaluations and representations of how they intend to live out their sexuality.[100] A politically free society is underpinned by the shared understanding that everyone has an obligation not to exclude others from a community of moral persons.[101] Furthermore, all individuals in a politically free society have equal intrinsic value.[102] This equality of value must be recognised by the law and other institutions of society.[103] The political representation I call for in this section, will ensure that women involved in prostitution will make known a world that has no reason to be noticed.[104] As a country undergoing political rehabilitation, given our oppressive history, it is important to question all naturalised differentiations in order to reconstruct an inclusive political atmosphere, in which all persons are believed to be capable of generating their own life plans.[105]

98 As above.
99 The Constitution (n 4).
100 Cornell (n 11) 18.
101 Cornell (n 11) 18.
102 As above.
103 As above.
104 Cornell & Seely (n 79) 24.
105 Cornell (n 11) 18.

This argument seeks to point out that no one should ever have to be legally captured by their appointed position in the social hierarchy.[106] As such no one's prospects in life should ever be determined by the exercise of their sex.[107]

The Report published by the Commission, although containing relevant concerns, is based on submissions of interest groups talking about sex work or prostitution. Not enough voice is heard from sex workers representing themselves. The Report is about them, but in the main, without their true involvement. A politically free individual should be individuated enough to represent herself, and make her claim to society, without having to refer to her social status.[108] Women's demand upon society is to be given a space to re-enliven themselves socially.[109] Women's bodies are theirs to claim as they see fit.[110] The state therefore has a duty, to rid our society of norms of heterosexual monogamy as the only acceptable organisation of life.[111] The state needs to refrain from trying to give shape to women's intimate lives. To bring the matter home, the contentions relating to legalising prostitution can be set at ease, when political representation (such as through forming unions) who will consist of, and act on behalf of women involved in prostitution.[112] Most importantly, when there is space for everyone to explore their imaginary domain, and nurture our sex, we would have achieved some form of political legitimacy.[113]

Many South Africans believe in the principle of *Ubuntu* in terms of which every member of society is regarded as being important.[114] By *ubuntu* I am referring to what has been described as a 'world-view of African societies and a determining factor in the formation of perceptions which influence social conduct.'[115] *Ubuntu* is also known as the African philosophy of life, which represents humanity, humaneness and morality.[116] *Ubuntu* is more than a social ideology.[117] It represents the very essence of being a human being.[118] The Bill of Rights, particularly Sections 9 (the equality clause), 10 (right to human dignity), 11 (right to life), give expression to *ubuntu*

106 Cornell (n 11) 19.
107 As above.
108 As above.
109 As above.
110 Cornell (n 11) 21.
111 As above.
112 Cornell (n 5) 96.
113 Cornell (n 11) 27.
114 Robson (n 35) 421.
115 Y Mokgoro 'Ubuntu and the law in South Africa Paper' delivered at the first Colloquium Constitution and Law held at Potchefstroom on 31 October 1997. This Paper was first published by the Konrad- Adenauer-Stiftung in their Seminar Report of the Colloquium Johannesburg 1998.
116 As above.
117 Mokgoro (n 115).
118 As above.

as defined above. *Ubuntu* entitles every member of society unconditional respect, and I believe that upholding *ubuntu* can help rehabilitate women's impoverished dignity.[119] It is unfortunate that in the *Jordan* case, the court does not make reference to *ubuntu,* even though the same court has previously referred to this principle, to arrive at some of the groundbreaking judgments, such as the *Makwanyane*[120] judgment, in terms of which death could no longer be used as a form of retribution.[121] I argue that even if it were to be accepted that women involved in prostitution enjoy a diminished status in the eyes of society because of their doing, they still possess an intrinsic worth that is owed to them simply because they are human.[122] The fundamental argument I make here, is that no one should be denied legal protection, based on other people's idea of a community.[123] Considering that we are a nation trying to rid itself of its oppressive past, we should safeguard against associating a certain sexual organisation with democracy.[124] This is because what needs protection is the sexual manifestation and not merely the origins thereof.[125] After all, any democratic state should refrain from conceptualising itself as a role-player in sexual arrangements, and similarly should not declare particular sexual manifestations as being more consistent with itself, because that runs a risk of marginalising other sexual arrangements.[126]

5 Can opposition against legalising prostitution yield to bodily integrity, in favour of legalisation?

5.1 Introduction

In this section, I will argue that with a renewed understanding of the right to bodily integrity, society can cease to view prostitutes as offenders whenever they engage in commercial sex.[127]

119 Robson (n 35) 421.
120 *S v Makwanyane* 1995 (3) SA 391 (CC).
121 Robson (n 35) 421.
122 As above.
123 Robson (n 35) 423.
124 Robson (n 35) 425.
125 Robson (n 35) 424.
126 Robson (n 35) 428.
127 Cornell (n 5) 119.

5.2 Analysing the right to bodily integrity to protect various sexual manifestations

The right to bodily integrity, in as far as I relate it to sexual freedom, should be interpreted so as to enhance and redefine social equality.[128] Furthermore, as part of a transformative undertaking, it is necessary to interrogate the sexual in a context much broader than through the prism of established relationships such as marriages and other civil unions.[129] To outlaw commercial sex violates the right to bodily integrity of prostitutes because this right protects everyone from arbitrary arrest and detention.[130] My argument in this section is that using the right to bodily integrity as the basis for legalising prostitution should form part of the broader process of democratisation, in order to create room for sexual freedom.[131] Prostitution is one aspect of sexual freedom. Bearing in mind the above discussion about the *Jordan* case, it is worth noting that women's demand for sexual freedom begins with the demand to be freed from the use of gender comparison as the ideal of equality.[132] The 'merchants' referred to in the judgment are women, and the legal provisions outlawing commercial sex is able to strike at them because they are women. However, the customer is difficult to detect, again because the customer is male. As a result, the body of the man, is assured some protection, and this is the consequence of the law by striking at the merchant.

5.3 The recognition of the imaginary domain to advance the right to bodily integrity

The Constitutional rights to bodily and psychological integrity were upheld in the matter of *Christian Lawyers Association v Minister of Health*.[133] The applicants sought to challenge the validity of the Choice on Termination of Pregnancy Act, but the challenge was unsuccessful.[134] The applicants argued that the termination of pregnancy violated the right to life, entrenched in Section 11 of the Bill of Rights.[135] The court dismissed this argument, and held that Constitutional rights applied to natural persons, and not unborn

128 Cornell (n 11) 1.
129 Robson (35) 409.
130 C Mgbako and others 'The case for decriminalisation of sex work in South Africa' (2013) 44 *Georgetown Journal of International Law* at 1423.
131 Robson (n 35) 410.
132 Cornell (n 11) 3.
133 MK Radebe 'The unconstitutional criminalisation of adult sex work' mini-article submitted in partial fulfilment of the requirements for the Degree Magister Legum (LLM), University of Pretoria (2013) at 13 (on file with the author).
134 As above.
135 Radebe (n 133) 13.

foetuses.[136] This case referred to above, indicates an attempt by some members of society to use criminal law to enforce morality.[137] This is the criminalisation of victimless conduct.[138] I argue that when making or interpreting laws, there must be a justification for why it is justiciable for the law to intervene by regulating private immorality, notwithstanding the fact that such immorality does not cause any immediate or foreseeable harm to anyone.[139]

In the case of *Teddy Bear Clinic for Abused Children & Others v Minister of Justice & Others*[140] the High Court held that the criminalisation of consensual sexual intercourse between minors (of ages 12-15) violated the Constitution.[141] The court held that criminalisation infringed on children's rights to dignity, privacy and autonomy.[142] The argument that minor children would not be able to make sound sexual decisions at their level of maturity, was countered by those who argued that children already engage in sexual activities, and it would be more productive to teach them about sex, rather than criminalise their sexual activities.[143] This judgment was confirmed by the Constitutional Court.[144]

The *Teddy Bear* judgment makes one wonder why adult commercial sex is still criminalised in South Africa.[145] I argue that a continued criminalisation of adult commercial sex violates the Constitutional rights to human dignity, privacy, and the right to bodily and psychological integrity.[146] I argue that the law needs to concern itself with protecting everyone's sphere of intimacy and autonomy, because the decision to live out one's individuation as being homosexual, bisexual, heterosexual or to belong to any other identifying associational category, is made in that sphere.[147] Engaging in sexual activities is a decision made in the sphere I mention above, and the law should not interfere, if the decision is made by an adult who can consent. The same protection afforded to minor children is what I argue women involved in prostitution deserve.[148] My argument is that by protecting the imaginary domain, the law would have afforded women the right to bodily integrity to do as they see fit with their bodies. This protection should form part of democratising sexual relations, by re-assessing social, historical and cultural norms

136 As above.
137 As above.
138 As above.
139 As above.
140 *Teddy Bear Clinic for Abused Children & Others v Minister of Justice & Others* (CCT 12/13) [2013] ZACC 35.
141 Radebe (n 133) 13.
142 Radebe (n 133) 13.
143 As above
144 As above.
145 As above.
146 As above.
147 Cornell (n 5) 100.
148 Radebe (n 133) 14.

regarding gender inequality.[149] Legalising prostitution will ensure that the state refrains from endorsing a certain view of sexual morality, especially considering how diverse South Africa is.[150] The *Jordan* case as discussed earlier endorsed societal stereotypes regarding women involved in prostitution.[151]

To argue that society discriminates against men and women involved in prostitution similarly, is to attempt to rewrite history. Historically women's sexual choices have always been legitimate to the extent that they were approved of by masculinity.[152] The focus of this article does not include the experiences of male prostitutes, or female customers. This judgment was couched in historically imposed sexual biases.[153] Even if the court is correct in saying society inherently looks down on prostitution, there is a duty to advance a public constitutional culture, in terms of which citizens agree on what is just, notwithstanding disagreements on important life values.[154] Feminist anthropologists have never truly discovered a time in history, where women were fully equal with men.[155] Therefore, invalidating a woman's sexual conduct is rooted in the sexism our Constitution seeks to eradicate.[156] By virtue of declaring the provisions of the Bill of Rights to also be constitutional values, their protection may sometimes require that they be placed above popular morality.[157] This is how the protection of the imaginary domain and bodily integrity can be ensured.[158]

6 Conclusion

In this article I outline the importance of bodily integrity and the imaginary domain in the process of individuation.[159] I also indicate that the protection of these elements of individuation is a prerequisite to attaining sexual freedom.[160] Sexual freedom and sexuality are formative to moulding one's personality.[161] Throughout this article I sought to emphasise that a decision to have sex, never mind the reason, is made beyond the proverbial veil, or the imaginary domain, an area where we battle with ideas of how to live out our

149 Cornell (n 11) 1.
150 As above.
151 *S v Jordan* 2002 (2) SACR 499 (CC) 16.
152 Cornell (n 11) 9.
153 Cornell (n 11) 10.
154 Cornell (n 11) 11.
155 Cornell (n 11) 14.
156 Radebe (n 133) 16.
157 Radebe (n 133) 23.
158 Radebe (n 133) 25.
159 Cornell (n 5) 4.
160 Cornell (n 5) 5.
161 Cornell (n 5) 6.

lives.[162] As such, this domain should never be invaded because its sanctity demands privacy, if it is to be useful to the individual concerned.[163] I acknowledge that prostitution is inherently exploitative and dangerous, but instead of criminalising it, I believe that creating a sexually-tolerant society can be beneficial for all, as part of transformative constitutionalism.[164] When we have transformed our political landscape enough, we will be able to afford women a space to live out their sex and sexuality, and not fear any shame or be marginalised.[165] Section 9 of the Constitution (the equality clause) should be used as a moral compass, to prevent any further marginalisation of minority groups.[166] This clause embodies a memory of the oppressive past, a place we should never revisit, but also contains a promise to a future marked with tolerance of difference, and a political and social culture of respecting the intrinsic worth of all human beings irrespective of their social status (both actual or perceived).[167] This is how I believe legalising prostitution can begin, but more importantly, allowing for sexual freedom by protecting bodily integrity and the imaginary domain.[168]

162 Cornell (n 5) 5.
163 As above.
164 Cornell (n 5) 6.
165 Robson (n 35) 424.
166 The Constitution (n 4).
167 Cornell (n 11) 25.
168 Cornell (n 5) 4.

LOBOLA (BRIDE PRICE) CULTURE AND THE EQUALITY OF WOMEN IN ZIMBABWE

*by Priccilar Vengesayi**

1 Introduction

Human rights are pillars that are essential for the sustainable development of individuals and communities.[1] They allow people to live with dignity, freedom, equality, justice and peace. In light of this, the customary law practice of the bride price *vis à vis* the right to equality is under scrutiny in this study. Although the custom of paying the bride price is practised in many African countries, this article focuses on Zimbabwe, where it is referred to as *lobola* or *roora*.[2] This paper seeks to examine the effects of *lobola* custom on the status of women and their right to equality. It argues that *lobola* creates a hierarchy in the marriage institution which forms the basis for unequal power relations between husbands and wives. In its form and procedure, *lobola* perpetuates the subjugation of women to men.

* LLD candidate at the University of Pretoria. Adopting a radical, non-conformist and courageous stance, this author discusses *lobola* and its impact on women's equality especially in light of the fact that Zimbabwe is a member state to a number of regional and international instruments that enjoins it to observe equality between men and women and it also enacted a women's rights friendly Constitution. This paper argues that the payment of *lobola* infringes the rights of women from two dimensions. Firstly, women are discriminated against as a category because they get little from *lobola* payment as compared to their male counterparts. Secondly the bride is discriminated against for she is not treated equally to her husband during the *lobola* negotiations.

1 www.un.org. (accessed on 27 August 2018).

2 Other African countries practising the bride price are South Africa, Lesotho, Sierra Leone and Kenya.

Women are subjected to control by men. This violates equal rights enshrined in Section 56 of the Constitution of Zimbabwe, Amendment (No 20) Act, 2013 (hereinafter referred to as 2013 Zimbabwean Constitution).

In Section 2 the definition of *lobola* and a background of the practice are outlined. From its definition and background it is apparently clear that women are put in a position of a commodity whereby their payment is negotiated by the father (or any other male figure representing the father) and the husband. Its background is hinged on the patriarchal society which undermines the status of women. The nature of *lobola* which has been evolving to suit the market demands is discussed in Section 3. Women's economic value has been consistently revalued to suit the economic situation of the day. Section 4 discusses the position of *lobola* in Zimbabwean marriages with the assessment of various court decisions. While courts have considered women to be at liberty to choose whether their fathers can receive *lobola*, it is a choice which is not readily available to women since customs are not individualistic. However courts have always been guided by the payment of *lobola* to establish the existence of African union, which is a sign that *lobola* is a customary requirement of a marriage.

By upholding the custom of *lobola* Zimbabwe is not only infringing its own Constitution but several legal frameworks which enjoins Zimbabwe to observe the principle of equality and women's rights. Such legal frameworks are discussed in Section 5. In the penultimate section the inequalities posed by *lobola* are explored followed by the conclusion. In conclusion and as a way forward it is suggested that *lobola* must be abolished. It is acknowledged that those who support *lobola* suggests its regulation instead of abolition. Regulation does not solve the problem being posed by the inequalities of *lobola*. In any case *lobola* is already being regulated by customary law yet inequalities against women persists. Payment for women category need to be removed in totality so that all human beings are treated with dignity on equal basis upon entering into, and during the subsistence of marriages.

2 Definition and background of *lobola*

Lobola is a Zulu term which refers to an ancient marriage custom.[3] In Shona and Sesotho languages it is called *roora* and *muhandi* respectively. *Lobola* denotes the payment of the bride prize by the

3 B Scheidler 'What the Bible says about Lobola' 2010 www.churchleadership resources.com/HotTopics/**Lobola**_A4.pdf. 2 (accessed on 25 August 2018).

groom to the bride's family.[4] Ansell defines it as a provision of gifts to the parents of a bride usually in the form of cash, livestock, clothing and groceries.[5] It consists of a series of payments, which are made by the prospective groom and his family to the family of a prospective bride.[6]

This custom is closely related to dowry in the European and Asian cultures with the difference being the fact that dowry is normally paid by a woman to the family of a man yet *lobola* is paid by a man to the family of a woman.[7]

The practice is common in most patrilineal societies in sub-Saharan Africa. It has been practiced in Zimbabwe since the pre-colonial era and the practice still exists in Zimbabwe.[8] In Zimbabwe's pre-colonial past, *lobola* generally took the form of a hoe, which was worth little materially, but was a symbol of marriage and work.[9] In some instance the man was supposed to pay it in labour to the in laws.[10]

According to Schmidt, prior to colonisation marriage payments included four to five head of cattle supplemented by other gifts such as hoes, blankets, and baskets of grain but with European occupation payments began to be paid in cash as every aspect of *lobola* became monetised.[11] Colonisation introduced cash in *lobola* transactions. Chigwedere commented that because of colonisation every aspect of *lobola* came to revolve around cash.[12] *Lobola* eventually became market conditions shaped, for instance cash was demanded as a result of falling wage incomes and crop prices and later due to shortages of cattle in the 1920s.[13] Ploughs and the scotch carts were also once used in the *lobola* transaction during the time when they were attracting a higher economic value.[14]

4 Customary Marriage Divorce http://www.bregman.co.za/customary-marriage-divorce-work-(accessed on 26 March 2017).
5 N Ansell 'Because its our culture! (Re) negotiating the meaning of *lobola* in Southern African Secondary Schools' (2001) 27 *Journal of Southern African Studies* 697.
6 A Shenje-Peyton 'Balancing gender, equality and cultural identity: Marriage payments in post-colonial Zimbabwe' (1996) 9 *Harvard Human Rights Journal* 105.
7 Scheidler (n 3) 2.
8 Shenje-Peyton (n 6) 106.
9 Ansell (n 5) 700.
10 E Schmidt *Peasants, traders and wives: Shona women in the history of Zimbabwe, 1870- 1939 (*1992) 110.
11 Schmidt (n 10) 110.
12 A Chigwedere *Lobola: The Pros and Cons, Books for Africa* (1982) 4.
13 MK Chiweshe 'Wives at the market place: Commercialization of *lobola* and communication of women's bodies in Zimbabwe' (2016) 16 *Oriental Anthropologist Journal* 229-243.
14 Chiweshe (n 13) 235.

3 Nature of *lobola*

Chigwedere recognises two prominent components of *lobola* in most parts of Zimbabwe.[15] These are the small items and the main marriage deal. Small item payments are made to introduce the groom's family to the bride family and serve the purpose of engaging the two families in preparation for a structured *lobola* process.[16] Main marriage deal has two separate components of beads or *rusambo* and a herd of cattle or *danga*. This involves the presentation of beads by the prospective groom to his would be father -in-law and this gesture is meant as a form of appreciation for all the services to be rendered to the son-in-law and his relatives by the bride.[17] Such services include cooking, cleaning, working in the fields and generally serving the husband and his community as needed.[18] This leaves the wife at the groom and his family's disposal. However due to the fact that *lobola* payment has been converted into a business transaction in this modern society *rusambo* is no longer being paid with traditional beads. The father-in-law can now charge any amount of money he desires.

A second part of the *lobola* payment are cattle (danga). In the modern society where people no longer need cattle, the equivalent value of the number of cattle may be paid in cash. Significantly cattle payment is for the prospective groom to secure legal rights over the children of the marriage.[19] This is probably the reason why children born in marriage take the surname of the father and not the mother.

In both beads and cattle payment it is the father of the bride who decides on the amount of money he need and the number of cattle or their value. The number of cattle to be delivered by the groom differs from society to society, from family to family and even within the family, depending on the achievements and status of the woman in question. However, whatever the number of cattle demanded by the father of the bride, the mother of the bride is entitled to only one cow and the rest of the herd as well as beads accrues to the bride's father. In a nutshell the father walks away with the bigger chunk while the mother retains a small share of *lobola*.

Chiweshe quoted Sekai Nzenza who narrated in the Herald[20] an experience with *lobola* ceremony:[21]

15 Chigwedere (n 12) 5. See also Shenje-Peyton (n 6).
16 Chigwedere (n 12) 5.
17 Chigwedere (n 12) 9.
18 Ansell (n 5) 699.
19 Shenje-Peyton (n 6) 106.
20 '*Lobola* and the meaning of marriage' *The Herald* 6 November 2013 6.
21 Chiweshe (n 13) 232.

> Apart from the small introductory payments, Philemon paid *mapfukidzadumbu*, the symbol to thank the mother for carrying Shamiso inside her uterus and stretching her abdomen the way she did. Then the *mombe yehumai*, the cow to thank the mother for giving birth to Shamiso. He could not afford the eight cattle, *danga* or *rusambo*, the bulk of the lobola ... Later on, if Philemon found Shamiso to be a virgin, we will politely remind Philemon that we need *mombe yechimanda*, the cow that will be slaughtered and enjoyed by both families to celebrate Shamiso's virginity. When the payments had been paid to the tune of a borrowed US$1000, Philemon and his people asked to meet the family. They came in crouching and clapping in humility.

In pegging the amount required for *lobola* and the number of cattle required, Scheilder argues that the following factors, with regards to the bride comes into play:[22]

- Her perceived beauty and desirability
- Her age or youthfulness
- Her virginity
- Her fertility
- Her family's status in their society
- Her education and the cost of her education
- Her career and earning capacity
- Wealth and status of the family of the groom.

If a bride has all of the above listed qualities, she would attracts a higher *lobola* value. Resultantly his has led to a situation where daughters from the same family being charged different price.

4 *Lobola* as a requirement for marriages in Zimbabwe

4.1 *Lobola* is not a statutory requirement

When I instigated a court application at the Constitutional Court of Zimbabwe to have *lobola* abolished, the most prominent criticism I got was based on the fact that *lobola* is not a prerequisite to a marriage.[23] It became the basis upon which the Chief Justice of the Constitutional Court requested me to withdraw the matter and do a factual investigation to prove the legal position of *lobola* in Zimbabwean marriages and allow the involvement of other women in the process. My contention was that it is a customary requirement

22 Scheidler (n 3) 2.
23 *Priccilar Vengesai v Minister of Justice Legal and Parliamentary Affairs & Others* Case Number CCZ 67/17.

which women who belong to a society in which *lobola* is practiced cannot easily avoid.

What is candidly acknowledged in this paper is that under the two Zimbabwean legislations which govern marriages being the Customary Marriages Act and the Marriages Act, *lobola* is not a statutory requirement for marriages.[24] Both of these legislations do not require *lobola* to be a legal requirement for the registration of either customary or civil marriage. This is so because *lobola* is a customary practice which, by virtue of being a custom, cannot be written in statutes.

4.2 *Lobola* as a customary requirement for marriage

While the practice of *lobola* custom, cannot be found in any Zimbabwean statute, it is a way of life of those who practice it. Hence it is a customary law requirement. Customary law depends, among other things, on the existing custom of the society. Customary law refers to the legal principles and judicial practices of a particular tribe.[25] According to Bennet customary law emerges from what people believe they ought to do rather than from what a class of legal specialists considers that they should do or believe.[26] It is basically a set of norms of what people do in a social situation and which rules they regard as binding. The positive content of customary law is not derived from lawyers and their reasoning but rather the dominant role of social actors determines its content.[27] *Lobola* payment has been practiced for a long time that it now qualifies to be customary law. Its existence predates the colonial era.[28] It therefore becomes trite that *lobola* forms part of the customary law in Zimbabwe.

The position of *lobola* with regards to marriages in Zimbabwe has been evolving since 1984. A very prominent judgement on *lobola* was handed down in 1984 by the Zimbabwean Supreme Court (then it was the highest court in the land) in *Katekwe v Muchabaiwa*.[29] In this matter the guardian of a woman was claiming seduction damages from a man who had sexual intercourse with her daughter before paying *lobola*. The community court applied customary law and ruled that indeed the father was entitled to the seduction damages. An appeal was made to the Magistrate court which upheld the community court's position. The Magistrate, in upholding the awarding of damages to the women's guardian held that[30]

24 Customary Marriages Act 6 of 1997 [Chapter 5:07]; Marriages Act 18 0f 1989 [Chapter 5:11].
25 African Law and Tribunal Courts Act {Chapter 237} since repealed.
26 TW Bennet *Source book of African customary law for Southern Africa* (1991) 6.
27 Bennet (n 27 above) 7.
28 Shenje-Peyton (n 6) 109.
29 1984 (2) ZLR 112 (SC).
30 *Katekwe v Muchabaiwa* 1984 (2) ZLR 117 (SC).

> One is constrained in arriving at this decision to ask if the defendant's submissions are upheld before this court, would that not be eradicating the whole fabric of our society's customs. Was it the intention of Parliament in enacting section 3(3) (of the Legal Age of Majority that the levels of custom should be done away with? The court is of the strongest opinion that at no time was it the intention of the law giver.

What the court was simply saying is that by giving women the majority status it does not mean that their parents cannot claim seduction damages, where *lobola* has not been paid and sexual intercourse has been taking place.

This position was overthrown by the Supreme Court on the basis that:

> An African woman who has been seduced can make an election as to which law she wants to be applied. If she elects the general law of Zimbabwe then she herself because she is now a major can bring an action for damages for seduction.

This interpretation, according to the court, directed itself to healing the pains inflicted on African women by legal encumbrances brought about by customary law. It was further held that African women were now emancipated and can sue, in their own right, without the assistance of their guardians. It was concluded that an African woman with majority status can, if she so desires, allow her father to ask for *lobola* from the man who wants to marry her. She is the only one who can make that choice. If she does agree to the payment of *lobola*, her father can go through the contractual procedure required before an African marriage is effected.[31] The father's entitlement to *lobola* would then depend upon his daughter's discretion. Once the choice of *lobola* payment has been made, the father can now enter into a *lobola* payment contract with his prospective son in law.

Barely ten years later, the same court that had ruled that *lobola* is a woman's choice, took a somewhat different stance. In 1992 in the case of *Mujawo v Chogugudza*[32] the Supreme Court in clear unambiguous terms acknowledged *lobola*, as a customary marriage requirement with the following words:[33]

> Traditionally all that a man is required to do to have any unmarried woman as his wife is to agree to any amount of *lobola* payable for the woman with her father or guardian and she becomes his spouse.

The court then went on to recognise the validity of the defendant's marriage on the basis of *lobola* payment. In this case there was no compliance with statutory requirements. A profound observation was

31 *Katekwe v Muchabaiwa* 1984 (2) ZLR 126 (SC).
32 1992 (2) LLR 32 (SC) at 327.
33 *Mujawo v Chogugudza* 1992 (2) LLR 32 (SC) at 327.

made by the court in the matter with regards to customary union, customary marriage and civil marriage. It held that[34]

> It is more accurate to refer to an unregistered customary union simply as a customary union and to the parties as customary spouses to distinguish such a union, from a customary marriage which has been registered.

Otherwise all of them are marriages under different legal regimes and no form of marriage is superior than the other. They are just different. A customary union becomes a valid marriage because of *lobola*. Customary and civil marriages derive their validity from their respective statutes.[35]

Furthermore *lobola* contracts are enforceable in the courts of law as was held in *Kuvedzimwe v Musariri*.[36] In this matter the father- in-law sued the son-in-law for outstanding *lobola* and the High Court concurred with the court *a quo* that the defendant was to deliver to the plaintiff seven heads of cattle which were outstanding items of *lobola*. This position was also upheld in *Mutaisi v Muzondo*[37] whereby the father-in-law was regarded to have a right to sue the son-in-law for the outstanding *lobola* In *Mutaisi v Muzondo,* the appellant was married to the respondent's daughter in terms of customary law. Respondent's daughter died after only part of the *lobola* had been paid by the appellant. Father to the deceased woman refused to take possession of and distribute the deceased's clothing, claiming that the outstanding *lobola* had to be paid off first. Appellant's application to the Magistrate Court for the respondent to take and distribute the deceased clothing was dismissed.

The above cases are important judicial precedencies on *lobola* which seem to be building up on each other yet. In actual fact, they are conflicting. In *Katewe v Muchabaiwa*, it was held that *lobola* was not a legal requirement for marriage, yet in *Mujawo v Chogugudza* the court regarded the need to pay *lobola* for there to be a marriage. Furthermore in *Mutaisi v Muzondo lobola* was regarded as a legally enforceable contract.

Katewe v Muchabaiwa precedent left a lot of issues unaddressed and a lot of questions about *lobola* unanswered. This could be so probably because, as the court rightly stated in *dicta,* the appeal was not concerned with *lobola*.[38] The case was dealing with the claiming of seduction damages by the father on behalf of his daughter. In *Katekwe v Muchabaiwa* the court could have simply established that *lobola* is not a statutory requirement and the father in law could have been required to prove the existence of *lobola* practice as their

34 As above.
35 TW Bennet (n 27) 6.
36 1999 (2) ZLR 20 (HC).
37 1999 ZLR 435 (HC).
38 *Katekwe v Muchabaiwa* 1984 (2) ZLR 127 (SC).

customary requirement for marriages. By nature and by operation, customs are ascertained through practice as opposed to legal rules which are written down in the form of statutes. This position does not give *lobola* a lesser status compared to statutory requirements but it is simply a customary requirement. A custom by its nature cannot be a written law. A customary norm in every society is established through continuous practice yet it is binding.

In 2000 the Zimbabwean High Court in *Gwatidzo v Masukusa*[39] acknowledged *lobola* to be a customary requirement in marriages. In this matter the defendant got married to Mr Gwatidzo under customary law after *lobola* was paid for the defendant. Mr Gwatidzo and the defendant had a child who was born in their union. Mr Gwatidzo then married the plaintiff under the Marriage Act at the Magistrate court. Mr Gwatidzo continued to have sexual relations with both wives. Defendant had a second child with Mr Gwatidzo after the civil marriage had been concluded. The plaintiff then claimed damages from the defendant for alleged adultery. Plaintiff was alleging that the defendant (who was the first wife under customary marriage) should have not slept with her husband after she had entered into a civil marriage with him.

Essentially this matter was about the conflict between a customary union and civil marriage. It would be easy to ascertain the existence of a civil marriage because there would always be a marriage certificate issued by the marriage officer and civil marriages are registered with the country's registrar. An unregistered customary union would be ascertained through compliance with certain marriage customs. In this case the court was guided by the payment of *lobola* to establish the existence of a registered customary union. It held that 'Gwatidzo paid *roora* to the defendant's parents and Gwatidzo and the defendant became husband and wife at customary law.'[40]

In *Gwatidzo v Masukusa* the court, in determining whether there was a customary union existing between the defendant and the plaintiff's husband, held that: Our courts must recognise customary law, that is, a law which our people believe in and accept as binding on them.[41]

It then accepted the existence of a customary union between the defendant and the Plaintiff's husband (Mr Gwatidzo) on the basis that Mr Gwatidzo had paid *lobola* to the defendant's parents. The validity and strength of the customary union between the defendant and Mr Gwatidzo was on the basis of the payment of *lobola*. Even in *Mujawo v Chogugudza*[42] where the court was grappling with which law to

39 2000 (2) ZLR 410 (HC).
40 *Gwatidzo v Musukusa* 2000 (2) ZLR 410 (HC).
41 As above.
42 *Mujawo v Chogugudza* 1992 (2) LLR 32 (SC) at 327.

apply to the deceased's estate, it was guided by compliance to customary formalities.[43] In this regard it said that:[44]

> The record revealed that whilst the deceased married the appellant in terms of the Marriage Act, the customary formalities were nevertheless complied with in that:
>
> (a) A go-between was appointed.
> *(b) Lobola* was paid.

Clearly if *lobola* was not a requirement for marriage at all there could have been no consideration for it by the courts at any stage. By practice, the payment of *lobola* is an essential requirement in concluding a customary union between a husband and a wife.[45] In some cases, couples first enter into a customary marriage through the payment of *lobola* and then later on conclude a civil marriage.[46]

Disregarding *lobola* as a requirement amounts to relegating customary law to a lower status than state law. It means that only those requirements written in statutes are important and customary requirements are not. Generally, in Zimbabwe customary law has been given a secondary status and is usually applied where there is a gap in common law.[47] This poses a danger of disregarding the reality of people's lives.[48] The majority of people's social interactions in Zimbabwe are governed by customary law. State law or state-sanctioned law has no monopoly on legal and social regulations, and this means that it is essential to explore people's legal rights beyond the confines of state law and incorporate social practices which are normally not recognised in the state courts. It is acknowledged in this paper that *lobola* is a very common cultural practice which is so central to the way of life of many Zimbabweans that a couple is not considered married unless and until *lobola* has been paid.[49]

4.3 To what extent is *lobola* a choice

Another point of contestation, which needs to be explored, from the *Katewe v Muchabaiwa* precedent is that it makes it a woman's choice to allow her family to ask for *lobola*.[50] It is necessary to examine

43 This was an appeal which was brought before the Supreme Court following the appointment of an heir of the eldest son from the first customary union of the deceased. The deceased had entered into two marriages. The first one was a customary union and the second one was the civil marriage. Upon his death the trial court applied customary law to the administration of his customary union to be the heir.
44 *Mujawo v Chogugudza* 1992 (2) LLR 32 (SC) at 340.
45 Customary Marriage Divorce http://www.bregman.co.za/customary-marriage-divorce-work-(accessed on 26 March 2017).
46 Ansell (n 5) 698.
47 Mutaisi (n 37) 428.
48 W Ncube *Culture and tradition in East and Southern Africa* (1998) 156.
49 Shenje-Peyton (n 6) 106.
50 *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC) at 126.

whether or not women enjoy that choice in reality. It is submitted that *lobola* is a choice in the sense that it is a custom. Customs by nature are a matter of choice. However, customs are a choice at a communal or social level and rarely at an individual level. When one is born within a given social framework of a custom, it is not up to the individual to change that custom and it is not easily achievable for one to run away from that custom. A culture or custom, by its nature, is not individualistic but that it is a societal norm which applies to the community as a whole.[51]

Non-individualistic nature of *lobola* is apparent even from the court in *Katewe v Muchabaiwa'*s wording when it says the woman may allow 'her father to receive *lobola* from the husband.' If it was individualistic since a woman was a major, the court could have said a woman can choose to receive *lobola* from her husband. In practice, women's freedom to choose whether to have *lobola* paid for them or not in not unencumbered. When a woman introduces the husband-to-be to her parents and indicates her intention for marriage, it then becomes obvious that the next step is *lobola*, because that's the societal norm. In a situation whereby society requires the payment of *lobola* prior to the registration of a marriage it then becomes a marriage requirement for persons belonging to that society.

