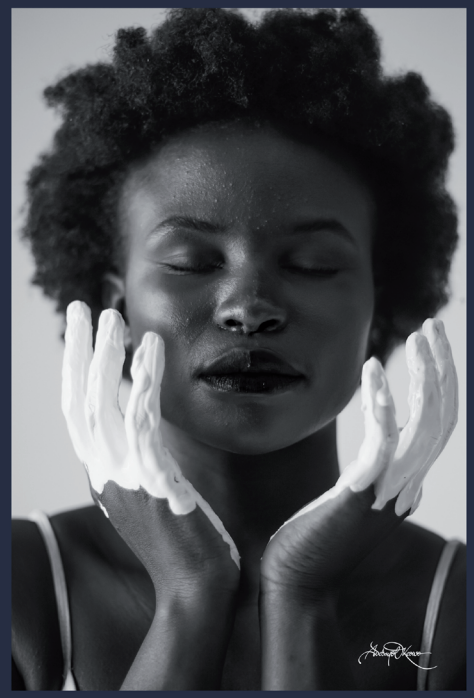

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EDITORS' NOTE

by Simon Motshweni

Honoured to present to you, the reader, the 2020 edition of the *Pretoria Student Law Review* (*PSLR*), an annual publication which is the pride of the best law faculty in Africa (according to the Times Higher Education World University Rankings). The University of Pretoria's Law Faculty ranks in the top 100 law faculties in the world, a feat unequalled in Africa. The *PSLR* is a student driven law review that creates an interactive forum for students, academics and legal professionals to discuss topical legal matters that challenge the status quo.

At the beginning of this year, lay the fantasy of newness — presenting an opportunity to do great things. But as I reflect on the journey leading to this publication, I understand that the 2020 edition of the *PSLR* had an engine that ran on hope; faith; dedication; perseverance; commitment and hard work.

Our predecessors had a vision to create a boldly outlined legacy for the *PSLR*, they spearheaded the setting up of a system that would last the lifespan of the *PSLR*. Today, some 13 years after the first edition of the *PSLR*, South Africa, the continent and the world at large are on the cusp of a new era — socially, economically and politically.

When my journey as Editor-in-Chief commenced, I imagined the *PSLR* as a ship, whose captain was myself. Customarily, it is easy to be a captain of a ship in calm seas, but unlike most of my predecessors, I have had to be the captain of a ship through the heftiest of storms. The world was not truly prepared to face challenges presented by the Covid-19, let alone the *PSLR*. In the wake of the 4IR and this new age of technology, sailing this ship to success was *still* a heavy task to complete.

It is therefore with great honour to have been able to successfully complete the task for which we, the 14th cohort of the Editorial Board, were called for. We have upheld the esteemed reputations that have been left by our predecessors. Fittingly, I wish to applaud my team for their inspiring commitment, outstanding contribution and service in maintaining the elevated standard of the *PSLR*. For indeed it is a publication, *par excellence*.

Amidst the storms, we have spearheaded the establishment of a 'free-floating' *PSLR* Collection in the OR Tambo Law Library. This collection is dedicated to house all published *PSLR* editions, dating since the inception of the *PSLR* in 2007. We have established and strengthened relations with other Law Faculties in the country, and even beyond. We published the very first special edition of the *PSLR*, a focused edition that covers a critical issue brought before the South African Law Deans Association — the Decolonisation of Legal Education. We have established a system by which all authors who publish with us, ought to have an ORCID iD. We have adopted internal regulations that outline the principles that govern the Editorial Board. We have spearheaded the adoption and implementation of a policy that forces us to comply with DHET Standards in order to be a DHET Accredited Journal so as to encourage and foster a student culture of critical research & writing in legal academia.

I am truly proud of the work that the authors have put into their articles and I would like to thank them for their submissions and tireless efforts to produce quality articles. More-so, I am proud of the Editorial Board for being able to work under immense pressure. This edition would have not been possible without the dedication and hard work of this dream team. I remain indebted to you all: Adelaide Chagopa, Kayla Thomas, Marcia van der Merwe, Nicholas Herd and Phenyo Sekati. It has been a great pleasure and a privilege to have worked with you on this annual edition. A note of thanks to Dr Gustav Muller in his capacity as the Guardian of the *PSLR*. To the reviewers, your adjudication lays the foundation for each edition, year-in-year-out. Your support and contribution to the *PSLR* remains invaluable. To Lizette Hermann, Elzet Hurter and Mornay Hassen, thank you for your continued and immeasurable support throughout this journey. To Primrose E.R Kurasha, thank you for believing in me and for guiding me. I am forever indebted to you my friend.

To my family: Elizabeth Mtshweni; Jostina Mtshweni; Clayton Mtshweni; Lucas Berto Mateus; Stephine Mashilo and Lerato Mashilo, words cannot begin to express my gratitude for all the support you have given me throughout this journey. Thank you for keeping me sane through one of the toughest times of my 'publishing' career. Thank you for the endless amount of support and the unconditional love you give me always. You are the power & oil that kept this engine running, all by the sufficient grace of God.

I hereby pass the baton and entrust the next Editor-in-Chief with the difficult task of running faster and running a better marathon than myself and my predecessors.

To you future author, I implore you to start writing, for the water does not flow until the faucet is turned on. To you the reader, Jurgen Zwecker was right: enjoy the read — without fear to question what is in front of you, for that is the only way we, as scholars, grow.

Simon Motshweni
Editor-in-Chief
2020

NOTE ON CONTRIBUTIONS

We invite all students to submit material for the fifteenth 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.

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STATUTORY UTILITY RIGHTS TO REALISE ACCESS TO SERVICES AS A CHARACTERISTIC OF ADEQUATE HOUSING

*by Gustav Muller**

1 Introduction

Government of the Republic of South Africa v Grootboom[1] ('*Grootboom*') is a landmark judgment for the interpretation of the right of access to adequate housing in South Africa. In this case the Constitutional Court was confronted with the intolerable and exigent housing needs of Ms Irene Grootboom and her fellow respondents in the Wallacedene community. The community had no access to potable water and sanitation services, the municipality did not collect their domestic refuse, and very few of the informal structures had access to electricity.[2] Many members of the community applied for access to low-cost subsidised housing from the Oostenberg Municipality and had been in the housing queue for almost seven years. Despite their actions they faced the prospect of enduring these intolerable conditions indefinitely. Since this prospect was unbearable, the respondents moved out of their waterlogged informal settlement onto a vacant, privately-owned property above the flood line where they erected their informal structures.[3] They were

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1 2001 (1) SA 46 (CC).

2 *Grootboom* para 7.

3 *Grootboom* para 8.

subsequently evicted from the property,[4] which they named 'New Rust', and then sought shelter on the sports field in Wallacedene because their stands in the informal settlement had been taken up by other people.[5] Their precarious position quickly deteriorated when the first wave of winter rain flooded their hopes of surviving another cold winter in Cape Town. The respondents launched an urgent application in the Western Cape Division of the High Court, Cape Town when the municipality made an unsatisfactory offer to their plea that the municipality would meet its constitutional obligations by providing them with temporary alternative accommodation.[6] In that judgment the court ordered the municipality to provide the applicants with 'tents, portable latrines and a regular supply of water'.[7] It is this order that formed the basis of the appeal directly to the Constitutional Court.

In *Grootboom*, Yacoob J provided a nuanced exposition of the obligations that flow from section 26 of the Constitution. In his analysis the right of access to adequate housing entails 'more than bricks and mortar'. Importantly, this includes access to:

> available land, *appropriate services* such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, *there must be services*, [and] there must be a dwelling.[8]

Yacoob J's description of what it means to have access to adequate housing in South Africa — in particular, services like water, refuse removal, and electricity — resembles[9] one of the characteristics that the United Nations Committee on Economic, Social and Cultural Rights[10] ('CESCR') identified as being indicative of having access to housing for purposes of article 11(1)[11] of the International Covenant

4 *Grootboom* para 10.
5 *Grootboom* para 9.
6 *Grootboom* para 11 with specific reference to footnote 9.
7 *Grootboom v Oostenberg Municipality* 2000 (3) SA BCLR 277 (C) 293A.
8 *Grootboom* para 35 (emphasis added).
9 Despite the 'significant' textual differences that Yacoob J enumerated in *Grootboom* para 28.
10 The committee consists of 18 experts with internationally recognised competence in the field of human rights who serve in their personal capacity for a renewable four year term. The primary task of the Committee is to assist the Economic and Social Council with its consideration of the reports that States Parties submit to the Secretary-General of the United Nations (article 16(2) of the ICSECR).
11 Article 11(1) of the ICESCR, which affords everyone the right to an adequate standard of living, reads:
'The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

on Economic, Social and Cultural Rights[12] ('ICESCR'). Housing, according to the CESCR, will be considered adequate if it *inter alia* provides access to:

> certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[13]

Conceptualising access to services — like water, sanitation, refuse removal, and electricity — as an integral part of the right of access to adequate housing reinforces Yacoob J's contextual approach to the interpretation of section 26 of the Constitution.[14] On the one hand, the approach forges explicit textual links with sections 24,[15] 27(1)(b),[16] 32,[17] and 33[18] of the Constitution. In doing so the

12 993 UNTS 3. The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976. As at 19 June 2019, the Covenant has been ratified by 169 countries. South Africa signed the Covenant on 3 October 1994 and ratified it on 15 January 2015.

13 CESCR *General Comment 4: The Right to Adequate Housing (Art. 11(1))*, UN Doc E/C 1992/23 (1991) para 8(b).

14 *Grootboom* para 21.

15 Section 24 of the Constitution states that:
'Everyone has the right — (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that — (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'
See, in general, I Currie & J De Waal *The Bill of Rights Handbook* (6th ed) (2013) chapter 24; M van der Linde & E Basson 'Environment' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2010) chapter 50; W Freedman *Property Aspects of Environmental Law* (forthcoming).

16 Section 27(1) of the Constitution affords everyone 'the right to have access to — (b) sufficient food and water.' See, in general, I Currie & J De Waal (n above) 592; AJ van der Walt *Constitutional Property Law* (2nd ed) (2005) 370–378; M Langford *et al* 'Water' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed) (Revision Service, May 2011) chapter 56B and M Kidd *Property in Water* (forthcoming).

17 Section 32(1) of the Constitution affords everyone 'the right of access to — (a) any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.' The Promotion of Access to Information Act 2 of 2000 was enacted to give effect to section 32(2) of the Constitution. See, in general, I Currie & J De Waal (n above) chapter 30; J Klaaren and G Penfold 'Access to Information' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed) (Original Service, 2002) chapter 62.

18 Section 33(1) of the Constitution affords everyone 'the right to administrative action that is lawful, reasonable and procedurally fair'. The Promotion of Administrative Justice Act 3 of 2000 was enacted to give effect to section 33(3) of the Constitution. See, in general, I Currie & J De Waal (n above) chapter 29 and J Klaaren & G Penfold 'Just Administrative Action' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2nd ed) (Original Service, June 2009) chapter 63; C Hoexter *Administrative Law* (2nd ed) (2012). See also G Quinot & S Liebenberg 'Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa' (2011) 22 *Stell LR* 639-663 (also published in S Liebenberg & G Quinot *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 197-221) and IM Rautenbach 'The limitation

conceptualisation affirms the interrelated, interconnected and mutually supporting nature of all the rights in the Bill of Rights.[19] On the other hand, the approach highlights the social and historical context against which the denial of access to water,[20] sanitation,[21] refuse removal,[22] electricity[23] (including as a source of energy for

of rights and "reasonableness" in the right to just administrative action and the rights to access to adequate housing, health services and social security' 2005 *Tydskrif vir die Suid-Afrikaanse Reg* 627-654.

19 See, in general, S Liebenberg *Socio-economics rights: Adjudication under a transformative constitution* (2010) 51–54 and the sources cited there.

20 *White Paper on Housing GG* 354 *GN* 1376 of 23 December 1994 ('*White Paper*') para 3.1.4(a) estimated that 25% of all functionally urban households did not have access to piped potable water supply in 1994. The latest statistics from Statistics South Africa indicate that the percentage of households in South Africa that have access water increased by 4,2% (or 4.904 million) from 84,4% (or 9.448 million) in 2002 to 88,6% (or 14.352 million) in 2017. The most prominent modalities of access to water are: piped water in the dwelling, piped water on site, a public/ communal tap, and water tanker. Furthermore, the quality of potable water in South African households are perceived as: harmful to their health by 7,7%; cloudy/unclear by 7,4%; unpalatable by 8,6%; and foul-smelling by 6,8%. See Statistics South Africa *Statistical Release P0318, General Household Survey 2017* (2019) 35, 40.

21 *White Paper* para 3.1.4(b) estimated that 48% of all households did not have access to flush toilets or ventilated improved pit latrines ('VIP toilets') whilst 16% of all households did not have access to any type of sanitation system in 1994. The latest statistics from Statistics South Africa indicate that the percentage of households in South Africa that have access to sanitation facilities increased by 20,5% (or 6.409 million) from 61.7% (or 6.907 million) in 2002 to 82,2% (or 13.316 million) in 2017. Having access to sanitation is described as being able to use either a flush toilet that is connected to the municipal sewage system or a septic tank, or a VIP toilet. Over the same period the percentage of households in South Africa that do not have access to any sanitation facilities decreased by 9,5% (or 0.908 million households) from 12,6% (or 1.410 million households) to 3,1% (or 0.502 million households). Not having access to sanitation is described as either using a bucket toilet or having no toilet facility at all. This then leaves 14,7% (or 2.381 million households) of the households in South Africa with access to sanitation services that are somewhere in between the golden standard of a flush toilet and no facility at all. See Statistics South Africa *Statistical Release P0318, General Household Survey 2017* (2019) 41–42.

22 The latest statistics from Statistics South Africa indicate that the percentage of households in South Africa that dump or leave their domestic refuse anywhere declined by 3,7% (or 0.309 million households) between 2002 and 2017. Over the same period the percentage of households that use their own dump to dispose of their domestic refuse declined by 5,5% (or 0.731 million households), while the use of communal dumps to dispose of domestic refuse increased marginally by 0,1% (or 0.166 million households). Where municipalities collect domestic refuse directly from households: those instances where removal takes place less than once per week declined slightly by 0,8% (or 0.140 million households), while those instances where removal takes place at least once per week increased significantly by 9,8% (or 4.395 million households). See Statistics South Africa *Statistical Release P0318, General Household Survey 2017* (2019) 44.

23 *White Paper* para 3.1.4(c) estimated that 46.5% of all households did not have a link to the electricity supply grid in 1994. The latest statistics from Statistics South Africa indicate that the percentage of households in South Africa that are connected to the mains electricity supply increased by 7,7% (or 5.086 million households) from 76,7% (or 8.586 million households) in 2002 to 84,4% (or 13.672 million households) in 2017. See Statistics South Africa *Statistical Release P0318, General Household Survey 2017* (2019) 32.

cooking)[24] and telecommunication[25] should be interpreted.

The Constitution states that it is one of the objects of local government to ensure the provision of basic services to communities[26] in an equitable and sustainable manner.[27] The power to realise these basic services has been assigned to local governments in terms of two

24 The percentage of households in South Africa that use their connection to the mains electricity supply for cooking increased by 18,4% (or 5.858 million households) from 57,5% (or 6.437 million households) in 2002 to 75,9% (or 12.295 million households) in 2017. As a result there was a simultaneous decline in the percentage of households that use paraffin (11,9% or 1.122 million households), wood (11,6% or 0.878 million households) and coal (2,6% or 0.271 million households). However, the increase in the percentage of people that use gas (2% or 0.434 million households) for cooking over the same period is an interesting development. See Statistics South Africa *Statistical Release P0318, General Household Survey 2017* (2019) 33.