In any event even if it was the case that *lobola* is a matter of choice, this does not mean that it can escape judicial or constitutional scrutiny on that basis. If that was the case then there would be no law to regulate anything because in life everything is about choices. Marriages are a matter of choice yet they are regulated, employment is a matter of choice yet it is regulated. Termination of pregnancy and prostitution are matters of choice yet they are forbidden by the laws of Zimbabwe. *Lobola* might be a choice which someone has to make but its constitutionality cannot remain unchallenged when consideration is given to its effects on women's rights.

Buttressing the fact that *lobola* is not an individual choice one has to consider the consequences which follow as punishment for those who chose not to have *lobola* paid for them. If *lobola* is not paid for a woman, she will be disassociated from family and be banished from attending family meetings and gatherings. The son-in law would not be recognised by the father-in-law and his traditional roles will not be acknowledged. He loses some of the privileges of a son-in-law.

5 Legal frameworks

Lobola as an African culture is not forbidden in any international, regional or domestic laws. However there are provisions which

51 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC).

prohibits cultural practices that infringe the rights of women. Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter referred to as CEDAW) which has been regarded as the International Bill of Rights for women, has categorically rejected discrimination of women caused by cultural practices and it provides as follows:[52]

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

Further the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa provides that:[53]

> States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

and

> Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:
>
> (f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women

The SADC Protocol on Gender and Development (SADC Protocol) and Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, in their bid to promote equality between men and women in the region has specific provisions which expressly reject customary practices which undermine women's rights. The SADC Protocol provides that:[54]

> States Parties shall take measures including legislation where appropriate to discourage traditional norms, including social, economic, cultural and political practices which legitimize and exacerbate the persistence and tolerance of gender based violence with a view to eliminate them.

52 Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) available at www.un.org/womenwatch/cedaw (accessed on 26 September 2018).

53 Protocol on the African Charter on Human and People's Rights on the Rights of Women in Africa 2003 Available at www.achpr.org/instruments/women-portal (accessed on 26 September 2018).

54 Southern African Development Community Protocol on Gender And Development 2008 https://www.sadc.int/issues/gender. (accessed on 26 September 2018).

Zimbabwe is not only a signatory of these international and regional instruments. It has also domesticated some of the principles of equality through the 2013 Zimbabwean Constitution. Zimbabwe in its 2013 Zimbabwean Constitution embraced equality between men and women while at the same time condemns customary practices which violate equality or other human rights. Relevant sections are:

> Every person has the right —
>
> (a) to use the language of their choice; and
> (b) to participate in the cultural life of their choice; but no person exercising these rights may do so in a way that is inconsistent with this Chapter.
> (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.
> (2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.
> (3) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.

The 2013 Zimbabwean Constitution has improved the protection of women's rights. Section 80 of the Constitution of Zimbabwe provides that:

> Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.
>
> (1) Women have the same rights as men regarding the custody and guardianship of children but an Act of Parliament may regulate how those rights are to be exercised.
> (2) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by the Constitution are void to the extent of the infringement.

Further Section 56 of the Constitution of Zimbabwe deals with Equality and non-discrimination and provides as follows:

> (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
> (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
> (4) A person is treated in a discriminatory manner for the purpose of subsection (3).
> (a) They are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected: or

(b) Other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
(5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
(6) The state must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and —
(a) Such measures must be taken to redress circumstances of genuine need
(b) No such measure is to be regarded as unfair for the purposes of subsection (3).

Section 56 is quite elaborate and far reaching with regards to the protection it offers to women. It accords everyone equal protection and benefit under the law. The word 'everyone' includes women and as such the constitutional protection of equality extends even to women. This clearly accords women similar protection of the law with men. Law under which everyone is supposed to benefit and get protection from is again not limited to any form of law. A reasonable conclusion to be derived from this wording is that everyone (men and women) must be protected in equal terms under every law in Zimbabwe be it private, public or customary law.

Both equality before the law and equal protection of the law, are not defined in the 2013 Zimbabwean Constitution. However equality before the law has been taken to mean that persons in similar situations must be treated equally and equal protection before the law implies that the existing law will be applied or enforced equally on all people in similar situations and no person shall be denied the protection or benefit of the law without a legitimate purpose.[55] Fundamentally, equality before the law gives everybody the right to equality yet equal protection of the law forbids unfair discrimination.

A law or conduct may violate constitutional rights to equality and equal protection of the law or either of them. Ackermann links the issue of equality before the law to human dignity.[56] He argues that equality before the law means that 'all people should be treated equally with respect to their human dignity (human worth) and that the law should not differentiate in its treatment of persons in a way that impacts negatively on their human dignity.'

Section 56(5) makes the presumption that any discrimination on the prohibited grounds is unfair unless that 'discrimination is fair,

55 L Juma 'Chieftainship succession and gender equality in Lesotho: Negotiation the right to equality in a jungle of pluralism' (2013) 22 *Texas Journal of Women and the Law* 174.
56 LWH Ackermann 'Equality and non-discrimination: Some analytical thoughts' (2006) 22 *South African Journal for Human Rights* 597.

reasonable, and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom'. Unfair discrimination simply means different treatment to different people attributable wholly or mainly to their respective descriptions based on prohibited grounds.[57] This section has 23 prohibited grounds for discrimination which includes sex, gender, custom, marital status and pregnancy. The prohibited grounds of discrimination if observed may go a long way towards protecting women from unfair discrimination and improving their status. Of relevance to this discussion is the fact that custom and culture constitute as prohibited grounds against which discrimination is prohibited.

6 Inequalities of *Lobola*

Having established that *lobola* is a customary requirement of marriage in Zimbabwe what then follows in this section is its scrutiny in terms of women status and equality. *Lobola* custom show the differentiation between men and women. *Lobola* discriminates against women in general because it benefits men and lowly regards women from every viewpoint. It seeks to perpetuate men's undue enrichment. It also discriminates the bride who is viewed firstly as an object and secondly is placed at a lower position than her husband in a marriage setup. Custom of *lobola* puts the bride and the groom on an unequal footing. One is treated as a subject (who is supposed to pay) and the other is treated as an object (who is supposed to be paid for). Payment of one person by the other creates a hierarchy in a union whereby the one who paid is above the one whom is paid for.

6.1 *Lobola* discriminates against the bride

One of the traditional reasons for *lobola* that goes to the heart of equality is that once a bride is married she would be expected to offer services to her husband and in laws. Symbolically, the payment of *lobola* signifies a transfer of rights of the wife and her children to the husband.[58] See also Chigwedere[59] and Shenje-Peyton.[60] It is thus in appreciation of these anticipated traditionally bestowed duties that a woman has to perform that *lobola* is paid for her. This recompense entitles the bridegroom to definite rights to the services of the bride. Sithole argues that the aspect of appreciation raises the man's expectation about the benefits which he is to find in the wife and it

57 Juma (n 55) 174.
58 Center for Reproductive Rights: Women of the World, Zimbabwe https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WOWAA08.PDF. (accessed on 23 March 2018) 141.
59 Chigwedere (n 12) 11.
60 Shenje-Peyton (n 6) 110.

might lead to wife abuse where those expectations are not met.[61] It has to be noted that even when a husband is born his parents goes through some inconveniences yet traditionally they are expected to treat such as their responsibility. Raising a woman becomes an inconvenience because at some stage she would be required to go away and offer services to her husband.

In 2005 BBC News carried out an interview on *lobola* and one man was quoted saying the following:[62]

> The purpose of it was to thank the parents of your woman for giving birth and bringing up this beautiful lady whom you are going to spend the rest of your life with. I know men who have paid bride price and they are not complaining because the benefits you get from a wife, her care, help and companionship, far outweigh the cost.

In this regard the scale is tilting in favour of a husband who by one transaction between him and the father in law secures life time services from the wife. The bride is expected to have been trained by her aunties on the services she is supposed to give to the husband. Most services are care giving and domestic work. In other words a wife is expected to work for a husband. There is no equality there when one is expected to serve the other.

Virginity of a bride plays a role in *lobola* as it brings an additional cow to the in-laws. This is a sign that *lobola* is an institution which is highly sexualised because of the payment of an extra cow where the bride is found to be a virgin. In this way girls who lose their virginity before marriage are viewed as damaged goods and no extra cow will be paid to the family.[63] A husband however do not go through the process of being considered a virgin or not. It does not matter whether he is a virgin or not at the time he marries.

Lobola payments are not voluntary on the part of the bridegroom. They are obligatory and they are pegged by the father-in-law.[64] During the transaction of *lobola* the bride is relegated to an object upon which her father and her husband to be has to determine her prize. A husband has the right to participate in the *lobola* negotiation yet the bride do not have that right. Marriage is a significant turnaround point in every human being's life, yet a woman is denied an opportunity to give her views and opinions in a matter which determines her future and her life. Further, because of *lobola*, marriage starts on an unequal footing with parties being treated differently. From the onset on *lobola* negotiations the bride is not treated on equal terms with the husband.

61 Unpublished: I Sithole 'An exploration of *lobola* and its impact within the arena of sexual relations and proactive imperatives' unpublished Masters dissertation Women's Law University in Africa 2005 13.
62 Sithole (n 62) 13.
63 Chiweshe (n 13) 235.
64 Shenje-Peyton (n 6) 124.

It has been evident through the evolution of *lobola* that the value of a bride appreciates to suit the economic factors of the country. *Lobola* is now commercialised and as a result girls are being viewed by their fathers as a profit-making enterprise and husbands who are forced to pay large sums in *lobola* tend to look at their wives as property or commodities and hence consider them as inferior. Chireshe and Chireshe argue that *lobola* is also perpetrated by fathers who now see their daughters as money-spinning projects as they tend to charge high values for *lobola*.[65]

In the modern Zimbabwe *lobola* is being paid in:[66]

> satellite dishes, cars, furniture and huge amounts of groceries. Modern *lobola* payments include cash, cattle, clothes, shoes and groceries. Anecdotal reports indicate that on average a man is asked to pay US$4,000 cash plus the cattle, clothes and groceries. The nature of *lobola* has become increasingly materialistic

Lobola institution *has* evolved to become a business venture whereby daughters have become a high priced commodity in Zimbabwe. Husbands are not paid for at all and they are highly regarded as purchasers of wives. This commodification of women in the *lobola* transaction is at the expense of the dignity and equality of women. As a result, *lobola* reinforces perceptions of women as second class citizens.

Furthermore non-payment of *lobola* has led to a scenario in which some parents refuse to bury the bride who would have died before full payment of *lobola*. This serves as surety for *lobola* payment which is in many ways extortion.[67] In the above discussed the case of *Mutaisi v Muzondo* proves this fact.[68] In the contrary it is rare that a man for not paying *lobola*.

6.2 *Lobola's* discrimination against women in general.

Chigwedere contends that *lobola* consists of two components. These being the father-in-law's payment and those of the mother-in-law.[69] The mother of the bride is entitled to *mapfukudza dumbu and mombe yehumai* (money for carrying the bride in her womb and a beast of being a mother). The mother of the bride gets very little while the father gets the biggest portion in the form of beads and any number of cattle he may want to demand. A mother is entitled to a lesser portion of *lobola* simply because she is a woman. It is common cause that where a child grows up with both parents, both parents play a

65 E Chireshe & R Chireshe (2010) 3 'Lobola: The perceptions of Great Zimbabwe University students' (201) *The Journal of Pan African Studies* 1.
66 Chiweshe (n 13) 235.
67 Chiweshe (n 13) 235.
68 *Kuvedzimwe v Musariri* 1999 (2) ZLR 20 (HC) at 428.
69 Chigwedere (n 12) 18.

significant role in his/her up-bringing. Mothers, however, have a bigger responsibility in that regard as they have to carry the pregnancy, breastfeed the child and perform care duties and yet they get a small portion of *lobola*. This is another dimension of women discrimination which is inherent in the substantive nature of *lobola*. In this regard, women are unfairly discriminated against on the basis of gender and sex.

The other point of contestation in the *lobola* payment is apparent where the parents of the girl being married were divorced or never married and the daughter was raised by the mother alone.[70] A father who was absent and did not provide for the children pays a cow known as *mombe yechiredzwa* (a beast for rearing the bride) to the father of the bride's mother. After paying this beast then he will be entitled to *lobola*. The mother who would have raised the bride alone does not get a beast for rearing the bride but gets *mapfukidza dumbu* and *mombe yehumai*.[71]

Furthermore a bride is considered to belong to the father's clan. As such the father or his family representatives need to be present for the marriage to be recognised.[72] Another aspect of *lobola* which violates the principle of equality is the fact that even in a situation whereby a bride was raised by a single mother where the father had died, at *lobola*, some male figure in the paternity line of the bride has to be found and be paid *lobola*. The same principle applies in a situation whereby both parents would have died, the *lobola* payment goes either to the eldest brother or to the uncles without any consideration to the sisters or any role which they might have played in the raising of their sibling being married.

In a nutshell, *lobola* seems to have been created to enrich men and to suppress women. This constitutes a violation of the equal rights of women on the grounds of sex and gender in violation of section 56 (3) which provides that:

> (a) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, ... tribe, ... sex, gender, marital status, ... economic or social status.

6.3 *Lobola* and the limitation clause

It has been established that *lobola* as a culture poses discrimination against women. However those who support *lobola* justify it as their cultural right which is provided for in the 2013 Zimbabwean Constitution. However it was settled in *Pitty Mpofu and Another v The State* that constitutional rights and freedoms are not absolute. In this

70 Chiweshe (n 13) 235.
71 Chiweshe (n 13) 235.
72 Chiweshe (n 13) 235.

regard when the Constitutional Court held that '[t]hey have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.'

Such boundaries for the right to culture exists in form of two limiting provisions found in the 2013 Zimbabwean Constitution being the specific limitation and the general limitation clause. In a situation where any custom or cultural practice contradicts equality and other rights it cannot be practiced. Section 63 of the 2013 Constitution provides that '[n]o person exercising these (cultural) rights may do so in a way that is inconsistent with this Chapter (Bill of Rights).'

Furthermore the established discrimination inherent in *lobola* custom, for it to pass the Constitutional muster, need to be justified in terms of the general limitation provisions of Section 86 (2) of the Constitution which provides that:

> The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitations is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors.

The analysis of the limitation clause requires *inter-alia* balancing benefits given by the practice of *lobola* and the harm it causes. If the harm caused outweighs the benefits then it cannot be regarded as a justifiable practice in the democratic society. According to Currie and De Waal the reasons for limiting the rights must be exceptionally strong.[73] It requires the application of rationality in determining whether a conduct or law violates rights thereby striking the balance between the two alleged competing interests. This balance according to Juma should be carefully negotiated bearing in mind the values that the society considers to be important.[74]

Supporters of *lobola* custom argue that it serves many social and economic functions. Most importantly it is believed to be a valuable part of African culture.[75] In some cases, even those who would have married in foreign countries they actually send money back home for *lobola*. *Lobola* is regarded as part of Zimbabwean heritage. Ansell contends that many Africans see *lobola* as linked to their very identity and to their survival as a people.[76] See also Shenje –Peyton.[77]

This traditional way of associating an identity with a cultural practice is misleading. Because one is a Zimbabwean first before one gets married. Even those who are not married through *lobola* are regarded as Zimbabweans. In terms of Section 35 of the 2013

73 I Currie & J De Waal *The Bill Of Rights hand book* (2017) 151.
74 Juma (n 55) 174.
75 Chiweshe (n 13) 233.
76 Ansell (n 5) 708.
77 Shenje-Peyton (n 6) 125.

Zimbabwean Constitution a person is regarded as a Zimbabwean through birth, descent or registration. *Lobola* by its nature is just a culture which serves social purposes. A cultural practice is defined as objects, events, activities, social groupings and language that participants use, produce and reproduce in the context of making meaning in everyday life.[78] To justify the practice of *lobola* as linked to Zimbabwean identity cannot be found to be reasonable considering the harm it causes to women.

Another reason for *lobola* payment is that it is used as a token to tie and deepen the bonds between and within the two families. According to Chigwedere, *lobola* is a bond uniting two families.[79] What need to be noted is that the bond being referred to in this matter is between the husband's family and wife's family and not between the husband and the wife. The same view was echoed by participants in the BBC debate on bride price (*lobola*) in 2005, one participant commented as follows:[80]

> Just as the wedding ring symbolizes unity between two people, the bride price is a symbol of unity between two families. Bride price injects a sense of accountability into a marriage giving both families a stake in it. This helps to create strong marriages.

The example of giving a ring as an equivalence to *lobola* in actual fact exposes the inequalities inherent in the custom. Ring is exchanged between the parties to marriage yet *lobola* is paid for a bride to her father in law. *Lobola* practice disregards the fact that the unity that needs to be considered is the one between husband and a wife and not between two families. If *lobola* was exchanged between a wife and a husband its fairness was not going to be questioned and the example of a ring would have been applicable. In any case the practice has lost its unifying function and serves merely as a business transaction involving ever-growing sums of money.[81]

According to Shenje-Peyton, *lobola* is paid to the parents of the bride as a gesture of gratitude for the inconvenience they went through while they were bringing up the bride.[82] *Lobola* serves as a token of appreciation to the in-laws. It is a way of thanking in-laws for bearing and rearing a wife for them. It is appreciated that when a wife is born and reared, the in-laws had to go through some inconveniences. Since her identity and services and belonging are going to be transferred and enjoyed by the husband and his family, her parents deserves some form of compensation. Marriage is a contract between two parties and there is no reason why one party

78 Urban Informatics http://www.igi-global.com/dictionary/cultural-practice/6412 (accessed on 25 August 2018).
79 Chigwedere (n 12) 36.
80 Sithole (n 62) 14.
81 Shenje-Peyton (n 6) 127.
82 Shenje-Peyton (n 6) 123.

which has to be appreciated and not both parties.[83] One however wonders why the parents are being compensated for the girl child and not for a boy child. In other words, *lobola* is paid for a woman simply because she is a woman.

It is also argued that *lobola* is seen as a way of giving the wife respect and an insurance in her marriage. In the traditional set up, *lobola* binds the marriage because it involves many members of each family such that each family involved even throughout the subsistence of that marriage. While this may be seen as a positive aspect, it may also work against the woman if she is the one who wants a divorce. In such a situation *lobola* will tie the woman to a marriage which she no longer.

Conversely there is no longer a rational connection between *lobola* and its intended purposes. The reasons put forth to justify *lobola* payment do not satisfactorily vindicate the custom. A custom must be rationally related to its purpose(s) for it to pass the Constitutional muster. [84] *Lobola* custom is rationally related to a patriarchal society which promoted male dominance and female subordination. This patriarchal society cannot be reproduced in its original form in the modern Zimbabwe. Zimbabwe is now building itself in a democratic society which embraces gender equality and constitutionalism. It was a tool for subjugation of women in our society. Clearly with *lobola,* women discriminated against because they are women and there is no real benefit for them in this transaction. The manner in which *lobola* is paid is a direct violation of the rights of women to dignity, equality and non-discrimination on the basis of custom, culture, sex, gender, status and origin.

The thread of discrimination against women emanating from the practice of *lobola* enslaves them throughout their lifetime.[85] Firstly, as women are being raised, this is done in a manner that the parents get something out of them when they get married. Secondly, at marriage, the *lobola* payment is done in a discriminatory manner since they get a lesser share than men. Thirdly, after raising their female children alone, women get little from the *lobola* and the patriarch of the family walks away with a lot. Even when they die they may not be buried when *lobola* is not paid in full. Sisters are discriminated against brothers where both parents are not present. There is naked discriminatory treatment given to women at *lobola*. This violates formal equality which requires all people to be equal bearers of rights.[86] There is no reasonable justification that is in sync with the limitation clause in Section 86 of the 2013 Zimbabwean

83 Sithole (n 62) 13.
84 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).
85 Shenje-Peyton (n 6) 136.
86 Currie & De Waal (n 75) 213.

Constitution to render such gross violation of fundamental rights acceptable in a democratic society. African women in Zimbabwe experienced oppression before and after independence under the 1980 Constitution which did not consider custom, sex or gender as a ground of unfair discrimination.[87] There is no more need for this kind of oppression to continue undermining the equality principles in the 2013 Zimbabwean Constitution.

7 Conclusion

In essence the above discussion is centred on the custom of *lobola*, its nature and purpose *vis à vis* the equality rights as enshrined in the 2013 Zimbabwean Constitution, Regional and International agreements. Emergent issues from literature highlighted varied contestations on *lobola*. It has been established that whist *lobola* is a popular customary law requirement for marriages in Zimbabwe, it poses serious challenges in the fight for gender equality. Gender equality is threatened by *lobola* because of the position it places the bride in particular and women in general. At the negotiation a bride is just a commodity of a transaction between the father in law and the son in law. Throughout the marriage she is expected to be submissive and at her death she cannot be buried before it is cleared. When it is being paid for her own daughter a woman gets very little and the father in law gets a bigger share.

An interesting view is postulated in *Zimnat Insurance Co. Ltd v Chawanda* where the court held that: [88]

> As our law accepts customary unions it should endeavor to secure equality of the parties and discard the intolerable affection of superior virtue inherited from the colonial past. To continue to exhibit a vestige of condescension and conservation towards customary law unions will benefit the current and unyielding movement by the state to real disabilities suffered by African women.

Cultural relativism cannot be used to justify human rights abuses and there is no reason why the currently dominant norms and customs such as *lobola* in Zimbabwe should remain unchallenged.

In addition, Ndulo regards it to be an extreme form of legal positivism to tolerate a discriminatory custom on the basis that it has been practiced in that manner for a long time.[89] Apart from its discriminatory nature, *lobola* has also been criticised for perpetuating domestic violence.[90] It can be very difficult for a woman to end an

87 Constitution of Zimbabwe Act 1 of 1980.
88 *Zimnat Insurance Co. Ltd v Chawanda* 1990 (2) ZLR 143 (HC).
89 M Ndulo 'African customary law, customs and women's rights' (2011) 18 *Indiana Journal of Global Legal Studies* 102.
90 Sithole (n 62) 16.

abusive marriage, fearing that her family is unable to repay *lobola*. In *Kanjera v Muchanyuka*, the court in dealing with another conflict between customary union and civil marriage held that it may not be easy for a wife to leave a husband who would have paid *lobola* immediately on the basis that he would have contracted a civil marriage.[91]

Demands for large sums of money for *lobola* can leave newlywed couples financially unstable, which often contributes to the breakdown of marriages. The whole issue of *lobola* has forced some parents to coerce their daughters to remain in abusive marital relationships.[92] *Lobola* also promotes other harmful practices such as domestic violence as some women cannot easily move out of abusive marriages out of fear that their fathers cannot refund *lobola*.

Those who support *lobola* suggest its regulation of *lobola* as a means of dealing with the challenges associates with its practice. This position fails to appreciate the fact that *lobola* is already being regulated under customary law. While statutory law would be amended to suit societal demands customary law revolves. The manner in which *lobola* has been evolving disregards equality between men and women. In any event even if regulation is to be considered it does not help as it is aimed at dealing with the commercialisation of *lobola* and this does not deal with the inequalities associated by it.

Even if *lobola* is to revert to its original non-materialistic value of paying it with a hoe, the fact remains that it is a women who is paid for and the unwarranted hierarchy would still exist. It is not necessarily the value attached to *lobola* payment that threatens gender equality but it is its substantive nature. In simpler terms the abolition of *lobola* means the curtailing of payments for a wives. Regulation means the payment of women in a statutorily controlled manner. Regulation deals with the amount involved yet abolition removes the payment in totality. It cannot be imagined to solve the unequal status which women are subjected to in a marriage by *lobola* through controlling how they are paid instead of doing away with the issue of payment itself.

As a way forward, it is submitted that *lobola* must be abolished. According to Shenje-Preyton the abolition of *lobola* is one of the most effective ways to achieve equality between men and women in the Zimbabwean society.[93] The abolitionist argument links the practice of *lobola* to the unequal power relations between men and women within marriages. As May puts it:[94]

91 *Kanjera v Muchanyuka* S-222-96,
92 Shenje-Peyton (n 6) 128.
93 Shenje-Peyton (n 6) 144.
94 Sithole (n 62) 1.

> One thing is certain; as long as the *lobola* system exists (as it is), women will never be free and equal members of society because men will not regard them as such.

This inequality is seen as curtailing the decision-making capacity of women for whom *lobola* has been paid with regard to how resources within the marriage should be used. Abolition of *lobola* must need to be perceived as a way of creating a new culture in which men and women are equal.[95] Conclusively, to uphold gender equality and women status in Zimbabwe there is need to harness concerted efforts towards the abolition of *lobola*. This will provide Zimbabwe with a balanced society where men and women finds themselves on equal footing in a marriage set up. A balanced and equal society is the one that is anticipated by Section 56 of the 2013 Zimbabwean Constitution.

95 Shenje-Peyton (n 6 above) 144.

DAMAGES FOR ADULTERY: A LEGAL MISFIT OR A NECESSITY?

*by **Shantel E. Ndebele****

1 History of the law of adultery in Zimbabwe

To attempt any debate or discussion on the law of adultery in a Roman Dutch common law jurisdiction, without tracing the development of the law in this regard under Roman law would be a gross injustice. This is because the common law in Zimbabwe is largely Roman Dutch law with graftings of English principles.[1] This is the law that was applied at the Cape of Good Hope as at 10 June 1891, as evidenced by section 89 of the old Zimbabwe Constitution.[2] It would be of no benefit to explore English Law in this discussion for the simple reason

* Third year LLB student, Midlands State University, Zimbabwe. This insightful article, with intense scrutiny, traces the history of adultery from the medieval Roman law era of the *lex Julia as well as* its development into modern Zimbabwean law. Also to be critically explored will be the transition of the law on adultery from the confines of criminal law to the sphere of private law in Zimbabwe, paying specific attention to the nature of damages that attach to adultery. The main argument is whether damages for adultery should remain part of Zimbabwean law in light of the moral convictions of modern day society or whether Zimbabwe ought to delete them from its law like most of its neighbouring jurisdictions.

1 Section 192 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

2 The Constitution of the Republic of Zimbabwe 1979 (as amended 2005).

that in England, all references to adultery have been deleted from the law.[3] It is no longer a crime, no longer gives rise to a third party claim for delictual damages and is no longer included in the divorce statutes.[4]

Since Roman Dutch law is the foundation of our common law, it is important to understand the *lex Julia* which was the cornerstone of matrimonial law under Roman law.[5] The *lex Julia* was an ancient Roman Law which was a moral code of conduct. It was a creation of patriarchy. Roman law was sometimes extreme when it came to adultery and it gave the husband powers of self-help.[6] One cannot over-emphasise how serious adultery was perceived in the Roman law society. Adultery was a crime so serious that it attracted a severe punishment, sometimes even capital punishment, and this could be executed either by the couples' guardian or the husband.[7] Although murder is an unfathomable punishment for any marital misdemeanour, adultery included, it was justifiable under the circumstances.[8] The law cannot however afford to stay stagnant hence, these ancient harsh penalties no longer find a place in our current Zimbabwean society as shall be highlighted below.

1.1 Present-day Zimbabwean Society

Because of the history of progression in society, which was largely catalysed by Christianity, as positivism superseded naturalism, the law evolved and adultery seized to be a crime.[9] Be that as it may, certain consequences are still attached to such conduct such as, being sued for damages by an innocent spouse. Since 'wrongful conduct' does not always equate to 'unlawful conduct', in current Zimbabwean law adultery does not amount to criminal conduct but an adulterer may be required to compensate an aggrieved spouse.[10] It naturally follows that since adultery is not a criminal offence, it is restricted to the sphere of private law. Parties can sue under the law of delict for *actio injuriurum* (injury to personality). It is the nature of these damages that I will explore below.

3 M Carnelley 'Laws on adultery: comparing the historical development of South African common-law principles with those in English law' (2013) 19 *Fundamina* 185.
4 Carnelley (n 5 above) 185.
5 Section 192 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 states that the law to be administered by the courts in Zimbabwe is the law that was applied at the effective date as subsequently modified.
6 A Jacobs '*Maritus v Mullier*: The double picture of adultery laws from Romulus to Augustus' (2015) 21 *Fundamina* at 283. The husband of an unfaithful wife could judge his wife and sentence her to death, assisted by her family.
7 Jacobs (n 6) above.
8 Lawhub (n 2) above.
9 *Green v Fitzgerald* 1914 AD 652.
10 *Makururu v Vori* HH 174/16.

2 Adultery as a delict

A delict may be defined as a wrong committed against a person for which damages may be claimed as compensation.[11] In order to succeed with a damages claim, a plaintiff must satisfy the following requirements:

(1) The wrongfulness/unlawful requirement: Wrongfulness is tested against the *bones mores* of society in other words conduct should be *contra bones mores*.[12]
(2) There must be a nexus between the alleged wrongdoer and the conduct complained of[13] and
(3) There must be an injury/harm/loss suffered by the plaintiff.[14]

Damages for adultery are not meant to restore the diminished state of the marriage neither are they intended to stop adultery, as it would take much more than damages to stop a cheating spouse.[15] To believe that one would be grossly misdirecting themselves. Damages for adultery serve the purpose of vindicating the sense of justice of the innocent spouse, in other words remedying the sense of being wronged.[16]

Surely a man who is slapped and in whose respect no contrition is shown cannot be equated to a man who has been slapped, but compensated for the humiliation. One cannot possibly think that the two scenarios are the same. Compensation does not undo the damage but it can greatly mitigate the pain or feeling of being injured or wronged as it can make bearable a very humiliating, painful and uncomfortable situation. It is for this reason that an innocent spouse may claim in terms of the delictual *actio injuriurum* for adultery, in the form of contumelia and loss of consortium.[17] The case of *Chinyadza v Phiri*,[18] defined *contumelia* as follows: 'Contumelia is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by adultery committed by a defendant with his or her spouse.'

Ncube defines consortium (consortium *omnis vitae*) as love, companionship, comfort and exclusive sexual intercourse (conjugal rights).[19]

> A party who sues for these damages has obviously suffered a sense of indignity and infringements of their rights. However, defendants have

11 G Feltoe, *A guide to Zimbabwean law of delict* (2012) 6.
12 *Musadzikwa v Minister of Home Affairs & Another* 2000(1) ZLR 405.
13 *Mushonga v Zinumwe* HH 519/15.
14 *Jhamba v Mugwisi* HB 01/10.
15 *Tanyanyiwa v Huchu* HH 668/14.
16 As above.
17 *Raitehwi v Venge* HH 152/11.
18 HH 76-09.
19 W Ncube *Family Law in Zimbabwe* (1989) 153.

> often argued, on fundamental constitutional grounds, a violation of the section 51 right to human dignity, section 57 right to privacy, section 58 right to freedom of association and the section 52 right to personal security, as was the case in *Njodzi v Matione*.[20] This is because the claim involves a disclosure and scrutiny of a third party's sexual life. Nonetheless, the law recognises that not all rights are absolute. The limitation clause then applies in this respect, in order to do justice between man and man.[21] Section 86(1) and 86(2) of the Constitution provides that:
>
> (1) The fundamental rights and freedoms set out in this chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons. (emphasis added)
> (2) The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom, taking into account all relevant factors including (a) the nature of right or freedom concerned (b) the purpose of the limitation, in particular whether it is necessary in the interest of ... public morality ... or the general public interest.

The courts take the position that the dignity of the adulterer need not be more important than that of the innocent spouse. The court in *Njodzi v Matione* held:

> In circumstances where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values. The invasion of a marriage by a third party in the Zimbabwean context is an attack on the dignity of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage. (My emphasis).[22]

The lesson which is to be drawn from the court's position is that constitutional rights are not absolute and are to be enjoyed responsibly in order to respect the rights of others. Hence, a third party who violates an innocent spouse's right to dignity cannot seek to enforce and protect their own dignity in a court of law because their rights are not more important than those of the innocent spouse's.

20 HH 37/16.
21 Section 86 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 provides that rights and freedoms in the bill of rights may be limited to the extent that the limitation is fair, reasonable and justifiable in a democratic society.
22 HH 37/16.

3 The marriage contract

It is important that one understands the very nature of the marriage contract including the legal relationships that it creates for the parties involved, whether the marriage is monogamous or polygamous. This serves to establish whether or not parties have a right to sue third parties for damages on the grounds of adultery in respect of the marriage. Marriage is a constitutionally protected institution whose very existence is regulated by the law — it is a right that is protected under section 26 of the Constitution on Marriage Act under the national objectives, read with section 78 on marriage rights.[23] Furthermore, in the interpretation of the rights contained in the Constitutional Bill of Rights, there is a mandate on the courts to take into consideration International Convections.[24] The Unilateral Declaration of Human Rights (UDHI), also imposes an obligation of the state to protect the family. [25] The UDHI provides: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[26]

Marriage is a *sui generis* contract which means that it is a contract like no other as it is governed by legislation, although general principles of contract law, such as privity and sanctity of contract, apply.

Whilst a marriage is between two people, it is one such contract in whose enforcement the state and the courts have an interest. The reasons are common cause, in that it is not any ordinary contract owing to the terms on which it is based namely, its exclusivity as expressed in the statements, 'to have and to hold' and 'till death do us part'. It is this sanctity of the marriage contract that adultery damages seek to protect according to the UDHI. A third party is deemed to have infringed the normal flow of the marriage and affected the rights and obligations that would have normally accrued to the parties had the infringement not occurred.[27]

4 Rationale for damages of adultery

The basis for damages for adultery stems from the fact that adultery is a recognised ground for divorce at law. Section 5 of the Matrimonial Causes Act provides for adultery as one of the factors to meet the

23 Section 78 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
24 Section 46(1)(d) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
25 UDHI is document which affirms an individual's rights, for example right to dignity, life, among others.
26 Article 16(3) of the Unilateral Declaration of Human Rights.
27 *Mahachi v Zimba* HH 315/17.

divorce requirement of irretrievable breakdown.[28] Section 5(1) and 2 (b) of the Matrimonial Causes Act reads as follows:

> (1) An appropriate court may grant a decree of divorce on the grounds of irretrievable break down of the marriage if it is satisfied that the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of restoration of a normal marriage relationship between them.
> (2) Subject to subsection (i) and without prejudice to any other facts or circumstances which may show the irretrievable break-down of a marriage, an appropriate court may have regard to the fact that
> (a) ...
> (b) The defendant has committed adultery which the plaintiff regards as incompatible with the continuation of a normal marriage relationship.

This particular provision is similar to Botswana's section 15(1) of its Matrimonial Causes Act.[29] Section 10 of the Maintenance Act also provides that adultery committed by a spouse is a basis on which the courts can deny a party spousal maintenance.[30] Section 10 of the Maintenance Act states:

> Where a spouse is proved to have committed adultery before or after making an order and such adultery has not been condoned, the maintenance court may refuse to make an order for maintenance in favor of such spouse or may discharge an order for maintenance made in favor of such spouse.

The general consensus is that adultery is frowned upon in modern day Zimbabwean society as it is deemed to be contrary to the *bones mores* of society.[31] The convictions of society are the utmost consideration of the courts when adjudicating disputes before them, including those of adultery. In the case of *Zimnat Insurance Co Ltd* v *Chawanda,* the court emphasised that the judiciary has the mandate to develop the common law to make it flexible taking into consideration the dynamic needs of society.[32]

4.1 Who can sue?

It is evident that when adultery is committed there is an infringement of rights of an innocent spouse. These rights include the right to dignity (section 51 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013) and the right to personal security (section 52).

28 Section 5 of the Matrimonial Causes Act [Chapter 5:13].
29 Matrimonial Causes Act [Chapter 29:06].
30 Maintenance Act [Chapter 5:09].
31 The values that the Constitution seeks to protect in the founding values of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013's section 3.
32 1990 (2) ZLR 143 (S).

In a civil marriage where spouses marry under the Marriages Act, either the husband or the wife can sue a third party for damages for adultery.[33] This is because of the monogamous nature of this union.

In a marriage solemnised under the Customary Marriages Act, a different approach is taken.[34] A husband can sue a third party for damages for adultery from a third person who commits adultery with his wife but a wife cannot sue third parties who commit adultery with her husband. This is because this is a potentially polygamous marriage and the husband can marry many wives if he so wishes. In *Mukono v Gwenzi,* the court affirmed that there is no right reposing on women in customary marriages to claim damages for adultery.[35]

The requirements for suing damages under the Customary Marriages Act apply *mutatis mutandis* to an Unregistered Customary Law Union (UCLU) because this type of marriage satisfies all the requirements of a customary law marriage save for registration.[36] The law recognises an UCLU husband's right to claim for damages for adultery in respect of his wife as stated in *Carmichael v Moyo*.[37] However an UCLU wife cannot sue in respect of her husband.

Although this position seems *prima facie* discriminatory on the female spouse in an UCLU marriage, this is justifiable in the sense that the marriage is of a polygamous nature hence, there is no restriction whatsoever on the male spouse should he wish to marry many wives.

5 Is the continued existence of adultery damages justifiable?

Section 56 of the Constitution is the equality/ non-discrimination clause and it provides that all persons are equal before the law. It has been submitted on behalf of most defendants in adultery cases that, these damages are discriminatory and invasive on third parties. This is because the third party is the one who is sued always and as one cannot sue their own spouse, according to the UDHI.

Upon assessing the law as it stands, one can oftentimes wonder if there is any fairness at all where these damages are concerned in the instance of the third party. If sanctity and privity of contract matter at all, then this means that obligations of fidelity are consequences which accrue to the spouses themselves. The obligation to protect the matrimonial institution rests on the spouses therefore, one wonders why a third party should be sued since they are not a party to the

33 Marriages Act [Chapter 5:11].
34 Customary Marriages Act [Chapter 5:07].
35 1999 (1) ZLR 117.
36 *Hosho v Hasisi* HH-419-15.
37 1994 (2) ZLR 176.

marriage contract. This is the position that the South African Constitutional court took by emphasising that in South Africa adultery no longer meets the wrongfulness requirement and hence no delictual liability attaches to it.[38]

Zimbabwean courts maintain that suing one's own spouse does not make sense. Suing one's own spouse could be a source of marital conflict and catalyse irretrievable damage to the marriage it is alleged. Whilst adultery is in itself evidence of disrespect by the third party to a marriage, it however suffices to say that it is the spouses themselves who undertake to be married to each other and to be faithful, 'for better for worse'. Therefore the plaintiff, in this case the innocent spouse, should not sue the third party as he or she is not a party to the plaintiff and defendant's marriage contract.

Doing away with these damages would ultimately mean that the only two remedies left for an aggrieved spouse would be either divorce or reconciliation. Furthermore, if the damages were to be done away with, this could further perpetrate the spread of HIV/AIDS. The need to guard against these problems is the basis for justifiable discrimination against third parties which is allowed by the law.[39]

6 Assessment of damages

The amount to be awarded as damages to an aggrieved spouse is based on the discretion of the court and is normally decided on a case by case basis in light of the circumstances and the measure of justice the case requires.[40] There are also certain guidelines that the courts will normally take into account — for example, the state of the marriage at the time adultery was committed, and this directly affects the amount of damages.[41] If the adulterous affair has resulted in a significant decrease in the guilty spouse's level of commitment in the marriage, then evidence of such will normally increase damages.[42] On the contrary, if the marriage had already broken down, the plaintiff is entitled to fewer damages.[43] Other considerations are the duration of the adulterous affair, whether the third party showed any remorse, and whether the affair resulted in the birth of children.

Other factors to be assessed are the social and economic status of the plaintiff and the defendant as set out in *Muhwati v Nyama*.[44] The *quantum* should by all means be proportionate and should be a

38 *DE v RH* CCT 182/14.
39 Section 56(4) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
40 *Dlamini v Nkomo* HB 15/18.
41 *Muhwati v Nyama* 1996(1) ZLR 434.
42 *Tanyanyiwa v Huchu* (n 17) above.
43 *Johnson v Joubert* 1976 (1) PH B 2.
44 2011(1) ZLR 634(H).

reflection of the circumstances surrounding the adultery.[45] Knowledge of a long stretching adulterous relationship on the instance of the plaintiff also has an effect of reducing the amount of damages to be awarded to a spouse. In *Jhamba v Mugwisi*, the plaintiff sued the defendant for damages stemming from a 20 year adulterous relationship between the plaintiff's husband and the defendant, a relationship that had resulted in the birth of four children to the plaintiff's knowledge.[46] The court observed that it could not be said that the plaintiff had no knowledge in such circumstances and hence she could not be awarded the full damages she had initially sought.

It is evident that the criteria for the *quantam* of damages is a reflection of what delictual damages are meant to achieve, and this is to compensate the aggrieved spouse for loss of benefits they ought to have enjoyed had the third party not interrupted the marriage.

7 Conclusion

As a result of Zimbabwe being a Roman Dutch common law jurisdiction, decisions of other Roman Dutch common law jurisdictions are of persuasive authority and the Zimbabwean courts are not bound by them.[47] In light of this, the South African Constitutional Court's decision in *DE v RH* stirred the waters in Zimbabwe and offered a ray of hope to the so called 'small houses'.[48] 'Small houses' is a Zimbabwean colloquial term for parties involved in extramarital affairs. The excitement was however short lived upon the realisation that Zimbabwean courts would not be following suit. In other words, there was need to read the decision in *DE v RH* whilst taking into account the legal and moral convictions that prevail in South Africa compared to those in Zimbabwe. The *bonos mores* of the Zimbabwean society are what qualify adultery as being wrongful. Third party delictual liability for adultery has also been scratched off in Botswana following the judgment by Justice Moroka in the Botswana High Court in *Kgaje v Mhotsha* where the court stated that although adultery remains a sin from a religious perspective, a spouse can no longer claim delictual damages from a third party because of the obvious fact that adultery cannot take place without the obvious participation of a spouse.[49] In this judgment, the learned Judge agreed with the decision of the Namibian Supreme Court in *Sibonga v Chaka & Another* to do away with adultery damages.[50]

45 *Gore v Chiware* HH-14-276.
46 HB-01-10.
47 *Grey & Another v Registrar of Deeds* HH 114/10.
48 CCT 182/14.
49 CVHFT-000237/17.
50 SA (77/2014) [2016] NASC 16.

Despite the developments in the neighbouring jurisdictions, Zimbabwean courts remained unmoved as they gave affirmation to the validity of these damages in *Njodzi v Matione*.[51] There is no denying that the decision to do away with third party delictual liability for adultery in South Africa, Botswana and Namibia is an obvious sign that there might be a need to follow suit in Zimbabwe. There is a need for reform in this area of our law as some delicts have now been rendered archaic. Adultery is a delict rooted in a foundation which may have lost relevance in Zimbabwean Law.

Third party adultery damages are still valid and claimable in Zimbabwe. The law maintains that there is a need to deter third parties from interfering with marriage hence, an innocent spouse may sue in respect of such wrongful conduct. There is no protection whatsoever for third parties. In other words, the law assumes that by involving themselves with a married spouse, a third party voluntarily assumes the risk that they may be held liable by the innocent spouse.[52] Once the court satisfies itself that the defendant had prior knowledge then the maxim *ignoratia iuris non excusat* (ignorance of the law is not an excuse) applies. This means that a third party who commits adultery with a married person is not allowed to rely on the defense that they were ignorant of the law relating to third party adultery.

This is to the exception of third parties who act *bona fide,* i.e., those without knowledge that they are involving themselves with married spouses. Until such a time that the Constitutional Court decides to scrap it off from our law and reverse the decision in *Njodzi v Matione*, it is blatant that no small house is safe, for they may be pounced on by an angry spouse and brought before the court to account for their misdemeanours.

There is evidently so much good that comes with the existence of damages for adultery in our law but perhaps the law could be more beneficial if it looked in another direction and implemented a number of reforms to the already existing delict. For instance, spousal damages which an innocent spouse can claim from the guilty spouse and not third parties. This is because, in essence, the spouses are the ones who are the parties to the marriage contract and as such have the obligation of fidelity, which is consequential to the marriage contract.

51 HH 37/16.
52 *Chinyadza v Phiri* (n 20) above.

UNDERSTANDING THE BEAST OF SEXUAL HARASSMENT IN THE WORKPLACE

*by Muano Nemavhidi**

1 Introduction

The field of labour law is an increasingly expansive one; however, one standard aspect remains common to it.[1] This inescapable requirement usually involves the interaction of persons in a work environment, whether on an employee-to-employee basis or employer-to-employee level.[2] In these interactions, events may arise that constitute a breaching of what is acceptable workplace conduct. A common instance of this is sexual harassment. Sexual harassment as defined in section 3(1) of the Code of Good Practice on the Handling of Sexual Harassment Cases (the Code) refers to 'unwanted conduct of a sexual nature'.[3] It may be physical, verbal or non-verbal acts. At times sexual harassment may receive a nonchalant response that insinuates

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1 A Ramsaroop & S Brijball-Parumasur 'The prevalence and nature of sexual harassment in the workplace: a model for early identification and effective management thereof' (2007) 33 (2) *Suid-Afrikaanse Tydskrif Vir Bedryfslelkunde* 25.

2 A Basson 'Sexual harassment in the workplace: An overview of developments' (2007) 18 (1) *Stellenbosch Law Review* 425.

3 Code of Good Practice on the Handling of Sexual Harassment Cases, Labour Relations Act item 3(1).

the offended party somehow invited the sexual advances.[4] In most cases, reasonable women do not complain about sexual harassment.[5] This paper will seek to advance the perspective that this is not so and will do so by a critical analysis of various source materials. This is to the effect that the invalidity of this perspective will be critically exposed.

2 The concept of sexual harassment in the South African context

Sexual harassment refers to a pervasive vice permeating the workplace from the highest ranks of corporate bodies to those of ordinary worker on the street.[6] As stated above, sexual harassment constitutes in the perpetration of unwelcome advances, demands for sexual favours, and other verbal or physical acts of a sexual sort. For example, lustful remarks, touching or sexual intercourse by any means.[7] However, the question arises as to what variants of sexual harassment exist. The following section will discuss the forms of sexual harassment, *seriatim*.

2.1 Forms of sexual harassment

2.1.1 Quid pro quo sexual harassment

The term *quid pro quo*, in the literal sense, means a thing for a thing.[8] The said higher-ranking person may do so by direct statements, suggestive remarks or actions.[9] The Code of Good Practice on the Handling of Sexual Harassment Cases states that this can take place where a superior in a workplace makes a desirable thing, such as a promotion or raise, available to a subordinate worker in exchange for a favour of a sexual nature. Again, this includes where a superior influences the outcome of a dismissal hearing, employment process or disciplinary proceedings.[10]

4 LC Herbert 'Why don't "reasonable women" complain about sexual harassment' (2006) 82 (1) *Indiana Law Journal* 711.
5 Herbert (n 4) 47.
6 A Mukheibir & L Ristow 'An overview of sexual harassment claims: Liability of the employer' (2006) 27 (2) *Obiter* 245.
7 As above.
8 FindLaw 'What is quid pro quo harassment?' https://employment.findlaw.com/employment discrimination/what-is-quid-pro-quo-harassment.html (accessed 29 April 2018).
9 J Grogan *Workplace law* (2014) 132.
10 Code of Good Practice on the Handling of Sexual Harassment Cases, Labour Relations Act item 4 (1)(d).

2.1.2 Hostile environment sexual harassment

This scenario relates to a situation whereby the person in a position of seniority by means of sexual advances or remarks makes the environment difficult to work in or otherwise uncomfortable for the other employee.[11] This form of harassment need not threaten the employment prospects or livelihood of the employee.[12] The Code makes specific reference to situations whereby an authority figure rewards those who submit to their advances but denies workplace advantages such as promotions to those who do not submit. The Code terms this as sexual favouritism.[13] An example of this is the case of *Christian v Colliers Properties*[14] wherein employer A told worker B that if she would like to keep her job she must first spend a night with him. She was fired after declining to spend the night with A.

2.1.3 Verbal sexual harassment

Verbal sexual harassment usually consists in the making of uninvited innuendos, propositions, hints, sexual advances, remarks and even comments in passing.[15] These do not need to be made in a serious tone, as even attempting to win someone's affections may constitute sexual harassment. The distinguishing feature is that such jokes have sexual undertones of a graphic nature. Verbal sexual harassment can extend to remarks about another person's body irrespective of whether they were made in the person's presence or 'to their face', so to speak.[16] Another instance is prying into the sex life of another individual.[17] This is illustrated in the case of *Campbell Scientific Africa v Simmers*.[18]

2.1.4 Non-verbal sexual harassment

In stark contrast to verbal sexual harassment, non-verbal sexual harassment can happen in the absence of words. It can include undesired gestures, exposure of private parts, as well as exhibiting sexually offensive material. For example, where a female co-worker

11 The Advocates for Human Rights 'Sexual Harassment that Creates a Hostile Work Environment' http://www.stopvaw.org/sexual_harassment_that_creates_a_hostile_work_environment (accessed 29 April 2018).
12 K Swisher *What is sexual harassment?* (1995) 48.
13 Code of Good Practice on the Handling of Sexual Harassment Cases, Labour Relations Act item 4 (2).
14 *CAMP v Colliers Properties* 2005 (5) BLLR 479 LC.
15 Basson (n 2) 427.
16 ML Boland *Sexual Harassment in the Workplace* (2005) 223.
17 Basson (n 2) 429; Code of Good Practice on the Handling of Sexual Harassment Cases, Labour Relations Act sec 4(1)(b).
18 *Campbell Scientific Africa v Simmers & Others* (2016) 37 April ILJ 116 (LAC). See also: *Sonja Grobler (nee Ensink) v Naspers Bpk and G Samuels* (2004) 25 ILJ 439 (C).

suggestively licks a lollipop in the presence of a co-worker, such conduct would constitute sexual harassment. [19] In the case of *NUMSA obo Mafuto v Duferco Steel Processing (Pty) Ltd,* the Court classified sexually suggestive dancing towards a co-worker as sexual harassment.[20]

2.2 The prevalence of sexual harassment

Sexual harassment is prevalent in all workplace contexts and largely affects more females than males.[21] Moreover, it takes place often in the lives of young women who are new job entrants. This is in contrast to where males of any age are less likely to be victims of sexual harassment. This attributes to the vulnerability of women in both an economic and physical sense.[22] Notwithstanding, reports of sexual harassment by males have been on the rise as males are encouraged to break the silence.

2.3 Workplace attitudes towards sexual harassment

Sexual harassment is largely classified as a minor issue by the male sex. This is according to several studies conducted by Bitton and Shaul.[23] These studies reveal that most females have a wider view of the actions that when considered in totality constitute sexual harassment. The converse is true for males. Again, female workers have indicated a large degree of reluctance to report incidences of sexual harassment. Further, when the women do report they do so much later than would yield fruitful intervention. This, according to the study, contributes to the perception that women make things up with the intention of obtaining fame, money and other incentives.[24]

This worsens the plight of harassed women in that upon reporting the incidents they are perceived as unreasonable. Worse yet, they may be told that they brought it on themselves.[25] This makes it harder for women to come forward. Such an attitude has been attributed to toxic masculinity, which renders women subservient to the demands of men.[26] Notwithstanding this supposed cause, many authors

19 C Murray *Gender and the new South African legal order* (1994) 116.
20 *NUMSA obo Mafuto v Duferco Steel Processing (Pty) Ltd* (MENT 21080).
21 R Le Roux *Harassment in the workplace: Law, policies and processes* (2010) 178.
22 Ramsaroop & Brijball-Parumasur (n 1) 26.
23 MS Bitton & DB Shaul 'Perceptions and attitudes to sexual harassment: An examination of sex differences and the sex composition of the harasser–target dyad' 2013 43 (1) *Journal of Applied Social Psychology* 2136.
24 As above.
25 N Smit & D van der Nest 'When sisters are doing it for themselves: Sexual harassment claims in the workplace' 2004 3(1) *Tydskrif vir die Suid-Afrikaanse Reg* 534.
26 O Ladebo & J Shopeju 'Sexual harassment: Perceptions and coping strategies among undergraduate students in Nigeria' 2004 36(3) *Acta Academia* 225.

concede that the root causes of sexual harassment are unknown. However, the apparent ones range from ignorance, lack of restraint or malice. Thus, the prevailing attitude remains one of apathy towards victims.[27]

3 The legislative framework relating to sexual harassment

A complex network of statutory regulations regulates the issue of sexual harassment. Over the years, this network was made simple for ease of use as well as interpreted by the courts. It comprises of several pieces of legislation, which will be explored below.

3.1 Code of Good Practice on the Handling of Sexual Harassment Cases[28]

The Code of Good Practice on the Handling of Sexual Harassment Cases[29] makes notice of several variants of sexual harassment, one of which is the quid pro quo variant. It recognises it not only under the context of employers but also under even those employees who wield control over other employees. In terms of Item 4 of the Code, an employee does not need to be directly confronted with offensive behaviour, but may be harassed even where others receive rewards for agreeing to do sexual favours. In the same way, this is the case with the other variants of sexual harassment, namely; verbal sexual harassment,[30] non-verbal sexual harassment,[31] and hostile environment sexual environment.[32] It is apparent that the Code has above all aimed to place in clear and broad terms the kinds of conduct that constitute sexual harassment.

Further, Item 5 of the Code requires the employer to take a policy stance that addresses sexual harassment. Again, it also requires the employer to take appropriate action.[33] This intersects with the provisions of the Employment Equity Act, which renders employers liable who do not take steps to ensure its employees comply with the

27 JD Adams, MS Mabusela & ET Dlamini 'Sexual harassment: The 'silent killer' of female students at the University of Ayoba in South Africa' 2013 27 (5) *South African Journal of Higher Education* 1149.
28 Code of Good Practice on the Handling of Sexual Harassment Cases, Labour Relations Act.
29 K Ross *Women, rape & violence in South Africa: Two preliminary studies* (1994) 15.
30 See also (n 15).
31 See also (n 17).
32 See also (n 10).
33 L Khumalo, C Gwandame & T Mayekiso 'Examining perceptions of sexual harassment among recent female graduates in the workplace.' 2015 44 (4) *Africa Insight* 107.

Act. This indicates a combative policy stance against sexual harassment.

3.2 Employment Equity Act[34]

In terms of the Employment Equity Act, employers are required to advance appropriate action when they know incidents of sexual harassment.[35] This allows the complainant to sue the employer in terms of the Act where the employer fails to follow an appropriate course of action. In this regard, section 60(3) of the Act provides that 'if the employer fails to take all the necessary steps referred to in subsection(2), and it is proved that the employee has contravened the relevant provision, the employer must also be deemed to have contravened that provision.'[36] In effect, this places a duty on employers to address sexual harassment in the workplace. To fulfil this duty, an employer must, upon receipt of a complaint of sexual harassment, make consultations with all the affected persons and comply with the Act's provisions.

The exception to the above provision exists where the employer is able to show that they had taken reasonable steps towards compliance with the Act as to prevent an employee from contravening the Act.[37] Noteworthy is that section 60 of the Act coincides with fulfilling the purpose of section 51 of the Act which is to protect employee rights. To that end, the Act also empowers the Minister, in terms of section 54, to issue a Code of Good Practice in respect of the Act. To this end, the Code on Sexual Harassment was issued. The Code defines and delineates the central aspects of sexual harassment in the workplace. Hence, where an employee faces unfair discrimination based on their sex, they may claim for damages in terms of section 50 of the Act.

3.3 Labour Relations Act[38]

In consideration of the Act, reference must be made to Section 138(6) of the Act. According to the section, the presiding officer must consider any Codes of good practice as issued by National Economic Development and Labor Council (NEDLAC) insofar as they are relevant to the matter before them. It is important to note that the NEDLAC was empowered to do so in terms of section 203 of the Act. This means the Code is always considered in matters involving sexual

34 Act 55 of 1998.
35 Act 55 of 1998 sec 60 (2).
36 Act 55 of 1998 sec 60 (3).
37 Act 55 of 1998 sec 60 (4).
38 Act 66 of 1995.

harassment.[39] In this case, said Code is the 2005 Code of Good Practice on the Handling of Sexual Harassment Cases.

The Act empowers employees to seek a remedy using the internal structures of the workplace. In the event that a party to the sexual harassment dispute is unsatisfied with that outcome, they may make use of section 135 of the Act. The section provides that the unsatisfied party may approach the Commission for Conciliation Mediation and Arbitration (CCMA) within 30 days of the dispute.[40]

In this regard, where an employee lost their job due to sexual harassment. The issue then becomes whether it was due to unfair discrimination based on sex or constructive dismissal.[41] The latter occurs where the employee leaves due to the harassment and is addressed by section 186(1)(e) read with section 187(1)(f). If successful, the employee receives compensation. Alternatively, they may claim damages for unfair discrimination in terms of the Employment Equity Act. However, these remedies do not need to be used individually but may be used in combination.

4 Judicial analysis of the sexual harassment dilemma

The sexual harassment dilemma is often addressed by the courts against many factual backdrops and economic contexts. I shall critically analyse some of the prominent cases by reference to case law.

4.1 *University of Venda v Maluleke and Others*[42]

4.1.1 Facts

In this matter, the applicant (the University of Venda) sought review of a decision by the Commission for Conciliation Mediation and Arbitration (CCMA) made in favour of the first respondent (Mr Maluleke). The factual matrix was that the first respondent allegedly made sexual advances towards three of his female students. Said students reported the advances through the relevant structures.

39 As above.
40 Khumalo (n 33).
41 Basson (n 3 above) 443.
42 *University of Venda v Maluleke and Others* (2017) 38 ILJ 1376 (LC) (28 February 2017).

4.1.2 In the Court a Quo

Mr Maluleke (the first respondent) made an application in the High Court seeking that a review is made of the outcome of a 'CCMA' arbitration hearing which gave its order in favour of the University of Venda (the applicant). In assessing the matter, the application was unsuccessful.

4.1.3 On review

After determining the reviewability of the matter, Snyman AJ began tackling the matter from a factual perspective. From this view, he concluded that the oral testimony of the three complainants gives rise to a probability that the incidents took place as alleged by the complainants and not by the respondent. On the facts, the learned judge pointed out that the conduct of the respondent is consistent with the definition of sexual harassment as per the university's own policy documents. Therefore, he was to be subject to the sanction imposed therein, which would be both substantively and procedurally fair.

The Court cited the cases of *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others.*[43] As well as of *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*[44] in respect of support of the use of the 2005 Code of Good Practice on the Handling of Sexual Harassment Cases as the yardstick for what constitutes sexual harassment as per item 4. The Court held in favour of the applicant.

4.2 *Kok v Commission for Conciliation, Mediation and Arbitration and Others*[45]

4.2.1 Facts

The applicant (Kok) had affections for the complainant who the Court referred to as 'T' (a cleaner employed by a third party) and tried to win her over romantically. He was unsuccessful. He, on a later date, fondled 'T's' breasts, buttocks and genitals. He stated that he could not restrain his passion further and flashed his genitals to her. He then forced her to hold them under threat of dismissal if she did not comply. On another occasion, he caused himself to ejaculate on her.

43 *SA Metal Group (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2014) 35 ILJ 2848 (LC) (15 April 2014).

44 *Maepe v Commission for Conciliation, Mediation and Arbitration and Another* (2018) 39 ILJ 1029 (LAC) (25 January 2018).

45 *Kok v Commission for Conciliation Mediation and Arbitration and Others* [2015] JOL 32888 (LC).

Again, he had said he could not restrain himself anymore. Another incident similar to the previous two ensued. The difference this time, however, was 'T' now reported the matter.

Kok was summoned to a disciplinary hearing by his employer (ABSA) to face charges of sexual harassment in respect of 'T'. At the said hearing, the court found Kok guilty and subsequently dismissed on a single month's notice.

4.2.2 In the Commission for Conciliation Mediation and Arbitration

Upon this outcome, Kok went to the CCMA raising the issue of an unfair dismissal. The finding was that due to the probabilities weighing in favour of the truthfulness of the complainant's version, it is fair to conclude that the sexual harassment did indeed take place as alleged. Considering credibility, there was no incoherence in the statements of the complainant at any stage in the proceedings.

4.2.3 The Labour Court

The first leg of the Court's inquiry was the 'reviewability' of the CCMA's decision. It found that in line with the principles set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[46] that dictate reasonableness as a suitable ground of review. In this regard, the applicant pointed towards the credibility finding of the complainant's evidence and the arbitrator's alleged misconduct. On the record of proceedings, the Court made a finding that the grounds had no footing on facts and upheld the finding of the CCMA.

4.3 *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*[47]

4.3.1 Facts

The case concerns an incident of alleged sexual harassment perpetrated by the respondent ('Simmers'), an employee of the appellant (Campbell Scientific Africa). It transpired that the respondent had to undertake a work-related trip to Botswana with one Ms CM (the complainant); whom did another company employ. During the trip, Simmers inquired as to whether the complainant would like a lover for the night, she refused. He further asked her relationship status which she clarified that she was in a committed

46 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).
47 See also (n 18).

relationship. Before bed, he informed her that he would be in a nearby room should she change her mind. She later informed management of her discomfort resulting from the behaviour. Simmers was called to a disciplinary hearing on charges of sexual harassment, misconduct and bringing the appellant's image into disrepute. This led to his dismissal.

4.3.2 In the Commission for Conciliation Mediation and Arbitration (CCMA)

Simmers was unhappy with this outcome and sought relief from the CCMA. The arbitration yielded the result that the decision of the hearing was correct. His behaviour was seen, by the arbitrator, to constitute sexual harassment and inappropriate for the context. The dismissal was, in this circumstance, an appropriate sanction.[48]

4.3.3 In the Labour Court

The Court primarily considered the question of whether Simmers inquiry amounted to sexual attention or sexual harassment. Steenkamp J noted that the Code's guidelines on when sexual attention becomes sexual harassment were not breached. This was insofar as Simmers had not persisted in his conduct nor breached the threshold for his single incident to be considered sexual harassment. Again, he had done so in ambition and not anticipation. Notwithstanding, the fact that Ms. CM walked away to show her disapproval of his actions. Thus, his conduct did not warrant a dismissal.[49]

4.3.4 In the Labour Appeal Court[50]

Here, the Court first considered the foundational values of the Constitution, which are; human dignity, achieving equality within a non-racial and non-sexist society under the rule of law. This is set against the aim of achieving substantive equality. Thus, sexual harassment is an infringement of those rights as per section 6(3) of the Employment Equity Act as well as both the old (1998) and the new (2005) Code of Good Practice on the Handling of Sexual Harassment Cases.

It further noted that sexual harassment protections encompass not only employees but also all those within the workplace context.

48 S Dube '"Trying your luck" not sexual harassment' 2014 14 (7) *Without Prejudice* 65.
49 *Simmers v Campbell Scientific Africa* (2014) 35 ILJ 2866 (LC) (9 May 2014).
50 See also (n 18).

In this regard, it pointed out that Simmers' conduct constituted sexual harassment as defined. It further happened where he had a power advantage over the complainant. To this effect, the Court cited with approval the cases of *SA Broadcasting Corporation Ltd v Grogan NO and Another*[51] as well as *Gaga v Anglo Platinum Ltd and Others*.[52] The principles expounded therein centred on how unequal power relations are assistive in the inquiry on what constitutes sexual harassment. Therefore, in light of the circumstances the dismissal was substantively fair. Further, the sanction imposed was appropriate, as there is no tangible probability of restoring the employment relationship. The appeal was upheld.

Concerning the above case, it is expedient to make mention of Botes' commentary. She contends that the central aspect to prove is whether sexual harassment did take place.[53] Once that is established, the inquiry then turns towards the appropriate measure to take. This applies in respect of the remedies available to the complainant and the sanctions imposed on the 'guilty party'. This is informed by the weight of the misconduct.[54] This in turn sums up the common thread of sexual harassment cases.

4.4 *Grey v Education Labour Relations Council and Others*[55]

4.4.1 Facts

In this matter, an educator referred to as Grey (the appellant) was a teacher at a certain high school. During the course of his employment there, he began an intimate relationship with a seventeen (17) year old pupil. After the hearing at the school, he was dismissed on that basis. He later sought recourse at the CCMA where the arbitrator found that the dismissal was fair only in the substantive sense and not in the procedural sense. This was due to the disciplinary hearing chairperson showing bias against the appellant. The appellant again went further to the Labour Court where the application for review was dismissed. Still not satisfied, Grey applied for leave to appeal to the Labour Appeal Court, which was granted.