25 The latest statistics from Statistics South Africa indicate that South African households have access to voice telecommunication services as follow: 3,5% of households (or 0.567 million) do not have access to either a landline or a mobile phone; 0,1% of households (or 0.162 million) only have access to landlines; 88,2% of households (or 14.288 million) only have access to a mobile phone; and 8,2% of households (or 1.328 million) have access to both a landline and a mobile phone. South African households have access to data telecommunication services as follow: 61,8% of households (or 10.010 million) have access to the internet using all available means while only 10,6% of households (or 1.717 million) have access to the internet at home. In both modalities the best access is experienced by households in the Western Cape (70,8% and 25,7% respectively) and Gauteng (74% and 16,5% respectively), while the worst access in both modalities is experienced in the Eastern Cape (51,8% and 3,5% respectively) and Limpopo (43,6% and 2,2% respectively). See Statistics South Africa *Statistical Release P0318, General Household Survey 2017* (2019) 47–48.

26 Section 152(1)(b), read with section 153, of the Constitution. The range of basic municipal services that a municipality should provide includes, in terms of schedule 4B of the Constitution, electricity and gas reticulation; municipal health services; municipal public transport; municipal public works; stormwater management systems in built-up areas; and water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. Schedule 5B of the Constitution adds cleansing; local amenities; municipal parks and recreation; municipal roads; refuse removal, refuse dumps and solid waste disposal; and street lighting. However, see the reports of the Auditor-General in terms of the Local Government: Municipal Finance Management Act 56 of 2003 that are available at https://www.agsa.co.za/Reporting/MFMAReports.aspx. See also K Makwetu 'Constitutional accountability for public resources: The role of the Auditor-General' (2019) 30 *Stellenbosch Law Review* 318-332; Anonymous 'The shocking state of South Africa's municipalities uncovered' *BusinessTech* 1 July 2020 https://businesstech.co.za/news/government/412459/the-shocking-state-of-south-africas-municipalities-uncovered/; Anonymous 'AGs report reveals the municipalities where money goes to waste' *Mail and Guardian* 2 July 2020 https://mg.co.za/news/2020-07-02-auditor-generals-report-reveals-the-municipalities-where-the-money-goes-to-waste/; S Shoba 'Municipalities still in financial disarray, audit reveals' *Daily Maverick* 25 June 2020 https://www.dailymaverick.co.za/article/2020-06-25-municipalities-still-in-financial-disarray-audit-reveals/; and Anonymous 'Auditor-general reveals shocking state of South Africa's municipalities' *BusinessTech* 26 June 2019 https://businesstech.co.za/news/government/325671/auditor-general-reveals-shocking-state-of-south-africas-municipalities/.

27 Section 155(4) of the Constitution.

important statutes:[28] the Housing Act 107 of 1997[29] ('Housing Act') and the Local Government: Municipal Systems Act 32 of 2000[30] ('Systems Act'). The Constitution and these framework statutes create a 'special cluster of relationships'[31] that exist between individuals and the municipalities which are mandated to facilitate access to these services. However, despite the 'public law nature'[32] of these services, property law principles play a significant role in obtaining access to statutory utility rights and protecting individuals from unlawful interferences with their use of these services.

28 Section 156(1) and (4) read with sections 155(6) and (7) of the Constitution. See G Muller & S Liebenberg 'Developing the law of joinder in the context and evictions of people from their homes' (2013) 29 *South African Journal on Human Rights* 554–570, for a brief overview of these statutes.

29 The long title of the Act states that the purpose of the Act is to facilitate sustainable housing development. Section 1 of the Act defines 'housing development' as 'the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to — (b) potable water, adequate sanitary facilities and domestic energy supply'. Section 9(1) of the Act imposes a peremptory obligation of local governments to '(a) ensure that — (iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient' and '(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers'.

30 The long title of the Act states that the purpose of the Act is to enable local authorities to move progressively towards the social and economic upliftment of communities, and to ensure that these communities obtain universal access to abovementioned basic services. Section 1 of the Act defines 'basic municipal services' as 'a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.' Section 73(1)(c) of the Systems Act places a peremptory obligation on local governments to ensure that all residents of the community have access to at least the minimum level of basic municipal services. Section 73(2) states that these municipal services must: (a) be equitable and accessible; (b) be provided in a manner that is conducive to (i) the prudent, economic, efficient and effective use of available resources, and (ii) the improvement of standards of quality over time; (c) be financially sustainable; (d) be environmentally sustainable; and (e) be regularly reviewed with a view of upgrading, extending and improving the service.

31 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 343.

32 *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC). In this case the electricity-service provider that is wholly-owned by the City of Johannesburg, City Power (Pty) Ltd, terminated the electricity supply to the applicants' homes because their landlord owed it a substantial amount of money. The Constitutional Court was asked to consider whether any legal relationship existed between the applicants and City Power, beyond the contractual relationship that existed between City Power and the landlord, and whether that relationship (between service provider and consumer) would entitle the applicants to procedural fairness in terms of s 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

2 Statutory utility rights

2.1 Water and sanitation

The Water Services Act 107 of 1998 ('WSA') was enacted to establish a framework within which to regulate all the water services institutions[33] in South Africa and to provide for access to basic water supply and basic sanitation.[34] The WSA gives direct effect to the right of access to sufficient water in section 27(1)(b) of the Constitution and the right to the environment in section 24 of the Constitution. The WSA achieves this by imposing peremptory obligations on every water services institution to take reasonable measures to realise these rights[35] and on all water services authorities[36] to include the details about the realisation of these rights in its development plans.[37] Access to these rights must be obtained from a water services provider[38] and this access is circumscribed by certain conditions,[39] procedures for the limitation or discontinuation of service,[40] and preferential provision of basic water supply[41] and basic sanitation[42] in those circumstances where water services institutions are unable to

33 Long title and preamble of the WSA. Section 1 of the WSA defines 'water services institution' as 'a water services authority, a water services provider, a water board and a water services committee.' See in particular chapter 2 (standards and tariffs); chapter 3 (water service authorities), chapter 4 (water services providers), chapter 5 (water services intermediaries), chapter 6 (water boards), chapter 7 (water services committees), chapter 8 (monitoring and intervention), chapter 9 (financial assistance to water services institutions), chapter 10 (national information system) and chapter 11 (general powers and duties of minister). For more detail about these institutions, see H Thompson *Water law: A practical approach to resource management and the provision of services* (2006) 712–722 (water services authorities), 723–736 (water boards), water services providers and water services intermediaries (756–758) and water service committees (736–742).

34 Long title and preamble of the WSA. See, in general, G Muller *et al Silberberg and Schoeman's The Law of Property* (6th ed) (2019) 772–777 and Van der Walt (n 16 above) 372–373.

35 Section 3(2) of the WSA.

36 Section 1 of the WSA defines 'water services authority' as 'any municipality, including a district or rural council as defined in the Local Government Transition Act 209 of 1993, responsible for ensuring access to water services.'

37 Section 3(3), read with sections 12–18, of the WSA.

38 See section 6 (for access to water services for domestic use) and section 7 (for access to water services for industrial use) of the WSA.

39 Sections 4(1) and (2) of the WSA.

40 Sections 4(3) of the WSA.

41 Section 1 of the WSA defines 'basic water supply' as 'the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.' Regulation 3 of *Regulations relating to compulsory national standard and measures to conserve water* in GN R509 in *GG* 22355 (8 June 2001) states that '[t]he minimum standard for basic water supply services is — … (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month — (i) at a minimum flow rate of not less than 10 litres per minute; (ii) within 200 metres of a household; and (iii) with an effectiveness such that no consumer is without a supply for more

meet the needs of all its existing customers.[43] This regulatory framework enables the promotion and fulfilment of the personal use rights of access to basic water supply and basic sanitation.

The WSA empowers the Minister of Human Settlements, Water and Sanitation — or any water board or water services committee acting with ministerial approval — to expropriate property.[44] In this regard a local government or a water services provider should furthermore be able to convince the minister to exercise this power if the application is motivated with reference to the Infrastructure Development Act 23 of 2014 ('Infrastructure Act'). Section 5(1) of the Infrastructure Act empowers either the minister or the Presidential Infrastructure Coordinating Commission[45] ('PICC') to expropriate land or rights in, over or in respect of land for the purpose of implementing[46] a strategic integrated project. The infrastructure that will support the provision of basic water supply and basic sanitation distribution throughout South Africa has already been designated[47] as a strategic integrated project.[48]

Once constructed end users will likely obtain access to the water supply and basic sanitation infrastructure from their homes through servitudes[49] that are registered against the title deeds of their properties. To this end the WSA affords an authorised person three important rights of entry. First, without prior notice, to enter any

42 than seven full days in any year.' This determination was unsuccessfully challenged by the Phiri community of Soweto in *Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* 2010 (4) SA 1 (CC). For criticism of this judgment, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2011) 466–480; M Langford (n above) chapter 56B-28, 56B–39; LA Williams 'The justiciability of water rights: *Mazibuko v City of Johannesburg*' (2009) 36 *Forum for Development Studies* 5–48; and P Bond and J Dugard 'The case of Johannesburg water: What really happened at the pre-paid "Parish pump"?' (2008) 12 *Law, Democracy and Development* 1–28.

42 Section 1 of the WSA defines 'basic sanitation' as 'the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic wastewater and sewage from households, including informal households.'

43 Section 5 of the WSA.

44 Section 81 of the WSA.

45 Sections 3 and 4, read with section 5(3)(b), of the Infrastructure Act.

46 Section 2(1)(b) of the Infrastructure Act states that one of the objects of this Act is 'the identification and implementation of strategic integrated projects which are of significant economic or social importance to the Republic or a region in the Republic or which facilitate regional economic integration on the African continent, thereby giving effect to the national infrastructure plan.'

47 Section 7(1) of the Infrastructure Act.

48 Section 8(1), read with section 22(1) of the Infrastructure Act. See, specifically 'Sewage works and sanitation', 'Waste infrastructure' and 'Water works and water infrastructure' in Schedule 1 and 'SIP 18: Water and sanitation infrastructure' in Schedule 3 of the Infrastructure Act.

49 Compare section 28(1) of the Sectional Titles Act 95 of 1986 which creates reciprocal implied servitudes in favour of each section over the common property and against any other sections capable of affording this right. See GJ Pienaar *Sectional Titles and other fragmented property schemes* (2010) 239. These implied servitudes include reciprocal servitudes of lateral and subjacent support

property[50] and inspect any water service work[51] to determine whether the use of water complies with the WSA and its regulations.[52] Secondly, after the provision of reasonable prior notice, to enter the property to 'repair, maintain, remove or demolish' a water service work; to remove vegetation that interfere with any water service work; to determine the suitability of any water source or site for the construction of a water service work; and 'any activity necessary' for the recovery or measurement of water.[53] Thirdly, after the provision of reasonable prior notice to an owner or an occupier, to cross the property with the purpose of lawfully entering another property.[54] A water services authority or a water service provider has an obligation to repair 'as far as reasonably possible' any damage caused by the removal of any water service work from property that is not owned by it.[55] The WSA creates an exception to the principles of *accessio* in that none of the water service works that are attached to the property of an owner will become their property.[56] In a further exception, a water service institution may transfer the rights and duties that flow from these rights of entry to another water service institution

and for the passage or provision of certain utilities. Sections 28(1)(a)(ii) and (b)(ii) state that these utilities include water, sewage, drainage, gas, electricity, garbage, artificially heated or cooled air, telecommunication and audio visual services 'through or by means of any pipes, wires, cables or ducts'. These implied servitudes are deemed to be incorporated in the title deeds of the affected sections (Sections 28(2)(a) and 31 of the Act) and afford the owners of these sections reasonable access the affected sections to install new conduits or conduct maintenance and repair works (Section 28(2)(b) of the Act.). Sectional owners are also entitled to the ancillary servitudal rights that may be reasonably necessary for the effective use of these implied servitudes (section 30 of the Act). The Act further provides that sectional owners may, by special resolution, direct the body corporate to create further servitudes that benefit or burden the sectional title scheme (Section 29 of the Act, section 5(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011 and *Body Corporate, Seascapes v Ford and Others* 2009 (1) SA 252 (SCA)).

50 Section 80(3) of the WSA circumscribes this right of entry by stating that a dwelling may only be entered when it is necessary to do so and then only upon reasonable notice and at a reasonable time.

51 Section 1 of the WSA defines a 'water service work' as 'a reservoir, dam, well, pumphouse, borehole, pumping installation, purification work, sewage treatment plant, access road, electricity transmission line, pipeline, meter, fitting or apparatus built, installed or used by a water services institution — (i) to provide water services; (ii) to provide water for industrial use; or (iii) to dispose of industrial effluent'.

52 Section 80(1)(a) of the WSA.

53 Section 80(1)(b)(i)–(iv) of the WSA.

54 Section 80(1)(c) of the WSA.

55 Section 79(2)(a) of the WSA.

56 Section 79(1) of the WSA. Compare section 23 of the Electricity Regulation Act 4 of 2006 which creates a similar exception, but elaborates by stating that any auxiliary things that have been attached to the property may not be attached and sold in execution of debt or be subjected to any insolvency or liquidation proceedings; not be subjected to the landlord's tacit hypothec; and only be acted upon with the written consent of the licensee.

'notwithstanding any law to the contrary' if these rights are explicitly drafted or can be interpreted as personal servitudes.[57]

Whereas the WSA provides the regulatory framework for the provision of water services to consumers flowing from the right to sufficient water, the National Water Act 36 of 1998 ('NWA') aims to dismantle the old dispensation 'relating to control over water and the exercise of traditional or common-law water rights.'[58] NWA was enacted to bring about a pivotal reform in the regulation of water resources[59] in South Africa. The new regulatory framework is a radical departure from the previous dispensation that was characterised by a distinction between private water (where private ownership vested over certain sources of water) and public water (where personal use rights were primarily acquired from riparian landownership). In the latter instance a user was afforded a 'strongly privileged position' as a result of the close connection between the personal use rights and the riparian landownership.[60] To this end the purpose of the NWA is to ensure that the scarce and unevenly distributed supply of water in South Africa is used *inter alia* to meet the needs of present and future generations; promote equitable access to water; redress the result of past discriminatory practices; promote the efficient, sustainable and beneficial use of water in the public interest;[61] and provide for the growing demand for water use.[62]

57 Section 77(1), read with section 77(2), of the WSA. See section 66 of the Deeds Registries Act 47 of 1937; AJ van der Walt *The Law of Servitudes* (2016) 458–459; G Muller *et al* (n above) 382. See also CG van der Merwe 'Can personal servitudes be worded in such a way that they are perpetual in nature and thus freely transferable and transmissible?' 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 340–348; A Botha 'Die bestaansreg van 'n verjaringstydperk vir persoonlike serwitute ten gunste van regspersone in the Suid-Afrikaanse reg' (1995) 28 *De Jure* 201–203 and JC Sonnekus 'Oordraagbaarheid en abandonering van persoonlike diensbaarhede' 1987 *Tydskrif vir die Suid-Afrikaanse Reg* 370–378.

58 G Muller *et al* (n above) 777.

59 Section 1 of the NWA defines a 'water resource' as including 'a watercourse, surface water, estuary, or aquifer' and in turn defines a 'watercourse' as '(a) a river or spring; (b) a natural channel in which water flows regularly or intermittently; (c) a wetland, lake or dam into which, or from which, water flows; and (d) any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse, and a reference to a watercourse includes, where relevant, its bed and banks', an 'estuary' as 'a partially or fully enclosed body of water — (a) which is open to the sea permanently or periodically; and (b) within which the sea water can be diluted, to an extent that is measurable, with fresh water drained from land', and an 'aquifer' as 'a geological formation which has structures or textures that hold water or permit appreciable water movement through them'.

60 Van der Walt (n 16 above) 373. See further AJ van der Walt 'Overview of developments since the introduction of the constitutional property clause' (2004) 19 *Southern African Public Law* 85–86 and WJ Vos *Principles of South Africa water law* (2nd ed) (1978).