51 *SA Broadcasting Corporation Ltd v Grogan NO and Another* (2006) 27 ILJ 1519 (LC).
52 *Gaga v Anglo Platinum Ltd and Others* [2012] 3 BLLR 285 (LAC).
53 A Botes 'Sexual harassment as a ground for dismissal: a critical evaluation of the labour and labour appeal courts' decisions in *Simmers v Campbell Scientific Africa* 2017 (4) TSAR 761.
54 As above.
55 *Grey v Education Labour Relations Council and Others* (2015) 36 ILJ 2802 (LAC) (23 October 2015).

4.4.2 In the Labour Appeal Court

The Court considered the provisions of section 17(1)(c) of the Employment of Educators Act,[56] which prohibits relationships between educators and learners. On the facts, the Court found that the incidents described by the learner are the most probable version of events and do constitute sexual harassment. The appellant's version was found wanting in credibility, and the inconsistencies present in the learner's version are most likely attributed to the appellant's attempts to influence her testimony. For the purposes of reconciling the conflicting versions, the Court agreed with the arbitrator's use of the approach used in the case of *SFW Group Ltd and Another v Martell et Cie and Others*[57]

Therefore, as in the Labour Court, dismissal was found to be an appropriate sanction. However, the way in which it was done was substantively fair but not procedurally fair. The appeal was therefore dismissed.

5 Commentary

The preceding discussion illustrates through case law how most of the incidences of sexual harassment are not provoked by the actions of the victims, most of whom are female. Instead, the perpetrators initiate and carry out these actions. These perpetrators, once caught, make arguments that portray the victims as either willing participants or seek to discredit the reports of the victim altogether. In so saying, if their arguments were heeded without regard to the rest of the evidence, the sexual harassment would be 'swept under the rug', so to speak. Drawing particular attention to the Grey case, it is notable that the perpetrator sought to disturb the evidence that the complainant gave.

This is not to say that every incidence that takes place portrays the harasser as a villain. Instead, this is to point out the general attitude society has towards reports of sexual harassment. This is in so far as, the woman herself is vilified to seem as though she plotted the whole incident.

6 Conclusion

Having considered the above, it is quite apparent that despite the efforts of our legal system sexual harassment remains a pervasive foe. It emanates through even the highest echelons of the work

56 Act 79 of 1998.
57 *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).

environment. The legislative framework pertaining to labour law has indeed grown and evolved in keeping with the dynamic nature of sexual harassment with respect to the way in which it manifests itself. In *Motsamai v Everite Building Products* (*Pty*) *Ltd* it was said that:

> Sexual harassment is the most heinous conduct that plagues the workplace; ... it undermines the dignity, integrity and self-worth of the employee harassed ... goes to the root of one's being and must, therefore, be viewed from the point of view of a victim.[58]

Therefore, sexual harassment is normally not provoked by any inherent characteristics of the female sex. Instead, it is a reflection of societal attitudes of misogyny saturating the workplace.

58 *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) (4 June 2010).

YOUTH UNEMPLOYMENT: WHAT ROLE CAN CORPORATE SOCIAL RESPONSIBILITY (CSR) PLAY IN CURBING THIS SOCIAL ILL IN SWAZILAND (ESWATINI) AND SOUTH AFRICA?

*by Simangele D. Mavundla**

1 Background on youth Employment in South Africa and Eswatini[1]

1.1 Definition of youth

In 2006 the African Union adopted a policy framework (not a convention) in the form of the AYC, which mandates signatory States to advance youth development in their respective countries.[2] The AYC

* This profound academic opinion advocates for youth employment by clearly arguing that even though the African Youth Charter (AYC) is not binding on states in as much as on corporates/businesses, at international law these same corporates/businesses have a role to play in ensuring that youth unemployment is curbed through invoking Corporate Social Responsibility (CSR). It will be argued that CSR is no longer only associated with philanthropy, but it is now part and parcel of promoting and protecting human rights in communities where businesses operate, such that they cannot turn a blind eye to social ills such as youth unemployment.

1 On 19 April 2018, the King of Swaziland or Eswatini unilaterally changed the name of the country from the Kingdom of Swaziland to Kingdom of Eswatini through Legal Notice 80 of 2018. The Notice stipulates in section 3 that 'reference in any written law or international agreement or legal document to Swaziland should be read and construed as reference to Eswatini.

2 Adopted by the Executive Council at its 6th Ordinary Session in Banjul in June 2006. The African Youth Charter has 42 signatory countries, 38 of which have ratified and only 3 are yet to sign and ratify. See https://www.africa-youth.org/frameworks/african-youth-charter/ (accessed 27 August 2018).

as a continental framework provides governments and stakeholders with ways in which programmes and strategic plans central to youth rights, duties and freedoms can be shaped and or formulated.[3] The African Youth Charter defines a youth as a person who is between the age of 15 and 35 years.[4] In South Africa, a youth is defined in line with the definition of the AYC as a person from the age of 14 to 35 years.[5] This definition coincides with Eswatini's definition of a youth.[6]

1.2 The rationale for the study

The rationale for studying the two countries is based on the fact that Eswatini is neighbouring South Africa and is frequently compared to South Africa, it's much larger neighbour on which it is significantly reliant for its current GDP. Since the two countries are neighbours, there is a strong likelihood that the youth may migrate from one country to the other in search of greener pastures. However, the migration will be a one way if one country has no development prospects attracting the youth. Secondly, there is a lack of youth involvement in the two countries which is primarily manifested in high youth unemployment rates in both countries. This is a cause for concern, hence the need to find youth-specific interventions which can ensure that the youth in Eswatini and South Africa actively participate in nation-building and the economy. Lastly, CSR is canvassed as one intervention which could be used to ensure that the youth finds employment.

1.3 Youth population

South Africa's population is largely made up of young people, ranging from the age of 15 and 35 years, who constitute about 36.2% of its population.[7] of the total population. Like South Africa, the population of Eswatini is youthful, with 39% of the population between the ages of 15-34, and a total of 79% under the age of 35.[8] The implication of the youth bulge can either be an opportunity for growth or a ticking

3 The African Youth Charter (AYC) 2006 http://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf (accessed 28 September 2017).
4 The African Youth Charter (AYC), as adopted by the Executive Council at its 6th Ordinary Session in Banjul in June 2006, definition section.
5 The South African National Youth Policy (NYP) 2015 – 2020, 10.
6 Swaziland's National Youth Policy (SNYP) 2009.
7 Statistics South Africa, Community Survey 2016 statistic release http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-_Statistical-releas_1-July-2016.pdf (accessed 28 August 2018).
8 UNFPA, Swaziland state of the youth report 2015 11 http://swaziland.unfpa.org/sites/default/files/pub-pdf/Youth%20Report%202015%20with%20covers.pdf (accessed 28 August 2018).

time bomb if not harnessed appropriately.[9] In this regard, the South African National Youth Policy (NYP) reveals that there are challenges stopping the youth from participating in the mainstream economy meaningfully; and these are joblessness, inequalities and poverty.[10]

The policy provides that if the challenges are not addressed, the socio-economic effects of youth unemployment will be hard to deal with, something which the country cannot afford to ignore. The effects will include a poorly performing economy, increased crime, extreme joblessness and poverty, and increased potential for political instability.[11] More or less the same challenges are attributable to Eswatini which has high rates of poverty, a decline in the strength of family structures, challenges with access to education, low employment, HIV/AIDS, access to family planning and youth-friendly sexual and reproductive health services, drug and alcohol use, gender inequality, violence, and crime.[12]

1.4 Youth unemployment

South Africa and Eswatini are grappling with high rates of youth unemployment. The labour force survey of June 2014 provides that in South Africa 36.1% of young people between the ages of 15 and 35 were unemployed, whereas the total unemployment rate for the country stood at 24.3%, females accounting for 26.6% compared to males at 22.4%.[13] According to the Swaziland labour survey of 2010, the unemployment rate for youth aged between15–24 was 53.3%, and more women were unemployed, with overall unemployment rates for females sitting at 47.4% as compared to 33.6% for males.[14]

9 T Tlou, The Youth Bulge Theory — assessing its implications for South Africa (2014) http://www.transconflict.com/2014/12/youth-bulge-theory-assessing-implications-current-confrontation-youth-state-south-africa-212/ (accessed 29 September 2017). See also K Ighobor *Africa's youth: a 'ticking time bomb' or an opportunity?* (2013) http://www.un.org/africarenewal/magazine/may-2013/africa's-youth-"ticking-time-bomb"-or-opportunity (accessed 29 September 2017).

10 NYP (n 5) 11.

11 As above.

12 UNFPA (n 8) 41. The report provides that 'crime, combined with the unemployment situation in the country and the challenges with education, presents a picture of young people in Swaziland who may be contravening the law as an outcome of their educational and socioeconomic status.'

13 Statistic South Africa, *Quarterly labour force survey* 4 (2014) http://www.statssa.gov.za/?p=2951 (accessed 28 August 2018). See also, the South African NYP 2020 3.

14 Ministry of Labour and Social Security, *Swaziland integrated labour force survey* (2010) http://www.swazistats.org.sz/images/reports/Labour%20Force%20Survey%20Report%202010.pdf (accessed 29 August 2018). See also, Mavundla (n 8) 35-36.

However, the statistics for 2017 revealed that in South Africa youth unemployment rose from 54% to 56%.[15] Meanwhile, the statistics for Eswatini revealed that the unemployment rate rose from 40.6% in 2011 to 53% in 2017.[16] This shows that there is an urgent need to find new ways which are innovative to address youth unemployment in both countries. The youth has vitality and if appropriately harnessed the youth can be utilised in order to bring about societal change, or used in nation building and development. However, the prevailing youth unemployment situation has left the majority of the youth idle and this is a challenge which governments cannot resolve alone. For youth employment to become a reality, the impetus is high for the governments of the two countries and the private sector to work together in order to resolve the challenge of youth unemployment.

Resolving youth unemployment will have a positive impact on other societal challenges that both countries continue to experience such as rural-urban migration, as well as informal settlements. Young people are less likely to move from rural areas in search for better, higher-paying jobs in the cities when there are attractive employment opportunities in the communities where they were raised. According to Uddin and another, the large number of unemployed youth could be capable of undermining democratic practices should they be engaged by the political class for clandestine activities.[17] Therefore, youth unemployment must be tackled because if it continues it may lead to political instability and economic chaos; youth migration to other countries in search of greener pastures; and violence against girls and/or women. Researchers such as Henrics as cited in Uddin asserts that, low opportunities for young graduates create the problem of violence due to lack of job and idleness because without jobs they will not be able to play a useful role in the society.[18]

2 National laws and policies on youth employment

Discussed below are the law and policy frameworks for both countries, Eswatini and South Africa, which tackle youth unemployment.

15 L Peyper, *Youth vulnerable as unemployment stays at the highest rate since 2003* (2017)https://www.fin24.com/Economy/youth-vulnerable-as-unemployment-stays-at-highest-rate-since-2003-20170807 (accessed 30 August 2018).

16 As above.

17 PSO Uddin and OO Uddin, 'Causes, effects and solutions to youth unemployment problems in Nigeria' (2013) *Scholarlink Research Institute Journal* at 397.

18 Uddin & Uddin (n17) 399.

2.1 Laws and policies on youth employment in Eswatini

The Constitution of the Kingdom of Eswatini does not provide for the right to employment but makes provision for protection from slavery and forced labour.[19] To tackle the problem of youth unemployment the government of Eswatini has adopted laws and policies that are relevant to youth employment in the past years. The Employment Act governs employee and employer relations including recruitment and dismissal and protection of wages.[20]

The country also adopted the Industrial Relations Act (IRA) and the Occupational Health and Safety Act in addition to the Employment Act which influences labour practice in Eswatini. For instance, the IRA is the main Act regulating collective bargaining on the terms and conditions of employment, as well as dispute resolution mechanisms, and other relevant matters.[21] The law also deals whereas matters touching upon the safety and health of persons at work and in the workplace are regulated by the Occupational Health and Safety Act.[22]

In 1999 the Government of Eswatini adopted the National Development Strategy (NDS). The objectives of the NDS are to reduce poverty in Eswatini, promote the creation of jobs and gender equality, plus the delivery of a better quality of life for the people. The country also adopted a plan of action named the Poverty Reduction Strategy and Action plan which put the NDS aims and/or objectives into action, i.e. to reduce poverty by half in the year 2015 and have its overall elimination by the year 2022[23]. These two broader policy frameworks also address the issue of youth employment as a crucial area. These policies appear unlikely to reach their targeted outcomes by 2022 since youth unemployment and poverty continue to rise in the Kingdom.

The overarching policy framework for youth is the Swaziland National Youth Policy (SNYC), which alludes to youth employment.[24] The youth policy calls upon the government to invest in an educational curriculum that meets the demands and/or requirements of the labour market. It further calls for the development of a youth service scheme which will serve the purpose of enabling young people to gain the required skills. The SNYC envisages the expansion of public works and infrastructure projects so that they provide youth with decent work. It also talks to the issue of opening the doors of

19 Sec 17 of the Constitution of the Kingdom of Eswatini, 2005.
20 The Employment Act of 1980, No. 5/1980.
21 The Industrial Relations Act (IRA) (No.1 of 2000) (as amended).
22 The Occupational Health and Safety Act (No 9 of 2001) (as amended).
23 The Swaziland Poverty Reduction Strategy and Action Plan (PRSAP) 2007 http://www.tralac.org/files/2012/12/Final-Poverty-Reduction-Strategy-and-Action-Plan-for-Swaziland.pdf (accessed on 26 August 2018).
24 SNYC (n 6) 47.

education so that the youth can participate in technical and vocational education. It points to the need to regulate the wage system in the country so as to improve minimum wage, amongst other important provisions. There is no published data indicating whether the SNYC's implementation has resulted in a reduction of youth unemployment.

In addition to the national laws and policies, there are internationally driven frameworks such as the International Labour Organisation's Decent Work Country Programme for Swaziland and the African Union's Youth Charter which was ratified by Swaziland in 2013. The AYC makes provision for signatory states to invest in and empower the youth using: 'strategic approaches to youth employment, livelihood and skills development.'[25]

Article 15 of the AYC address specifically the youth employment question.[26] It explicitly provides that young people have the right to gainful employment. It compels countries to have accurate data on youth employment, unemployment, and under employment so that the issue can be prioritised in national development programmes. The AYC provides for appropriate measures in article 15(4) that countries can adopt to ensure the realisation of the right to gainful employment by young people. For instance, countries which are signatories are to ensure equal access to employment and equal pay for equal work without any discrimination.[27] Countries are urged to develop macroeconomic policies that focus on job creation for young people.[28] Also, countries are to foster greater linkages between the labour market and the education system to ensure alignment to the needs of the labour market and youth employability.[29]

The ILO's Decent Work Country Programme for Swaziland makes provision for a number of key programmatic outputs such as:

> to put in place policies promoting the creation of jobs for the youth, for women and for Swazi citizens as that would be likely to have the greatest impact on unemployment and poverty.[30]

and these outputs are in line with the Swazi National Development Strategy and the UN Development Assistance Framework. There is not much-written evidence to assess whether the internationally driven policies are being implemented in Eswatini and to gauge the degree to which they have improved the experiences of the youth in the labour market thus far.

25 Articles 13(4a-p), 14 (2b-d) & 15 (4a-h) of the African Youth Charter.
26 Article 15 of the AYC.
27 Article 15(4)(a) of the AYC.
28 Article 15(4)(b) of the AYC.
29 Article 15(4)(c) of the AYC.
30 ILO 'Decent work country programme for Swaziland (2010-2014)' 2010 14.

2.2 Laws and policies on youth employment in South Africa

South Africa has tackled the issue of youth unemployment through laws, policies, and programmes on youth employment. The South African Constitution No. 108 of 1996 makes no mention of employment as a right but instead provides in section 13 that a person may not be subjected to slavery, servitude or forced labour.

The constitution further provides for the freedom of trade, occupation and profession in section 22 as follows: 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'[31]

Section 23 provides that everyone has the right to fair labour practices.[32]

The are other statutory laws touching on employment in the Republic such as the Basic Conditions of Employment Act (BCEA)[33]. The BCEA is not youth specific, it applies to all workers. It lays down minimum and maximum standards that must be complied with by the employers.[34] The Act applies to all employment establishments and employees, excluding members of the National Defence Force, the National Intelligence Agency, the South African Secret Service; and unpaid volunteers working for charitable organisations.

Another statute regulation employment in South Africa is the Labour Relations Act (LRA).[35] The LRA's stated purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace in South Africa. Amongst other things, the LRA provides for employees' right to freedom of association, collective bargaining and the right to strike and recourse to lockout.[36]

The Occupational Health and Safety Act, is another legislation touching on employees in the Republic.[37] The Occupational Health and Safety Act provides for the health and safety of persons at work and in connection with the use of plant equipment and machinery; protection against hazards to health and safety arising from activities of people at work; and the establishment of an advisory council for occupational health and safety.[38]

31 Sec 22 of the Constitution of the Republic of South Africa, 1996.
32 Sec 23 of the Constitution of the Republic of South Africa, 1996.
33 The Basic Conditions of Employment Act 75 of 1997.
34 S Kopel *Guide to Business Law — Commercial Law* (2017) 350.
35 The Labour Relations Act 66 of 1995.
36 Secs 4, 26, 35 & 64 of the Labour Relations Act 66 of 1995.
37 The Health and Safety Act 85 of 1993.
38 Kopel (n 34) 355.

Unemployment Insurance Act, provides for the establishment of a central fund administration, financed through compulsory contributions by employers, employees, and the State.[39] In terms of the Act, the employer is to contribute 2% of the employee's remuneration of which 1% comes from the employee and the other from the employer.[40] This Act is also not youth specific but applies generally to a selected category of employees. To reinforce this Act the Unemployment Insurance Contribution Act was promulgated in 2002.[41] This Act creates a duty on every employer to whom it applies to make contributions to this insurance fund monthly.[42] Almost all employees are required to become contributors and may be eligible to claim unemployment benefits. Again this Act is not youth specific and addresses the issue of the unemployment insurance fund generally.

There is also the Skills Development Act (SDA) which has the objective of ensuring that in the labour market the levels of investment in education and training are increased.[43] In terms of this Act, there is an expectation placed on employers to create new opportunities for employees to acquire new skills, to assist those entering the labour market for the first time gain work experience, as well as to hire those persons who struggle to find gainful employment.[44] Therefore, the SDA makes it essential that employees get the opportunity to be upskilled through participation in learnership and other training programmes.[45] It can rightly be inferred that this Act directly or indirectly addresses the issue of youth employment in South Africa.

The Employment Equity Act (EEA) is another statute that deals with the issue of employment in South Africa.[46] The aims of the EEA are to promote equal opportunity and fair treatment in employment whilst ensuring the elimination of unfair discrimination.[47] Youth unemployment, when it is systematic can be viewed as unfair discrimination, and this Act may be used to challenge it.

A closer look at youth-specific policies shows that the government of South Africa has been tackling the problem of youth unemployment. At the heart of policies on youth employment is the National Youth Policy. It recognises youth unemployment as a major challenge. Other policies are viewed to be inefficient in addressing

39 The Unemployment Insurance Act 63 of 2001.
40 Kopel (n 34) 357
41 The Unemployment Insurance Contribution Act 4 of 2002.
42 Kopel (n 34) 357.
43 The Skills Development Act 97 of 1998.
44 Kopel (n 34).
45 As above.
46 The Employment Equity Act 55 of 1998.
47 Kopel (n 34) 380.

the demand for youth employment with Motlalepula Mmesi commenting that:

> Top-down initiatives such as the government's Extended Public Works Programme (EPWP), launched in 2004 and sold to the public as a means of short to medium-term labour absorption and income generation for poor households, have proven they cannot adequately address youth unemployment.[48]

However, all is not lost as there are still government policies which are seen as confronting the plight of youth head-on such as the Youth Enterprise Development Strategy (YEDS).[49] The YEDS is a programme solely aimed to encourage youth self-employment and youth-owned and managed enterprises. In essence, top-down government job creation schemes have proven ineffective in South Africa and in other SADC countries like Eswatini.

3 International, regional and sub-regional legal framework on youth employment

3.1 International Level

Both Eswatini and South Africa have ratified international treaties which promote and protect access to employment. The international legal framework comprises of both, binding and non-binding frameworks on either, labour issues in general or youth employment specifically. These include the International Covenant on Civil and Political Rights (ICCPR),[50] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[51] The ICCPR outlaws slavery, providing that no person maybe help in slavery and slave-trade.[52] It further prohibits that a person be held in servitude.[53]

The right to work, is found in article 6 of the ICESCR where state parties recognize the right of everyone to have the opportunity to gain a living by work which he or she freely chooses and/or accepts, as well as to take reasonable steps to safeguard the right.[54] The

48 M Mmesi, 'South Africa's youth unemployment problem: What we need to know' (28th May 2015) http://www.polity.org.za/article/south-africas-youth-unemployment-problem-what-we-need-to-know-2015-05-28 (accessed 14 November 2017).
49 The Department of Trade and Industry *Youth Enterprise Development Strategy* (YEDS), a programme launched in November 2013.
50 ICCPR, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.
51 The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976.
52 Article 8 of the ICCPR.
53 As above.
54 Article 6 (1) of the ICESCR.

Covenant enjoins state parties, to take the following steps to achieve the full realization of this right:

> technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.[55]

The ICESCR does not end there, but goes on to provide that the state parties to it recognise:

> the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular; fair wages and equal remuneration for work of equal value without distinction of any kind, with equal pay for equal work, and a decent living for themselves and their families;[56] safe and healthy working conditions;[57] equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;[58] and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.[59]

Eswatini ratified both the ICCPR and the ICESCR in 2004, whereas South Africa, ratified the ICCPR in 2002 and the ICESCR instruments in 2015. Despite the above provisions by the instruments, both countries are grappling with unemployment challenges, particularly those concerning the youth. This is despite the fact that both countries have ratified and signed all major Conventions by the International Labour Organisation (ILO) as depicted in the ILO's Decent Work Country Programme for Swaziland (2013 – 2015) and the ILO's Decent Work Country Programme for South Africa (2014).

3.2 Regional Level

Both Eswatini and South Africa have ratified the African Charter on Human and People's Rights (herein referred to as the African Charter), in 1995 and 1996 respectively.[60] The African Charter also known as the Banjul Charter provides for the right to access work in article 15 that every person has the right to work under favourable and satisfactory conditions and receive equal pay for equal work.[61]

It further stipulates that one of the duties of the person is chief of which to work to the best of his or her abilities and competence, as well as to pay taxes.[62] Even though it is not clear what the intention

55 As above.
56 Article 7(a)(i) and 7(a) of the ICESCR.
57 Article 7(b) of the ICESCR.
58 Article 7(c) of the ICESCR.
59 Article 7(d) of the ICESCR.
60 The African Charter on Human and Peoples' Rights (Banjul Charter), adopted 27 June 1981, entered into force 21 October 1986.
61 Article 15 of the Banjul Charter.
62 Article 29(6) of the Banjul Charter.

of this proviso is, it can be inferred that for the individual to be able to uphold his or her duties, he or she needs an enabling environment to gainful employment and/or entrepreneurship.

The AYC which is the major document offering blueprints on the rights of young people to access gainful employment, provides for sustainable livelihoods and youth employment.[63] The AYC categorically provides for every youth to have the right to gainful employment.[64] It further implores member states to conduct research and look into youth employment, unemployment and underemployment so as to ensure the availability of accurate data on the issue. This is to be done in order to ensure that there is a prioritisation of the issue in national development policies and programmes backed by clear and succinct programmes to address youth unemployment.[65] Be that as it may, the challenge with the AYC is that it is a policy framework which countries must utilize for their purpose.

It must be noted that despite, the adoption of legal, policy, and programme frameworks at both national and international level, both Eswatini and South Africa's youth unemployment continues to increase at an alarming rate. The search for alternative solutions to curb youth unemployment facing the two countries remains alive. Perhaps business's corporate social responsibility, if strategically harnessed, can be one of the ways which can help reduce or even halt the increasing statistics on youth unemployment. Corporations exist within communities. Communities in crisis are akin to businesses in trouble. Since the existence and profitability of a corporation is dependent on the surrounding communities at large, discussed below are ways used by the two countries to ensure that corporations play their part.

4 Corporate Social Responsibility and human rights

The definition of CSR that is adopted for this paper is that provided by the World Business Council for Sustainability Development (WBCSD) as

> the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.[66]

63 Article 15 of the AYC.
64 Article 15(1) of the AYC.
65 Article 15(3) of the AYC.
66 FASSET *Corporate social responsibility course handbook* (2012) 3.

According to the above entity, CSR is an ethical approach in which a company voluntarily contributes towards the betterment of society.[67] According to Ally, CSR deals with the integrity of the company as an institution, the mission, values, and the impact the company has on the community as opposed to corporates spending funds and expertise.[68] It is something more than philanthropy.

Over the years, human rights have featured as an important aspect of CSR. This is evidently seen in the adoption of the United Nations (UN) Guiding Principles on Business and Human Rights (also known as the Ruggie principles). The principles guard against possible negative human rights impacts by business and describe what companies and governments should do to avoid and address them.[69] The Ruggie principles in this regard postulate the following:

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.[70]

The above text resonates with the arguments in favour of CSR as alluded to by writers such as Ally, who is of the view that it is typical of CSR norms, to be aligned with the belief that it is in the best interest of corporations to be socially responsible.[71] The writer further bases his assertion on the premise that taking care of the environment and communities where they operate by the present generation of corporates will yield good results in the long-term sustainability of their business.[72] Indeed, this will be in the best interest of corporations as sustainability is regarded as a process whereby the present generation takes care of their needs but is also mindful of the needs of the future generations.

The author Fig, argues that business in South Africa has avoided CSR, despite the wide use of the term among practitioners and academics, in favour of concepts such as corporate social investment and corporate citizenship.[73] According to the author, the two

67 As above.
68 S Ally 'Corporate social responsibility: Practices, trends and developments' LLM Thesis, University of Cape Town 2013 at 13.
69 Ally (n 68) 23-24.
70 Guiding Principles on Business and Human Rights (Ruggie Principles): Implementing the United Nations 'Protect, Respect and Remedy' Framework, endorsed by the Human Rights Council through resolution 17/4 of 16 June 2011.
71 Ally (n 68) 37.
72 As above.
73 D Fig Manufacturing amnesia: Corporate social responsibility in South Africa In critical perspectives on corporate social responsibility *International Affairs Royal Institute of International Affairs* (2005) at 599.

concepts ask no questions about legacy, memory, history, justice, or moral and ethical responsibilities.[74] The author affirms that even though the concepts project ideas of good practice, neither really assign to firms any moral or ethical responsibility for past malpractice. He avers that under these concepts there is little acknowledgement of the legacies of social and environmental injustice perpetrated by business under apartheid.[75]

Fig further observes that businesses have responded in different ways to perceived state failure or incapacity to address major social issues adequately.[76] He highlights the contributions made by business in combating crime in South Africa through the formation of a coalition entitled 'Business Against Crime'. The author further alludes to the fight against HIV, stating that while the government was debating about the toxicity of the treatment, the business sector had already begun to provide HIV-infected workers with anti-retroviral drugs.[77] These are just a few examples of the many contributions to the protection of human rights in South Africa by the business sector.

It must be noted that business in South Africa have acted in line with the Ruggie principles in their involvement with alleviating social challenges. In principle 15 of the Ruggie Principles, businesses are urged to adopt policies and have processes in place that are commensurate with their size. This would ensure that they meet their responsibility to uphold human rights in communities where they operate. The principles call for:

> A policy commitment to meet their responsibility to respect human rights; A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute, amongst others.[78]

The Ruggie Principles dictate that business enterprises have the responsibility to respect human rights at all times. Hence, businesses are called upon to adopt the appropriate policies and processes. Moreover, principles 16 to 24 stipulate that business enterprises need to know and show that they respect human rights. This can effectively be done when there is in place policy commitment. In carrying out human rights due diligence, business enterprises can be able to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[79]

Recently scholars have successfully argued that CSR can be used to address challenges associated with the attainment of socio-

74 As above.
75 Fig (n 73) 601.
76 Fig (n 73) 608.
77 Fig (n 73) 610.
78 Principle 15 of the Ruggie Principles (n 70).
79 Principle 17 of the Ruggie Principles (n 70).

economic rights. Socio-economic rights in recognition of international law originate from the International Covenant on Economic, Social and Cultural Rights (ICESCR) and are rights which are regarded as second generation rights.[80] This means that these rights impose a positive duty on the state to act, or at least create conditions necessary for citizens to have access to facilities which are considered essential for modern life.[81]

As alluded to above the right to work is provided by the ICESCR.[82] It must be noted that the positive obligation to create jobs for the youth rests primarily on governments. However, this paper argues that through engaging CSR, corporations too, have a role to play in the protection of human rights such as the right to gainful employment. For instance, Obisanya argues that CSR can be used to claim for the following socio-economic rights: 'right to adequate housing, health care, water and social security, clean environment and finally right to education.'[83]

It is the contention of this paper that Obisanya is accurate in his assertions and that by extension, CSR can address claims for the socio-economic right known as the right to work and or right to gainful employment. Below the paper looks at some of the laws and policies on CSR that have been adopted by both countries to provide for youth employment, if any.

5 Laws and policies on CSR

Even though CSR is a topical issue usually reserved for discussion under corporate governance, in Eswatini, the main legislation regulating corporates namely, the Companies Act of 2009, makes no direct or indirect reference to corporate social responsibility. The same can be said about South Africa's Companies Act 71 of 2008. The Acts do not impose a duty or obligation on companies to engage in CSR activities or projects in order to uplift the communities where they operate. It is other government laws and policies which directly or indirectly hint on CSR in South Africa together with King III Code on Corporate Governance, which is a soft law on ethical leadership and corporate citizenship which applies to businesses globally. As a result, many corporations have taken part in some form of CSR in both countries.

80 JC Mubangizi *The protection of Human Rights in South Africa — A legal and practical guide* (2013)11.
81 As above.
82 Article 6 of the ICESCR.
83 TA Obisanya 'Philanthropic corporate social responsibility as a tool for achieving socio-economic rights in South Africa' LLM thesis, University of Venda, 2017 at 4.

5.1 CSR in Eswatini

It appears that there is no concerted effort from the government to make CSR compulsory for businesses in the country, as there is no law or policy regulating and directing business on CSR. As such companies choose for themselves whether to opt for CSR and if so, to which area or sphere they would like to direct their corporate responsibility. Many companies in the Kingdom have directed CSR to events that would promote their image or indirectly advertises their services. Hence the major football league in Eswatini is sponsored by big companies such as MTN and corporate banks. Kabir and another are of the view that CSR as a concept for Eswatini's companies is fairly new and that only a handful of them disclose CSR information in their corporate reports.[84] It is common practice in Eswatini to see companies devoted to CSR concentrating on sports and beauty pageants and very few concentrate on funding causes which are socio-economic rights oriented such as, education and community development projects and youth employment in particular.

In essence, companies do as they please when it comes to adhering to CSR. However, there are companies seen to be adhering to their CSR responsibilities despite the fact that there is no policy directing them on how to go about it. For instance, the Swaziland Sugar Association (SSA), provides in its annual integrated report of 2011/12 that the company adheres to the King III Code on Corporate Governance.[85] The company's website states that for SSA corporate responsibility is informed by the company's aims and is committed to providing a relevant and meaningful social investment programme which contributes to the sustainable social development of Eswatini.[86] Accordingly, corporate social investment (CSI) is an integral part of SSA's commitment to sustainable development in the country as evidenced by its annual budget. Furthermore, the company recognises that CSI is its gateway to the primary terrain for branding and enhancing the organization's reputation as a responsible corporate citizen and a caring partner within communities where the sugar industry operates.[87]

It is of absolute importance that companies involved in CSR/CSI do so in collaboration with others. This is what is currently being carried out by SSA. For instance, the company stipulates that where it lacks the certain competence to deliver on CSI, it collaborates with other

84 MDH Kabir 'Corporate social and environmental accounting information reporting practices in Swaziland' 8(2012) *Social Responsibility Journal* at 156.
85 Swaziland Sugar Association (SSA) *Annual report* 2011/2012 http://www.ssa.co.sz/images/stories/financials/SSAAnnualreport2012.pdf (accessed on 14 July 2018).
86 http://www.ssa.co.sz/social-responsibility/ (accessed on 14 July 2018).
87 As above.

organisations with which they share common values so that they form a mutually beneficial partnership in order to achieve their CSI jointly to the betterment of the communities they are serving.[88]

SSA has tackled socio-economic rights through their CSI policy implementation. This is because SSA is currently focusing on activities which are part of socio-economic rights directly and indirectly. For instance SSA addresses the issue of youth employment supporting financially rural primary education; capacity building and skills development for rural communities on one hand.[89] On the other hand, SSA supports health-care in and environmental preservation.[90] The company plays a role in national disaster relief programmes and activities aimed at vulnerable groups of the community (e.g. elderly, disabled, orphans).[91] It has been involved in the development of sports; and self-empowering programmes as for the youth, women and people with disabilities.[92]

Since the government is not involved, one has to commend the company for having a CSR policy document that primarily addresses issues of socio-economic rights and youth empowerment and employment. This goes to prove that indeed businesses in Eswatini can engage in the promotion, protection and fulfilment of human rights. It shows that the adoption of CSR policy statements by companies can be harnessed to serve not only as a mere public relations strategy but as a vehicle that delivers on the protection of socio-economic rights as well as, the right to employment, in particular, youth employment.

The issue that remains is accountability with regard to the issue as to whom a company is accountable for ensuring that their CSR policy is indeed benefiting the real needs of the community, such as to curb youth unemployment. The company self-regulates its CSR which is very problematic hence, this paper argues that the government of Eswatini should step in and call corporations to account on their implementation of CSR.

However, the government has no instrument which entitles it to demand accountability from companies. Solace and remedy lie in the John Ruggie Principles on Business and Human rights, which call on states to promote, protect, and fulfil human rights and fundamental freedoms.[93] Eswatini can comply by putting in place laws and/or policies to gentle nudge businesses to do the right thing because as revealed by the SSA case, businesses are likely to respond to socio-

88 http://www.ssa.co.sz/social-responsibility/ (accessed on 14 July 2018).
89 As above.
90 As above.
91 As above.
92 As above.
93 As discussed above (n 70).

economic rights challenges/problems facing communities. Also, the Ruggie Principles call on businesses to comply with all applicable laws and to respect human rights, something which is not hard for business to follow as most of them are creatures of statutes and or laws, as their very existence is as a result of following the country's laws.[94]

5.2 CSR in South Africa

Despite the fact that the Constitution of the Republic of South Africa, 1996 and the 2008 Companies Act do not have any reference to CSR, there are laws and policies in South Africa addressing CSR, unlike in the case of Eswatini. These laws are, the Companies Regulation 2011, the Broad-Based Black Economic Empowerment Act, 2003 and the Employment Equity Act, 1998.[95]

It must be pointed out at the outset that the EE Act is only binding on businesses that employ above 50 employees or companies within the Agricultural industry with a yearly revenue greater than R2 million.[96] The Act provides that businesses formulate a work-place equity policy mapping the corporations' strategy to ensure occupational parity and render a year on year account of its developments in this respect.[97] The EE Act in section 24(1) gives a directive to businesses to designate one or more high-ranking administrators to assume the function of effecting and supervising the equity strategy.[98] However, for the purposes of tracking compliance in as far as employment equity is concerned, there is sadly no provision for a committee which will monitor and report on the same.[99]

A closer look at the Broad-Based Black Economic Empowerment Act, which came about as a means to comply with the BEE Act has resulted in many companies being legally compelled to adhere to CSR initiatives.[100] The Act requires corporations and/or business enterprises based in South Africa to engage in Preferential Procurement Policy, so as to assist previously disadvantaged groups and communities who were excluded in the economy, to be actively involved in the country's economy.[101] This is one way the government of South Africa has addressed the imbalances of the past, and it may

94 As above.
95 These laws are extensively discussed in pages 7 and 8 of this paper above.
96 Obisanya (n 83) 43.
97 Sec 20 of the Employment Equity Act 55 of 1998. It stipulates the objectives to be reached for each year of the plan (sec 20(2)(a)) together with the procedures to be followed in order to monitor and evaluate the progress of the plan (sec 20(2)(f)).
98 As above.
99 Obisanya (n 83) 98.
100 The Broad-Based Black Economic Empowerment Amendment Act, 2013.
101 FASSET (n 66) 9.

be argued that they have thereby addressed one aspect of human rights for those people through indirectly engaging CSR.

Furthermore, the Act establishes a national framework for the promotion of BEE through the establishment of the Black Economic Empowerment Advisory Council, which shows that the government is serious about accountability as this Council was created to hold businesses accountable in their adherence to CSR.[102] In addition, the Act compels the Minister responsible in the implementation of the black economic empowerment initiative, to issue codes of good practice to companies which are part of the BEE initiative.[103] The Minister must issue a scorecard to the companies to measure their accomplishments and encourage sector-specific BEE compliance, with the aims and objectives of the Act.[104] Such a stance is in support of the argument that the government is nudging businesses to address issues of human rights. Critics point out that the initiative has not been handled well, however, if the BEE initiative had been properly implemented, it could have been one of CSR's examples in dealing with human rights to empower people and local communities.[105]

Another component of CSR dealing with human rights is found in the Companies Regulation of 2011. The regulation compels certain companies to have Social and Ethics Committees (SEC) state-owned company.[106] It calls upon corporations to establish SECs, and the SEC has the mandate to monitor corporate governance and to oversee the implementation of philanthropic and/or CSR projects.[107]

In conclusion, one can safely adduce that South Africa has a plethora of law and policies in place to encourage businesses to fully participate in CSR initiatives that address the main argument of this paper, youth unemployment. However, as critics correctly object, the operationalisation of such initiatives which have prospects of supporting youth employment are frustrated by mismanagement and lack of correct implementation.

6 CSR advancing youth employment as a human right

The AYC has already made the call that every young person shall have the right to gainful employment, and governments have been called

102 Obisanya (n 83) 44.
103 As above.
104 As above.
105 As above.
106 Sec 26 (2) of The Companies Regulation of 2011.
107 As above.

upon to take all appropriate measures with a view to achieving the full realisation of this right.[108] The statistics presented for both countries under investigation here have shown that these countries are grappling with youth unemployment despite putting in place laws and policies aimed at curbing youth unemployment.

In the case of South Africa CSR has been used to address some of the historical imbalances which was caused by racial inequality in South Africa. This is evidenced by the provisions of the BEE Act, and the EE Act, which are aimed at economic empowerment of blacks including youth and eliminating unfair discrimination in the workplace, respectively. In the case of Eswatini, CSR is being adopted by businesses for the promotion of their own personal image and gain. These businesses can be called upon through a policy to direct their CSR to programmes which will, directly and indirectly, curb youth unemployment in Eswatini.

For instance, MTN Eswatini can decide to channel its philanthropic CSR investments to rural schools in Eswatini so that they have libraries and laboratories. That would go a long way in ensuring that students from rural communities also have access to quality education, which will then lead them to having access to gainful employment.

CSR directed to education is much needed in Eswatini considering that, even though the Constitution of the Kingdom of Eswatini, 2005 provides for free primary education, the government of Eswatini was reluctant to provide for it. In the case of *Swaziland National Ex-Miners Workers Association v The Ministry of Education and Others*, the government was taken to court for the endorsement of the right to free primary education.[109] However, the court made the right to be subject to progressive realisation, something which was against international norms.[110]

In order for these rights to be realised, there is a need for a monitoring or regulating body to ensure that businesses are focusing CSR to where it is needed most which is to curb youth unemployment. According to author Fig, in South Africa, the regulatory functions of the state are relatively well developed, with the exception of certain aspects of environmental governance.[111] He makes the example of BEE and argues that it is an area where the state has used its authority to urge business to act in line with government policy and address certain social ills.[112] He points out that the government, labour and business have agreed to be bound by the terms of the BEE Charter.[113]

108 Article 15 of the AYC.
109 *Swaziland National Ex-Miners Workers Association v The Ministry of Education and Others* (2168/09) [2010] SZHC 258 (19 January 2010).
110 A Skelton & SD Kamga 'Broken promises: Constitutional litigation for free primary education in Swaziland' 3(2017) *Journal of African Law* at 419.
111 Fig (n 73) 606.
112 As above

The Charter lays out for businesses specific targets for transformation to take place in spheres such as ownership, employment, tender and procurement processes, and promotion and training opportunities, as well as local economic development.[114]

South Africa has made a good attempt to align CSR with the realisation of human rights. There is a need to shift their focus from the injustices of the past and take concrete actions to address the injustices of today, particularly youth unemployment. However, in the case of Eswatini, there is little evidence suggesting that there is a policy directive on how businesses should engage CSR. Therefore, in Eswatini, business enterprises are to adhere to the Ruggie Principles and adopt CSR policies and/or programmes that will make a significant contribution to their development and or human rights. Nevertheless, there are exceptions as it was revealed that some companies, albeit a few, appear to be adhering to the CSR call such as SSA and are making small inroads in tackling youth empowerment and employment in Eswatini.[115]

Such initiatives by corporations are laudable because they empower the youth with job prospects in the future and job opportunities in the present time. The job prospects would be a step towards empowering future leaders' as they are sometimes referred to.[116] This paper argues that for every young person, a job prospect and opportunity ensures that the youth's dignity is safeguarded and that he or she will be dissuaded from frustrations which might lead to delinquency, and or abuse of illegal substances, such as drugs. Also, a CSR initiative that eradicates youth unemployment has a good impact on communities in that, youth employment is seen as a glue that facilitates social integration, intergenerational dialogue, citizenship and solidarity.

The youth forms the majority of the population in the two countries studied here, hence it is inconceivable that the largest proportion of the society is being side-lined intentionally, or unintentionally. This paper has successfully argued that businesses and human rights are not mutually exclusive, but in fact, businesses have a responsibility to respect and promote human rights where they operate. It was pointed out that socio-economic rights, in particular, the right to employment, can be addressed through the adoption of CSR initiatives. In order for that to happen, governments and

113 Fig (n 73) 607.
114 As above.
115 Swaziland Sugar Association (SSA) *Annual report* 2011/2012 http://www.ssa.co.sz/images/stories/financials/SSAAnnualreport2012.pdf (accessed on 14 July 2018). See also SSA's contribution to CSR in Eswatini is discussed on page 18 of this article.
116 The Swaziland state of the youth report, 2015 https://swaziland.unfpa.org/sites/default/files/pub-pdf/Youth%20Report%202015%20with%20covers.pdf (accessed 15 September 2018). See also the South African National Youth Policy 2015 – 2020.

businesses ought to work together. If the governments and businesses of the two countries fail to forge a way of curbing or halting the growing youth unemployment challenge, there will be huge ramifications in terms of economic growth, crime, political instability, drug abuse, and other social challenges.

7 Conclusion

This paper has looked at the situation of youth unemployment in both Eswatini and South Africa and it was found to be high. It was observed that there are many causes for the soaring numbers of youth who are unemployed. The legal and policy framework for both countries targeting youth employment were investigated and it was found that most of the laws are not youth specific and that policies that have been put in place by the government to target youth employment take a top-down approach and have not yielded much of the results which were anticipated. The international legal framework on employment was also investigated.

In this paper, the AYC was used as the benchmark to advance arguments necessary for young people to have access to gainful employment in Eswatini and South Africa. It was revealed that there were no laws and/or policies directly mandating the use of CSR by businesses in Eswatini, whereas in South Africa, CSR initiatives are compulsory for some business enterprises. However, the implementation of CSR in SA is fraught with challenges. The paper has successfully argued that the interests of the youth will be better served if governments and the business sector collaborate.

DEVELOPING THE SUBSTANCE OVER FORM DOCTRINE IN TAXATION AFTER THE JUDGEMENT IN *COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE v NWK*

*by **Johan Coertze****

1 Introduction

In 1936 Lord Tomlin in *IRC v Duke of Westminster* (hereafter '*Duke*')[1] concluded that it is trite law that every man (and woman) is entitled to arrange his or her affairs as to pay the least amount of tax under the appropriate statutes. This sentiment has been a cornerstone of South African tax jurisprudence and was again repeated in *Commissioner for the South African Revenue Service v NWK Ltd* (hereafter '*NWK*').[2] This broad liberty in arranging one's own tax affairs has, however, led some taxpayers to dress up their transactions and hide their' true nature as to 'either … secure some advantage which otherwise [the law] would not give, or to escape some duty which otherwise the law would impose'.[3] The most prominent tool the courts can use to try and curb this type of abuse is the General Anti-Avoidance Rules (hereafter 'GAAR') in Section 80A to 80L of the Income Tax Act 58 of 1962 (hereafter 'the Act'), other

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1 (1936) AC 1.

2 *WTRamsay Ltd v Inland Revenue Commissioners* [1982] AC 300; 11 ATR 752; 2011 (2) SA 67 (SCA) para 42 & 54.

3 *Zandberg v Van Zyl* 1910 AD 302 (hereafter '*Zandberg*') at 309.

specific anti-avoidance provisions in the Act[4] and the substance over form doctrine (hereafter 'the doctrine').

The doctrine is founded on the principle that the law regards the substance rather than the form of things.[5] The doctrine entails the court looking at the substance of a transaction and not the form, to determine the legal and tax consequences of the transaction.[6] The court only has regard to the legal substance of any given transaction and if the parties to a transaction intended to give effect to the transaction according to its form, the court has to have regard to that transaction even though the only reason the transaction is structured in a specific manner is to pay the least tax permissible.

In *NWK*, this doctrine was, intentionally or overtly, interpreted to include the requirement that an arrangement must have some underlying commercial sense or purpose, which does not include tax evasion (or avoidance) to be recognised by the court, which is similar to the requirement of commercial substance in the GAAR.[7] The SCA in *Commissioner: South African Revenue Service v Bosch* (hereafter *'Bosch SCA'*)[8] repudiated the change in the common law that the court in *NWK* aimed to achieve, and reaffirmed the taxpayer's right to arrange his affairs as to pay the least amount of tax permissible as long as the outward appearance of the transaction correlates with the parties' true intention.

If the doctrine cannot be applied, since the form of an arrangement is identical to the substance thereof, the courts may use the GAAR to curb impermissible tax avoidance. The GAAR came into effect in 2006 and replaced the previous section 103(1), which according to the explanatory memorandum accompanying the new GAAR was an ineffective deterrent to the increasingly sophisticated forms of impermissible tax avoidance some financial advisors and taxpayers were implementing.[9] The GAAR gives the Commissioner the power to reduce, eliminate, or neutralise any tax benefit that arises from an impermissible tax avoidance arrangement.

An impermissible tax avoidance arrangement, pursuant to section 80A of the Act, is summarised by Kujinga as an arrangement that has a sole or main purpose to avoid tax and that is also characterised by one of the following: the absence of commercial substance; abnormality for a bona fide business purpose; the creation of rights and obligations that would not normally be created in an

4 See for example section 103.
5 *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 547 (hereafter *'Dadoo'*) 547.
6 P Daniels 'Will the real NWK please stand up!' (2013) 4(1) *Business Tax & Company Law Quarterly* 14 15.
7 *NWK* (n 2) paras 42 & 54; section 80A(1)(a)(ii) of the Act.
8 2015 (2) SA 174 (SCA).
9 Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006 62.

arm's length arrangement; and the misuse or abuse of the Act.[10] The GAAR, therefore, gives the Commissioner wide powers to curtail overzealous tax avoidance. There has however been no reported case on the GAAR and SARS has been hesitant to invoke the GAAR due to the uncertainty created by its complexity and a perceived lack of understanding by SARS officials of how exactly the different parts should be interpreted and applied.[11]

Due to the failure of the GAAR and the current application of the doctrine, South African tax law is open to abuse by the wealthy and big businesses to create overly complex arrangements, without any real commercial sense, with the only intention to pay as little tax as possible. This, in turn, solidifies and increases South Africa's high wealth and income inequality and could lead to distrust in the tax system, as according to the Davis Tax Committee a tax system which ignores wealth and income inequality will be seen as lacking legitimacy.[12]

It can therefore legitimately be asked whether the doctrine is compatible with the egalitarian vision of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') described by the Constitutional Court in *President of the RSA v Hugo* (hereafter *'Hugo'*)[13] as follows.[14]

> The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights, but in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle.

If the doctrine is found to be incompatible with this vision, then having regard to Section 39(2) of the Constitution which puts an obligation on the courts to develop the common law in line with the spirit, purport and objects of the Bill of Rights, the doctrine should be developed to serve as a valuable tool in detecting and invalidating overzealous tax avoidance arrangements, where the GAAR is

10 B Kujinga 'a Comparative analysis of the Efficacy of the General Anti-Avoidance Rule as a Measure Against Impermissable Income Tax Avoidance in South Africa' unpublished LLD thesis, University of Pretoria, 2016 103.

11 Kujinga (n 10) 295; E Libtak 'The New GAAR 10 years on — part II: Mistakes and missed opportunities' 2017 https://www.thesait.org.za/news/326188/The-New-GAAR-10-Years-On--Part-II-Mistakes-and-Missed-Opportunities-.htm.

12 According to Statistics South Africa, the Gini coefficient measuring relative wealth reached 0.65 in 2014 based on expenditure data (excluding taxes), and 0.69 based on income data (including salaries, wages, and social grants). The poorest 20% of the South African population consume less than 3% of total expenditure, while the wealthiest 20% consume 65%, The World Bank 'The World Bank in South Africa' http://www.worldbank.org/en/country/southafrica/overview (Accessed: 2017-06-29); Davis Tax Commitee 'Report on feasibility of a wealth tax in South Africa' 67.

13 1997 (4) SA 1 (CC).

14 Hugo (n 13) para 74.

ineffectual. This could, in turn, contribute to the achievement of a transformed society based on substantive equality, by radically altering the current 'unjust, uneven and impermissible power and resource distribution ...'.[15]

This contribution seeks to answer the above questions by first analysing and evaluating the current jurisprudence on when a court should develop the common law and secondly whether the decision in *NWK* could form the basis for said development of the doctrine.

2 When is it necessary to develop the common law?

The doctrine was imported from English law and developed by South African courts and forms part of the common law.[16] The Constitutional Court, Supreme Court of Appeal and the High Court have the inherent power to develop the common law, taking into account the interest of justice.[17] Sections 8(1), (2) and (3) further make the Bill of Rights binding on all law, on natural and juristic persons and places an obligation on the courts to develop the common law to give effect to these rights when and if they bind natural and juristic persons. When the court has decided that these sections permit the development of the common law, the Constitution further requires that the court 'must promote the spirit, purport and objects of the Bill of Rights' when developing the common law.[18]

There is some debate between the courts and academics as to whether sections 8, 39(2) and 173 (hereafter 'the development clauses') should be interpreted to place an obligation on the courts to develop the common law whenever it deviates from the spirit, purport and objects of the Bill of Rights or whether the spirit, purport and objects of the Bill of Rights will only be applicable if the court has already decided to develop the common law because the interest of justice so demands.[19]

15 D Moseneke 'Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309 318.

16 T Legwaila 'The substance over form doctrine in taxation: The application of the doctrine after the judgment in *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA)' (2016) 28(1) *South African Mercantile Law Journal* 112 113.

17 The Constitution of the Republic of South Africa, 1996 section 173.

18 The Constitution (n 17) section 39(2).

19 See D Davis 'Transformative constitutionalism and the common and customary law' (2010) 3 *South African Journal on Human Rights* 403; K Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human Rights* 146; A Fagan 'The secondary role of the spirit, purport and objects of the bill of rights in the common law's development' (2010) 4 *South African Law Journal* 611; *S v Mashumpa and Another* 2008 (1) SACR 126 (E); *Masiya v Director of Public Prosecutions Pretoria and Another* 2007 (8) BCLR 827.

The Constitutional Court in *Carmichele v Minister of Safety and Security* (hereafter *'Carmichele'*)[20] interpreted the development clauses as putting an obligation on the courts to develop the common law where the common law deviates from the spirit, purport and objects of the Bill of Rights, to remove that deviation.[21] The spirit, purport and objects of the Bill of Rights is found in the objective normative value system set out in the Constitution as a whole, influenced by the fundamental values in section 1 of the Constitution.[22] Values of particular significance to this research are the achievement of equality and the advancement of human rights and freedoms.[23] These values, read together with section 39(2) of the Constitution, as explained by Moseneke, require the courts to 'intervene in unjust, uneven and impermissible power and resource distributions, in order to restore substantive equality'.[24]

The transformative nature of the Constitution was first explained by Klare when he defined the concept of transformative constitutionalism as a 'long term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country's political and social institutions and power relations in a[n] ... egalitarian direction'.[25] Building on the foundational work on this subject Klare and Davis go further and explain that development of the common law should not just be about 'tinkering or consistency ...' but the legal foundations of common law rules should be investigated and transformed to form a just and equal society envisaged by the Constitution.[26] They opine that judges should play an active role in this transformative process and the South African legal culture should align with this project.[27]

The development clauses are, therefore, not mere interpretive tools or rules for construction but authorise a new mode of judge made law, founded by the Constitution.[28] They conclude that the mandate of section 39(2) to develop the common law in line with the spirit, purport and objects of the Bill of Rights is not dependant on

20 2001 (4) SA 938 (CC).
21 *Carmichele* (n 20) para 33.
22 *Carmichele* (n 20) para 53; Section 1 of the Constitution (n 17) reads as follows: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.
23 The Constitution (n 17) section 1(a).
24 Moseneke (n 15) 318.
25 Klare (n 19) 150.
26 Davis (n 19) 414.
27 As above.
28 Davis (n 19) 422.

whether the court is confronted with the application or development of the common law (as section 39(2) refers to development and section 8(3) distinguishes between development and application) but must be exercised 'whenever a judge engages in any way with common law authority ...'.[29] This position was accepted by the Constitutional Court in *S v Thebus* (hereafter '*Thebus*')[30] and means the court in both *NWK* and in *Bosch SCA* was under the obligation to analyse the doctrine (as it was engaging with a rule of the common law) and even if it had been consistent with the specific rights found in the Bill of Rights, it should have been compared to the spirit, purport and objects of the Bill of Rights and if found to fall short thereof, developed in harmony with the objective normative value system of the Constitution.[31]

The courts have however been reluctant to develop the common law if a specific right in the Bill of Rights has not been directly violated and have let go of the traditional common law methods of developing the common law only when the rule cannot be applied to a new set of facts.[32] This is true especially in questions of economic distribution as they have been handled with overzealous deference to what Davis and Klare call 'separation-of-powers platitudes ...'.[33] The slow pace of development can, however, be explained by judges taking the view, explained by Fagan, Cheadle, Davis and Zitzke, that the wording of section 39(2) and 173 do not create an obligation to develop the common law but merely state an inherent power to develop the common law.[34]

Fagan, agreeing with Cheadle, opines that the spirit, purport and objects of the Bill of Rights is not reason in itself to develop the common law but only a means of deciding on a specific mode of development, when there exists more than one.[35] He directly contradicts Davis and Klare as he suggests that in some instances common law rules are not developed in their application and therefore section 39(2) is not triggered by mere application.[36] The context of section 39(2) makes this clear as the same section contains the wording '[w]hen interpreting any legislation ...', which is

29 Davis (n 19) 423.
30 2003 (6) SA 505 (CC).
31 *Thebus* (n 30) para 27.
32 Davis (n 19) 427.
33 Davis (n 19) 414 & 450.
34 Fagan (n 19) 611; H Cheadle 'Application' in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights 2 ed* (2005) 3–11; D Davis 'Interpretation of the Bill of Rights' in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights 2 ed* (2005) 33–10. E Zitzke 'a new proposed constitutional methodology for effecting transformation in the South African law of delict, unpublished LLD thesis. University of Pretoria, 2016 117; Davis has since changed his view on this point, as stated in Davis (n 19 above) 423.
35 Fagan (n 19) 613; see also S Woolman 'The amazing, vanishing bill of rights' (2007) 4 *South African Law Journal* 762.
36 Fagan (n 19) 613; see for example *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430G.

interpreted by the Constitutional Court as meaning that promotion of the spirit, purport and objects of the Bill of Rights is only required when the court is, in fact, interpreting legislation and does not put an obligation on the court to interpret legislation.[37] Promotion of the spirit, purport and objects of the Bill of Rights is accordingly only required when the common law is, in fact, being developed for independent reasons.[38] Fagan sets out the following three reasons as the only constitutionally mandated (independent) reasons to develop the common law: '(1) the rights in the Bill of Rights; (2) justice; and (3) the rules of the common law itself'.[39]

If this position is accepted, the doctrine should only be developed in line with the spirit, purport and objects of the Bill of Rights if one of these independent reasons are present. The doctrine will, in this line of reasoning, only be open to development if it can be shown that it is in the interest of justice or if the rules of the common law itself permit development of the doctrine. As no right in the Bill of Rights is directly offended by the doctrine, the first reason stated by Fagan will not be applicable. Developing the doctrine as to be a more powerful tool in detecting and preventing tax avoidance would be in accordance with the pursuit of substantive justice as espoused by the Constitutional Court and the dicta in *AG'S Distributors v Commission for Conciliation, Mediation and Arbitration and Others* by Cassim AJ:[40]

> The extraordinary failure to stem the tide of the schism between the have and have nots cannot be solely blamed on the government. The courts must accept their responsibility in this very important task to bring about social justice and to give effect to the meaning of the values enshrined in our Constitution. The facts of this case illustrate the failure of the legal system we have inherited. There exists in our legal system an inherent bias in favour of the wealthy established class to the detriment of the poor and the vulnerable.

If weighing this pursuit against the current corpus of our law of contract and the freedom to contract that underlie the doctrine it would, in the researcher's opinion, not be in the interest of justice to develop the doctrine, as the legislature is in a better position to effect the necessary changes if, and when it feels the tax avoidance allowed by the doctrine to be unacceptable.[41] Giving the court the discretion to include commercial considerations in the doctrine could compromise legal certainty, which has been accepted by the Constitutional Court as a central consideration in any constitutional

37 Fagan (n 19) 621.
38 As above.
39 Fagan (n 19) 621.
40 [2009] 5 BLLR 407 (LC) para 22 & 23.
41 As discussed in section 3.5.

state.[42] Developing the doctrine because the rules of the common law so require has already been dismissed by the SCA in *Bosch SCA*.[43]

The researcher agrees with the reasoning of Fagan and proposes that developing the common law should only be done if there exists an independent reason for doing so, as this is what the text of the Constitution allows. This is also in line with earlier decisions of the Constitutional Court, most notably the words of Kendridge AJ in *S v Zuma*[44] where he explains that courts, whilst always being mindful of the values underlying the Constitution, should never forget that they are interpreting a written document and the Constitution does not mean whatever the interpreter wants it to mean.[45]

The decision of the Constitutional Court in *Carmichele* has been accepted by the courts as the correct interpretation of the development clauses and is also binding and will, therefore, be followed.[46] The courts have an obligation to develop the common law where the common law deviates from the spirit, purport and objects of the Bill of Rights to remove that deviation.[47] The power to develop the common law is not absolute and the 'judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society'.[48] The courts should develop the common law to meet the objects in section 39(2), but this should be done within the common law paradigm, which prescribes deference to existing common law principles, leaving law reform to the legislature and that this body of law should be developed in incremental steps.[49]

This important caveat to the power the courts wield in developing the common law was extrapolated by Wallis AJ in his dissenting judgement in *Makate,*[50] where he warned that the common law, which is explicitly preserved by the Constitution,[51] should not be simply disregarded because the court has sympathy for one of the

42 See for example E Broomberg 'NWK and Founders Hill' (2012) 60(10) *The Taxpayer* 187 200 and H Vorster NWK and purpose as a test for simulation. (2011) 60(5) *The Taxpayer* 83 at 84; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* (1) SA 984 (CC); Legal certainty is a cornerstone of the rule of law which forms part of the foundational values in section 1(c) of the Constitution.

43 *Bosch SCA* para 40.

44 1995 (2) SA 642 (CC).

45 *Zuma* (n 44) para 17.

46 See *Masiya v Director of Public Prosecutions Pretoria and Another* 2007 *(*8) BCLR 827 para 33; The Constitution (n 17) section 165(5) read with section 167.

47 *Carmichele* (n 20) para 53.

48 *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) paras 60 (hereafter '*Du Plessis*').

49 *Carmichele* (n 20) para 55; D Davis 'Where is the map to guide common-law development?' (2014) 25(1) *Stellenbosch Law Review* 3 5.

50 2016 (6) BCLR 709 (CC) para 160.

51 The Constitution (n 17) Item 2(1)(b) of schedule 6.

parties or because of the disgraceful conduct of a party.[52] He also emphasised that the process of developing the common law requires firstly; a clear understanding of the current state of the common law as it applies to the problem and secondly; a precise identification of the manner in which it should be developed.[53] Developing the common law is a challenging process and should be done with due regard for all the consequences overzealous judicial law reform will have on legal certainty.

3 The process of developing the common law

The Constitutional Court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* (hereafter *'Mighty Solutions'*),[54] building on *Carmichele,* laid down a five-stage process to determine if and how the common law should be developed, namely: (1) determining exactly what the common law position is; (2) then considering the underlying reasons for this position; (3) enquiring whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development; (4) consider precisely how the common law could be amended; finally (5) the court should take into account the wider consequences of the proposed change on that area of law.[55]

3.1 What is the common law position?

The doctrine was first laid down by the SCA in *Zandberg v Van Zyl* (hereafter '*Zandberg*')[56] where the court stated that the court, when deciding on the rights inherent in any agreement, when the parties conceal the real character of that agreement, 'can only do so by giving effect to what the transaction really is; not what in form it purports to be'.[57] The court thus only has regard to the substance of any transaction and not its form. This doctrine is a branch of the fundamental doctrine that the law only regards the substance of things and not the form thereof.[58] Application of the doctrine is not limited to tax disputes and it has been developed for general application in determining the legal implications of transactions and agreements. The doctrine is applied in two distinct scenarios by the South African courts:

52 *Makate* (n 50) para 160.
53 As above.
54 2016 (1) SA 621 (CC).
55 *Mighty Solutions* (n 54) para 38.
56 1910 AD 302.
57 *Zandberg* (n 56) 309.
58 *Dadoo* (n 5) 547.

- in the case of so-called simulated transactions whereby the parties dishonestly and purposefully disguise the true intention of a transaction by the adoption of a different form, the so-called simulation principle; and
- situations where the parties have made a *bona fide* mistake as to the true legal nature of the transaction they have entered into, or the so-called label principle.[59]

The simulation principle will be the focus point of this discussion and references to the doctrine must be interpreted as only referring to the application of the doctrine in simulation cases as tax avoidance is usually the purpose of the simulation of a transaction. The doctrine is, in essence, a legal test and not an economic test as the legal substance of any agreement is the deciding factor in determining whether the agreement is simulated and the economic substance is only a subsidiary factor that the court may use to determine the legal substance.[60] If the legal substance can easily be determined and conforms to the true intention of the parties, the economic substance is irrelevant.[61]

The SCA expanded on the doctrine in *Dadoo* regarding a tax dispute by deciding that parties may genuinely arrange their transactions as to avoid the provisions of a tax statute and further that such a transaction cannot be declared illegitimate 'by the mere fact that [the] parties intend to avoid the operation of the law, and the selected course is as convenient in its result as another which would have brought them within it ...',[62] and later in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd,* (hereafter '*Randles*')[63] by deciding that the mere fact that an agreement 'is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it' does not mean the agreement is a disguised one.[64] The only requirement is that the parties must honestly have the intention to give effect to the form of the agreement.[65]

A disguised transaction which would give the court the ability to apply the doctrine to strip the form of the transaction and let the law operate in relation to its true nature is a transaction that falls within a specific provision or stature, but is dressed up in a guise to conceal the true intention of the parties.[66] Such a transaction is *in fraudem legis* as the parties never genuinely intend to perform according to

59 Daniels (n 6) 15.
60 Daniels (n 6) 16.
61 As above.
62 *Dadoo* (n 58) 548.
63 1941 AD 369.
64 *Randles* (n 63) 395 - 396.
65 As above.
66 *Dadoo* (n 58) 548.

the tenor of the transaction.[67] This position was again accepted in the recent case of *Bosch SCA* dealing with a tax dispute, where the court after referring to the decision in *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC and Others* (hereafter *'Roshcon'*),[68] reiterated that the court should examine the transaction as a whole, taking into account all unusual features including the income tax consequences and the manner in which the parties intend to implement the transaction when deciding if a transaction is simulated.[69] The court used the decision in *Randles* as reflecting the true position and concluded that the test is one of genuineness as set out in *Roshcon*.[70]

The courts can, therefore, only use the doctrine to give effect to the substance of an agreement where it is arranged in a manner that allows the avoidance of tax and the true intention of the parties differ from the form of the transaction. If their true intention, however, matches the form of the agreement, the agreement is valid and the court has to give effect thereto even if there is no economic substance and the only reason the transaction is arranged in a specific way is to stay outside the applicable tax statutes.

3.2 What is the underlying reason for this position?

The underlying basis of the doctrine can be found in another common law principle called *pacta servanda sunt*, which is best described by Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson*:[71]

> [i]f there is anything which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred.

South African contract law is based on the will theory whereby a contract is founded on consensus between the parties combined with the serious intention of concluding the specific contract according to its juristic consequences.[72] The motive of the parties to a contract is irrelevant.[73] The doctrine is in line with this principle as only the true consensus between the parties is given effect to and the motive of the parties plays only a secondary part in determining if the form of the transaction coincides with its substance.