61 See A Rabie 'Water for the environment' (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 111–116 and H Klug 'Water law reform under the new Constitution' (1997) 1(5) *Human Rights & Constitutional Law Journal SA* 5–10.

62 Section 2(a)–(d) and (f) of the NWA.

The NWA affords a person the entitlement[63] to use water[64] in or from a water resource for 'reasonable domestic use, domestic gardening, [and] fire fighting'.[65] However, a person may only use water in terms of a general authorisation[66] or a licence[67] that was issued to that personal in terms of the NWA.[68] Furthermore, in what Van der Walt describes as a 'critical' element of the new regulatory framework,[69] any entitlement granted in terms of the NWA replaces any right to use water that a person might have enjoyed or enforced under 'any other law'.[70]

The NWA, like the WSA, affords the minister[71] a broad power to expropriate 'any property for any purpose' that falls within the envisaged ambit of the Act's regulatory framework.[72] This includes the power to expropriate servitudes of abutment, aqueduct or submersion in chapter 13 of the NWA[73] and all 'the necessary rights' in land that are required by a person who is under an obligation to

63 Section 1 of the NWA defines 'entitlement' as 'a right to use water in terms of any provision of this Act or in terms of an instrument issued under this Act'.

64 Section 21 of the NWA lists an inclusive list of water uses.

65 Section 4(1) of the NWA. Schedule 1(1) of the NWA elaborates on the permissible uses of water in terms of this section as follows:
'A person may, subject to this Act — (a) take water for reasonable domestic use in that person's household, directly from any water resource to which that person has lawful access; (b) take water for use on land owned or occupied by that person, for — (i) reasonable domestic use; (ii) small gardening not for commercial purposes; and (iii) the watering of animals (excluding feedlots) which graze on that land within the grazing capacity of that land, from any water resource which is situated on or forms a boundary of that land, if the use is not excessive in relation to the capacity of the water resource and the needs of other users; (c) store and use runoff water from a roof; (d) in emergency situations, take water from any water resource for human consumption or fire-fighting; […] and (f) discharge — (i) waste or water containing waste; or (ii) runoff water, including stormwater from any residential, recreational, commercial or industrial site, into a canal, sea outfall or other conduit controlled by another person authorised to undertake the purification, treatment or disposal of waste or water containing waste, subject to the approval of the person controlling the canal, sea outfall or other conduit.'

66 Section 39 of the NWA.

67 Sections 27–55 of the NWA.

68 Section 4(3), read with section 22(1), of the NWA.

69 Van der Walt (n 16 above) 373.

70 Section 4(4) of the NWA. The section states that this includes '(a) to take or use water; (b) to obstruct or divert a flow of water; (c) to affect the quality of any water; (d) to receive any particular flow of water; (e) to receive a flow of water of any particular quality; or (f) to construct, operate or maintain any waterwork.' The NWA repealed the whole of the Water Act 54 of 1956.

71 The minister may also authorise a water management institution in writing to expropriate property. However, section 63(2)(b) of the NWA explicitly prohibits the minister from delegating the power to authorise a water management institution to expropriate property.

72 Section 64(1) of the NWA.

73 Section 65(2) of the NWA.

undertake rehabilitation[74] or other remedial work[75] on the land of another person but who is unable to obtain access to that land on reasonable terms.[76] The minister or the PICC may further expropriate land or rights in, over or in respect of land for the purpose of implementing[77] a strategic integrated project in terms of section 5(1) of the Infrastructure Act. The infrastructure that will support the equitable allocation and sustainable use of water throughout South Africa has already been designated[78] as a strategic integrated project.[79]

Chapter 13 of the NWA establishes a framework for obtaining access to and rights over land in three parts. Part one empowers an authorised person[80] to enter or cross property to conduct routine inspections of the use of water;[81] undertake necessary works and perform various maintenance activities;[82] and investigate various matters pertaining to the implementation of the Act.[83] Part 2 affords an authorised person the right to claim[84] or amend an existing

74 Section 1 of the NWA states that the meaning of 'protection' in relation to a water resource includes 'the rehabilitation of the water resource'. See, in general, chapter 3 of the NWA (protection of water resources). Section 137(2)(d) of the NWA specifically requires the national monitoring systems on water resources to collect 'appropriate data and information necessary to assess' the rehabilitation of water resources.

75 Section 53(1) of the NWA empowers a 'responsible authority' to direct an owner or another person who contravenes that Act 'to take any action' specified in a written notice to rectify the contravention. Section 53(2) then empowers the authority to approach a court for relief if the owner or other person fails to comply with the notice. If a court has made a determination about harm, loss or damage in terms of section 152 of the NWA, the court may order that remedial measures must be undertaken by the accused or a water management institution in terms of section 153(c) of the NWA.

76 Section 65(1)(a) of the NWA.

77 Section 2(1)(b) of the Infrastructure Act states that one of the objects of this Act is 'the identification and implementation of strategic integrated projects which are of significant economic or social importance to the Republic or a region in the Republic or which facilitate regional economic integration on the African continent, thereby giving effect to the national infrastructure plan.'

78 Section 7(1) of the Infrastructure Act.

79 Section 8(1), read with section 22(1) of the Infrastructure Act. See, specifically 'Sewage works and sanitation', 'Waste infrastructure' and 'Water works and water infrastructure' in Schedule 1 and 'SIP 18: Water and sanitation infrastructure' in Schedule 3 of the Infrastructure Act.

80 Section 124 of the NWA.

81 Section 125(1) of the NWA.

82 Section 125(2) of the NWA. This includes the power to: '(i) clean, repair, maintain, remove or demolish any government waterwork operated by any water management institution; (ii) undertake any work necessary for cleaning, clearing, stabilising and repairing the water resource and protecting the resource quality; (iii) establish the suitability of any water resource or site for constructing a waterwork; (iv) undertake any work necessary to comply with an obligation imposed on any person under this Act, where that person has failed to fulfil that obligation; (v) erect any structure and to install and operate any equipment on a temporary basis for monitoring and gathering information on water resources; or (vi) bring heavy equipment on to a property or occupy a property for any length of time.'

83 Section 125(3) of the NWA.

84 Section 127(1)(a) of the NWA.

servitude[85] of abutment,[86] aqueduct[87] or submersion[88] in terms of a certain procedure.[89] An authorised person may claim any of these servitudes as either a praedial or personal servitude[90] and may claim the servitude over an existing waterwork.[91] A high court has the power to determine and award[92] just and equitable compensation[93] for the creation of such a servitude. Once awarded the servitude holder has the right to access the land[94] and obtains expansive effective use rights that must be exercised in a *civiliter* manner.[95] However, the holder of the servitude is also under an obligation to maintain the servitude area and effect repairs to the waterworks and access roads during its operation[96] and to conduct reasonable

85 Section 127(1)(b) of the NWA.
86 Section 126(a) of the NWA defines a 'servitude of abutment' as 'the right to occupy, by means of a waterwork, the bed or banks of a stream or adjacent land belonging to another'.
87 Section 126(b) of the NWA defines a 'servitude of aqueduct' as 'the right to occupy land belonging to another by means of a waterwork for abstracting or leading water'.
88 Section 126(c) of the NWA defines a 'servitude of submersion' as 'the right to occupy land belonging to another by submerging it under water'.
89 Sections 127(4) and 129 of the NWA read with Schedule 2 of the NWA.
90 Section 127(2) of the NWA.
91 Section 127(3) of the NWA.
92 Section 130 of the NWA.
93 Section 131(1) of the NWA states that the court may, in addition to the factors listed in section 25(3) of the Constitution, also consider the following: '(a) the nature of the servitude or amendment, including the nature and function of the waterwork relating to the servitude or amendment; (b) whether any existing waterwork will be used to give effect to the servitude; (c) the probable duration of the servitude; (d) the extent of the deprivation of use of the land likely to be suffered as a result of the servitude or amendment; (e) the rental value of the land affected by the servitude or amendment; (f) the nature and extent of the actual inconvenience or loss likely to be suffered as a result of the exercise of the rights under the servitude or amendment; (g) the extent to which the land can reasonably be rehabilitated on termination of the servitude;(h) any advantage that the landowner, or other person with a compensatable interest in the land subject to the servitude, is likely to derive as a result of the servitude or amendment; and (i) the public interest served by the waterwork relating to the servitude or amendment.'
94 Section 128(1) of the NWA.
95 Section 128(2) of the NWA. This includes the rights to: '(a) take from the land subject to the servitude, any material or substance reasonably required for constructing, altering, replacing, maintaining or repairing any waterwork or part of a waterwork in respect of which the servitude has been acquired; (b) remove and use vegetation or any other obstacle which is on the land subject to the servitude and which is detrimental to the reasonable enjoyment of the servitude; (c) deposit on the land subject to the servitude any material or substance excavated or removed from the waterwork in the reasonable exercise of the servitude; (d) occupy, during the period of construction of the waterwork in respect of which the servitude has been acquired, as much of the land subject to the servitude as may reasonably be required for — (i) constructing camps or roads; (ii) constructing houses, reservoirs or other buildings or structures; or (iii) installing machinery or equipment, necessary for the construction of the waterwork; (e) occupy, for the duration of the servitude, as much of the land subject to the servitude as is reasonably required for — (i) accommodating people; (ii) workshops; or (iii) storage purposes, to the extent that this is necessary for the control, operation and maintenance of the relevant waterwork.'
96 Sections 128(3) and (4) of the NWA.

rehabilitation of the land upon termination.[97] Part 3 affords the State and a water management institution the right to retain ownership of a waterwork that was *bona fide* erected on someone else's land[98] and the right to remove that waterwork from the land.[99] The NWA creates an explicit exception which permits the transfer of personal servitudes in waterworks held by the Minister of Water and Sanitation or a water management institution.[100]

2.2 Electricity

The Electricity Regulation Act 4 of 2006 ('ERA') was enacted to establish a regulatory framework for the generation, distribution[101] and trading of electricity; to designate the National Energy Regulator of South Africa[102] ('Nersa') as the custodian and administrator of this regulatory framework;[103] and to enumerate the electricity reticulation duties of municipalities to end users.[104] The focus of the ERA's regulatory framework is *inter alia* to facilitate universal access to electricity;[105] to ensure that the electricity interests and needs of end users is protected;[106] and to achieve the development and operation of electricity supply infrastructure in South Africa.[107]

The ERA, unlike the WSA and the NWA, does not give direct effect to a right in the Bill of Rights. Instead, the ERA indirectly gives effect to section 152(1)(b), read with schedule 4B, of the Constitution in that it enables the promotion and fulfilment of the personal use right of access to electricity. The ERA achieves this by imposing peremptory obligations on local governments to *inter alia* to provide basic reticulation services 'free of charge or at a minimum cost', within its available resources, to certain classes of end users[108] and invest appropriately in its electricity infrastructure so that it can ensure 'access' to these services on a progressive basis.[109]

97 Section 128(5) of the NWA.
98 Section 135(1)(a) of the NWA.
99 Section 135(1)(b) and (2) of the NWA.
100 Section 136 of the NWA.
101 The definition of 'distribution' and 'transmission' in section 1 of the ERA is identical but for the distinction that is made in terms of the conveyance of electricity below 132kV for distribution power systems and above 132kV for transmission power systems.
102 See chapter 2 of the ERA and chapter 2 of the National Energy Regulator Act 40 of 2004.
103 Sections 7–21 of the ERA.
104 The definition of 'customer' and 'end user' in section 1 of the ERA is identical but for the distinction that the former purchases the electricity and/or service and the latter uses the electricity and/or service. We will use 'end user' to refer to both unless the context specifically indicates otherwise.
105 Section 2(d) of the ERA.
106 Section 2(b) of the ERA.
107 Section 2(a) of the ERA.
108 Section 27(e) of the ERA.
109 Section 27(d) of the ERA.

Licensees may be confronted with the problem of acquiring appropriate land or rights in, over or in respect of land that will enable it to build the infrastructure and roll out these services to a larger number and wider range of end users throughout South Africa in the congested spatial makeup of integrated municipal development. The ERA anticipates this problem and empowers the Minister of Public Works to expropriate such land or rights in, over or in respect of land.[110] However, the minister may only exercise this power if the licensee is unable to acquire the land from the current owner in terms of an agreement[111] and if it reasonably requires that specific land or rights in, over or in respect of land 'for facilities which will enhance the electricity infrastructure in the national interest'.[112] In this regard a licensee should be able to convince the minister to exercise this power if the application is motivated with reference to the Infrastructure Development Act 23 of 2014 ('Infrastructure Act'). Section 5(1) of the Infrastructure Act empowers either the minister or the Presidential Infrastructure Coordinating Commission[113] ('PICC') to expropriate land or rights in, over or in respect of land for the purpose of implementing[114] a strategic integrated project. The infrastructure that will support electricity distribution throughout South Africa has already been designated[115] as a strategic integrated project.[116]

Once constructed end users will likely obtain access to the electricity infrastructure from their homes through servitudes[117] that are registered against the title deeds of their properties. To this end

110 Section 26(1) of the ERA and Electricity Regulations for Expropriating on behalf of a Licensee *Government Notice* R147 in *Government Gazette* 30754 of 8 February 2008.

111 Section 26(3)(a) of the ERA and Regulation 2(2)(a), (b), (f) and (h).

112 Section 26(3)(b) of the ERA and Regulation 2(2)(c) and (d).

113 Sections 3 and 4, read with section 5(3)(b), of the Infrastructure Act.

114 Section 2(1)(b) of the Infrastructure Act states that one of the objects of this Act is 'the identification and implementation of strategic integrated projects which are of significant economic or social importance to the Republic or a region in the Republic or which facilitate regional economic integration on the African continent, thereby giving effect to the national infrastructure plan.'

115 Section 7(1) of the Infrastructure Act.

116 Section 8(1), read with section 22(1) of the Infrastructure Act. See, specifically 'Electricity transmission and distribution' in Schedule 1 and 'SIP 10: Electricity transmission and distribution for all' in Schedule 3 of the Infrastructure Act. See also section 34 of the ERA and 'Power stations or installations for harnessing any source of energy' in Schedule 1 and 'SIP 8: Green energy in support of the South African economy' and 'SIP 9: Electricity generation to support socio-economic development' in Schedule 3 of the Infrastructure Act. See further 'SIP 20: Energy' in *GN* 812 *GG* 43547 of 24 July 2020.

117 Compare section 28(1) of the Sectional Titles Act 95 of 1986 which creates reciprocal implied servitudes in favour of each section over the common property and against any other sections capable of affording this right. See Pienaar (n 49 above) 239. These implied servitudes include reciprocal servitudes of lateral and subjacent support and for the passage or provision of certain utilities. Sections 28(1)(a)(ii) and (b)(ii) state that these utilities include water, sewage, drainage, gas, electricity, garbage, artificially heated or cooled air, telecommunication and audio visual services 'through or by means of any pipes, wires, cables or ducts'.

section 22(1) of the ERA empowers an authorised person to 'at all reasonable times' enter[118] a premises where electricity is supplied to: (a) determine the quantity of electricity consumed; (b) inspect the 'lines, meters, fittings, works or apparatus' that belong to the licensee;[119] or (c) remove any of these auxiliary things where the electricity supply is no longer required or where the licensee may terminate the supply. This right of entry includes the right to do whatever is necessary to carry out its licenced activities 'over, in or along roads or streets and associated infrastructure'.[120] However, in doing so a licensee must comply with all applicable laws and by-laws and complete its works within a reasonable time.[121] The licensee has an obligation to repair any damage caused by the entry, inspection or removal of the auxiliary things or compensate the owner of the premises.[122] Section 23(1) of the ERA creates an exception to the principles of *accessio* in that none of the auxiliary things that are attached to the land or premises of an owner or the municipality will become their property. These auxiliary things may therefor: not be attached and sold in execution of debt or be subjected to any insolvency or liquidation proceedings; not be subjected to the landlord's tacit hypothec;[123] and only be acted upon with the written consent of the licensee.[124]

2.3 Telecommunication

The Electronic Communications Act 36 of 2005 ('ECA') was enacted to establish a regulatory framework[125] to *inter alia* promote convergence amongst various information technology sectors; and to regulate electronic communication services[126] and electronic

118 Section 22(2) of the Act details peremptory protocols for the entry of any premises.
119 Section 33 (1)(a) of the Act extends this right to a person authorised by the National Energy Regulator.
120 Section 24(1)(a) of the Act. Section 24(1)(b) of the Act makes this right subject to supervision.
121 Section 24(2)(a) and (b) of the Act.
122 Section 22(3) of the ERA. See further section 24(2)(c) of the Act.
123 See R Brits *Real Security Law* (2016) 435–478, S Viljoen *The Law of Landlord and Tenant* (2016) 311–344, NS Siphuma *The lessor's tacit hypothec: A constitutional analysis* (unpublished LLM thesis, Stellenbosch University, 2013) and Muller *et al* (n above) 520-525.
124 Section 23(2)(a)–(c) of the ERA.
125 Long title of the ECA.
126 Section 1 of the ECA defines 'electronic communications service' as 'any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services.'

communication network services.[127] The primary objective of this regulatory framework is to, in the public interest, promote: the provision of a variety of quality services at reasonable prices;[128] the interests of consumers with regard to the price, quality and the variety of these services;[129] an environment of open, fair and non-discriminatory access to these services and broadcasting services;[130] and the universal provision and connectivity to these services.[131]

The ECA, unlike the WSA and the NWA, does not give direct effect to a right in the Bill of Rights. Instead, the ECA indirectly gives effect to section 32 of the Constitution in that it enables the promotion and fulfilment access to information as a personal use right. The Universal Service and Access Agency of South Africa[132] ('Agency') was established to promote the goal of universal access to telecommunication services and to encourage, facilitate and offer guidance on any scheme that aims to achieve this goal.[133] To fulfil this mandate the Agency must conduct research into and keep abreast of developments on information communication technology, services and facilities and must continually evaluate the extent to which the goal of universal access have been achieved in South Africa.[134] The Agency may also conduct investigations into matters relating to its mandate and may issue information about the extent of access and provision of information communication technology, services and facilities in South Africa.[135]

Licensees may be confronted with the problem of acquiring appropriate land or rights in, over or in respect of land that will enable it to build the infrastructure and roll out these services to a larger number and wider range of end users throughout South Africa in the congested spatial makeup of integrated municipal development. Unlike the WSA and the ERA, the ECA does not explicitly empower the minister to expropriate land or rights in, over or in respect of land for this purpose. However, the Agency is empowered to 'foster the adoption and use of new methods of attaining universal

127 Section 1 of the ECA defines 'electronic communications network service' as 'a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise — (a) for that person's own use for the provision of an electronic communications service or broadcasting service; (b) to another person for the other person's use in the provision of an electronic communications service or broadcasting service; or (c) for resale to an electronic communications service licensee, broadcasting service licensee or any other service contemplated by this Act.'
128 Section 2(m) of the ECA.
129 Section 2(n) of the ECA.
130 Section 2(g) of the ECA.
131 Section 2(c) of the ECA. See the definitions of 'universal access' and 'universal service' in section 1 of the ECA.
132 Visit its website at http://www.usaasa.org.za for more information about its leadership, projects, resources and tenders.
133 Section 82(1)(a) and (b)(i) of the ECA.
134 Section 82(4)(b) and (c) of the ECA.
135 Section 82(4)(a) and (d) of the ECA.

access and universal service'[136] and could use its expertise to recommend to the Minister of Communication[137] or advise the Independent Communications Authority of South Africa[138] ('Icasa') that land or rights in, over or in respect of land should be expropriated to promote the goal of universal access and universal service. A licensee would likely be able to successfully motivate that the minister or the PICC exercise their expropriation power in terms of section 5(1) of the Infrastructure Act. The infrastructure that will support the roll out of communication services and information technology installations throughout South Africa has already been designated as a strategic integrated project.[139] Following the expropriation the resources in the Universal Service and Access Fund may be used to subsidise the construction of the required infrastructure in underserviced areas.[140]

With the infrastructure in place the rollout of the services to the end users can commence. The resources in the Universal Service and Access Fund may also be used in these circumstances to subsidise the costs involved with the provision or use of these services for people in need.[141] The ECA also empowers the minister to develop a policy for the rapid deployment and provisioning of electronic communications facilities.[142] Icasa must then prescribe regulations that establish procedures and processes for resolving disputes that may arise between a landowner and an electronic communications network service licensee.[143] In this regard section 22(1) of the ECA affords a network service licensee three important rights. First, the right to enter any land, railway or waterway.[144] Second, the right to construct and maintain an electronic communications network or facility on any land, railway or waterway.[145] This right has three ancillary rights: (a) the right to construct and maintain pipes, tunnels or tubes under any street;[146] (b) the right to erect and maintain a gate in a fence that

136 Section 82(1)(c) of the ECA.
137 Section 82(3) and (4)(e) of the ECA.
138 Section 82(4)(f) of the ECA.
139 Section 8(1), read with section 22(1) of the Infrastructure Act. See, specifically 'Communication and information technology installations' in Schedule 1 and 'SIP 15: Expanding access to communication technology' in Schedule 3 of the Infrastructure Act. See also 'SIP 22: Digital Infrastructure' in *GN* 812 *GG* 43547 of 24 July 2020.
140 Section 88(1)(b), read with section 88(2), of the ECA.
141 Section 88(1)(a) of the ECA.
142 Section 21(1) of the ECA.
143 Section 21(2)(b) of the ECA.
144 Section 22(1)(a) of the ECA.
145 Section 22(1)(b) of the ECA.
146 Section 24(1)(a) of the ECA. A local authority has a similar power to install conduit pipe for underground cables from a point of connection on the street boundary to a building on a premises in terms of section 23 of the ECA.

would otherwise preclude the licensee entry or inconvenience the licensee's right to enter;[147] and (c) the right to fell or prune any tree or vegetation that obstructs or interferes with the operation and maintenance of an electronic network communications network or facility.[148] Last, a network service licensee has the right to alter an electronic communications network or facility by attaching wires or struts to any building or structure, or remove such network or facility.[149] Any alteration or removal may be necessitated by a misalignment or an uneven surface, or the commencement of building works by a local authority or a private person.[150] In exercising all these rights the licensee must have due regard 'to applicable law'[151] and the environmental policy of South Africa.[152]

3 Conclusion

The preceding analysis reveals that a suite of statutes — comprising the WSA, NWA, ERA and ECA — has been enacted since 1994 to establish a new regulatory framework within which obtaining access to services like water, sanitation, electricity and telecommunication can be promoted and fulfilled. The WSA and the NWA gives direct effect to the right to the environment in section 24 of the Constitution and to the right of access to the sufficient water in section 27(1)(b) of the Constitution. The ERA, on the other hand, indirectly gives effect to a specific function of local government in section 152(1)(b), read with schedule 4B, of the Constitution while the ECA gives indirect effect to the right of access to information in section 33 of the Constitution. Collectively the suite of statutes affords individuals personal use rights to access water and sanitation, electricity and telecommunication.

147 Section 26(1)(a) of the ECA. The licensee must also provide a set of duplicate keys to the owner or occupier of the land in terms of section 26(1)(b) of the ECA.

148 Section 27(1) of the ECA.

149 Section 22(1)(c) of the ECA. Compare section 28(1) of the Sectional Titles Act 95 of 1986 which creates reciprocal implied servitudes in favour of each section over the common property and against any other sections capable of affording this right. See Pienaar (n above) 239. These implied servitudes include reciprocal servitudes of lateral and subjacent support and for the passage or provision of certain utilities. Sections 28(1)(a)(ii) and (b)(ii) state that these utilities include water, sewage, drainage, gas, electricity, garbage, artificially heated or cooled air, telecommunication and audio visual services 'through or by means of any pipes, wires, cables or ducts'.

150 Section 25 of the Act.

151 In *Tshwane City v Link Africa* 2015 (11) BCLR 1265 (CC) paras 150–155 the court held that 'applicable law' included various principles of the common law of servitudes. In *Dark Fibre Africa (Pty) Ltd v Cape Town City* 2018 (4) SA 185 (WCC) the court held further that 'applicable law' also included levies in terms of section 75A(1)(a) of the Local Government: Municipal Systems Act 32 of 2000 and conditions that were imposed on the applicant in terms of the local authority's street by-law.

152 Section 22(2) of the Act.

The various service providers may, however, be confronted with the problem of acquiring appropriate land that will enable it to build the infrastructure and roll out these services throughout South Africa in the congested spatial makeup of integrated municipal development. To this end the WSA, NWA and ERA explicitly afford the respective ministers the power to expropriate land or rights in, over or in respect of land that will enable the service providers to build the required infrastructure. However, the ECA does not explicitly afford the minister this power. Instead the Agency is empowered to 'foster the adoption and use of new methods of attaining universal access and universal service' and should use its expertise to recommend to the minister or advise Icasa that land or rights in, over or in respect of land should be expropriated to promote the goal of universal access and universal service. Additionally, the various service providers would likely be able to successfully motivate that the respective ministers or the PICC exercise their expropriation power in terms of section 5(1) of the Infrastructure Act. The infrastructure that will support the roll out of basic water supply and sanitation, support the equitable allocation and sustainable use of water, support electricity distribution and promote communication services and information technology installations throughout South Africa has already been designated as a strategic integrated project in Schedules 1 and 3 of the Infrastructure Act.

The suite of statutes also explicitly recognises a range of non-consensual servitudes that permit service providers to enter and inspect property with or without reasonable prior notice; to conduct repair and various maintenance works; to remove installations and vegetation that interfere with the operation of the installations with the consequent obligation to repair any damage that may have been effected to the property in the process; and to demolish installations. The ERA and the WSA also create explicit exceptions to the principles of *accessio* to the extent that the installations which have been affixed to buildings in terms of these statutes do not attach to the land and thereby become the property of the owner through the operation of law. In a further set of exceptions both the WSA and the NWA permit the transfer of personal servitudes (of entry and waterworks respectively) to another organ of state.

The regulatory framework — comprising distinct property principles of personal use rights, expropriation and servitudes — that the suite of statutes establishes to obtain access to these services should be interpreted as positive measures in terms of section 26(2) of the Constitution that have been enacted to progressively realise the right of access to adequate housing in section 26(1) of the Constitution. The suite of statutes has the transformative potential of facilitating access to these services for a larger number and wider range of individuals throughout South Africa. However, despite this transformative potential, the right of access to adequate housing also

contains a negative obligation 'to desist from preventing or impairing'[153] the access that individuals currently have to these services. Property principles can protect the use of these services with a possessory remedy known as the spoliation remedy.

153 *Grootboom* para 34.

THE EXPERIENCES OF WOMEN AND BARRIERS FOR CAREER ADVANCEMENT IN TERTIARY INSTITUTIONS IN A SOUTH AFRICAN CONTEXT

*by Bernardete Mendes**

Abstract

In 1994, South Africa became a democratic state and focused primarily on advancing and protecting human rights; however, these rights had to first be constitutionalised. As a result, the South African Constitution was adopted in 1996 with fundamental rights under its Bill of Rights, which ensures that government can be held accountable for the protection of citizens' rights. One of the fundamental rights entrenched in the Constitution is gender equality, which aims at increasing access for women to the public sphere and opportunities. The right is supported by domestic legislation and binding international law instruments. There is, however, limited research on the lived experiences of women at various institutions in South Africa post the adoption of the various gender equality laws, prompting the question: are institutions implementing, practicing, and embracing gender equality? This article discusses the experiences of women and the challenges that they face in the education sector focusing specifically on tertiary institutions in the context of gender equality and women as staff.

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The article argues that although — legislatively — South Africa has committed to gender equality, by ensuring equal representation and access to opportunities for women, the challenges that women are facing in the higher institutions show that law is not enough to deal with gender equality: There is a need for government to focus on redressing the challenges that women still face in tertiary institutions.

1 Introduction

The transition from apartheid, an institutionalised form of racial segregation which enforced racial discriminations in all sectors of South Africa through policies and legislation, meant that change was inevitable especially in the sphere of human rights. The constitutional recognition of human rights through the adoption of the Constitution of the Republic of South Africa, 1996 (the Constitution) in 1996 and the enforcement of such rights under the Bill of Rights, have allowed for social, economic, and political changes in the now democratic South Africa. One of the fundamental rights constitutionally enshrined in South Africa is to ensure equality as stipulated in section 9 of the Constitution. Section 9 stipulates that 'everyone is equal before the law and has the rights to equal protection and benefit of the law' and 'equality includes the full and equal enjoyment of all rights and freedoms'.[1] This includes the elimination of unfair discrimination based enumerated prohibited grounds, such as sex, race, ethnicity, religion etc.[2]

When speaking about gender equality, concepts such as 'gender', 'sex' and 'stereotype' are important to define as they play a significant role in the discussion of gender equality especially in reference to women. 'Sex' refers to biological attributes in humans that are mostly associated with 'physical and physiological features including chromosomes, gene expression, hormone levels and function, and reproductive/sexual anatomy'.[3] As such, although the normal categorisation is either male or female, this varies depending on the biological attributes. 'Gender' on the other hand refers to socially and culturally assigned roles and behaviours which are deemed to be appropriate to one's 'sex' and as such, society defines what maleness or masculinity and femaleness or femininity are.[4] 'Stereotype' is defined as a standardised mental picture that is very often held by a group of people and represents an oversimplified

1 Sec 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
2 As above.
3 Canadian Institutes of Health Research 'What is gender? What is sex?' 28 April 2020 https://cihr-irsc.gc.ca/e/48642.html (accessed 13 September 2020)
4 C Zulu 'Gender representation patterns in higher education management in South Africa' (2003) 17 *South African Journal of Higher Education* 98.

opinion, prejudiced attitude, or uncritical judgment.[5] Therefore, both sexes may experience gender stereotyping because they have been socialised from a young age what is expected from them based on their socially ascribed roles based on sex.[6] For example, girls must be less assertive, emotional and dependent;[7] while boys should be assertive, rational and independent;[8] and therefore it is not surprising that gender stereotypes influence the experiences that women and men face in various institutions.

Gender equality, defined here as 'equal access to opportunities for professional and career advancement, equal representation in high level academic and administrative positions as well as equal access to information and promotion opportunities for both men and women',[9] is a global objective which is addressed domestically, regionally, and internationally in a majority of countries, including South Africa. Internationally, it started with the Universal Declaration of Human Rights adopted in 1948. South Africa ratified the United Nations' Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 with the main objective of eliminating discrimination against women and ensuring that they are included in the public sphere.[10]

Moreover, the Southern African Development Community (SADC), of which South Africa is a member state, in recognising regional gender inequality challenges, established a SADC Gender Unit that organised a SADC Consultative Conference on Gender and Development in 2005.[11] South Africa also ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) in 2004 and domestically adopted the Employment Equity Act and other supporting policies to redress gender imbalances.[12]

5 Merriam Webster, Stereotype https://www.merriam-webster.com/dictionary/stereotype (accessed 28 May 2020).
6 Zulu (n 4) 98.
7 As above.
8 As above.
9 Zulu (n 4) 98.
10 Centre for the Study of Violence and Reconciliation People Opposing Women Abuse 'South African shadow report on the implementation of the convention on the elimination of all forms of discrimination against women' February 2011 https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10362_E.pdf (accessed 14 September 2020).
11 PG Mudiwa 'Addressing the issue of gender equity in the presidency of the university system in the Southern African Development Community (SADC) region' (2010) 2 *Forum on Public Policy* 1.
12 African Union 'Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' 16 October 2019 https://au.int/sites/default/files/treaties/37077-s-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE%27S RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf (accessed 14 September 2020).