The freedom all people have to contract and the sanctity of these agreements provide all capable people of contracting with another

67 *Randles* (n 63) 395 - 396.
68 2014 (4) SA 319 (SCA).
69 *Bosch SCA* (n 8) para 40.
70 *Roshcon* (n 68) para 15.
71 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.
72 CJ Nagel (eds) *Commercial Law* (2015) 41.
73 Nagel (n 71) 65.

party in any form and on any terms they deem fit, and the courts must give effect to these arrangements.[74] There are, however, some restrictions as an agreement that is unlawful or offends public policy is not enforceable and legislation can restrict and forbid certain contracts and contractual terms.[75] Public policy in this regard means 'doing simple justice between man and man'.[76] The foundation of a contract is legal certainty and is, for this reason, the basis of all commercial transactions.[77] The ability to contract freely is grounded in the philosophy of 'laissez-faire liberalism and individualism ...' and the values of freedom, autonomy and human dignity and plays an integral role in a market-based economy as persons are free to take part in commercial dealings with the assurance their agreements will be respected.[78] Our courts have rejected the notion that judges and in this instance the Commissioner can disregard a contractual provision on the basis that it offends their personal sense of fairness and equity.[79]

3.3 Does the application of the doctrine offend the spirit, purport and objects of the Bill of Rights?

To decide if the doctrine offends against the spirit purport and objects of the Bill of Rights, what these words mean must first be determined. The court in *Carmichele* did not elaborate on how these words should be interpreted, or what is entailed by the objective normative value system on which development of the common law should be based.[80] A factor which further complicates this enquiry is the courts' reluctance to address problems of class domination, wealth inequality and the ways in which common law rules contribute to the unequal distribution of resources and the resultant poverty of jurisprudence on this subject.[81]

74 JJ Hefer 'Billikheid in die kontraktereg' (2004) 29(2) *Journal for Juridical Science* 1 2.
75 Hefer (n 74 above) 2.
76 *Botha and Another v Finanscredit* (Pty) Ltd 1989(3) SA 773 (A).
77 South African Law Commission Project 47: 'Unreasonable stipulations in contracts and the rectification of contracts'19; in *Basson v Chilwan & others* 1993 (3) SA 742 (A) 762H Eksteen JA referred to '[t]he paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...'.
78 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57. Y Mupangavanhu 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) *De Jure* 116 116 & 117; M Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *South African Law Journal* 545 551.
79 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 16.
80 Wallis (n 78) 564 opines that the courts' continuous references to the objective normative system of the Constitution aids in creating legal uncertainty by not conducing to clarity.
81 Davis (n 34) 484.

The spirit, purport and objects of the Bill of Rights is often equated with the values of the Constitution as set out in Section 1 of the Constitution. Zitzke is, however, not in favour of this 'shallow reading ...' of section 39(2) and offers some guidance into the meaning of the spirit, purport and objects of the Bill of Rights.[82] He opines that the spirit of the Bill of Rights refers to its true meaning and not a strict interpretation thereof, i.e. its substance and not its form.[83] This definition is similar to the dictum by Mogoeng CJ in *City of Tshwane Metropolitan Municipality v Afriforum and Another* (hereafter *Afriforum*).[84]

> Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped. We cannot emphasise enough, that form should never be allowed to triumph over substance.[85]

The purport can be regarded as what the Bill of Rights appears or means to be or do, and as the discussion above has shown, the purport of the Bill of Rights is the transformation of South African society in a more egalitarian direction.[86] The objects of the Bill of Rights question what the purpose thereof is, which Zitzke contends is found in Section 7(1) which states:

> This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

It must now be decided if the doctrine offends any of these principles. Klare and Davis suggest that the distributional and ideological consequences of rules of the common law must be brought to the forefront, so they can be investigated and 'as appropriate, the rules can be revised so as to aim for more egalitarian and solidaristic outcomes ...'.[87]

The aspect of the doctrine which might most probably offend these principles, is the result it creates. Allowing the wealthy and powerful to avoid paying tax by exploiting legal rules and technicalities, leads to less money going to the fiscus and may inhibit the state from delivering on its social obligations. This may offend the substantive vision of equality espoused by the Constitution which

82 Zitzke (n 34) 120.
83 Zitzke (n 34) 121.
84 2016 (6) SA 279 (CC).
85 *Afriforum* (n 84) para 18.
86 Zitzke (n 34) 121; Moseneke (n 15) 318; Klare (n 19) 150.
87 Davis (n 19) 449.

leans in favour of the transformative development within the field of contract law which expands egalitarianism, a more equal distribution of wealth and social solidarity.[88] Klare and Davis further contend that if a common law rule 'produces a constitutionally unacceptable distribution of basic, life-sustaining goods, the state, acting through the judiciary must intervene to ensure a constitutionally adequate distribution of the proponents of human welfare'.[89]

With regard to the egalitarian vision of the Constitution and transformative nature of the Bill of Rights, the doctrine can be said to offend the spirit, purport and objects of the Bill of Rights as it entrenches the unequal distribution of wealth.

3.4 How can the common law be amended?

The decision in *NWK* by the Supreme Court of Appeal forms the basis of a possible amendment of the doctrine. A broader discussion of this decision is needed to establish its context.

3.4.1 Tax avoidance and tax evasion

In *NWK* the court continuously referred to tax evasion, when it was never pleaded by SARS. Academics agree that the court erred in using the words tax evasion when it seems the court meant tax avoidance.[90] According to Krebs the importance in distinguishing between tax avoidance and evasion is the different consequences that attach to each.[91] Croome defines tax avoidance as the reduction or avoidance of a taxpayers' tax liability, using the provisions of tax legislation to the advantage of the taxpayer.[92] This practice, although legal, is deemed by some to be immoral and has been handled with contempt by the courts.[93] Schemes designed to avoid tax can be deemed to be impermissible and are curbed through the general and specific anti-avoidance provisions in the different tax statutes (for example the GAAR) or the application of the doctrine. Tax evasion is a criminal act and can be defined as the avoidance or reduction of tax by illegal means such as dishonesty or connivance and is curbed by provisions in

88 Moseneke (n 15) 318; Davis (n 19) 479.
89 Davis (n 19) 434.
90 Daniels (n 6) 22; Vorster (n 42 above) 85; B Ger 'Supreme Court of Appeal a-'maize'-s tax planners with watershed judgment.' (2011) 507 *De Rebus* 43 44.
91 M Krebs 'The substance over form doctrine in taxation: The application of the doctrine after the judgment in *Commissioner for the South African Revenue Service v NWK Ltd* 2011 (2) SA 67 (SCA).' Unpublished Master's dissertation, University of Pretoria, 2015 28.
92 B Croome *Tax Law: An Introduction* (2013) 487.
93 *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A) 715; see also Legwaila (2016) 28(1) *South African Mercantile Law Journal* 112 125, *Commissioner for Inland Revenue v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) 618.

the TAA.[94] It is important to note that the use of fraud or contrivance with the intent to evade tax is made illegal by section 235(1)(d) of the TAA.

For the purposes of this contribution, the researcher will accept that the use of the words tax evasion was indeed a mistake and the court meant tax avoidance.

3.4.2 The facts

The facts of *NWK* are not in their full complexity important for this research, a summarised version shall suffice;[95] a subsidiary of First National Bank lent NWK Ltd R96 million which was repayable in five years, interest on the loan is payable every six months and the capital amount repayable after the five years by the delivery of maize to First National Bank. This result was achieved by a series of self-cancelling and interlinked transactions which in turn enabled NWK to deduct the interest under section 11(a) of the Act on the amount of R96 million.[96] The issue before the court was whether the court should give effect to the elaborate arrangement and allow NWK to deduct the interest on the loan amount of R96 million, or if the intention as contended by the Commissioner - that this was in effect a loan for R50 million and the inflated amount of R96 million was only to allow NWK to deduct more interest - was the true substance of the transaction and should be given effect to by applying the doctrine.[97]

3.4.3 The decision of the Tax Court

The Tax Court, after setting out the detail of the arrangement, confirmed the legal position as understood before *NWK* i.e. that a taxpayer is free to arrange his affairs as to stay outside the applicable tax legislation as long as both parties intend to give effect to the arrangement according to its tenor.[98] The court went further and laid down a few important factors that are indicative of the nature of the true substance of the agreement between the parties:[99] The historical background to the transaction; the nature of the negotiations; the purpose the parties intended to achieve; abnormal or improbable features which mitigate against a genuine or normal commercial transaction and further that an arrangement that consists of different interrelated and interdependent transactions each one must be considered in the context of the others to determine their total

94 Croome (n 92) 488; TAA section 235.
95 *NWK* (n 2) para 1; Legwaila (n 93 above) 113.
96 *NWK* (n 2) para 1; Legwaila (n 93 above) 114.
97 *ITC 1833* (2008) 70 SATC 238 (hereafter '*NWK tax court*') para 16.
98 *NWK tax court* (n 97) para 1-13.
99 *NWK tax court* (n 97) para 30.

effect.[100] It is interesting to note that the economic substance, sense or purpose of the transaction is not mentioned.

The court, after evaluating all the above-mentioned requirements, and having due regard to the effort NWK and FNB put into calculating an accurate forward price for the maize that would serve as the hedge, concluded that the parties had the true intention to perform according to the terms as set out in the arrangement and the fact that the parties chose the most tax effective route did not negate their arrangement.[101] The transaction was not simulated, and the doctrine could not be applied by the court.

3.4.5 The decision of the Supreme Court of Appeal

The first issue dealt with by the court is the onus of proof.[102] The court, in contradiction with the tax court, decided that the onus rests on the taxpayer to prove that the agreement reflects the true intention of the parties and that the mere production of agreements do not 'prove that the parties genuinely intended them to have the effect they appear to have ...'.[103] How the court should then evaluate the evidence provided by the taxpayer to ascertain the true intention of the parties when the agreement seemed to be simulated, was the important question to be answered by the court.[104]

The court started the discussion on determining the real or simulated intention of the parties to an agreement by reiterating that the taxpayer is free to arrange his affairs as to stay outside the applicable tax statutes and secondly that the court should not be deceived by the form of a transaction but should give effect to the true substance thereof and finally that these two principles of our law are not in conflict.[105] After traversing a line of decisions by the courts on how the doctrine had been applied to cases of simulation, Lewis J quoted with approval the decision in *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* (hereafter *'Hippo'*),[106] where the court drew a distinction between the motive and purpose of a transaction on the one hand and the intention on the other.[107] The court in *Hippo* restated the position regarding the court's discretion to give effect to any agreement into a two-pronged test namely:

> Motive and purpose differ from intention. If the purpose of the parties is unlawful, immoral or against public policy, the transaction will be

100 As above.
101 *NWK tax court* (n 97) para 97.
102 *NWK* (n 2) para 40.
103 As above.
104 *NWK* (n 2) para 41.
105 *NWK* (n 2) para 42.
106 1992 (1) SA 867.
107 *Hippo* (n 106) para 19; *NWK* (n 2) para 50.

> ineffectual even if the intention is genuine. That is a principle of law. Conversely, if their intention ... is not genuine because the real purpose of the parties is something other than [their stated intention], their ostensible transaction will likewise be ineffectual. That is because the law disregards simulation. But where, as here, the purpose is legitimate and the intention is genuine, such intention, all other things being equal, will be implemented.[108]

It was from there that the court came to the conclusion that the test for simulation should not only be if the parties had in fact intended to give effect to the transaction according to its tenor but should include an examination of the Commercial sense or stated differently, the true substance and purpose of the transaction. The court used *Hippo* to develop the doctrine to include a test for the economic substance of the transaction i.e. a business-related purpose for structuring the transaction in a specific manner. The court also clearly excluded the evasion [avoidance] of tax or a peremptory law as legitimate purposes for structuring an agreement in a specific manner.[109] Using the new and developed doctrine, the court found the transaction to be simulated as it lacked commercial sense and gave effect to a loan of R50 million as contended by the Commissioner.

The developed doctrine now requires the court to juxtapose the form of a transaction with the legal substance and the economic substance thereof to determine if the transaction is simulated. The fact that the parties to a transaction intended to give effect to it according to its tenor, only creates valid rights and obligations if the way in which it is arranged has some commercial sense, or economic purpose. This proposed test would be applicable to cases of tax avoidance and when the doctrine is used in general to determine the legal implications of transactions and agreements and the sole aim of a transaction is to avoid the application of a peremptory law or legal rule.

The new test can, therefore, be summarised as follows:[110]

> [T]he test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms ... The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion [or avoidance] of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated ...

108 *Hippo* (n 106) 877C-E.
109 *NWK* (n 2) para 55.
110 As above.

3.5 The wider consequences of the proposed change on tax law

To establish the wider consequences of the development of the doctrine in line with *NWK,* the role the doctrine currently plays in the detection and prevention of tax avoidance the Commissioner deems impermissible must first be regarded.

Firstly, if a taxpayer enters into an arrangement and the form of the arrangement does not conform to the legal substance thereof, i.e. the parties to the arrangement do not intend to give effect to the arrangement according to its tenor, the Commissioner and the court can disregard the rights and obligations created by the parties and can give effect to the true substance of the transaction.[111] If a taxpayer, however, enters into an arrangement and the form of the arrangement coincides with the legal substance of the agreement, but the sole intention of the arrangement is the avoidance of tax, the first tool the Commissioner can use to attack the arrangement is the GAAR. If the requirements of the GAAR set out in section 80A-80L of the Act have been met, the Commissioner can disregard the actual rights and obligations the parties created and impose tax according to the provisions of the Act.[112] The Commissioner has no discretion in this regard and must comply with the prescripts of the Act.[113] If the agreement does not meet the requirements of the GAAR the Commissioner and the courts must impose tax according to the rights and obligations of the parties.[114]

However, the development of the doctrine in line with *NWK*, would give the Commissioner and the court the ability to disregard the rights and obligations created by parties to an arrangement, where the parties intend to give effect to the arrangement according to its tenor (its legal substance coincides with its form), if the only reason the transaction is arranged in a specific manner is to avoid tax and the requirements set out in the GAAR are not met.[115] The Commissioner or the court can then impose tax on a construction of the arrangement it deems has some commercial sense or substance.[116]

The first problem with this construction of the doctrine is that it could lead to discrimination by the Commissioner. According to Broomberg, this new rule laid down by the court in *NWK* hinges on the same criteria found in the GAAR and could lead to assessors using the GAAR on some taxpayers and the doctrine on others, which could lead to discrimination and make the GAAR obsolete as the GAAR is more

111 *Bosch SCA* (n 8) para 41.
112 Broomberg (n 42) 200.
113 As above.
114 As above.
115 As above.
116 Broomberg (n 42) 203.

onerous to prove.[117] The second problem this construction creates is the removal of the onus placed on the Commissioner in terms of the GAAR to prove some abnormal element in the arrangement, as set out in section 80A(a), (b) or (c).[118] The limitations placed on the Commissioner's power, in terms of the GAAR, are removed and by contending that there is an avoidance motive present in an arrangement, the Commissioner creates an irrebuttable presumption of simulation.[119]

The further problem is that this construction infringes on the separation of powers doctrine which is a fundamental part of the rule of law — as set out in section 1(1) of the Constitution.[120] Only the legislature can impose tax, and in applying the amended doctrine, the court can create artificial rights and obligations and impose a tax, the amount of which is determined by the court or the Commissioner.[121] This also undermines the legality principle and *pacta servanda sunt* as a taxpayer's contractual rights and obligation, even when they are part of a valid agreement, could be disregarded and parties' will be unsure on which contractual terms they will be taxed. This in turn will create legal uncertainty.

The effect on any development on tax laws should further be understood in the broader context of South African society. Poverty, corruption and inequality cannot be remedied exclusively by an ever-increasing burden on a few taxpayers, as the positive effects of the increased taxes collected are negated by these societal ills. The words of the Davis Tax Committee in their closing report that 'a tax system cannot be used to address all [society's] problems — this requires a coordinated whole of government approach in consultation with Business and Labour' should be borne in mind when engaging with tax laws, and the effect of any increase in the tax burden on a few individuals should be thoroughly researched and prudently undertaken by the relevant forum which, in most circumstances, would be Parliament.[122]

3.6 Concluding remarks on the process laid out in *Mighty Solutions*

In *Hugo* Kriegler J emphasised that equality is the central and organising principle of our constitutional democracy and informs the normative value system underlying the Constitution.[123] The

117 Broomberg (n 42) 202; Vorster (n 42) 83.
118 Vorster (n 42) 84.
119 Vorster (n 42) 84.
120 Broomberg (n 42) 199; see also *Bernstein v Bester* 1996 (2) SA 751 (CC).
121 Broomberg (n 42) 199; see also *Bernstein v Bester* 1996 (2) SA 751 (CC); the Constitution section 75 and 77.
122 Davis Tax Committee 'Closing Report' (2018) 15.
123 *Hugo* (n 13) para 7.

jurisprudence of the Constitutional Court supplemented by the writings of Klare and Davis, further obliges the courts to compare any legal rule with the spirit, purport and objects of the Bill of Rights, when the court in any way engages with a common law rule and if the rule is found to be inconsistent, develop that rule accordingly. This view is criticised by some writers, but as it encapsulates the jurisprudence of the Constitutional Court and given the dire need for the development of the common law in the field of taxation, the court in *NWK* and *Bosch SCA* was under a general obligation to compare the doctrine with the spirit, purport and objects of the Bill of Rights and if there existed a discrepancy, the doctrine should have been developed.

Using the position taken in *NWK* can, however, in the researcher's opinion, not form the basis of the development of the doctrine. Development of the doctrine in line with *NWK*, could lead to a dilution of the *pactu sunt servanda* principle and will create legal uncertainty as parties to an agreement will be unsure if effect will be given to their agreements. The development could also enable SARS to unfairly discriminate between taxpayers, as SARS could use different legal methods of attacking a taxpayer's agreements with either the GAAR or the developed doctrine. This development could also diminish the effectiveness of the GAAR and lead to SARS or the courts levying tax as they would be able to decide on what terms the taxpayer would have concluded an agreement, if it had been concluded on terms which have some economic substance. This would contravene the separation of powers doctrine and the rule of law as parliament is the only body with the necessary authority to raise taxes.

The reasoning of the court in *NWK* can, therefore, be the basis on which Parliament can amend the doctrine through statute in a manner that would create legal certainty and ensure the doctrine can be used in harmony with the GAAR and other specific anti-avoidance sections of the Act.[124]

4 Conclusion

The discussion on the development of the common law makes it apparent that there is no clear picture as to when it is appropriate to develop the common law and even if it is accepted that the courts stand under a general obligation to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights. There further exists very few indicators as to when it would be appropriate to develop the common law solely on the grounds of economic inequality and the redistribution of wealth.

124 See for example section 103 of the Act.

The decision in *NWK*, although not explicitly engaging with the obligation resting on the courts to develop the common law, comes to a conclusion which could, in the researcher's opinion, be construed as an attempt to develop the common law doctrine in line with the values underlying the Constitution. Any attempt to curb impermissible tax avoidance will contribute to a reduction in wealth inequality and further the constitutional vision of a truly egalitarian society.[125] This view is supported by the Davis Tax Committee as it opined:

> Given the disturbing levels of wealth inequality in South Africa, a taxation system that would ignore such disparities of wealth will lack the important requirement of legitimacy in the tax system.[126]

The doctrine applied in its current form does offend the spirit, purport and objects of the Bill of Rights as it entrenches the unequal division of wealth in South Africa and enables those with the necessary means to diminish their responsibility to pay tax. This must be weighed against the role the doctrine plays in economic activity and the wider consequences of the possible development of the doctrine on the law and society in general.

Having regard to the abovementioned the decision in *NWK* could not form the basis for developing the common law doctrine of substance over form in line with section 39(2) of the Constitution as the negative impact of this development on tax law, taxpayers' rights and the law of contract, together with the possible negative economic effects, outweigh the possible benefits of this development.

This contribution should however be seen as an attempt to infuse South Africa's tax jurisprudence with a Constitutional dimension and a contribution to the project of ensuring a fair, robust and effective tax system, which prioritises the alleviation of wealth inequality, which can make a substantial difference in ensuring the vision of a truly equal society is achieved.

125 L Harmse *South Africa's Gini coefficient: causes, consequences and possible responses*, unpublished Master's dissertation. University of Pretoria (2014) 28.

126 Davis Tax Committee 'Report on feasibility of a wealth tax in South Africa' (2018) 67.

A CONSTITUTIONAL DEMOCRACY SHOULD PROVIDE FOR THE LEGALISATION OF ORGAN TRADING

*by Bianca Murray**

1 Introduction

The choice before us is not between buying or not buying organs.[1] This is happening regardless of the law. The choice is whether transplant operations and the sale of organs will be regulated or not.'[2] It is in light of this statement that I propose a legalised system of organ trading. Desperate people will turn to the black market regardless of the law. If organ trading could be regulated, we can protect all parties involved and ensure that they get the benefit they deserve.[3]

A very important factor of this way of procuring organs is that it will curb the organ shortage. The waiting period for an organ transplant in South Africa is 5-11 years. Approximately 50% of people die while being on a waiting list for an organ transplant.[4] While there is such a dire need for organs, research has shown that only 0.2% of

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1 In this article organ refers to all the solid organs, which include the kidneys, lungs, liver, pancreas and heart.

2 M Slabbert & H Oosthuizen 'Establishing a market for Human organs in South Africa part 2: Shortcomings in legislation and the current system of organ procurement' (2007) *Obiter* at 323.

3 S Khoza 'The Human organ trade-the South African tragedy' (2009) *Forum* at 47.

4 Roche 'Living kidney donor education booklet'.

South Africans are organ donors.[5] Something must be done to motivate more people to become organ donors. While the need for organs grows daily, the black market is flourishing. As none of the organ procurement systems in other countries are successful enough to provide the need for organs, our only viable option might be to implement a payment system. When closely regulated, the system of organ trading can be an enormous success.

2 South Africa's system regarding organ procurement

2.1 The Constitution

The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) does not specifically make provision for organ donations or organ transplants. There are, however, certain rights contained in the Bill of Rights that can be interpreted in relation to organ transplants. Firstly, is the right to life which is set out in section 11 of the Constitution.[6] Venter suggests that the right to life does not merely refer to living, but also entails the right to a life worth living. It can be argued that patients on dialyses do not live a life worth living because of their diminished quality of life.[7] If more people have access to organs, fewer people will need dialysis and therefore fewer people's right to life will be infringed. The right to dignity is also applicable as it goes hand in hand with the right to life.[8] It can also be argued that people on dialysis do not live a dignified life because of their restrictions.

The next section that should be noted is section 12(2)(b) of the Constitution. This section sets out that everyone has the right to bodily and psychological integrity which includes the right to security in and control over their body.[9] Organ donations give effect to this right in the sense that one practices autonomy when making the choice to donate or not. I will, however, later in this article discuss why the full effect is not given to this right, where after I will set out how the implementation of organ trading will give effect to this right.

Section 27 of the Constitution provides everyone with the right to access to health care.[10] Section 27(2) places a duty on the state to

5 M Freedman 'Shocking: Less than 0.2% of SA are Organ Donors' 18 April 2017 https://www.health24.com/Medical/Heart/Heart-transplants/shocking-less-than-02-of-sa-are-organ-donors-20170418 (accessed 22 March 2018).
6 Section 11 the Constitution of the Republic of South Africa,1996.
7 B Venter 'A selection of constitutional perspective on human kidney sales' (2013) *Potchefstroom Electronic Law Journal* at 362.
8 Section 10 the Constitution (n 6).
9 Section 12(2)(b) the Constitution (n 6).
10 Section 27 the Constitution (n 6).

take legislative and other measures to give effect to this right, which lead to the enactment of the National Health Act.[11] This section will also be discussed in more depth later in this article when I constitutionally justify the legalisation or organ trading.

2.2 The National Health Act

In South Africa, we follow an 'opting-in' system regarding organ donations.[12] This means that people must indicate that they want to donate organs on a voluntary basis.[13] South Africa, the United Kingdom and the United States of America are some of the countries that follow the 'opting-in' system.[14] The donation is seen as 'the gift of life' and remuneration for the organ is strictly prohibited by legislation. In the past, organ and tissue donations were regulated by the Human Tissue Act,[15] this Act has, however, been repealed by the National Health Act. Chapter 8 of the National Health Act now regulates the use of organs, blood, gametes, blood products and tissue.[16]

Section 60 of the National Health Act is very clear regarding remuneration for the importation, acquisition or supply of tissue, blood, blood products or gametes.[17] Section 60(4) expressly states that payment for the above mentioned donations is prohibited, except for reasonable costs incurred to make such donation possible.[18] Section 60(5) states that the legal sanction for the infringement of section 60(4) is either a fine or imprisonment for up to 5 years or both. This penalty is because the Act regards it as an offence for a donor to receive a financial reward for such donation (except for reimbursing their reasonable costs) as well as the sale or trade in tissue, gametes, blood or blood products except as provided for in the Act.[19] The reasonable cost incurred includes the payment of the medical practitioner who carries out the procedure, as section 60(3) allows for the payment of a health care provider for the professional service rendered by him or her.[20]

To better understand the procedure regarding organ transplants in South Africa, a distinction must be drawn between living and deceased donors. It must also be noted that the kidney and a part of

11 Section 27(2) the Constitution (n 6).
12 M Slabbert 'Combat organ trafficking — reward the donor or regulate sales?' (2008) *Koers* at 77.
13 M Slabbert 'Establishing a market for Human organs in South Africa part 1: *a proposa*l' (2007) *Obiter* at 45.
14 Venter (n 7) 353.
15 Human Tissue Act 65 of 1983.
16 National Health Act 61 of 2003 (hereafter NHA).
17 NHA (n 16) sec 60.
18 NHA (n 16) sec 60(4).
19 NHA (n 16) sec 60(5).
20 NHA (n 16) section 60(3).

the liver lobe are the only organs that can be donated from a living donor.[21] According to section 55 of the National Health Act, living donor donations are made according to the will of the living person and the living donor must give written consent for the donation prior to the donation.[22] On the other hand, dead donor allocation will occur in accordance with what the deceased stipulated in his or her will or made clear orally in a statement in front of two competent witnesses.[23] Donations of human bodies and tissue of deceased persons may also be donated in terms of a written document signed by two competent witnesses. An intended donation must be stipulated in the will, document or statement, otherwise, it will render the donation null and void.[24]

When it is not clear what the deceased's stance was on the donation of human tissue or organs, consent can be given on behalf of the deceased. Section 62(2) of the National Health Act provides us with the persons who may consent on behalf of the deceased: the spouse, partner, major child, parent, guardian, major brother or major sister of that person, in the specific order mentioned, may donate the deceased's body.[25] When one of the aforementioned people cannot be located, the Director General has the right to donate the body and human tissue of the deceased. However, this may only occur if all the prescribed steps have been taken to locate the aforementioned persons.[26]

Donations from living persons are only allowed if they are related by blood to the patient in need of a transplant, or if the donor is the patient's spouse or partner. If this is not the case and the donor is not related or married to the patient in need of a transplant, a further procedure must be followed. An application must be made to the Department of Health, to get the written consent from the Minister for the transplant to take place.[27] The Minister's consent is also required for an organ to be transplanted in a person who is not a South African resident.[28] These stipulations have been made to try and curb the number of illegal transplants (or transplants in exchange for remuneration) that take place. It is easy to understand why a mother would want to donate a kidney to her sick child, but when it is a stranger wanting to donate, without any benefit to them whatsoever, a reasonable suspicion is raised.

21 M Slabbert, FD Mnyongani & N Goolam 'Law, religion and organ transplants' (2011) *Koers* at 262.
22 NHA (n 16) sec 55.
23 NHA (n 16) sec 62(1).
24 NHA (n 16) sec 62(1)(c).
25 NHA (n 16) sec 62(2).
26 NHA (n 16) sec 62(3).
27 Slabbert (n 12) 87.
28 NHA (n 16) section 61(3).

It is also noteworthy to distinguish between organ allocation in the public sector and the private sector. Netcare, the biggest private hospital group regarding transplants in South Africa, handles the process of organ donations. They have a specific procedure they follow when dealing with the allocation of organs. Firstly, the patient is diagnosed. This involves it becoming evident that the patient will need a transplant because of one of their organs not functioning properly anymore. The patient is then referred to a certain transplant unit where the patient will meet their transplant coordinator and discuss the way forward. The patient will only be accepted onto the transplant list after being assessed and it is established that the patient is healthy enough to be eligible for receiving a specific organ.[29] Organ allocation is regarded as less 'formal' in the public sector since the referrals are based on the doctor's opinion of the patient. Some of the things the doctor will consider include the location of the recipient, his health, he must have a prospect of living at least two more years after the transplant, he must be younger than 60 years, if diabetic younger than 50 years and he may not have certain illnesses such as HIV or hepatitis.[30] Section 65 of the Nation Health Act also provides for the revocation of the donation.[31] This is to protect the donor, should he change his mind.

2.3 Criticism

This system of organ procurement may seem nice on paper: It is regulated by legislation, there are certain procedures and guidelines that need to be followed, the donor is protected and best of all, the donations are made on a voluntary basis, so there seems to be no need to change it. This system is, however, a failing system.

It is relevant to refer to the statistics given in the introduction again. These statistics are already an indication that the current system is not working. The fact at hand is that the statistics clearly indicate a shortage of transplantable organs, but it cannot precisely indicate just how big of a problem we are facing. This is especially true regarding the shortage for kidneys. There is no national list with the number of people on dialysis, nor is there a national waiting list, therefore these statistics can only be used as an indication.[32] This raises a big concern, surely organ transplants and the number of people waiting for a transplant should be better regulated? Regardless of which system is being used to procure organs, the system should be better regulated.

29 M Slabbert 'One heart — two patients: Who gets the donor organ' (2009) *Stellenbosch Law Review* at 135.
30 Slabbert (n 29) 136.
31 NHA (n 16) sec 65.
32 Slabbert (n 13) 64.

The demand for organs needed for transplantation increases daily. The supply can simply not meet the demand.[33] Slabbert recognises the importance of finding a new system. She states that while countries are busy looking into new ways to motivate more people to become organ donors, the shortage of organs causes the black market to thrive.[34] I agree with this point of view, as it makes sense that when the demand for organs cannot be met desperate, terminally ill patients will start looking at alternative options such as the black market.

It can be argued that the legislation regulating the current system is inadequate. This brings me back to section 60(4) of the National Health Act. As mentioned above this section makes provision for the donor to be reimbursed for reasonable costs incurred, regarding the donation. What exactly includes 'reasonable costs'? Reasonable costs are not described in the National Health Act's regulations, nor is there any mention made of it in the definition section of the Act.[35] This also raises the question of who will determine if the fees paid was reasonable should an investigation rise? This leaves the door open for the price of the organ being included within the 'reasonable costs'.[36]

The current legislation does not give enough consideration to the individual's autonomy. Even if there is a clear indication that a person wants to be an organ donor, once he is deceased, his decision can easily be overruled by that of his family. There might be a sticker in his identification document indicating that he is a registered organ donor, which reflects his wish to donate, but if the family does not give their consent, his organs will not be donated.[37] Another issue regarding this is the fact that the health care providers are under no obligation to ask the family that the organs be donated.[38] It is a very sensitive topic to approach the family in their time of grief and it is understandable that it might be daunting for the practitioner to raise this topic with the family, but by simply ignoring it and making the decision not to ask the family about it, the chance is missed to potentially save the life of 7 more people. [39]

The current system does not promote equality. Section 9(1) of the Constitution states that everyone has the right to equal benefit and protection from the law.[40] Since there are not enough organs available to meet the demand, not everyone is getting equal benefit and protection from the law, this is thus an infringement of section

33 Slabbert (n 13) 45.
34 Slabbert (n 12) 75.
35 NHA (n 16) sec 1.
36 Slabbert (n 12) 88.
37 Slabbert (n 2) 311.
38 Slabbert (n 2) 312.
39 Organ Donor Fund https://www.odf.org.za/ (accessed 4 April 2018).
40 Section 9 the Constitution of (n 6).

9(1) of the Constitution.[41] The way the current system of organ allocation works infringes the equality principle: One organ goes to the private sector and one goes to the public sector. *Prima facie* this seems fair, however, only 27.7% of the population make use of the private sector. The allocation of organs between the private and public sector is thus greatly uneven and not in line with the principle of equality.[42] Another indication of the unequal distribution of resources is the fact that only 8 out of the 18 hospitals in South Africa, that perform transplants, are state hospitals and the remaining 10 are private hospitals, although there are more patients that make use of state hospitals.[43]

3 The different organ procurement systems worldwide:

3.1 Opting-out

This system is also known as presumed consent and is the opposite of the opting-in system. In this system, everyone is regarded as an organ donor upon death unless an individual chooses to 'opt-out' by indicating that he or she does not wish to be an organ donor.[44] This system of organ procurement is used in countries such as France and Belgium which entails a National register to be kept with the names of all the people who do not want to be organ donors. This list is readily available to all hospital staff to check once a person is declared brain dead and thus a suitable donor.[45]

The problem with this presumed consent system is just that. It is presumed. This might be seen in a negative light with the public as it creates the idea that the state has the right to take and distribute our organs as they seem fit. Once the public loses confidence in the transplantation system it will lead to a decrease of available organs.[46] There are some ethical concerns regarding this system, especially because the consent is presumed. Administrative issues or flaws in the system can lead to people's autonomy not being respected. The following example can be used to illustrate this point: If South Africa changes its organ procurement system to that of opting out, to make

41 D Labuschagne & PA Carstens 'The Constitutional influence on organ transplants with specific reference to organ procurement' (2014) *Potchefstroom Electronic Law Journal* at 218.
42 Labuschagne & Carstens (n 41) 219.
43 K Hawkins 'Organ donation in South Africa: Opt-in, opt-out or mandated choice?' LLM thesis, University of Witwatersrand, 2017 at 26.
44 Slabbert (n 13) 45.
45 Slabbert (n 13) 46.
46 Hawkins (n 43) 28.

the transition will take time, this time gap will lead to people's organs being removed without them having 'opted-out' yet.