Since 1994, the government has been aiming towards achieving gender equality and ensuring participation of women in different sectors in the country.[13] This is not only for justice in terms of the distribution of wealth, opportunities, and privileges within the South African society, but also for economic development. This has definitely yielded positive results as comprehensive policy framework for higher education has been put into place and led to an increased participation for the previously disadvantaged individuals especially the women.[14] In 2018, Professor Ahmed Bawa, chief executive officer of Universities in South Africa, stated that although women comprise 58% of the students in universities, compared to 42% being men, when one looks at the staffing, particularly at the top level, the story is different.[15]

In relation to staffing and gender representation in universities, 2016 national data from Higher Education Management Information System, indicates that out of 2 218 professors in South African institutions, only 27.5% are women.[16] In addition, out of 2 131 senior professors, 39.5% are women; while at senior lecturer level, women account for 45.1% of 4 890 personnel.[17] Yet, women make up 53.3% (out of 8 498) and 56.6% (out of 1 035) of the total appointments at lecturer and junior lecturer level.[18]

However, the figures, and the legislation, do not unpack the stories of the lived experiences of women as staff in institutions, particularly tertiary institutions. This article aims to uncover the experiences of women in tertiary institutions focusing on their roles as staff members as well as the challenges that they encounter within this space. Moreover, it aims to discover whether socio-cultural norms as well as gender stereotypes play a role in their experiences. The article begins by dealing with women representation in terms of employment in higher institutions and their experiences within the workplace focusing on the impact of socialisation and patriarchy. Thereafter, it unpacks the barriers or challenges that women face in advancing their careers in higher institutions; and concludes by

13 Department of Women, Youth and Persons with Disabilities 'South Africa's report on the progress made on Implementation of the Beijing platform for action' June 2019 http://www.women.gov.za/images/Final-National-Beijing-25-Report-2014-2019--Abrideged-.pdf (accessed 11 September 2020).

14 S Badat 'The challenges of transformation in higher education and training institutions in South Africa' April 2020 https://www.ru.ac.za/media/rhodesuniversity/content/vc/documents/The_Challenges_of_Transformation_in_Higher_Eduaction_and_Training_Institutions_in_South_Africa.pdf (accessed 28 May 2020).

15 E Naidu 'Universities body to probe gender imbalance at the top' *University World News* 27 July 2018.

16 As above.

17 As above.

18 BM Akala 'Challenging gender equality in South African transformation policies – a case of the white paper: a programme for the transformation of higher education' (2018) 32 *South African Journal of Higher Education* 226.

making recommendations on what the government and the higher institutions can do to deal with these challenges.

2 Women: Employment and representation in tertiary institutions

During the apartheid system, black women suffered 'triple marginalisation' due to their race, gender, and social class.[19] The higher education system perpetuated exclusion, discrimination and gender segregation institutionalised by the apartheid system which ultimately meant that by 1993, research and teaching institutions were only comprised of 32% women.[20]

Moreover, most of these women occupied either lecturer or junior lecturer positions whereas only 3% and 8% were professors and associate professors, respectively.[21] The transition to democracy brought hope to South African women with the adoption of different international and domestic laws. These laws aim for gender equality in that, amongst other things, women are afforded equal opportunities as the male counterparts in accessing the public sphere such as tertiary institutions.[22] However, this is not the reality in terms of the management and employment in tertiary institutions. In 2019, it was found that the management positions at tertiary institutions are mostly occupied by white men; for example, only 4 out of the 26 institutions are managed by women.[23] Two years before, the Council of Higher Education found that out of the 56 527 academic staff, only 13 531 PhD holders were women, whereas women made up 44,76%, 29%, 41% and 46% of senior managers, professors, associate professors, and senior lecturers, respectively.[24]

Thus, we can see that women are still not adequately represented in leadership positions in tertiary institutions and it is important to try and understand the reasons behind that. Zulu argues that this is a result of taught socialisation patterns within society, as people learn from a young age the roles that society assigns to them based on their gender.[25] For example, while young girls are taught to be obedient, emotional and care-givers, men are taught to be aggressive and emotionally strong through expressions such as 'men don't cry' — and

19 Akala (n 18).
20 R Mabokel & K Mawila 'The impact of race, gender, and culture in South African higher education' (2004) 48 *Comparative Education Review* 396.
21 Mabokela & Mawila (n 20) 397.
22 As above.
23 B Mangolothi 'Advancing gender equality in academia' 20 September 2019 https://mg.co.za/article/2019-09-20-00-advancing-gender-equality-in-academia/ (15 May 2020).
24 As above.
25 Zulu (n 4) 99.

this ultimately leads to gender stereotypes in various settings, including the workplace. On the other hand, Alabi *et al* argues that this is the result of the patriarchal system which enforces socio-cultural norms, behaviours, and expectations on women.[26] This system domesticates women and views them as caregivers while men are assigned primary and predominated power.[27] Daniella Coetzee argues that women were only superficially included in the education system because, as one analyses it deeper, one will realise that it reinforces socio-cultural norms of patriarchy. This is seen as less women are promoted in academic profession and are assigned positions that fit their ascribed gender roles.[28]

This is the reason that most women choose careers in higher institutions that are fitting to their roles as caregivers, for example administrative roles, and thus occupy the lower ranks. Therefore, gender-based roles are perpetuated in the workplace.[29] A survey conducted telephonically in all South African universities between March 2000 and 2002, found that women choose mostly administrative careers because of the flexibility of said career options.[30] In addition, the socio-economic disadvantages that apartheid caused still impact women's experiences in tertiary institutions. This is because, although one might have the experience, the lack of qualifications is a disadvantage.[31] During apartheid, it was found that majority of women worked as domestic workers, and thus had experiences or were skilled domestically although it was lowest paid and lowest skilled job opportunities.[32] Because segregation laws restricted work and educational opportunities, women were denied education and thus their chances of obtaining qualifications were limited, obstructing access to better employment opportunities.[33] A study found that out of 22 women interviewed, only seven had doctorates — which is considered a prerequisite for high leadership positions.[34]

Moreover, even in the post-democratic South Africa, it was found that women (most particularly black women) are still viewed as 'outsiders' within tertiary institutions. This perception makes them

26 O Alabi, M Khan & A Abdullahi 'The lived experiences of postgraduate female students at the University of KwaZulu Natal, Durban, South Africa' (2019) 5 *Heliyon* 1.
27 As above.
28 D Coetzee 'South African education and the ideology of patriarchy' (2001) 21*South African Journal of Education* 300.
29 Mabokela & Mawila (n 20) 398.
30 Mabokela & Mawila (n 20) 101.
31 As above.
32 J Nolde 'South African women under Apartheid: Employment rights, with particular focus on domestic service and forms of resistance to promote change' (1991) 10 *Third World Legal Studies* 203.
33 As above.
34 A Moultrie & C De La Rey 'South African women leaders in higher education: professional development needs in a changing context' (2003) 38 *Mcgill Journal of Education* 407.

less likely to express themselves or want to be seen.[35] Mabokela, who conducted qualitative interviews with 26 female academics employed in various academic institutions, found that women are reportedly given more teaching workload in comparison to their co-workers, sometimes having to teach twice in a day.[36]

This therefore disables women from furthering their studies and even the likelihood of promotion as they are loaded with work and cannot invest in furthering their studies; this is tantamount to unequal competition with male counterparts for promotion.[37] It was further found that women as junior lecturers were denied study leave for any advanced degree purposes and through practices similar to these, women are still marginalised and discriminated against.[38] In addition, the participants were hardly involved in research activities as senior scholars opposed supporting junior rank staff.[39]

The 'old boy network', is an informal system through which men use their positions or influence to assist those who went to the same school or university or share similar social backgrounds, as well as gender identity, also negatively impacts on women working in higher education.[40] In Mabokela's interviews, it was found that the mainstream journals were managed through the 'old boy network' and as such women's articles were mostly rejected as they were '… not receptive to the kind of work that women academics are engaged in … research that is community based and written from a non-western perspective or research that is written from the perspective of gender'.[41] But more than that, women had to prove themselves as they were always constantly being watched or observed[42]. Lastly, the participants also mentioned that the working conditions did not allow women the chance to equally compete with their male counterparts and 'the imbalanced group representation resulted in stereotyping and subtle forms of discrimination'.[43] Naicker, who focused on the historical experiences of women academics in the field of theology, recognises that maybe there should be an increase of women studying and teaching theology as means of dealing with exclusion and discrimination, especially in the theology field.

35 L Johnson and K Thomas 'A similar, marginal place in the academy: contextualizing the leadership strategies of black women in the United States and South Africa' (2012) 14 *Advances in Developing Human Resources* 156.
36 R Mabokela 'Reflections of black women faculty in South Africa universities' (2002) 25 *The Review of Higher Education* 185.
37 As above.
38 Mabokela (n 36) 191.
39 Mabokela (n 36).
40 Zulu (n 4) 99.
41 L Naicker 'The journey of South African women academics with a particular focus on women academics in theological education' (2013) 39 *Studia Historiae Ecclesiasticae* 325.
42 As above.
43 Naicker (n 41) 327.

However, beyond understanding the experiences of women staff in the tertiary institutions, one also needs to understand the daily challenges or barriers that prevent women from succeding in leadership or management positions in tertiary institutions.

3 Barriers and challenges confronting women in higher education

A study in India found that women did not excel in high positions primarily because of work-stress related to their male counter parts and balancing between their academic and household duties.[44] This is because of the dominance of men in the workplace and patriarchy. Due to social and culturally assigned expectations on women, they are always put in circumstances where they have to make choices between their responsibilities towards family or advancing their careers.[45] As a result, when women choose the former, they miss career opportunities and decrease their cumulative work experiences, thus impeding their career advancement.[46] This refers back to the social and cultural influences of patriarchy which reduce women to mostly reproductive labour.[47] More than that, it is important to acknowledge that academic institutions also play a role in gender inequality through their practices, particularly in terms of research. The academic field has a competitive culture which is seen especially in single-authored research papers where most women cannot participate and thus are not represented due to the limited research involvement.[48] Holmann, who studied the gender gap in science, found that authorship positions associated with seniority and prestigious journals have fewer women authors, and that men are invited to submit papers at double the rate in comparison to women.[49] Moreover, professional autonomy and lack of equal opportunities at departmental levels also contribute to gender inequality.[50] Bain and Cummings add that the probability of women being included in high ranks are also affected by the their limited experiences and scholarly productivity, a result based on the duration of employment within the higher education.[51]

44 N Gupta & A Sharma 'Women academic scientist in India' (2002) 32 *Social Studies of Sciences* 901.
45 As above.
46 N Boshoff 'The representation of women academics in higher education in South Africa: progress in the pipeline?' (2005) 19 *SAJHE* 359.
47 This refers to all household activities and care giving roles performed within a household. See CBE Meléndez 'Unpaid Reproductive Labour: A Marxist Analysis' (2013) *Emerald Group Publishing Limited* 131.
48 Boshoff (n 46) 374.
49 L Holman, D Stuart Fox & CE Hauser 'The gender gap in science: how long until women are equally represented?' (2018) https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.2004956 (accessed 12 September 2020).
50 Boshoff (n 46) 374.

Zulu argues that women advancement is influenced by either extrinsic or intrinsic factors. The above-mentioned barriers would mostly fall within the extrinsic factor in that they are external factors that ultimately influence women advancement, such as one's role with an organisation and the fact that culture influences women's leadership roles as they are believed to be followers where men are leaders.[52] Intrinsic factors are instilled through socialisation, such as women being taught to be submissive and emotional.[53] Therefore, women might lose on employment opportunities if employers choose to hire people with aggressive and competitive characters in a society governed by traditional social norms.[54]

Thus, there is a need for improvement on the experiences of women in the tertiary sector and this cannot be through representation by numbers alone. There's a need to ensure women's full participation in academic activities and to be given equal opportunities within the organisational culture and practices.[55] This can be through gender main-streaming which is 'the systemic integration of equal opportunities for women and men into the organisation and its culture and into all programmes, policies and practices into ways of seeing and doing.'[56] This can include raising awareness about gender equality and gender monitoring while training the employees.

4 Conclusion

It can thus be concluded that the experiences of women in higher institutions, as well as the challenges that they face in advancing their careers, is perpetuated by socio-cultural norms reinforced by patriarchy. Although nationally legislation and policies — which notionally and formally require redress and equity — are in place, these frameworks are not self-enacting; they require proactive enforcement and ongoing development, re-development and implementation of (further) redress strategies which instil equitable socio-cultural norms and which aim to eliminate discriminatory barriers to women accessing and occupying tertiery and other institutional spaces.

51 As above.
52 Zulu (n 4) 103.
53 As above.
54 Zulu (n 4) 103.
55 Boshoff (n 46) 375.
56 Boshoff (n 46) 375.

‘I’VE CHANGED’ SAYS SOUTH AFRICAN LAW: HAS THE JUDICIARY OPENED UP TO BLACK WOMEN LAWYERS?

*by Cebolenkosi Makhaye**

1 Introduction

Historically, South African law and legal culture has been an exclusionary field towards a number of different groups of people. One of the most glaring of these exclusions is that of black women lawyers. South African law and politics have claimed to have changed, but one still finds spaces that have not quite had the substantial kind of change that would be in line with the transformative nature that our constitution demands or at the very least, there is still plenty of room for improvement.

The 2017/2018 statistics from the Law Society of South Africa (LSSA)[1] paints a clear picture of the past and current legal spheres. I will also rely on some sentiments that I have read from a number of black women scholars in legal practice to give the perspective to what working as a black women lawyer in South Africa is like.

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1 Law Society of South Africa ‘LEAD Statistics on the profession’ July 2018 http://www.lssa.org.za (accessed 09 May 2019).

Professional spaces in South Africa have been found to be more favourable towards white people when compared to black and mixed race people. This was one of the main findings in a study on multiculturalism in the workplace from 2017 to 2018.[2] This would mean that in order to 'fit in' with that kind of professional environment, black and mixed race people would need to assimilate and act similarly to the dominant 'other' thereby sacrificing their own voice. South Africa has a very long history of exclusion and the effects of that history do not just disappear.

There still seems to be a void within the legal field when it comes to transformation. It would also be safe to say that even if the profession was to fully embrace the process of transformation and specifically, transformative constitutionalism, it would still need to take into account the fact that transformation is a never ending journey, it is not fixed, but rather evolves with the needs and dynamics of the people.

Karl Klare coined the term 'transformative constitutionalism'.[3] Langa CJ has said that the term has no single definition because the word brings about features of changeability.[4] Klare has defined transformation as a social and economic revolution, a means to provide greater access through actions such as affirmative actions.[5] Klare also states that transformative constitutionalism is committed to substantive equality, which entails getting rid of not only changing society in theory, but also substituting the overtly racist, overtly sexist and other overtly discriminatory laws and practices with those that are inclusive. Substantive equality, in the process of transformative constitutionalism, also involves the complete removal of the structures which were used to create an unequal society, as well as the redistribution of resources and power in accordance to the values of freedom, human dignity and equality.[6]

2 Demographics in the legal industry of South Africa

The Law Society of South Africa is a leading source for developments within the attorney's profession in the country. Recent statistics for

2 LT Jackson & FJ van de Vijver 'Multiculturalism in the workplace: Model and test' (2018) 16 *SA Journal of Human Resource Management* 76.
3 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Human Rights Journa*l 146.
4 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.
5 Klare (n 3 above) 352.
6 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248-249.

the profession range from the number of registered LLB/BA Law/ BCom Law students up until the number of admitted attorneys and magistrates. Overall, the more recent numbers (2018 statistics)[7] show an increase in the number of black women entering the field as attorneys. As far as university statistics are concerned, there is a substantial number of final LLB graduates in 2018. This shows that there is no shortage in black women lawyers who *want* to become lawyers (or who at the very least show an interest in studying the law). Thus, it would be insufficient to argue that a lack in substantive transformation in the legal sphere is due to black people or black women not wanting to be in the industry or being uninterested in it.

Although more women graduate from law school, the problem arises when it comes to actually entering into the profession, as it is the men who are more present in that regard.[8] Practising women advocates are reported to sit at a measly 24% of all practising advocates with 64% of them being white female advocates, 4% representing black women. Indian women make up 2,8% and Coloured women make up 1,6%. The remaining 27,6% did not specify race. It is not my intention to overload this paper with percentages, however they can help in painting a fuller picture of how women of various races fit into the legal profession and whether there is space for them as professionals in which they can substantively add to the profession and hopefully thrive as lawyers in South Africa.

For attorneys, there is a general trend that is closer in reflecting the gender composition of the country. When referring to LLB registrations, graduation rates, articles and attendance at law schools, the presence of women is on the rise each time and the numbers are usually consistently higher for women than for men.[9] This is measuring the trends from 2010 until 2017. There is a switch when it comes to admission of women and the numbers of women practising as attorneys. In 2017, women only made up 39% of practising attorneys and a linear prediction shows that it would probably take another 35 years for the number of male and female practising attorneys to become equal.[10] It would be reasonable to infer that the bulk of women lawyers in the country are white women, given that white people outnumber all races when looking at the profession (this is not inclusive of university admissions and graduation rates). The most saturated law society, the Society of the Northern Provinces has shown an increase in the number of black

7 Law Society of South Africa 'LEAD Statistics on the profession' July 2018 http://www.lssa.org.za (accessed 09 May 2019).

8 C Albertyn & E Bonthuys 'South Africa: A transformative constitution and a representative judiciary' in G Bauer & J Dawuni (eds) *Gender and the judiciary in Africa: From obscurity to parity* (2006) 58.

9 T Meyer 'Female Attorneys in South Africa: A Quantitative Analysis' (2018) 42 *African Journal of Employee Relations* 7-10.

10 Meyer (n 9 above) 10-11.

attorneys over the 2007-2017 period,[11] which is encouraging especially when one thinks of how Gauteng was one of the strongholds of the apartheid government. However, it is white attorneys which have been dominant in this society.[12] It was observed in the statistics that senior positions in the legal profession from the law firms, the Bar and the judiciary still have one particular category of people who are dominating: white men. [13]

3 Challenges faced by black (women) lawyers

The CALS (Centre for Applied Legal Studies) has identified some of the challenges that black women lawyers face which include: a shortage of jobs; limited connections to established legal professionals; greater offers from the corporate sector than the legal sector; cultural alienation, bias, racism, sexual harassment, briefing patterns to the disadvantage of black women, reinforcing gender roles/ stereotypes and trailblazer standards which are enforced to the disadvantage of black women.[14]

In the study, the CALS found many instances which speak to the treatment of black women lawyers in the workplace and it was found that there are domestic stereotypes which play a role in the workplace. Participants in the study spoke on having to be conscious of not promoting preconceived ideas and attitudes that associated black lawyers with laziness, incompetence or figurehead employees used for BBBEE compliance.[15]

Invisible rules governing social life outside work, such as weekend golf matches, was also mentioned as a barrier. Social interactions, especially the playing of golf, is known as a gateway to gaining work between lawyers.[16] The general idea is that it is easier to learn how to play the sport than try to rebel, a classic example that is used by lawyers is the expectation that 'one cannot succeed if you do not go skiing with the right people'. The study furthermore found consistent evidence of sexual harassment, gender discrimination as well as discrimination based on race are factors which are haemorrhaging the transformation and advancement of the legal profession.[17]

The work that black women produce in an effort to access senior positions, is judged against a much higher standard while the same standard of excellence does not necessarily apply to white men. The

11 Law Society of South Africa (n 7 above).
12 Law Society of South Africa (n 7 above).
13 Law Society of South Africa (n 7 above).
14 Centre for Applied Legal Studies 'Transformation of the legal profession' 2014 10-12.
15 Centre for Applied Legal Studies (n 14 above) 44
16 Centre for Applied Legal Studies (n 14 above) 38.
17 Centre for Applied Legal Studies (n 14 above) 38.

benefit of the doubt, or benefit of being viewed as capable and competent from the get-go is not available to black women in the way that it is for their white counterparts.[18]

Another prominent problem within the legal industry lies in the State's lack of support for black lawyers. The Black Lawyers' Association — an organisation that advocates for black lawyers in South Africa — had marched to Union Buildings in July of 2017 to speak out on the government's side-lining of black lawyers, advocating specifically for black women lawyers.[19] The government has been characterised as the 'largest consumer of legal services and the main policy driver of transformation in the legal profession' because of its aims and duties towards redressing the injustices of the past.[20] The onus is on the government to lead in making the necessary strides for black women lawyers within the profession. If not, the system of exclusion will continue even through the era of democracy.

Reports from the organisation and from some practicing black lawyers, have expressed how black lawyers experience being deliberately left out or overlooked in the legal field despite having the required skills and qualifications.[21] This paints a contrasting picture to the demographics, or at least to the real experiences of black [women] lawyers in South Africa. An example is the infamous phenomenon of skewed briefing patterns in favour of one type of lawyer over others.[22] This also goes against the overall goal of transformation that our democracy seeks to achieve. It is simply not enough to have a certain number of black lawyers present in the field and let that be the end of the transformation in law. There also needs to be substantive change. A study done by a UNISA senior lecturer and a LSSA independent consultant, Mr Tsili Phooko, revealed that of the sample which responded to the study, 50% of the black advocates that were briefed were male and only 17% were female. A similar pattern for Indian and Coloured lawyers was presented; a significantly much higher number of male advocates than female advocates. It was also revealed that at some private firms, it was not uncommon to have senior practitioners instruct which advocates get which brief. Although the research was not conclusive due to there being entities which did not submit their data in time for the study, it was concluded

18 Centre for Applied Legal Studies (n 15 above) 44.

19 A Mitchley, News24 'Stop feeding us crumbs, black lawyers tell government' 14 July 2017 https://www.news24.com/SouthAfrica/News/stop-feeding-us-crumbs-black-lawyers-association-tells-govt-20170714 (accessed 09 May 2019).

20 RM Phooko & SB Radebe 'Twenty-three years of gender transformation in the Constitutional Court of South Africa: Progression or Regression' (2016) 8 *Constitutional Court Review* 322.

21 N Manyathi-Jele 'LSSA hosts summit on briefing patterns' 25 April 2016 http://www.derebus.org.za/lssa-hosts-summit-briefing-patterns/ (accessed 29 May 2020).

22 Law Society of South Africa (LSSA) 'Summit on briefing patterns in the legal profession' (31 March 2016).

that there is an 'unequal distribution of work'.[23] A disturbing challenge that was revealed by the study was that some participants spoke of being overlooked if they were female with the exception being if the particular female was considered to be 'pretty'. Coupled with the stereotypes faced by black lawyers, such as being described as incompetent or being undermined because of which institution they had studied at, the results expose the many setbacks faced for a lawyer who is black and female. [24]

Perhaps also, the fact that at the start of the country's democracy, the Constitutional Court only had two women permanently appointed — Justices Yvonne Mokgoro and Katherine O'Regan- might have set a certain tone or pattern for the low numbers of women in the profession.[25] The judiciary has had great milestones in achieving racial diversity, growing from seven white Justices and four black Justices to the current bench of 7 'African' judges and 1 male 'Coloured' judge (in effect totalling 8 black judges). Justice Tshiqi and Justice Majiedt were only appointed in October 2019 by President Ramaphosa and Justice Cameron has recently retired. Prior to that, between 1994 and 2014, the number of women in the Constitutional Court remained at two, despite the upward pattern of the number of women graduating with law degrees from the early 2000s. The numbers in the lower courts (High Court, Labour Appeal, Land Claims court etc.) have been more encouraging in terms of appointing women judges. In 2012, 14 women out of 61 candidates were appointed as judges, 77 out of a total of 239 judges were women in 2013.[26]

The issue of attaining mentors for young lawyers is also a challenge to women lawyers and was raised at the Law Society of South Africa's Summit on Briefing Patterns.[27] Mentorship is especially important when one looks at the societal and economic background that is most prevalent for black women across the country. Advocate Samantha Martin, who was one of the individuals on the 'legal' panel at the LSSA'S summit, spoke on challenges faced by advocates at the Johannesburg Bar Council and stated that there is a void in respect of mentors for young female advocates. Former Chairperson of the Bar Council, Adv Dali Mpofu SC, highlighted that despite 76% of briefs being allocated to previously disadvantaged persons, the number on its own was meaningless without looking at the quality of briefs being sent to these individuals. This is, yet again, a nod towards substantive change. It is all good and well to dish out briefs to black lawyers, women lawyers or black women lawyers in great numbers, but those

23 Law Society of South Africa (n 7 above).
24 LSSA (n 22 above), Manyathi-Jele (n 21 above).
25 Phooko *(*n 20 above) 318.
26 Centre for Applied Legal Studies (n 14 above) 7-8.
27 LSSA (n 22 above).

briefs cannot be solely fewer complex briefs. Previously disadvantaged lawyers should get the opportunity, like any other practitioner, to explore their abilities to handle a range of legal cases and matters, to improve their skills and enhance their legal experience. According to Adv Mpofu, young female advocates join the bar but within a year or two, they leave 'because of no work'. From this, the necessity of mentors becomes even clearer, especially for young, black women practitioners.

The black middle class, despite no consensus over its exact size, is a much smaller class of people when compared to rest who are living in poverty with 'limited access to socio-economic services'.[28] If one is not part of this small pool of the middle class nor the even smaller Black elite class, it is highly unlikely that black people can enter into the legal profession without deliberate positive reinforcement tools that will build their skills, education and assist them in accessing socio-economic services and rights which they have been guaranteed in the Constitution.[29]

4 A brief look at the composition of the judiciary of South Africa in the democratic era

As mentioned, the dawn of democracy saw only two women being appointed as Justices of the very first Constitutional Court. The number is not even half of the bench and thus does not reflect the nation's gender and race composition.[30] At the dawn of democracy, women, and particularly black women lawyers were already lagging behind in terms of representation in the land's highest court. The composition of the original Constitutional Court set up a pattern for the rest of the judiciary because the appointment of judges in various courts have shown leaps and bounds in changing the racial composition in favour of African judges but again, it would seem that it would be male African judges that would be leading in this category. A look at the LSSA's 2012 statistics on the appointment of permanent judges reveals the how slowly the gender transformation has been in the country's judiciary. [31]

Judges represent the interests of black women lawyers in that women are likely to have a better understanding of issues affecting women, as argued by Budlender, especially in a society where women

28 Phooko (n 20 above) 321.
29 Phooko (n 20 above) 321-322, The Constitution of the Republic of South Africa, 1996.
30 Phooko (n 20 above) 318.
31 LSSA LEAD 'Statistics on the profession March 2012' http://www.lssa.org.za (accessed 29 May 2020).

make up just over 50% of the population.[32] Black lawyers are also more likely (compared to white judges) able to relate and understand the life experiences and needs of the majority of South Africans.[33] If these arguments were to be applied to a black women in law, it would reasonable to deduce that the appointment or increased representation of black women as judges would, in effect, make for the functioning of courts that are more in tune with the life experiences and needs of the public that it serves with a better understanding of issues affecting women — an all too important factor given the rise of gender-based violence in the country.

In a 2016 investigative report, the Commission for Gender Equality, revealed that the major South African corporate law firms are still dominated by white men and particularly the higher/ executive positions.[34] This was done via a survey by the South African Legal Fellows Network in 2013.[35] This is reminiscent of the pre-1994 version of the legal profession and it is discouraging to note the similarities 20 years after the beginning of a democracy.

5 A look at the history of the composition of the South African legal profession

Many legal scholars describe the law of South Africa as consisting of a Euro-Western jurisprudence. The name itself, is telling of the heavy influence of European thought and reasoning on European law and theories of law. Essentially, the norms, values and the overall culture of Europe/the West is what informs the foundation of its laws. The issue comes in where this kind of law, with the kind of foundation it has, is imposed on a people of a totally different culture and made to permeate as the only acceptable way for human beings to function in a society.

6 The impact of the west on the law and legal education in South Africa

The train of thought of a Euro-Western jurisprudence can be broken down into three main parts: (1) Modern Europe is seen as the centre of civilisation worldwide, (2) this creates a sense of superiority which depicts anyone or anything that is outside the scope of Modern Europe

32 G Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' (2005) 4 *South African Journal on Human Rights* 449.
33 Statistics South Africa http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf. (accessed 20 May 2020).
34 Commission for Gender Equality 'Lack of gender transformation in the judiciary investigative report' 2016.
35 M Sedutla 'Necessary Transformation' (2013) 532 *De Rebus* 10-13.

as inferior and in need of 'development' to become civilised. (3) this process of civilising non-Western, non-European places and beings is to be dictated and completed according to the standards compiled by the Modern Western European Man — specifically referred to as 'the Man', because of the tendency of the Western/Europe world to regard women as almost child-like, weaker and thus as lesser beings.[36]

This kind of thought has created a narrative in legal education where those falling outside the scope of the European Man is seen as not deserving of legal education, ending any control over the society in which these individuals have. With the violent conquest and dispossession of land that came with colonialism which later bore imperialism, the process of Western education was introduced to Africans as a means to create a docile class of willing transmitters of the colonial culture.[37] Fortunately, this was not successful as lawyers such as Alfred Mangena and Pixley ka Isaka Seme would use that same Western education as tools to fight against the system. These two are, however, just the exception to how things generally panned out for black people.

Most of the first black South African lawyers studied in colleges abroad. Tiyo Soga, who was possibly the first black South African who to obtain formal education aboard around 1865 is an example of such a lawyer.[38] He later got married to a Scottish woman and had children whom he wished to be educated in Glasgow as he contended that there was no adequate education for non-white children. Formal education in the form of the first established school in the country began in 1658, founded by a man who has essentially became the 'face' of the Dutch East India Company, Jan van Riebeeck. The school catered to slave children and was incredibly oppressive as the children would be forced to abandon their original identities and assimilate.[39] They received very harsh treatment from the colonial powers and in exchange for obedience, would essentially be bribed with alcohol.[40] Later on, the British colonialists created a department for education in the Cape. The department was established to further the interests of building a white, British empire in collaboration with the Anglican Church.

The Mineral Revolution came with many wars, including identity and cultural elements of war. Conquest over the Nguni and Sesotho

36 SA Burrell *Handbook of Western Civilisation 1700 to Present* 2nd Edition (1965) 67.
37 T Ngcukaitobi *The land is ours: South Africa's first black lawyers and the birth of constitutionalism* (2018) 328.
38 D Killingray 'Significant Black South Africans in Britain before 1912: Pan-African Organisation and the Emergence of South Africa's First Black Lawyers' (2012) 64 *South African Historical Journal* 394.
39 South African History Online 'Amersfoort legacy — history of education in South Africa' 27 August 2019 https://www.sahistory.org.za/article/amersfoort-legacy-history-education-south-africa (accessed 21 May 2020).
40 South African History Online (n 39 above).

nations had set in, with the help of missionaries who imposed the British way of life all over the country.[41] An obsession over the newly found gold and diamonds took attention away from the schooling of the people and as the economy grew, a need for a great deal of manual (forced) labour also emerged. This would form the basis of education for black children for many years later, making it extremely difficult for non-white children to pursue occupations other than those in agriculture, metalwork and other industrial and menial work (skills that would build the British colonial economy).[42] In this respect, it is understandable why many Africans and other black people who were presented with the opportunity, by the British to its Imperial subjects, to legally own property, live where they wanted to and work in whichever professions they chose to tried by all means to study overseas and gain as much knowledge as they could.[43]

In 1948, the National Party won the election and legalised racism for the next four decades. Every aspect of life; social, political, economic was governed by race. The white race was subsequently placed at the top of this racial hierarchy, and every other race was viewed as and treated as inferior. In the early 1950s, the Bantu Education Act came into force with two aims: to facilitate the end of missionary education of black people and the advancing of mass education geared towards preparing the African children for roles of servitude.[44] There was never anything beyond that and despite the legal profession's role as the cornerstone in addressing this system of legalised/institutional racism and the domain of white men, it was also hardly addressed. The rare appearances of the likes of Oliver Tambo and Nelson Mandela who became lawyers and had their own law firm at one point, only speaks to the sheer resilience of black people even under the most unbearable conditions.