To change the system will require that everyone must understand the system and know of their right to opt-out. Access to information is thus an imperative part of this system. This is not a viable option in South Africa as the diversity in language, the limitation on literacy and barriers regarding access to information makes it nearly impossible to ensure that informed consent is achieved.[47] This system will also lead to inequality as the poor and uneducated will have a greater chance of not having their autonomy respected than that of the educated, who will be aware of their option to opt out.[48]

3.2 Required request

This system is also known as routine enquiry and entails that patients are asked to consider donating their organs once admitted to hospital. The hospital staff consults with the patient or his next- of- kin and asks them to consider donating their organs should they be near death or already deceased. It is merely a request to consider and the patient or next-of-kin is under no obligation to give an answer.[49]

Slabbert notes that to change a system of organ procurement to that of required request seems futile as none of the countries using this system have sufficient organs for transplantation.[50] This system will also put more strain on the national health budget as resources such as national databases and trained personnel will be required. Not everyone dies in a hospital or is even admitted to hospital in their lifetime, not enough citizens will be reached to supply in the need for organs.[51]

3.3 Mandated consent

This system makes use of a platform in which it requires citizens to make a choice regarding organ donations. There will be a section regarding organ donations on the paperwork when dealing with various government-run procedures such as applying for a driver's licence or doing a tax return. It gives people 3 options: Organ donor, non-organ donor or family decision upon death.[52] This system makes

47 Hawkins (n 43) 30.
48 Slabbert (n 13) 47.
49 EJ Fourie 'An analysis of the doctrine of presumed consent and the principles of required response and required request in organ procurement' LLM thesis, University of Pretoria, 2005 at 100.
50 Slabbert (n 13) 45.
51 D Labuschagne 'An analysis of organ transplantation in South Africa with specific reference to organ procurement' LLM thesis, University of Pretoria, 2013 at 57.
52 Hawkins (n 43) 2.

people more aware of organ donations as it gets people talking about donations.

Strict regulations would have to be put in place for this system to work. It should make provision for people to be able to later change their mind to ensure that their autonomy is respected. Without this understanding, informed consent cannot be given.[53] The question of equality will again be raised with this type of system. Many of the poor, uneducated people would not partake in government procedures such as tax returns or applying for a driver's license. They would be excluded and thus be denied the chance to be an organ donor. This is also not a viable option for South Africa, not only because of the point just raised, but also because of the high numbers of illiteracy. Many people cannot read or might not understand the procedure as explained on paper, it would be better for someone to explain it to them in person.[54]

It has been argued that the term mandated consent is confusing as it seems like consent is forced, where it is rather that the choice is mandated but giving consent is not. This can also lead people to lose trust in transplant systems, discouraging them to choose to be a donor. Mandated choice might be a more suitable term for this system.[55]

3.4 Xeno-transplantation

Xeno-transplantation refers to a system where animal organs are procured to be transplanted into human bodies. Medical research is inadequate for this option to be used as a procurement system.[56] It must also be noted that South Africa is a third world country which results in the fact that it would take much longer for us to ascertain the resources to reach a point where this is a possibility for a procurement system.

3.5 Organ donations by prisoners

Until as recent as 2013 this method of organ procurement was used in China and has been a very controversial method for the procurement of organs.[57] Prisoners' organs are procured in one of two ways: Either by making a deal with the prisoner, his organs in exchange for a decrease in his prison sentence or by harvesting the deceased

53 Hawkins (n 43) 35.
54 Hawkins (n 43) 38.
55 Hawkins (n 43) 2.
56 Slabbert (n 13) 48.
57 Labuschagne (n 51) 65.

prisoners' organs before the bodies are released to family members.[58] It is understandable why this system has provoked controversy.

One of the arguments against this system is that it is exclusive. Only the prisoners get the option of having a reward for donating their organs (reduced sentence) while other people who also make the choice to donate their organs get no reward.[59] I agree with this argument as it seems very unfair that *bona fide* people get no reward for their goodwill, while prisoners are rewarded for their choice. If a certain system of organ procurement is put in place it should apply equally to all people.

This kind of system will also be very difficult to regulate. If the prisoner gets a lesser sentence because of the agreement that he will become a cadaveric donor, and he then at a later stage decides not to donate or his organs are not fit for donation, the prisoner will then have gotten a lesser sentence in exchange for nothing.[60] There is not a simple solution to this problem. One cannot simply say that they will not be allowed to change their mind at a later stage. Losing the right to revoke their decision is taking away their freedom of choice and bodily integrity. This system cannot be constitutionally justified.

3.6 The sale of organs

Iran is currently the only country in the world where it is legal to sell one's organs in return for financial remuneration. With this system in place, Iran has solved their shortage of transplantable kidneys.[61] The matter in which it is regulated in Iran is as follows: There are no organ brokers, the organ transplant system is government funded and the government pays a fixed price for the organs received.[62] This is a way to prevent exploitation from taking place. If there is no middleman charging people an exorbitant price for organs, with only a regulated fixed price in place, the entire system becomes more fair.

A non-profit government organisation registers buyers and sellers and then puts these sellers into contact with the patients. As far as the government is concerned, organs are not allowed to be sold privately. This is something that must be regulated very carefully otherwise exploitation will take place. The organ waiting list has been virtually eliminated, there is still, however, a waiting period of roughly one year before the procedure takes place.[63] The waiting

58 Labuschagne (n 51) 66.
59 Labuschagne (n 51) 67.
60 Labuschagne (n 51) 65.
61 S Fry-Revere *The kidney sellers: A journey of discovery in Iran* (2014) 204.
62 Labuschagne (n 51 above) 62.
63 Health24 'The dark world of internet kidney trafficking' https://www.health24.com/Medical/Kidney-and-bladder/News/The-dark-world-of-internet-kidney- trafficking (accessed 3 January 2018).

period is mostly due to ensure that everything goes well with the procedure. The buyers and sellers go for medical and psychological screening. Doctors in Iran have performed more than 30 000 kidney transplants in this way since 1993. An organ is usually set for a fixed price of 4600 American Dollars.[64]

4 Arguments for the legalisation of organ trading

4.1 It will decrease the organ shortage

The fact that Iran basically does not have a waiting list for organs anymore is already an indication of my point that this system will decrease the organ shortage.[65] If we look at other countries in the world, regardless of the procurement system they use, their supply cannot match the demand for organs.

To add a financial reward to the donation could encourage more people to become organ donors,[66] which in return will decrease the shortage. Without any financial reward, people are not jumping at the chance to become living organ donors. It is a painful procedure that involves a lot of administration, the donor will have to take time off of work and most importantly, the costs are high. When you are the recipient, and lucky enough to be a member of a medical aid, the aid will pay for the operation and your stay in hospital. However, the medical aid will not provide for the costs incurred by the donor, such as the donor's hospital stay, medical expenses, traveling expenses and medication.[67]

In today's capitalist society where people are driven by greed and what they can take rather than what they can give, in my opinion, almost no person will go through the above for an absolute stranger without a reward. Yes, there is a reward in the form of the satisfaction you get from knowing you helped save a person's life, but sadly, in the world we live in, that simply will not be enough. More people might be willing to be organ donors after they have become deceased, as this will eliminate the above-mentioned burden to them. However, the number of living donors must be increased to combat the shortage of organs.[68]

There are several benefits when using live organ donors instead of cadaveric donors. Firstly, better planning can be done, a time can be discussed for the procedure that fits both the donor and recipient's

64 Labuschagne (n 51 above) 62.
65 A Haffejee 'Commerce in organs — an ethical dilemma' (2003) *South African Medical Journal* at 845.
66 Slabbert (n 15) 263.
67 Slabbert (n 15) 272.
68 Slabbert (n 23) 137.

schedules best. There is more time to prepare for the procedure, which can play an essential part in the safety and success of the transplant. More time can be taken to perform medical and psychological screening on the donor, which can help detect any illnesses in the donor.[69] Comparisons between the tissue of the donor and recipient tissue can also be done more precisely, which will decrease the chances of rejection after the transplant has taken place.

4.2 It will combat organ trafficking

If there is a demand for organs which cannot be met by our current system, there will be a black market.[70] Desperate patients all over the world turn to the black market to buy organs, while people in desperate financial situations line up to provide these organs, at a price. People are concerned that the legalisation of organ trading will be exploitive, but what is currently taking place on the black market is exploitive. People that are in desperate financial need, will go as far as to sell their kidneys for only 1000 American Dollars, while the 'middleman' or organ broker will make all the profit. There is no regulation so there is not even a guarantee that they will get their money or that the operation will be safe.[71]

A few years ago, a huge scandal was unveiled that took place in South Africa. It was revealed that between the years 2001 and 2003, 109 illegal kidney transplants took place at the St Augustine's Hospital in Durban. 5 of these illegal transplants were conducted by removing kidneys from minors. The St Augustine Hospital forms part of the Netcare group, the biggest private hospital group in charge of organ transplants in South Africa. At first, it was an Israeli organ broker syndicate that brought Israelis, who are willing to buy organs, to South Africa. This syndicate initially bought the organs from other Israelis for 20 000 American Dollars on average, after which the recipient had paid the syndicate an average of 120 000 American Dollars. The syndicate then moved on to sellers from Romania and Brazil after realising that they would sell their kidneys for far less and paid these people only on average about 6000 American Dollars. Hospital staff and doctors at this hospital were involved in the scandal which lead to the Netcare group, having to as an admission of guilt, pay a fine of nearly R4 million because of their involvement. According to one of the surgeons prosecuted, the illegal operations that took place were

69 Slabbert (n 23) 137.
70 Haffejee (n 59) 845.
71 Health24 'The dark world of internet kidney trafficking' https://www.health24.com/Medical/Kidney-and-bladder/News/The-dark-world-of-internet-kidney- trafficking-20150225 (accessed 3 January 2018).

only a small part of a further 220 illegal kidney transplants that took place countrywide.[72]

If organ trading is legalised it will combat organ trafficking. Once you have a strictly regulated market, it will cut out middlemen whose sole purpose is to make a profit.[73] If you take out the middlemen and the main agenda is not profit anymore but saving lives and helping people in need of money, a different picture is painted. If there is no middleman and the demand is not so high anymore, because of an increase in the supply, the organs will not be sold at r unaffordable prices anymore. If there is not so much money at stake, the temptation to traffic people for their organs become less. If a syndicate knows he can get 120 000 American Dollars or even more on the black market for an organ, people will be trafficked, but if organs become freely available at affordable prices, there will be no need for a black market.[74] A person who needs an organ would rather pay a fixed, government regulated price, which they know will be a well-planned and safe procedure, rather than turn to the black market for an overpriced organ with absolutely no protection or guarantees. Organ trafficking takes place because of the existence of a black market. A black market only exists because organ trading is illegal.

4.3 It is fair-All parties will be rewarded

With the current system in place, only the medical staff and the recipient is rewarded. The medical staff that is involved with all the procedures leading up to and during the transplant is remunerated for their services, as they should be, and the recipient receives an organ, which is a wonderful second chance at life. Why not give the donor a reward too since they make a big sacrifice and are, after all, a significant part of the process?

The National Health Act already provides for the reimbursement of reasonable costs incurred by the donor, we might just as well go a step further and reward them for their choice.[75] All the parties will benefit and be protected in a regulated environment.[76] When the sale of organs is not regulated, as they aren't when being sold on the black market, it is a very dangerous situation. The recipient has no guarantee that the correct precautionary measures have been taken before the transplant or if a safe, matched organ is being used. There might be rejection as soon as the transplant is completed and the

72 Health24 'The dark world of internet kidney trafficking' https://www.health24.com/Medical/Kidney-and-bladder/News/The-dark-world-of-internet-kidney- trafficking-20150225 (accessed 3 January 2018).
73 Khoza (n 4) 47.
74 A kidney that was auctioned on eBay in 1999 hit the cost of $5.7 million before the sale was stopped.
75 Slabbert (n 7) 91.
76 Slabbert (n 15) 271.

people responsible will be gone with the recipient's money. It is also just as risky for the organ seller, as he also has no guarantees and might never see the money he was promised. It might be easy to say they should simply not turn to the black market for help, but when people are in such a desperate situation it seems like the solution. If people are going to turn to the black market, why not bring the system in place? At least all parties involved will be protected and get the benefit they need.[77]

4.4 It can be constitutionally justified

Section 2 of the Constitution states that the Constitution is supreme and any law inconsistent with the Constitution is invalid.[78] We must thus test whether organ trading is in line with the Constitution and can be constitutionally justified.

We have already determined that the current system is not in line with the equality clause, as set out in section 9 of the Constitution. A concern raised by many is that the legalisation of organ trading would be unequal because of the big division between rich and poor.[79] Slabbert believes that the ability to pay should never be a criterion for whether a person should have access to an organ or not. She states that access to organs should be made more equal even if that involves more state involvement.[80] The implementation of the organ trading will require exactly that, more state involvement. The state will be responsible for the payment of organs, which poor people cannot afford, while medical aids will be responsible for the payment of organs for its members. Later in this article, I will discuss in detail how this system should be implemented to be in line with equality. Currently, there is not enough organs available and this causes inequality. If there become more organs available, more people will have access to these organs which will promote equality.

The right to human dignity and the right to life are complementary, they go hand-in-hand as these two rights should be valued above all other rights in the Constitution.[81] Once a person is in a situation of poor health it decreases their human dignity and right to life.[82] The right to life includes the full enjoyment of life and people who are sick and on dialysis are not living a full, dignified life because of their restrictions.[83] The right to life and dignity of people who are in need of a transplant is being infringed. The ideal solution

77 Haffejee (n 59) 845.
78 Section 2 the Constitution (n 6).
79 http://www.debate.org/opinions/should-the-sale-of-human-organs-be-legal (accessed 23 February 2018).
80 Slabbert (n 23) 129.
81 Labuschagne and Carstens (n 36) 219.
82 Venter (n 9) 368.
83 Venter (n 9) 362.

for them is to get a transplant and the legalisation of organ trading can provide for this. If more organs are available, more people will have access to these organs and more lives will be saved which is in line with the promotion of life.[84]

Section 12(2)(b) of the Constitution reads: 'Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.'[85] The control over one's body implies that we should have a say in what happens to our body and have the choice of what we want to do with our bodies. It is this very argument that allows women to legally terminate their pregnancies.[86] Venter states that if one can end a life because of this right in the Constitution, then surely one should be able to save a life because of the same right.[87] The legalisation of organ trading is in line with respecting the autonomy of people; it does not compel them to do anything while still giving them the option.[88] It provides freedom of choice over our bodies. Allowing the sale of organs will be a recognition of people's rights as set out by section 12(2)(b) of the Constitution.[89]

Another important section of the Constitution to look at is section 27 as it provides for health care. Section 27(1)(a) provides that everyone has the right to access to health care.[90] Two hospitals in Gauteng were willing to provide statistics surrounding their dialysis units. At these two hospitals alone, they show away approximately 500 patients each on a monthly basis. That is a 1000 people who go home every month without the urgent medical care they need.[91] These people do not have access to health care, making it a direct infringement of their constitutional right. Section 27(2) further imposes a duty on the state to take reasonable legislative measures, within its available resources, to give effect to the rights set out by section 27(1).[92] This section of the Constitution was dealt with in detail in the case of *Soobramoney v Minister of Health,* KwaZulu-Natal.[93]

The *Soobramoney* case dealt with a person who needed a kidney transplant and who was on dialysis at a private hospital. His funds,

84 Slabbert (n 15) 263.
85 Section 12 the Constitution (n 6).
86 *Christian Lawyers Association of South Africa v Minister of Health* 1998 4 SA 1113 (T) par 32.
87 Venter (n 9) 375.
88 Slabbert (n 7) 94.
89 Slabbert (n 8) 55.
90 Section 27 the Constitution (n 6).
91 Clairwyn van der Merwe 'SA's shortage of organs for transplant affects thousands' 3 August 2017 https://www.unisa.ac.za/sites/corporate/default/Research-&-Innovation/News-&-events/Articles/SA%27s-shortage-of-organs-for-transplant-affects-thousands (Accessed 4 April 2018).
92 Section 27(1) the Constitution (n 6).
93 *Soobramoney v Minister of Health,* KwaZulu-Natal 1997 12 BCLR 1696 (CC) par 45.

however, ran out and he had to depend on public health care. The state hospital, however, showed him away as he did not meet the criteria to receive renal dialysis. Mr Soobramoney was 41 years old and was also suffering from heart disease, vascular disease and was a diabetic. Mr Soobramoney's health issues meant that he was not eligible for a transplant and the hospital only provided dialysis for patients who were eligible for a transplant, because of the shortage of dialysis machines. He made an urgent application, in terms of his right to life[94] and his right to receive emergency treatment,[95] to a local division of the High Court for an order directing the Addington Hospital to provide him with ongoing dialysis and interdicting the respondent from refusing him admission to the renal unit of the hospital. The application was dismissed. The court held that section 27(3) is not applicable as his case was not one of emergency, but that his condition was ongoing. Mr Soobramoney could also not rely on his right entrenched in section 27(1)(a) of the Constitution as access to health care should only be provided within the 'available resources' of the state. As there was a shortage of dialysis machines in the state hospital, it was not in the state's available resources to provide the treatment.[96]

Venter asks the question, that when a resource has been limited for a number of years, does it not impose a duty on the state to find an alternative that could relieve the need?[97] This is what section 27(2) does. Many people are currently not getting the dialysis they need, their access to health is thus infringed upon. This results in the state having to take reasonable legislative measures, within its available resources, to give effect to the rights set out by section 27(1). Some might argue that the legislative measures involving the legalisation of organ trading is not possible as it is not within the available resources of the State. This is, however, not a valid argument as the legalisation of organ trading will be more cost effective to the government. At this stage, the government must pay for the dialysis of state patients, which is set at approximately R200 000 per annum, per patient.[98] It would make more sense financially to rather pay a once-off amount for an organ transplant at a fixed, regulated price.

94 Section 11 the Constitution (n 6).
95 Section 27(3) the Constitution (n 6).
96 *Soobramoney* (n 93) par 53.
97 Venter (n 9) 388.
98 Venter (n 9) 362.

5 Addressing the arguments against the legalisation of organ trading

5.1 Selling organs is unethical

Friedman and Friedman responded to this argument by asking 'just what is so ethically wrong?' They compare it to the selling of ova and sperm, transactions which are legal in the United States, and ask why it is worse to sell one's organs. They raise the point, that in fact, it should be more ethically wrong to sell ova and sperm as these cells can create new life.[99]

There is also an argument that it is unethical because people will put themselves through a risky operation just because of their financial situation. A study done in the United States of America showed that the risks for a living donor are slight, as only 0,03 percent of kidney donors died in a four-year cycle after the donation.[100] This can be compared to the same amount of risk as driving a car for 16 miles every day.[101] The same medical tests and procedures will still have to be followed to ensure the safety of both the donor and the recipient, the fact that remuneration is given for the organ has nothing to do with the risk involved in the operation.[102]

Some are also against the idea of selling one's organs because it is irreversible if they regret their decision once the transplant has been completed, there is nothing that can be done. This is again, why I emphasise how important it is to establish a well-regulated market. Some guidelines can be put in place to prevent this from taking place, such as setting a certain time as a 'cooling-off' period between the time the person decides to sell their organs and the actual transplant taking place. An age restriction should also be imposed, for instance, no-one under the age of 25 can sell their organs.[103]

5.2 Body parts cannot be commodified

The definition of a thing in a South African law context is as follows: 'It is a corporeal object that is external to persons and which is, as an independent entity, subject to juridical control by a legal subject, to whom it is useful and of value.'[104] Specific reference must be made

99 Slabbert 'Ethics, justice and the sale of kidneys for transplantation purposes' (2010) *Potchefstroom Electronic Law Journal* at 99.
100 Slabbert (n 93) 94.
101 Slabbert (n 7) 57.
102 Slabbert (n 7) 93.
103 Slabbert (n 7) 58.
104 Mostert H & Pope A (eds) *The principles of the law of property in South Africa* 2010 at 235.

to 'external to persons' which indicates that organs are not regarded as things and can therefore not be sold as it is a thing incapable of being owned. A human is a subject who holds rights but cannot be the object of a right.[105]

If no one owns our body, who has a say in what happens to our bodies? It can be argued that the deceased's next-of-kin has property rights over the body since they can decide what happens to our organs after death. We do, however, have property rights in our bodies, since we have the choice to terminate a pregnancy as well as the fact that one can only consent to something being donated if you are the legal owner thereof.[106] We can also stipulate in our will if we wish to be cremated, this is also exercising rights over our bodies. This indicates that the current position in law is wrong and the law should be amended to provide for property rights in our bodies and that body parts should be provided for in the definition of a thing. A thing was defined in a South African law context before the possibility of trading one's organs, it was not foreseeable that medical science would advance to this point where it is possible.[107]

Kant, who is a philosopher, stated that if you buy and sell organs you are giving human beings a market value, thus treating them as objects which is an infringement to their human dignity.[108] This is, however, missing a crucial point, body parts are already being commodified by the existence of a black market, where desperate people are extorted into selling their organs at low prices, because of their dire situations. It is our bodies, we should have property rights over it and exercise control. Our body is our property, we may treat it as an object if we please to do so. The infringement of dignity takes place when we treat other people's bodies as objects.[109] By allowing the sale of organs, you are simply providing them with the choice to exercise personal autonomy.

5.3 It will be exploitive

There is already exploitation taking place with the current system, especially as the black market is thriving, feeding off of the vulnerability of the poor. To regulate the sale of organs might do the opposite of causing exploitation and reduce the current exploitation taking place.[110] If people are going to turn to the black market because the current system is failing them, why not regulate the

105 Slabbert (n 7) 53.
106 Slabbert (n 7) 54.
107 Slabbert '"This is my kidney, I can do what I want with it" — property rights and ownership of human organs' (2009) *Obiter* at 517.
108 Slabbert (n 7) 58.
109 Slabbert (n 7) 59.
110 Slabbert (n 8) 91.

market in a way that all parties are protected?[111] In this manner, all the parties will benefit, not as in the current system where the donor does not receive anything. To expect the donor to go through all the trouble, costs and pain of a transplant without allowing remuneration is exploiting the donor.[112] In the next chapter, I will discuss in detail how this system should be implemented, to avoid exploitation, benefit all parties and promote equality.

6 Recommendations

6.1 Differences from the Iran system

As discussed earlier, it is legal to trade organs in Iran. I would suggest a very similar system with some differences. I agree that there should not be any organ brokers, no private organs can be sold and that the transplant system should be government funded. In Iran, however, a non-profit organisation registers buyers and sellers and then puts them in contact with each other. I recommend that this is implemented differently in South Africa. The patient and the donor still have a right to privacy and their confidentiality should be respected. This will also ensure that there is not more money paid under the table between the parties. If the parties do not know each other and work independently with the established government body, they will have to abide by the fixed price, as regulated by legislation.

This brings me to my next point; a non-profit organ procurement organisation will have to be established. They will oversee registering all the buyers and sellers and will be the only organisation in South Africa that regulates the buying and selling of organs. It will be much easier to investigate the conduct of one organisation than to keep track of different, independent organisations.

6.2 The amendment of legislation

Section 60 of the National Health Act should be repealed. As mentioned in the previous chapter, the definition of a thing in the property law context will have to be amended. New legislation should be enacted to provide for the trade in organs and how it should be regulated. This legislation should also determine a fixed price for organs, which should be amended annually in accordance with inflation. Another very important aspect is that a national donor list, as well as a national waiting list, should be created. These lists should also contain the medical information of the parties to ensure that

111 Khoza (n 4) 47.
112 A Garwood-Gowers '*Living donor organ transplantation: Key legal and ethical issues*' (1999) 192.

quicker matches can be made. This is an imperative part of making sure that this system is regulated carefully.

6.3 How the system will work in regards with living donors

All prospective buyers and sellers should register at the organ's procurement organisation. There should be various offices of this organisation nationwide to provide for equal access. The organisation should send the person for medical and psychological screening. The process will be explained in detail to both the buyer and seller to ensure informed consent can be given. Immunological tests will then be performed to match organs of sellers and recipients. Once there is a match, the organisation will inform the buyers and seller of the match, without making clear the identity of either party. The buyer will then pay the fixed amount over to the organisation. This money will stay in a trust account until the operation has been completed.

Once the operation is completed, the money will be paid into the account of the seller. The seller gets the full amount of money regardless of whether the buyer's body receives or rejects the organ. If the buyer experiences rejection after the transplant and the doctors cannot reverse it, he, unfortunately, will not receive the money back. The risk of buying the organ is that of the buyer. This is something that should be explained to the buyer before the procedure. There should be a 'cooling-off' period of 6 months between the date the sale is concluded and the date on which the actual transplant takes place.[113] This is to ensure that both parties have enough time to change their mind about the procedure, should they want to.

6.4 How the system will work with deceased donors

It seems the most popular option to regulate these sales is by means of a future contract. The contract will have to fulfil all the normal contractual requirements and will be concluded while the seller is still alive. The contract will be subject to a suspensive condition where the contract will only be enforceable once the seller is deceased. The money will then form part of the deceased's estate.[114] This will also be controlled by the organ procurement organisation as the contract will be concluded between the seller and the organisation. While the seller is still alive he will also be accepted to go for medical and psychological screening. There will also have to be a provision in the contract stating that if a person commits suicide they are automatically disqualified from the program and the contract

113 Slabbert (n 7) 58.
114 Slabbert (n 8) 50.

becomes void. This is to prevent people from committing suicide with the intention to sell their organs to provide for their family. Even with this provision, which will disqualify some people from selling their organs, I believe this system will still be successful in providing enough transplantable organs.

7 Conclusion

The purpose of this article was to determine whether the implementation of organ trading as a procurement system would be a viable option for South Africa. I critically analysed our current system and established that it is a failing system. Thereafter, I considered different procurement systems and analysed whether they can successfully be applied in South Africa. I considered all the aspects, positive and negative, surrounding the legalisation of organ trading. After all my considerations I conclude that the legalisation of organ trading is not only the most viable option for South Africa but also our only hope in procuring enough organs.

THE COST ASPECT OF MEDICAL EXPERT WITNESSES AND THE POSSIBLE INTRODUCTION OF A MEDICAL EXPERT WITNESS PANEL IN SOUTH AFRICA

*by Emma Tratschler**

1 Introduction

Expert witnesses are often crucial when it comes to court cases. They can possibly be the difference between winning and losing a case. However, expert witnesses are not readily available to every person who wishes to use them. In order to make use of an expert witness, one has to pay the expert an amount set out in the Government Gazette[1] and the Labour Relations Act.[2]

However, what happens when you need an expert witness, but you cannot afford one? Lawyers are required to do a certain number of hours *pro bono* work per calendar year, the number of which is set out in the Attorneys Act.[3] Should medical professionals also be required to work *pro bono* a certain number of hours a year to be used as expert witnesses?

* Final year LLB student at the University of Pretoria. This article is underscored by the importance of expect witnesses on court cases but also the realisation that expert witnesses are often beyond the means of those who need them. An analogy is drawn between the *pro bono* work that legal practitioners must do and the idea that medical practitioners can serve as expert witnesses as part of their *pro bono* work. This article will critically evaluate whether medical practitioners should be required to give themselves a certain number of *pro bono* hours to serve as expert witnesses.

1 South Africa (2014) Labour Relations Amendment Act. (Proclamation No. R. 87, 2014) *Government Gazette* 10336: 594, December 19, Regulation No. 38317.

2 Labour Relations Act 66 of 1995.

3 Attorneys Act 53 of 1979.

The implementation of these *pro bono* hours would help inadequately resourced litigants to utilise expert witnesses and enable them to fully utilise the allowance of witnesses in the South African legal system.

Expert witnesses are often detrimental to the legal process as they have no legal knowledge and no idea how a court functions. Often expert witnesses, instead of providing information to the court as a whole, provide testimony that is aimed at helping the party who employed them. Considering the judge in many matters is not learned on the matter at hand, this one-sided testimony can be harmful to the case. A multitude of sources will be examined in order to assist in putting forward the idea of a panel of expert witnesses, this will include an analysis of the so-called 'hired gun phenomenon' as well as international sources which may pave the way for South Africa to follow suit.

When looking at the cost of medical expert witnesses and the question of whether, like attorneys, medical professionals should be required to give of themselves a certain number of hours *pro bono* per year to be used as expert witnesses, I will critically analyse the cost aspect of expert witnesses and weigh it up against the need for expert witnesses for those who cannot afford one.

2 An examination into whether the costs of medical expert witnesses negatively affect the cases of those who cannot afford to hire one

2.1 Costs

Expert witnesses, although often extremely useful, are not free. The costs of hiring an expert witness are set out in the Government Gazette pursuant to the Labour Relations Act, Regulations of 1995. The witness fee is R300 per day as well as reasonable travelling costs that may be involved.[4]

There are other sources that set out the costs, specifically for witnesses in civil and criminal cases, as well as for psychiatrists, and clinical psychologists. The latter two categories are of particular importance as they relate to medical professionals.

The guideline divides the fees into subsistence allowance, transport and travelling expenses and income forfeited. According to this guideline on witness fees payable in civil cases, the subsistence

4 *Government Gazette* (n 1) 3.

amount includes any expenses if the witness needs to hire accommodation for the night, as well as R50, or any expenses that were reasonably incurred for meals. It goes on to say that the above allowances are payable to the witness for the period that the witness is absent from their home, to attend court. The travelling expenses of a witness in a civil case are as follows: A witness may use private transport, in which case the expenses will be 92c per km in case of a motorcycle; or R1,30 per km in case of a motor vehicle, calculated along the shortest route.[5] In the case of a witness making use of public transport, the travelling expenses are 'an amount equal to the fare for the least expensive transport along the shortest route'.[6] Lastly, the income forfeited fees the guideline provides as follows: [7]

> On satisfactory proof having been produced that a witness has forfeited income as a result of his/her attendance of a civil case, he/ she is entitled to an allowance equal to the actual amount of income so forfeited, to a maximum of R1 500 per day.

The above indicates the fees in respect of witnesses in civil cases.

The fees payable for witnesses in criminal cases differ from the above. They too are set out in the guideline and they are as follows: The subsistence amount includes any expenses if the witness needs to hire accommodation for the night, as well as R20, or any expenses that were reasonably incurred for meals.[8] It goes on to say that the above allowances are payable to the witness for the period that the witness is absent from their home, to attend court. The travelling expenses are the same as in civil cases, being, for private transport, 92c per km in case of a motorcycle; or R1,30 per km in case of a motor vehicle, calculated along the shortest route.[9] In the case of a witness making use of public transport, the travelling expenses are 'an amount equal to the fare for the least expensive transport along the shortest route'.[10] The income forfeiture is also the same as in civil cases.

Now one must look at the witness fees and allowances payable to a psychiatrist or clinical psychologist to appear in court. The subsistence amount includes: Any expenses if the witness needs to hire accommodation for the night, as well as any expenses that were reasonably incurred for meals. It goes on to say that the above allowances are payable to the witness for the period that the witness is absent from their home, to attend court. The travelling costs are the same as mentioned above for witnesses in civil and criminal cases.

5 South African Medical Association *Witness fees payable: Civil and criminal cases*, 2012, 1.
6 As above.
7 SAMA (n 5).
8 SAMA (n 5) 2.
9 As above.
10 SAMA (n 5) 2.

The remuneration of psychiatrists and psychologists is where the fees differ from witnesses in civil and criminal cases. The remuneration of these medical professionals is set out as follows: That 'a psychiatrist who is appointed by the court in terms of section 79(1) of the Criminal Procedure Act to enquire into the mental condition of an accused and who is not in the full-time service of the State, shall be compensated for giving evidence in court from public funds at the following rates',[11] either R3500 a day, or R2000 for evidence given in the morning, or lastly R1500 for evidence given in the afternoon.[12]

The information provided herein regarding costs was taken from a 2012 article from the South African Medical Association[13] and lays the basis for the question to be asked, namely whether the costs of medical expert witnesses negatively affects those who cannot afford one.

2.2 Effect of costs on those who cannot afford an expert witness

As can be seen from the above, expert witnesses are most definitely not free. The costs associated with them can be too costly for a low-earning litigant to pay, especially if it is in addition to the legal fees involved.