Modern Western European thought continued to echo through the development and use of the common law which is a manifestation of Christian culture, composing of the historic belief that God placed women deliberately in a subordinate position to men.[45] In light of the impact of colonialism, imperialism, and then later apartheid, law and legal education gave an overall message that said 'Non-white persons and women are not welcome to participate in law but are bound by it'. The accompanying Christian thought makes for a double punishment for black women lawyers and black women in general. Black women lawyers are then the target of discrimination on the basis of skin colour/race plus gender and are thus in a far more vulnerable position in the profession than anyone else and would

41 South African History Online (n 39 above).
42 Ngcukaitobi (n 37 above) 18-19.
43 Killingray (n 38 above) 395.
44 Bantu Education Act 47 of 1953.
45 GJ Watkins *Feminism Is for Everybody* (2000) 2.

require far more attention to bring them to an equal position with white lawyers.

7 What changes have occurred for black women lawyers in South African since 1994?

Transformation and more specifically, measures like affirmative action, does not advocate for the appointment of a less qualified person in whatever position simply to fill a quota or simply because that person belongs to the category of previously disadvantaged persons. Transformation rather serves to remove the unreasonable barriers put in place by colonialism and apartheid. The aim is to stop impediments faced by certain lawyers so as to ensure that they are offered opportunities to develop and gain skills and experience. It also requires asking difficult and uncomfortable questions.

To be able to affect any sort of change, one would have to look at what conditions are required for the change or transformation to commence. This action — of looking at what the conditions required for transformation is part of the main premise of transformative constitutionalism.[46]

For black women, these conditions will have to speak to their underrepresentation in the workplace, specifically in the legal profession. In order to understand the root of this inequality and continuance of systems purporting this inequality, one needs to understand 'where power comes and collides, where it interlocks…'[47] The term, 'intersectionality' was coined by one of the leading scholars on Critical Race Theory and Colombia Law School professor, Kimberlé Crenshaw, who introduced this concept as a way to help express the particular oppression of African-American women; the bias and violence they face and the dismissal of their cases when they approached as victims of discrimination on the basis of race *and* gender. The professor introduced the term to explain the multi-dimensions of the particular manner in which black women are subordinated.[48]

The position of black women in society is unique because of its compounded nature. There is their 'blackness', which qualifies them as members in the various liberation efforts which black people have made throughout South African history, and then there is their 'femaleness' which qualifies them as part of the feminist efforts. The issue is that both movements only speak to one side of black women;

46 Klare (n 4 above) 352.
47 Colombia Law School 'Kimberlé Crenshaw on intersectionality, more than two decades later' https://www.law.columbia.edu/pt-br/news/2017/06/kimberle-crenshaw-intersectionality (accessed 15 May 2019).
48 Colombia Law School (n 47 above).

they place black women in a 'one must die' situation where black women are in a constant limbo between two struggles. This leads to a situation where black woman have to choose between fighting for women's rights and against patriarchy or fighting against racism and its many manifestations.[49]

8 Some of the efforts made by (black) women in addressing inequality

Considering the how women were involved in and gradually ended up leading the movement for democracy and how the Constitution was in part constructed by (black) women, it can be said that this on its own is a step in the right direction.[50] The Constitution (including the Interim Constitution) is one of the most prominent signs of transformation; it was a matter of using the law to change an oppressive law.[51] The Constitution introduced a vision of an egalitarian society and demanded a nationwide process of transformative constitutionalism.[52] The Constitution expressly places a duty on the judiciary to 'reflect broadly the racial and gender composition of South Africa' among other obligations.[53] The Johannesburg Bar and the Cape Town Bar as well as the Legal Resources Centre collaborated and have recently introduced the Annual Chaskalson Pupillage Fellowship in 2016 which is aimed at black aspiring advocates, especially black women aspiring advocates.[54] This is signals the awareness of the compounded nature of the black women's experience in the country. This awareness intersectionality of being a black female in a country with centuries of oppression, particularly through the use of law, only advances and supports racism and thus hinders one's pursuit in aspiring towards a legal career as a black female.

Other means of transformation include the implementation affirmative action aimed at giving opportunities and socio-economic empowerment and access to the previously disadvantaged.[55] It is certainly positive to see the rise in women pursuing legal education and law degrees now that traditionally Afrikaans universities are also now available to educate anyone.

49 Colombia Law School (n 47 above).
50 Phooko (n 20 above) 326.
51 Constitution of the Republic of South Africa, Act 200 of 1993 ('Interim Constitution').
52 Klare (n 3 above) 150.
53 Constitution of the Republic of South Africa, 1996 sec 174(1-4).
54 D Chambers Time Live 1 'Lawyers ready to foot R100 000 bar bill in transformation drive' September 2016 http://www.timeslive.co.za/local/2016/09/01/Lawyers-ready-to-foot-R100%E2%80%9A000-Bar-bill-in-transformation-drive?platform=hootsuite (accessed 16 May 2020).
55 Klare (n 3 above) 152.

9 The South African legal culture and where black people fit within it

The South African legal culture is one that has been built to be in favour of white male lawyers. Karl Klare defines a legal culture as the 'professional sensibilities, understandings and assumptions' relating to politics, social life and justice which are deemed part of the legal field.[56] Klare asserts that those within a legal culture are often unaware that this culture can have the effect of dictating their ideas as well as the responses to various legal issues (i.e. 'skiing with the right people').[57] This, in turn, has influence on the development of law in a substantive way.

The South African lawyer is a stickler for conservative analysis, according to Klare. There is an intense habit of being overly-cautious when dealing with law and the tendency to treat law as infinitely sacred. This is not to say we should not respect the law or be dismissive of it, however a change in perspective could prove useful — the law is meant to serve human life and should accommodate human life, not the other way around. It is not the cure to all societal problems but is frequently the first avenue for transformation projects and understandably so; many times it was the law that enforced and reinforced segregation, sexism and other forms of oppression, and so it would be reasonable to use law to try to undo that damage.[58]

The introduction of the Legal Practice Act and the changed patterns of the State Attorney's Office and other government offices where the briefing of black advocates is especially common, has also brought in change to the profession.[59] The Legal Practice Act provides that membership of legal institutions such as the South African Legal Practice and the Provincial Councils must reflect the gender and racial make-up of the country.

The overall aim of any attempt to achieve transformation is based on inclusion and this is seen from documents such as the current Constitution, to various statutes and racial and gender criteria set for the appointment of black lawyers and judges. This is a noble and meaningful approach, but it will be ineffective and problematic if this inclusion is implemented in an unchanged environment which still possess the structures and traits of oppression and substantive inequality. Not enough change can be implemented in the profession

56 Klare (n 3 above) 167-168.
57 Klare (n 3 above) 167.
58 Klare (n 3 above) 168-169.
59 Legal Practice Act 28 of 2014.

if the 'enduring residue of the colonial past' is not addressed systematically.[60]

It is argued by Beth Goldblatt and Catherine Albertyn that the Constitution aimed at substantive equality in order to address the social and economic inequalities experienced in the ordinary lives of South Africans.[61] Albertyn asserts that equality goes beyond just inclusion and involves changing the social structures, norms and attitudes which have reproduced inequality since the days of cocolonisation. She states that this is different from the egalitarian approach in that there is less focus on individuals and more focus on the conditions that cause, support and shield inequality.[62]

10 Glimmers of hope

Considering where we come from as a country, what the political agendas of the apartheid government brought about, as well as the extreme impediments and regression in various forms black people and for non-white people in general, it is certainly remarkable to see increasing statistics of black students enrolling at law schools, graduating and completing their articles. If nothing else, this is at dent in the work which still needs to be done on the journey to substantive equality in the legal field. At this time, perhaps it is hopeful enough to see a 'representation' of the community of black women lawyers sitting at the proverbial table where there previously was none.

11 Conclusion

Implementing social inclusion into existing systems in their current conditions will not be enough to establish a substantively equal institution or society. It is enough to get the ball rolling, but that is not where transformation should end; in fact, one could say that the transformation process should never actually end, but should rather be a continuous process where we investigate and evaluate the legal profession and other spheres of societal life in South Africa and ensure that the systems are in line with the values we wish to uphold in the society: Freedom, Dignity, Ubuntu and Equality.

60 T Serequeberhan 'African philosophy as the practice of resistance' (2009) 4 *Journal of Philosophy: A Cross-disciplinary Inquiry* 44.
61 Albertyn (n 8 above) 248-249.
62 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic injustice' (2018) 34 *South African Journal of Human Rights* 461-462.

SEXUAL ORIENTATION AND GENDER IDENTITIES (SOGI) LAW AND SOCIAL CHANGE

*by Chanelle van der Linde**

Abstract

It has been widely acknowledged in the realm of research that Africa is historically a diverse continent for gender identities and sexual orientations and practices. Research conducted through various disciplines depicts accounts of unique bond-friendships and dynamic gender roles that existed openly prior to the introduction of colonial discriminatory laws. With variation in social and legal positions with regard to LGBTQIA+ rights and recognition over time and space, the question is postulated of how the natures of social and legal change affects the relationship between these positions. The adoption of Queer Theory, as a lens of analysis, does not dichotomise the relationship of social and legal changes through a riddle of which came first, but rather acknowledges the domination of prevailing anti-LGBTQIA+ sentiments in colonial governments through the mechanism of law. The embedment of queer phobia into social institutions allowed for its continued existence post-independence through the shift in perspectives and attitudes toward LGBTQIA+ persons by individuals in society. Though individuals and collectives continue advocating for the recognition and realisation of legal rights and protections for LGBTQIA+ persons throughout the continent, varying legitimisation has only been seen in limited countries such as South Africa, Botswana, and Angola.

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Changes in society have also occurred slowly, however there are instances where social change seems to be occurring at a faster pace than legal change.

1 Introduction

Gender variance and sexual diversity, often encompassed in the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and more (LGBTQIA+) acronym, is largely discriminated against throughout the African continent. Historical, sociological and anthropological accounts record the existence of diverse sexual orientations and gender identities (SOGI) in Africa prior to colonial domination, ushering in discriminatory laws institutionalised through formal colonial legal systems.[1] This shift from acceptance to rejection points to a change in law and social perspectives of the original African population. While there are currently movements advocating for the decriminalisation and legalisation of SOGI rights throughout the continent, challenges emerge from both formalised law and individual prejudices. The importance of multidisciplinarity cannot be discounted and can be demonstrated through the examples of political science and anthropology. Freeman writes of empirical political science, which analyses measurable variations in order to answer hypotheses,[2] and normative political theory which proposes and discusses theories around 'how the world ought to work'.[3] Empirical political science may provide a useful lens to analyse evidence of variations in law, both customary and western formal systems, in order to determine and account for the nature of the variations.[4] Anthropological insights stem from field research and work, and its importance cannot be discarded — especially in the recorded works by anthropologists in Africa, without which, may have led to some African practices falling victim to the passage of time.[5] Anthropologists work to improve the lived realities of communities during their work, drawing from empirical research and cultural

1 Same sex sexual intercourse is often criminalised under penal codes that were instituted under colonial rule. These penal codes were never removed subsequent to independence and examples of these, are section 162 of the Penal Code of Kenya and section 104 of the Criminal Offences Act 29 of 1969 in Ghana. Same sex acts other than intercourse are also criminalised under penal codes, for example article 158 of the Penal Code of Zambia and article 158 of the Penal Code of Uganda which both criminalise indecent acts committed in private or public with a person of the same sex.

2 M Freeman 'On the interactions between law and social science in the understanding and implementation of human rights' in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 6.

3 Freeman (n 2 above) 6.

4 Freeman (n 2 above) 8.

5 S Wieringa 'Women marriages and other same-sex practices: Historical reflections on African women's same-sex relations' in R Morgan & S Wierenga (eds) *Tommy boys, lesbian men, and ancestral wives: Female same-sex practices in Africa* (2006) 295.

studies.[6] Anthropology and political science certainly do not encompass all relevant disciplines in relation to law, however showcase the potential for deeper understanding and accounts for both human rights theories and means to realise human rights. Drawing from empirical research, historical contexts and developments mentioned herein are supported by political science and anthropological methodologies.

This paper will foremost discuss theories proposed to speculate a formula for the relationship of legal and social change, moving onto a discussion on the use of queer theory in rethinking the nature of this relationship outside of a binary framework. Subsequently, it will discuss Sexual Orientation and Gender Identities (SOGI) prior to colonial rule and the characteristics exhibited by the colonial institutions legal regimes in influencing the original population's psyche toward these identities and practices. Following, it will discuss the ubiquities and status of the relationship between social change and legal change in the post-colonial era. Change is dynamic and differs in the temporal and spatial realities in which it unfolds, however if human rights are to be recognised and fulfilled, there must be an understanding of the oppression and reactions by those facing discrimination so as to identify the factors enabling the survival of oppressive structures.

2 Theoretical frameworks

The debate concerning the relationship between legal and social change comprises of arguments that explore variations in law and society over time and in specific contexts, the role of law within a specific society, the extent of legal influence over society and the inverse, and the timing of changes seen. Watson proposes that the relationship between law and society is not as close as one may think, and that the law does not always reflect the interests of the greater society or ruling class.[7] Watson also positions law as an inevitable fate for social ideas to pass through in order to be legitimised, and that despite social pressures, these changes will regardless occur in a legal paradigm.[8] As such, Watson holds the view that social, economic, and political conditions do not impact legal change to the extent that other theorists believe.[9]

In contrast, Friedman proposes that the main facilitating force for legal change is through social pressure, deriving from a schism in legal

6 ABS Preis 'Human rights as cultural practice: An anthropological critique' (1996) 18 *Human Rights Quarterly* 287.
7 A Watson 'Legal change: Sources of law and legal culture' (1983) 131 *University of Pennsylvania Law Review* 1121 & 1136.
8 Watson (n 7 above) 1153.
9 Watson (n 7 above) 1154.

position and social beliefs.[10] He asserts that public opinion, outside of non-traditional or authoritarian states, constitute the fundamental building blocks of law.[11] Demands are made on institutions, which in turn translate them into legal concepts, at the risk that it may result in a change to the nature and meaning of the demand.[12] He therefore establishes the relationship in changes between law and society as one that goes hand in hand.

Watson and Friedman therefore create two binary positions — whilst they may have overlapping points, their positions portray an either/or relationship, existing mutually exclusively. The dichotomisation of the relationship into one-way structures encourages a limited conceptualisation of the relationship and its characteristics. This creates an entry point into a brief discussion of the importance and relevance of multidisciplinary in human rights writing and research.