It is common knowledge that South Africa has an alarmingly high unemployment rate and is a country that is plagued by poverty. In a study done by Stats SA, it was found that in 2015 more than half of South Africans were poor, the poverty rate is 55.5%.[14] This means that the earning capacity of almost 30.4 million people is extremely low, as they are living in poverty.[15]

Due to the fact that the unemployment rate in South Africa is currently at 26.7%,[16] and the poverty rate is sitting at approximately 55.5%, it is clear that if people that are unemployed or do fall into the 55.5% poverty rate require legal help, and the assistance of an expert witness could greatly enhance their case, they cannot afford one.

There is currently no case law in which it was said that not having an expert witness detrimentally affected the outcome of the case. Due to this fact, I will instead look a case law where medical expert witnesses were invaluable to the outcome of the case. The reason for

11 SAMA (n 5) 3.
12 As above.
13 SAMA (n 5) 3:
14 STATSSA 'Poverty on the rise in South Africa' 22 August 2017 http://www.statssa.gov.za/?p=10334 (accessed 17 March 2018).
15 STATSSA (n 14).
16 Trading Economics 'South Africa unemployment rate' Stefanie Moya 15 May 2018 https://tradingeconomics.com/south-africa/unemployment-rate (accessed 17 March 2018).

this is because I can then prove the point I am attempting to make, being that the cost aspect of medical expert witnesses negatively affects those who cannot afford one.

In an article on Health 24, it was said that,

> Most private citizens can't afford to hire an expert, however much it might help their case. Rich defendants, however, can bring in as many experts as they wish.[17]

An example of this is the Oscar Pistorius case, a rich defendant who was able to bring as many expert witnesses as he liked.

There are multiple cases where expert witnesses have been of great assistance to a court case. Specifically looking at psychiatrists and clinical psychologists who are asked to give evidence in a case regarding the mental condition of an accused, it has already been discussed that these medical professionals come at a price. Yet, often their expertise is invaluable in the determination of the outcome of a case.

2.2.1 Case law

An example of evidence given with regards to the mental conditions of an accused can be seen in the case of *S v Pieterse*.[18] This case dealt with a psychopathic paedophile and it involved a psychiatrist evaluating and giving evidence as to the results of the accused's mental condition at the time the crime was committed. The psychiatrist found and told the court that the accused had full cognition at the time the crime was committed as well as conation. This then leads the court to furnish a guilty verdict as the individual was charged with murder.[19]

Another case, in which the expert evidence of a medical professional was extremely useful in the outcome of the case, was *S v Kavin*.[20] This case involved a father who suffered from reactive depression who shot and killed his family. In this case medical professionals, namely three psychiatrists evaluated Kavin and they provided the court with evidence of Kavin's mental condition. They told the court that, at the time of the shooting, Kavin could distinguish between right and wrong, but he lacked conation. They referred to a so-called irresistible impulse, which meant that Kavin

17 Health 24 'The state of expert evidence in SA courts' 7 September 2015 https://www.health24.com/Columnists/The-state-of-expert-evidence-in-SA-courts-20150907 (accessed 19 March 2018).
18 *S v Pieterse* 1982 (3) SA 678(A).
19 As above.
20 *S v Kavin* 1978(2) SA 731(W).

had no willpower to resist and was therefore acquitted but committed to a mental institution.[21]

As can be seen from the above two cases, the role of expert witnesses is often of utmost importance with regards to the outcome of a case. If an individual is unable to afford such a medical professional to give expert testimony at a hearing, it is quite possible that this will negatively affect the outcome of the case, as opposed to the possible outcome if the parties had been able to afford an expert witness who could then lead evidence which would assist the parties.

It can thus be said that there is a high possibility that those who cannot afford to acquire an expert witness, specifically a medical one, can be negatively affected as opposed to those who can afford one.

3 Determining whether it should be mandatory for medical professionals who are experts in their field to commit themselves to be available pro bono for a certain period of time each year as expert witnesses

3.1 *Pro bono* work

According to the Law Society of South Africa, attorneys are required to give of themselves 24 hours per calendar year to do *pro bono* work.[22] In looking at the meaning of *'pro bono'* it can be seen that the direct Latin translation means, for the public good.[23] Generally, *pro bono* means that professionals provide services free of charge to clients who are poverty stricken, or non-profit or charitable organisations.[24]

The idea put forward is the possibility that medical professionals should give of themselves, also 24 hours per calendar year to be used as expert witnesses. Outside of the 24 hours, the normal rates would apply.

The reason for this idea is due to the fact that, as has been seen above, expert witnesses can be unaffordable for the many in South

21 *Kavin* (n 20):
22 Law Society of South Africa 'Getting legal assistance' http://www.lssa.org.za/public/getting-legal-assistance (accessed 4 April 2018).
23 Investopedia 'What does "pro bono" really mean?' Stan Murray 27 November 2017 https://www.investopedia.com/ask/answers/08/pro-bono.asp (accessed 4 April 2018).
24 As above.

Africa who live below the poverty line or who are unemployed. This unaffordability coupled with the positive effect expert witnesses can have on the outcome of the case, leads to this idea of *pro bono* hours for medical professionals to be used as expert witnesses.

3.2 Criterion for *pro bono* work for medical professionals to be used as expert witnesses

It is obvious that the implementation of this idea would lead to unhappiness within the medical professional community due to the fact that they would be losing income to appear before a court without being remunerated.

A second problem is that it has to be decided which cases warrant a medical expert witness and which cases can do without.

In order to attempt to answer these problems, one needs to look at the weighing up between income and community service. Secondly one needs to look at the possible development of criteria to determine when a medical expert witness is needed so as not to waste the time of all parties involved and allow a medical expert to be used in a case when they could be of more use in another.

3.2.1 Income v community service

A problem that would arise if medical professionals were required to give of themselves 24 hours per calendar year to be used as an expert witness would be the issue of loss of earnings for the 24 hours they were in court.

The average hourly salary for a doctor is R334.[25] If a doctor works from 8am-5pm, as most doctors do, this would mean that the daily income of a doctor would be approximately R3006. It is understandable that a doctor would not want to lose R3006 because he or she is sitting in court as an expert witness. There is also no way that this result can be avoided if the *pro bono* hours were to be implemented. Ultimately the truth is that the 24 hours spent doing *pro bono* work would result in a loss of earnings.

The question, however, is whether it can be justified to have medical professionals losing income in order to assist in what can be called, the greater good. This greater good would be assisting people who cannot afford to call an expert witness unless it is free of charge.

Ultimately one has to weigh up the importance of income and the importance of community service. In a country like South Africa, one

25 Pay Scale 'Physician / Doctor, General Practice Salary' 19 May 2018 https://www.payscale.com/research/ZA/Job=Physician_%2F_Doctor%2C_General_Practice/Salary (accessed 8 April 2018).

which is rife with unemployment and poverty and one which is still trying to recover from its past, it is clear that community service is important. South Africa needs basic services to be provided free of charge so as to attempt to lessen the gap between those who have money and means, and those who do not.

David Holness, in his article,[26] speaks about the arguments for the introduction of mandatory *pro bono* work. Although this article is regarding *pro bono* legal services for legal professionals, it is possible that the arguments for the introduction of mandatory pro bono work could also apply to medical professionals performing the service of expert witnesses.

The first of these arguments that could apply to medical professionals is that 'lawyers enjoy a profitable monopoly on the provision of legal services; it does not seem unduly burdensome to impose such an obligation in order to afford everyone in the country access to the courts'.[27] If this is an argument for lawyers to engage in *pro bono* work, it seems even more fitting that medical professionals should do so too, due to the fact that often, medical professionals are also high earning members of society. Therefore, as the article says, it would not be unduly burdensome to impose such an obligation, due to the fact that it is providing people with access to expert witnesses who cannot afford them otherwise.

The second argument is that '... a failure to engage in such work violates the right to access to justice expressed in section 34 of the Constitution'.[28] It continues that: [29]

> Legal services are otherwise available only to those who are able and willing to pay relatively high professional charges. Low-income people are especially disadvantaged. The poor often go without legal services because the monetary and other costs of using the legal system are greater than their ability to bear them.

This extract sets out the crux of the argument for the introduction of *pro bono* hours for medical professionals to be used as expert witnesses. If the introduction of *pro bono* work for lawyers aids in access to justice, then surely the introduction of *pro bono* hours for medical professionals to be used as expert witnesses, does that same thing. By having access to expert witnesses free of charge, this can only aid in access to justice, and thus gives effect to section 34 of the Constitution.

26 D Holness 'Recent developments in the provision of pro bono legal services by attorneys in South Africa' (2013) *Potchefstroom Electronic Law Journal* 16.
27 Holness (n 26) 145.
28 Holness (n 26) 146.
29 As above.

For these reasons, it can be seen that in the income versus community service clash, community service must prevail in the South African context.

3.2.2 Possible criteria

The introduction of possible criteria on which the decision as to whether a medical expert witness is needed, is one that can only be postulated, due to the fact that there is no research on the matter.

It seems obvious that of the vast number of cases heard by South African courts per year, not every case can have, or needs an expert witness. If there was an implementation of *pro bono* hours for medical professionals to be used as expert witnesses, a system would be needed to determine when an expert is most appropriate so as to avoid experts being 'wasted' in court cases which do not require them.

This possible criterion would ultimately have to depend on the case at hand, and firstly whether there is a medical aspect to the case which requires the expert evidence of a medical professional. The party, who wishes to make use of a medical expert, would have to apply to the court or presiding judge and state the reasons why they believe a medical expert is necessary.

If the process involves the parties being able to use a medical expert if they want one, without even a simple process or criteria having been followed, this would lead to expert witnesses being 'wasted' on cases that they are not really vital to.

This process, however, as mentioned earlier is merely a postulation of what could possibly be introduced as a criterion, it is subject to flaws and it is subject to possible success, but without proper implementation, the actual outcome can only remain a speculation.

The information provided is that of *pro bono* work, the argument of income versus community service and the possible criteria for the use of an expert medical witness. Using this information and applying arguments for the introduction of mandatory *pro bono* work to medical professionals, could quite possibly lead to the conclusion that perhaps it should be mandatory for medical professionals to give of themselves 24 hours per calendar year to be used as expert witnesses. Although this idea is not without its flaws, namely the two mentioned above, it is conceivable to think that this concept is a possibility.

4 Examining whether the implementation of a panel of expert witnesses would help with regards to medical professionals doing pro bono work as expert witnesses

4.1 Panel of experts

In his dissertation, Dr Scharf defines medical expert witnesses as follows:[30]

> The MEW can be defined, as anyone (by implication in medicine - a medical practitioner) with special knowledge, skill, experience, training or education in a particular field or discipline, that permit him or her to testify to an opinion that will aid a judge in resolving a question that is beyond the understanding or competence of lay persons.

The above definition explains what a medical expert witness is and is vital in the explanation of a panel of expert witnesses. Simply put, a panel of expert witnesses means a group of individuals who are experts in their respective fields, forming a panel of experts to be used when required by parties.

Parties will then essentially pick an expert that they need for their case from that panel.

Of importance to this article is an explanation of a panel of medical expert witnesses. A panel of medical expert witnesses is not much different to a panel of experts, the difference being that a panel of medical experts is made up specifically of medical professionals, such as doctors, psychiatrists and psychologists to name a few. These experts will have prior training as to how to conduct themselves while in court and to ensure that they are not biased in their testimony. This aspect will be further discussed below.

4.2 Would a panel assist in the implementation of pro bono legal work of medical professionals?

The question is now posed as to whether the panel of expert witnesses would assist in the implementation of *pro bono* legal work for medical professions?

As discussed above, the *pro bono* work would require medical professionals to give of themselves 24 hours per calendar year to be used as expert witnesses. The introduction of a panel of medical

30 GM Scharf 'The medico-legal pitfalls of the medical expert witness' unpublished Masters of Law dissertation, University of South Africa, 2014 at 17 (on file with the author).

expert witnesses could very possibly assist in the implementation of the proposed *pro bono* work, due to the fact that medical professionals may view the panel as a means to further their knowledge of the law and, although providing the service free of charge and losing income, they may relish in the legal knowledge they gain from being a part of the panel. This is, however, mere speculation. Due to the fact that there are no *pro bono* legal hours set for medical practitioners and no panel of medical experts, the ideas set out in this paper do not have a factual basis, and are, as such, just ideas.

The more likely answer is that the introduction of a panel of medical expert witnesses will have no bearing on the implementation of the *pro bono* legal hours for medical practitioners, as those who do join the proposed panel will be paid and it can be said that the panel and the *pro bono* hours are two ideas that are far removed from one another. It is unlikely that the majority of medical professionals will choose advancing their legal knowledge over losing a day's worth of income, especially those highly qualified specialists, such as orthopaedic and neurosurgeons, who make R1,220,838 per year[31] and R3,533,094 per year[32] respectively. This then translates into approximately R1699 per hour, for a neurosurgeon, which means the daily income loss will be over R15 000.

Another view that could support the implementation of a panel of medical expert witnesses is found where Dr Scharf mentions that witness doctors are often placed under a significant amount of stress when testifying against a fellow doctor. They fear that they could lose hospital privileges,[33] and the witness doctors often believe that fellow doctors can make a mere mistake and not necessarily be negligent.[34] There is clearly a negative stigma attached to those medical professionals who act as expert witnesses. However, it is possible that if every medical professional has to testify as an expert due to the implementation of the *pro bono* hours that the negative stigma attached to medical expert witnesses may be lessened if all medical professionals now know what it is like to testify.

Therefore, it can be seen that on examination of whether the panel of experts would assist in the implementation of the *pro bono* legal hours for medical professionals, there are only ideas that can be put forward. Due to the fact that neither the panel nor the *pro bono* hours currently exist, determining whether one would assist in the

31 Pay Scale 'Experienced orthopaedic surgeon salary' 26 May 2018 https://www.payscale.com/research/ZA/Job=Orthopedic_Surgeon/Salary/c6b79c87/Experienced (accessed 15 April 2018).

32 Salary Expert 'Neurosurgeon Salary in South Africa' https://www.salaryexpert.com/salary/job/neurosurgeon/south-africa (accessed 16 April 2018).

33 Scharf (n 30) 44.

34 As above.

implementation of the other can only be based on ideas from the research that is available, such as the earnings of medical professionals and mere human nature.

5 Would the implementation of a panel of expert witnesses help alleviate the problem of expert witnesses not having any basic legal knowledge?

5.1 Lack of basic legal knowledge

Medical practitioners are not lawyers. Lawyers need medical practitioners as expert witnesses to help explain the often, complex medical aspects of certain matters to the court. An example of which is the case of *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*[35] where it was said that 'the assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence'.[36]

Due to the fact that medical practitioners are by no means lawyers, it follows that they will lack legal knowledge, such as court procedures and knowledge of the fact that, for criminal cases specifically, both factual and legal causation is required. These are some of the legal processes that a medical professional will not know, just as the lawyer will not know the medical aspects, which is why the medical expert is needed.

The problem is now that, due to a lack of legal knowledge, the medical expert can sometimes be more damaging to the case than helpful and if they fail to follow the correct procedure or presentation of their evidence, their evidence may be rejected.

5.2 Alleviation of this problem via the implementation of a panel of experts

The implementation of a panel of experts is an idea on its own, but a panel of experts will not alleviate the problem of the lack of basic legal knowledge that was discussed above. To alleviate this problem, it is necessary to require the experts on the panel to undergo basic legal training, so as to understand, for example, the court

35 *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA).
36 *Linksfield* (n 35) para 39.

procedures. This will be done by looking at a dissertation by Dr Scharf.[37]

In his dissertation Dr Scharf is of the opinion that, 'medical witnesses should have legal training and insight into the legal and court procedures'.[38] Throughout his writings he reiterates the need for medico legal training and using a book by Perry Hookman entitled 'Medical malpractice expert witnessing', he hypothesises that 'medical expert witnesses should have to undergo some training in the 'principles of medical law' as well as ethics'.[39]

What is of the utmost importance is that a medical expert witness must not warrant a guess or give misleading information. It is vital that all the evidence that is given by a medical expert witness must be relevant to the case at hand.[40] This is ultimately where legal training must present itself; it is required so as to ensure that the evidence given by the expert witness is not rejected because of the way they present it.[41]

It has been said that there are certain criteria that will lead to the acceptance of the legal findings of scientific facts[42] and that they are as follows:

(a) 'Theories are to be established, confirmed and must be relevant'[43]
(b) 'The medical expert witness must understand the theory and science around it'[44]
(c) 'Medical scientific principles must be correctly applied to the facts of the case'[45]
(d) 'It must be understandable in and to the court'[46]
(e) 'Correctness of the witness's presentation is essential'[47]
(f) 'Credibility'[48]

Many of the criteria above can be fulfilled by legal training. The need for theories to be relevant and confirmed is something a medical practitioner will not know unless they are told about it prior to taking the stand, thus basic legal training would stop this problem from arising. The criteria that the evidence given to the court must be understandable in and to the court can also be a problem, the reason being that a judge and lawyers will not understand complex medical terms which are second nature to a medical practitioner, and it is a

37 Scharf (n 30).
38 Scharf (n 30) 10.
39 Scharf (n 30) 32.
40 Scharf (n 30) 113.
41 As above.
42 As above.
43 As above.
44 As above.
45 As above.
46 As above.
47 As above.
48 As above.

negative blow for the case if the witness must constantly be asked to repeat himself in a manner the court can understand. If medical witnesses undergo basic legal training they will possess this knowledge and this problem will be alleviated. All of the above-mentioned criteria can be met by providing a witness with basic legal training, which would be a necessary requirement for the panel of expert witnesses.

Therefore, it can be seen from the above that the introduction of a panel of medical expert witnesses would not be successful unless the members of the panel were required to under basic legal training to ensure that they do not cause more harm to a case than good.

6 Determining whether the implementation of a panel of expert witnesses who have undergone basic legal training would help alleviate the so called 'hired gun phenomenon

6.1 Hired gun phenomenon

Judges have been complaining about expert witnesses being biased for a significant period of time. To show this long period of complaints, one can look at the case of *Lord Arbinger v Ashton,*[49] in which the following was said

> Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the persons who employ them.

It is now one hundred and forty-five years later, and it can be said that there is still a problem with witness bias. This witness bias can be called the 'hired gun phenomenon'.[50] Expert witnesses are hired by legal practitioners in order to assist them in proving or disproving their respective cases to the court. It is obvious that when hiring an expert, this will only be done when the expert can be of assistance to the case and its success. This raises the issue of witness bias. When an expert is hired to assist in a case, they may 'try to manipulate the situation so as to give an opinion aimed at advancing the case of those who instruct him or her, instead of placing an independent and unbiased defensible theory before the court'.[51]

49 *Lord Arbinger v Ashton* (1873) 17 LR Eq 358.
50 H Lerm 'Beware the hired gun' Are expert witnesses unbiased?' (2015) *De Rebus* 36-38.
51 Lerm (n 50) 2.

In order to counter this, there has been a set of rules established, of all these rules, the one which was ultimately excepted by South African writers was the set of rules designed by Creswell J in the *National Justice Compania Naviera*.[52] These rules are listed below:

> (1) Expert evidence presented to the court should be and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> (2) An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise ..., An expert witness should never assume the role of an advocate.
>
> (3) An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
>
> (4) An expert should make it clear when a particular question or issue falls outside his expertise.
>
> (5) if an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.[53]

What the above rules mean is this: 'an expert is required originality, objectivity and an unbiased assistance to the court'.[54] When providing the court with evidence the witness must base everything they say on facts or assumptions.[55] The above rules were then accepted by South African writers 'Zeffertt, Paizes & Skeen The South African Law of Evidence 5ed',[56] and they were quoted in the case of *Schneider NO and Others v AA & Another*.[57]

In the *Schneider* case, the court said the following regarding an expert witness involved in this case

> An expert comes to court to give the court the benefit of his or her expertise'. Turning to the responsibilities of an expert witness, the court found that he or she must provide 'the court with as objective and unbiased an opinion, based on his or her expertise ... An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case' nor does he or she 'assume the role of an advocate [58]

As can be seen from the above, bias when it comes to witnesses is not a new issue; it is an issue that has reared its head for several years, and despite numerous attempts in the form of rules to quell the problem, it appears that it is still evident today. For this reason, I

52 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (The Ikarian Reefer) (No 1) [1993] 2 Lloyd's Rep. 68 [QBD CC].
53 As above.
54 Lerm (n 50) 2.
55 As above.
56 Lerm (n 50) 2.
57 *Schneider NO and Others v AA & Another* 2010 (5) SA 203 (WCC) at 211J-212B.
58 As above.

propose that perhaps the basic legal training that will come hand in hand with the implementation of a panel of medical expert witnesses will be a strong contender in the conquering of the hired gun problem.

6.2 Panel of expert witnesses alleviating the hired gun phenomenon

As mentioned above, the panel of medical expert witnesses will involve mandatory basic legal training for those who are selected and placed on the panel. This basic legal training will include an understanding of the court processes, and of the utmost importance, it must include an awareness of the fact that an individual's expert evidence will be rejected by the court if it is not presented correctly.

The correct presentation includes the expert witness setting out the evidence in such a way that it is not biased. The evidence must in no way be predominantly one sided, it should be based solely on facts and assumptions. If a medical expert witness presents evidence with the sole purpose of ensuring that the side they represent is successful, there is a high possibility that their evidence will be rejected, but there is also another problem, which relates to a judge and their reception of the evidence. This problem was set out in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police*[59] and was cited in the South African case of *Oppelt v Department of Health, Western Cape*.[60] The following was said:

> [O]ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved — instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence.

This extract could be the basis for the idea that if a witness does present evidence in a certain manner, it may also affect the judge's objectivity, although the judge should be aware of the possibility if this and guard against it, there is the possibility that a judge, who has no knowledge of any medical facts, could be inclined to take the evidence presented by a medical expert witness, and base his decision solely on that. Despite the fact that case law has set out that judges should come to a decision based on their own judgement, having taken into account all the evidence presented, including that of experts the problem still persists. In an article written by TB Barlow, the following was said:[61]

59 *Dingley v The Chief Constable, Strathclyde Police 2000* SC (HL) 77.
60 *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC).
61 TB Barlow 'Medical negligence resulting in death' (1948) *THRHR* 173-190.

> The question arises as to what regard the courts must pay to medical opinion. Must the courts make medical men the final judges ... or must they decide questions involving medical theory and dispute? ... The difficulty that faces the legal man is, however, that of judging upon the correctness of work that is highly skilled and beyond his providence. The practice of our courts has been to weigh up carefully the medical evidence presented to it by both sides but to keep the final decision in their own hands.

Judges, therefore, need to make decisions objectively and the final decision rests with the judges, after taking into account the evidence tendered by expert witnesses, whether medical or otherwise.

Despite the problem of evidence being rejected due to the nature of its presentation, it can be seen that there are other problems, one of which can be the judge as shown above.

These are but a few of the possible problems faced when an expert witness presents evidence in a biased manner. The proposed basic legal training that accompanies the proposed panel of expert witnesses could possibly alleviate the hired gun phenomenon and the problems that flow from it. It could do so because this basic legal training would inform medical experts on how to present evidence in the correct manner and warn them of the consequences of non-compliance with these rules.

In this way, the medical experts will have sufficient knowledge of the legal process to present evidence in the correct manner and thus alleviate the problems that follow a biased witness's testimony.

7 International views on panels of expert witnesses and legal training

7.1 The medical expert witness and legal training in other legal systems

The medical expert witness is used in many legal systems across the world. Although this article focuses on South African medical expert witnesses and the proposed implementation of a panel of expert witnesses accompanied by legal training, it is important to look at the views of other countries on the matter. Looking at other legal systems will help one to get a holistic view of the medical expert witness.

To begin, in Australia, it has been said that medical expert witnesses must 'undergo training and accreditation'.[62] In the USA it has been said that:

62 Scharf (n 30) 128.

> In future some form of legal education and training will have to take place to set a minimum standard. Guidelines must then also be given for acceptable testimony, ensuring that it is conducted fairly, reasonably and in good faith.[63]

In the United Kingdom, it has been said that medical expert witnesses should partake in some form of training or a course and then be registered as a medical expert witness after this has taken place.[64] Courses for medical expert witnesses have been initiated in the UK,[65] and it has also been recommended that medical expert witnesses should take the time and put in the effort to get some form of legal training prior to taking the stand, this includes training on ethics relating to the legal profession.[66]

Further support for basic legal training of medical expert witnesses can be found in the American Academy of Paediatrics in a technical report released on expert witness participation, where it was set out that: 'in 2006, the AAP graduating resident survey revealed that only 25% of residents reported that their training program provided adequate education on the expert witness process'.[67] It was then said that: [68]

> Educating paediatric residents to be cognizant of the ethical obligation of paediatricians to participate in the legal process and have a rudimentary understanding of the guidelines of medico-legal participation is important.

It is clear from the above extracts from the AAP that in American legal systems, legal training is also said to be important for medical expert witnesses.

Another instance in which the US spoke of the importance of legal training is when the US Department of Justice's National Indian Country Training Initiative together with the International Association of Forensic Nurses, announced in 2015 that they would hold the Sexual Assault Nurse Examiners' Expert Witness Training.[69]

63 As above.
64 Scharf (n 30) 129.
65 Scharf (n 30) 136.
66 As above.
67 K Sandeep and others 'Expert witness participation in civil and criminal proceedings' (2017) 139(3) *American Academy of Pediatrics*.
68 As above.
69 Forensic Healthcare Online 'LIVE TRAINING: SANE Expert Witness Training' 29 April 2015 https://www.forensichealth.com/2015/04/29/live-training-sane-expert-witness-training/ (accessed 30 May 2018).

Lastly, from a country who is not seen as a big influencer as the UK or USA is, medical expert witness training is also done in Singapore. They have a medical expert witness training programme set for this year during the months of May, June and July 2018[70] and they set out the following regarding the training:

> The Medical Expert Witness Training Course 2018 is a joint collaboration between the Medical and Legal Profession of Singapore. This course aims to prepare Medical Professionals to be an effective medical expert witness in court. [71]

It can be seen from the above that there are many legal systems who have noted the extreme importance of legal training of medical expert witnesses, and in some countries, the training can be seen as a prerequisite for being a medical expert witness. Perhaps it would be wise for South Africa to follow suit, for this reason, I have proposed the panel of expert witnesses that will be accompanied by basic legal training.

7.2 International views on a panel of experts

It is unfortunate that not a great deal of information is available regarding panels of expert witnesses in foreign jurisdictions, a possible reason for this could be because many countries do not have panels of experts implemented in their legal systems.

Although there are countries, such as America who have panels of experts, they are not necessarily panels of medical expert witnesses. The closest to a panel of medical expert witnesses that can be seen is The Forensic Panel, which consists of psychiatrists and psychologists who assess a person's mental state relating to legal issues.[72] This, although it is a panel of medical experts, relates specifically to psychiatry. The panel proposed for South African in this dissertation is one which encompasses all types of medical professionals.

A holistic panel of expert witnesses can be found in the County of Los Angeles in America. The expert witnesses are listed in the County of Los Angeles Superior Court and consist of witnesses from a listed set of fields.[73] This list includes medical experts, as well as experts not related to the medical field. Although it includes a panel of medical expert witnesses, it is not exclusively a panel of medical expert witnesses as this dissertation suggests. However, it is more

70 Academy of Medicine, Singapore 'Medical expert witness training 2018' 2018 https://ams.edu.sg/latest-news/medical-expert-witness-training-2018 (accessed 30 May 2018).

71 As above.

72 The Forensic Panel 'Forensic psychiatry' https://www.forensicpanel.com/expert_services/psychiatry.html (accessed 30 May 2018).

73 County of Los Angeles Superior Court Panel of Expert Witnesses 7 May 2018 http://www.lacourt.org/division/criminal/pdf/witnesses.pdf (accessed 30 May 2018).

than sufficient to use the panel used in Los Angeles as a means to show that the implementation of panels of expert witnesses have been done in a foreign jurisdiction and it seems this has been done with success.

It is important to note here the panel of medical experts that relate to the Road Accident Fund (RAF). Although this chapter relates to international views on panels of medical expert witnesses, it would be an error of judgement if one did not look at this panel. The RAF stated the following:

> The Road Accident Fund requires the services of medical experts when conducting its defence on litigated claims. American Medical Association (AMA) trained doctors are also needed to perform AMA assessments and provide reports in order to finalise new amendment act claims on general damages.[74]

These experts will be required to, amongst other duties, have to 'give expert evidence on behalf of the RAF during trials'.[75] Although this panel stands in South Africa, it does not fall into the proposed panel of experts as the RAF panel is exclusively for the RAF, whereas the proposed panel of medical experts does not have exclusivity attached to it. Any person requiring a medical expert witness, who can afford one, may make use of the panel.

To conclude based on all the above listed information, it can be seen that there are many foreign legal systems which provide for legal training for medical expert witnesses. Although some jurisdictions merely state that medical expert witnesses should preferably undergo training, others can be said to have made it a requirement. It can be seen that this legal training, something which seems to only be beneficial, is not properly regulated and enforced in countries all over the world. What is important to note is that South Africa may be far behind the countries who do propose such training, and is in dire need of implementing this training to alleviate the problems experienced when making use of medical expert witnesses.

It is unfortunate that there is not a vast array of sources to draw from when it comes to panels of expert witnesses. What is important is to look at the countries who have implemented such panels, despite the fact that these panels may not be identical to the panel proposed herein, because information can be drawn from these panels. By looking at foreign legal systems that do have panels of experts, South Africa could be advised on how to implement such a panel, as well as its regulation.

74 Road Accident Fund Compulsory Briefing Session RFB /2013/00026 28 August 2013 https://www.raf.co.za/Procurement/Documents/Briefing%20session%20presentation%20PANEL%20OF%20MEDICAL%20EXPERTS%20FINAL%2028%20August%202013.ppt (accessed 30 May 2018).

75 As above.

8 Conclusion

The ideas proposed by this article relate directly to the medical profession. It can be seen that there are significant problems that are attached to the cost aspect of medical expert witnesses. Medical professionals, understandably, require a large sum of money to spend the day in court, but the problem that has been identified herein is that many people cannot afford medical experts, and this may impact on the outcome of the case. This is due to the fact that a medical expert witness testimony is often invaluable if presented correctly, and it results in an unfair advantage that the rich can bring as many experts as they like, and yet the so-called poor cannot do the same.

For the reasons listed above, the first proposal was introduced which relates to the implementation of *pro bono* hours for medical professionals. This is an idea, as with all proposals, that has both positive and negative accepts. These range from the positive aspect, being that it would allow poorer people to make use of experts, to the negative aspects, which include the loss of earnings for the medical professionals. In order for this idea to be implemented, it would have to involve a weighing up of the negatives against the positives. It would also have to involve reviews given by both the medical professionals and those involved in the legal field that has borne witness to cases where medical expert evidence has not been utilised due to the cost aspect. These are mere recommendations on the implementation of the *pro bono* hours, recommendations that cannot be dealt with in this article alone, but that are necessary.

The second aspect of this article relates to the implementation of a panel of medical expert witnesses. This is an idea that has been implemented in part in other countries, although not in an identical fashion to the one proposed herein. The definition of a panel of medical expert witnesses is one step of the process. The main purpose of the medical expert witness panel is to alleviate the problems that accompany medical expert witnesses, these problems being the lack of legal procedures and the hired gun phenomenon. The problems mentioned in this article can both be alleviated by requiring medical professionals, who sit on the panel, to undergo basic legal training. This would then lead to these experts knowing how to testify and understanding the processes relating to the court. By implementing mandatory legal training for medical professionals who sit on the panel, the implementation of a panel of expert witnesses could, in this way, alleviate the problems relating to a lack of basic legal knowledge that is being experienced in South Africa.

The importance of foreign jurisdictions relating to legal training and panels of expert witnesses is extremely important. The ideas proposed currently have no standing in South Africa, and if South Africa were to look at the possible implementation of these ideas, it

would be vital to look at other jurisdictions that have implemented such ideas or have said that it is a preferable route to take. The reason it is so important to look at other jurisdictions is because it provides South Africa with the ability to compare and analyse. It allows South Africa the opportunity to see how other countries have gone about implementing such ideas, how they are regulated and how they are enforced. Most importantly, it allows South Africa to see how these ideas are working in those countries and examine the pros and cons. This can all be done before implementing these notions in our own country, and this first-hand insight is invaluable.

It must be reiterated that these proposed notions are just that, proposed notions, they are currently not in force in South Africa. The aim of this article is to show the current discrepancies when it comes to medical expert witnesses in the South African legal system, and to layout possible ways to alleviate these discrepancies.

It can be seen from the above article that these ideas, although simple in form, can have extreme consequences, both positive and negative, which cannot be ignored. Unfortunately, no definitive answer can be reached regarding the possible implementation of these ideas within this article. However, what can be said with certainty is that the discrepancies when it comes to medical expert witnesses cannot be overlooked and further extensive research needs to be conducted before these ideas can materialise into reality.