2.1 Queer Theory as a framework

Queer theory is a relatively new theory for critical analysis by social scientists and within the humanities. Emerging within a post-structuralism context of the 1990's, the very name is a reclamation of the word 'queer' from its status as a slur, as queer refers to something that is out of the usual, something that deviates from an expected norm — in using the word queer, it allows one to question what the 'normal' is that it is being deviated from.[13] Its position inherently poses a question concerning what society considers to be normal within the context in which it operates. The theory acknowledges how sexuality is understood through the gender binary (man/woman), positioning heterosexuality as the normal in many traditional and modern cultures and being the category through which other social, political, and cultural phenomena are to be understood.[14] Warner, an inaugural queer theorist, introduces the concept of 'heteronormativity', finding roots in writers such as Adrienne Rich's conceptualisation of 'compulsory heterosexuality.[15] These constructions of gender and sexuality result in dragooning individuals into obeying institutionalised notions of cisgenderism and

10 LM Friedman 'The law and society movement' (1986) 38 *Stanford Law Review* 771.
11 Friedman (n 10 above) 771.
12 Friedman (n 10 above) 771.
13 M Hirsch *Queer theory and social change* (2000) 33.
14 GN Pindi 'Beyond labels: envisioning an alliance between African feminism and queer theory for the empowerment of African sexual minorities within and beyond Africa' (2020) 43 *Women's Studies in Communication* 109.
15 M Warner 'Fear of a queer planet' (1991) 29 *Social Text* 6 – 9.

heterosexuality — a pressure felt by many queer individuals in Africa.[16]

A major precursive writer of queer theory is Michael Foucault, whose writings on power and discipline is relied upon. Concepts introduced in Foucault's work *Discipline and punish* form an important component in queer theory in its understanding of the subjection of LGBTQIA+ individuals. [17] One such understanding is that power effects domination on a subjected group not just through a top-down legalistic manner, but is deeply imbedded into social institutions and is not localised into a single specific relationship (such as that between classes).[18] Individuals, as vehicles for power, continue social policing toward queer people through exclusionary practices and pressure. While it can be acknowledged that demands upon an institution, such as a government, can result in the change of structural and legal institutions (such as the decolonisation movements in Africa), to argue that law does not always reflect the interest of a society or ruling class is erroneous. Law is often a tool used for domination, stemming from an assertion of power that conforms to a prescribed standard of normality.[19]

3 Identities and domination

The vestiges left by colonialism include lingering Euro-Christian and Islamic values and norms that hold certain moral judgements against LGBTQIA+ individuals. The history of Africa cannot begin at the arrival of the coloniser — to do this does not acknowledge African people as autonomous agents of their own cultures, but to forever remain in time as the colonial subject.[20] The erosion of cultural knowledge has, slowly over time, led to changes in African communities and greater societies. The colonial empires demonstrated that social change can be enacted through political encroachment and the use of law to discipline and assert authority.[21] Alienation from cultural traditions by colonial regimes resulted in the change of understanding or interpreting historic practices, such as *Oumapanga* (a bond

16 M Nagadya & R Morgan 'Some say I am hermaphrodite just because I put on trousers': Lesbians and tommy boys in Kampala, Uganda' in R Morgan & S Wierenga (eds) *Tommy boys, lesbian men, and ancestral wives: Female same-sex practices in Africa* (2006) 71.
17 M Foucault *Discipline and punish: The birth of the prison* (1975).
18 Foucault (n 17 above) 27.
19 Foucault (n 17 above) 20.
20 RF Romanow *The postcolonial body in queer space and time* (2006) 3.
21 HW Von Hesse 'Gender, flexible systems, in Africa' in H Chiang *et al* (eds) *Global encyclopaedia of lesbian, gay, bisexual, transgender, and queer history* (2019) 595.

friendship)[22] — but one must be wary of clinging to an essentialist approach to an 'authentic' African culture.[23]

Female masculinities and manhood demonstrate the flexibility and inversions of gender, sex and gender roles throughout a multitude of African cultures. Ahebi Ugbabe was an early 20th century ruler in the Nsukka Division of Igoboland during colonial rule — however their dual position as a female chief and warrant chief demonstrate the leadership roles of women in precolonial Africa.[24] Women in the position of royal advisors could also be referred to as men,[25] while male diviners who dressed in traditional women's clothes were viewed to be possessed by female spirits and would perform sexual and gender roles associated with women.[26] Igbo, Yoruba and Akan/ Asante societies allowed for postmenopausal women to become sons, kings, or 'honorary men' demonstrating the dynamic nature of gender, rather than remaining the same or static throughout ones entire life.[27]

Anthropologists have observed that same sex relationships in Africa did not have a relation to the biological sex of an individual, but rather embodied an expression of gender roles.[28] In Ghana, the Nzema people practiced a form of same sex marriage custom, where friends of the same sex that held physical attraction to one another could be married — this was known as 'friendship marriage'.[29] Customs around this practice reflected most of the same practices held in heterosexual marriages, including payment of a dowry (a bride-price) and sharing of a matrimonial bed.[30] Marriages between women that have been embedded into society structures have been recorded in 40 countries throughout Southern Sudan, Kenya, Southern Africa, Nigeria and Benin.[31] Gender and social roles of women classified as 'female-husbands' varied, and in cases where women were barren, as observed in Nuer culture, they were automatically considered men and could marry women.[32]

Where societies may have practiced gender variance and homosexuality prior to colonial rule (such as Ghana), colonial authority asserted, through political domination, that homosexuality and gender variant practices were 'unnatural' and offensive. Colonial

22 Wieringa (n 5 above) 292.
23 Pindi (n 14 above) 108.
24 Von Hesse (n 21 above) 595.
25 As above.
26 Von Hess (n 21 above) 595, Von Hesse mentions the Zvibanda, Chibados, Quimbandas, Gangas, or Kibambaa.
27 Von Hess (n 21 above) 595.
28 As above.
29 K Andam 'Ghana' in H Chiang *et al* (eds) *Global encyclopaedia of lesbian, gay, bisexual, transgender, and queer history* (2019) 612.
30 Andam (n 29 above) 612.
31 Wieringa (n 5 above) 298.
32 Wieringa (n 5 above) 304.

laws such as The Courts Ordinance of 1935 remain in the Ghanaian Criminal Code, which penalises and bans 'unnatural carnal knowledge' and sodomy.[33] South Africa too retained the British colonial empires' sodomy laws until the Immorality Amendment Act of 1969, which increased regulation of homosexual men under Apartheid.[34] The Botswana Penal Code contained much retention of British colonial laws, including laws against 'carnal knowledge' which has been used to prosecute same-sex conduct.[35]

4 Changes in independent Africa

After the independence of African states from their colonial rulers, many of the colonial laws introduced continue to remain in place. Out of the 54 African United Nation member states, same sex sexual acts are illegal in 32 (59%).[36] In 2019, Botswana decriminalised same sex legal acts on the basis that previous colonial laws were incompatible with the Botswanan Constitution on the grounds of the fundamental freedoms clause (Article 3), the right to privacy (Article 9) and the non-discrimination clause (Article 15).[37] The government of Angola also repealed colonial era laws that criminalised same-sex sexual relations in 2019, affording more protection under the laws against discrimination.[38] South Africa is the only country in Africa to legalise same-sex marriage together with benefits and recognition for gender variant individuals, among other rights.[39] The retention of colonial laws are deliberate, as they largely reflect prevailing attitudes of discrimination and prejudice toward LGBTQIA+ persons, with possibility of social stigma being described as one of the worst fears for those in the community.[40] In addition, the effects of the preservation of these laws have attributed to queer-phobic narratives that are at times used by African politicians in asserting that same sex relations and gender variance are from a western origin despite historical evidence demonstrating otherwise.[41]

33 Andam (n 29 above) 613.
34 GG da Costa Santos 'Decriminalising homosexuality in Africa: lessons from the South African experience' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013) 314 & 317.
35 M Tabengwa & N Nicol 'The development of sexual rights and the LGBT movement in Botswana' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth* (2013) 340.
36 ILGA State Sponsored Homophobia Dataset 2019 https://ilga.org/maps-sexual-orientation-laws.
37 ILGA State Sponsored Homophobia Report 2019 https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2019.pdf.
38 ILGA Report 2019 (n 40 above) 17.
39 Equaldex 'LGBT Rights in South Africa' https://www.equaldex.com/region/south-africa (accessed 6 May 2020).
40 Izugbara *et al* 'Regional legal and policy instruments for addressing LGBT exclusion in Africa' (2020) 28 *Sexual and Reproductive Health Matters* 3.
41 Andam (n 29 above) 612, Tabengwa (n 35 above) 348.

The shift from societies once accepting and celebrating queer persons to defending and, at times, advocating for violence toward LGBTQIA+ people and allies demonstrates the existence of a close relationship between legal and social change, even if it took place over a long period of time. [42] There is also, however, room for argument that in other instances, there is a large gap between social change and legal change as the legal change may not reflect general social views at the time. In *Letsweletse Motshidiemang v Attorney General,*[43] The High Court of Botswana repealed colonial era laws which criminalised same-sex sexual acts, despite a large number within society believing that same-same relationships are immoral.[44] Regardless, the demand for social change challenges the power relations existing within and between existing social categorisations of SOGI and demands a shift in the dominant paradigm of heteronormative understandings of sexual orientation, practice, and identity.[45]

Social change can utilise various means to challenge a changing society, either through individual or collective action. Collective action on an international level allows the legitimisation of claims of communities, and places them in front of the international community. Organisations such as the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) contribute to United Nations human rights mechanisms through engagements with the Human Rights Council.[46] ILGA Pan-Africa engages on LGBTQIA+ issues through partaking in submissions of shadow reports for Universal Periodic Reviews (UPR) of states, as well as through regional engagement with the African Commission of People and Human Rights (ACHPR). [47] Through advocacy and educational programmes, they can target communities and individuals to directly address prejudice at a social level.

Individual action fosters notions of solidarity within LGBTQIA+ communities, such as the drag queen community in Kenya that creates safe spaces to explore gender variance and same sex relationships.[48] Demonstrations of visibility and education may take the forms of photography, art, music, dance, literature and poetry —

42 Peter Fabricius 'South Africa teeters, but avoids falling, in its high-wire act of protecting LGBTI rights without offending its African chums.' 27 February 2014 https://issafrica.org/iss-today/just-how-serious-is-south-africa-about-gay-rights (accessed 28 May 2020).

43 *Letsweletse Motshidiemang v Attorney General* (2019) MAHGB-000591-16.

44 Tabengwa (n 35 above) 348.

45 C Ngwenya *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 197.

46 Human Rights Council https://ilga.org/human-rights-council (accessed 25 April 2020).

47 Pan Africa ILGA 'Training Projects' http://panafricailga.org/our-work/ (accessed 25 April 2020).

48 BBC News Africa 'The secret lives of Kenya's drag queens' https://www.youtube.com/watch?v=0Kg-HvC1QaU (accessed 20 April 2020).

which may result in shifts of perspectives of LGBTQIA+ persons.[49] Where some individuals prefer not to interact with an institutionalised fight against queerphobia, there remains a necessity for individuals to bring about legal change from within structures themselves.[50] The contestation of dominant ideals and beliefs around African identities serves to vindicate individuals from being perceived as the deviant and perverted, shaped by moral degradation or Eurocentric influence.[51] Individuals are able to demonstrate their existence as legitimate, and deconstruct concepts within an African identity that serve to restrict and shape the identity within the continuing western heteronormative archetype.

5 Conclusion

The nature of the relationship between social and legal change in regard to LGBTQIA+ discriminatory laws is full of complexities. Writers such as Watson and Friedman have demonstrated mutually exclusive approaches, utilising a vertical characterisation of law and society. However, with the use of queer theory drawing from modalities across various disciplines, the nature of the relationship between law and social change becomes clearer. Historical shifts in social perspectives and laws concerning gender variance and sexuality in Africa demonstrate the dynamic nature of change and cultivate an understanding of law as a tool for either realisation or the destruction of human rights values. Social change may be slow, enforced by interpersonal policing and within relationships, can be dynamic; either catalysed by prevailing dominant discourses or within society itself e for varying economic, social, cultural, or legal reasons. Legal change can comprise of change begun by actors within the legal system itself, or through means such as strategic litigation. It can occur quicker if the institution is efficient but may also occur slowly where it functions within a bureaucratic system, relying upon state agents such as police to enforce laws. For either social or legal change, there are a number of diverse variables that must be identified and examined in their specific context. The nature of the relationship between social and legal change is one involving individual characteristics meeting in complexity and cannot be comprehensively understood with one blanket theory but must rather be examined through a variety of disciplines and must be conceptualised as containing multitudes.

49 Andam (n 29 above) 614.
50 Hirsch (n 13 above) 100.
51 Ngwenya (n 45 above) 199.

GAME OF THRONES: THE BATTLE OF THE MPHEPHUS

*by Gudani Tshikota**

Munwali ndi Gudani Tshikota. Ndi muvenda mubikwa na ive, ive la vhibva nne nda sala. Ndi mukololo, sa mukololo, ndi nwala nga u ditukufhadza nahone ndi so ngo divhudza u nyadza nndu khulu ya musanda ha-Mphephu Ramabulana.[1]

'Singo langa rambau. Sunguzwi i a dzudzumela i nyaga u tiba Makhado Tshilwavhusiku tshaha Ramabulana.'[2]

1 Introduction/Mathomo

South Africa, like the whole of Africa and many parts of the world, was not immune to Western civilisation, and this 'civilisation' was accompanied by the imposition of Western ideas, laws, cultures and

* Final year LLB student, University of Pretoria. ORCID: 0000-0001-5967-3101. I dedicate this paper to Prof Charles Maimela. His contribution and involvement in my understanding and knowledge of customary law in South Africa has been incredible. I would also like to acknowledge and give my utmost gratitude to my mentor Dr Joel Modiri for his contribution towards my critical thinking and writing skills and making sure I read and write more often. Prof Nicholaus Nelson-Goedert has also been very influential in ensuring that I acquire analytical reasoning and writing skills. Suzan Tshilivhali Tshikota and Karabo Tshikota remain the root of everything.

1 Here I introduce myself and reveal that I am a Venda young man born between the royal families of Tshikota and Vele. I note with great humility that this writing is not intended to dishonour or disrespect the great royal house of the Vhavenda people.

2 Here I praise the clan names of the Mphephu Ramabulana family, showing salutation and humility. This was written by Mbulaheni Mphephu and it is to be found here http://www.wakahina.co.za/listings//surname/mphephu.

traditions, and many other attributes of conquest.[3] African law was infiltrated and distorted beyond recognition, resulting in the origination of 'official' customary law, which remains stagnant and incapable of accounting for the needs, values and circumstances of an ever-changing society.[4] This study looks at the battle for the Vhavenda kingship/queenship between Masindi Mphephu (hereafter 'Masindi') and Toni Peter Mphephu (hereafter 'Toni') and contends that the Supreme Court of Appeal's decision was correct in light of the values enshrined in our constitutional democracy.[5] This is done by looking at the decision pertaining to the principle of male primogeniture in *Bhe and Others v Khayelitsha Magistrate and Others* (hereafter 'the *Bhe* case') and succession in *Shilubana and Others v Nwamitwa* (hereafter 'the *Shilubana* case').[6] Throughout this study, the adoption of 'living' customary law by judicial systems and the legislature is proposed as a catalyst towards the transformation of customary law.[7] Finally, this study contends that the pronouncement of Masindi as queen would be a step towards the transformation of customary law.[8]

2 The battle for the throne/Nndwa ya vhuhosi

2.1 History of the Vhavenda Kinship/Divha zwa kale ya vhuhosi ha Venda

The Vhavenda people, just like many other South Africans, originate from the great lakes of central Africa.[9] The Vhavenda people first settled at the Soutpansberg Mountains and built their first capital known as 'D'zata.[10] The Venda culture has a remarkable combination of other cultures and is comprised of Nguni, Central African and Sotho characteristics.[11] The Kingdom of Mapungubwe emerged in 800 AD and stretched from the Soutpansberg Mountains in the South and across the Limpopo River to the Matopos in the North.[12] The Mapungubwe kingdom encountered a decline from 1240 AD which occasioned the movement of the epicenter of trade and power to the

3 J Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 320.
4 DD Ndima 'The African law in the 21st century in South Africa' (2003) 36 *Comparative and International Law Journal of Southern Africa* 327.
5 Constitution of the Republic of South Africa, 1996 Preamble.
6 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 1 SA 580 (CC) (hereafter '*Bhe*') para 87; *Shilubana and Others v Nwamitwa* 2008 9 BCLR 914 (CC) (hereafter '*Shilubana*') para 31.
7 Ndima (n 3 above) 327.
8 As above.
9 Siyabona Africa http://www.krugerpark.co.za/Kruger_Park_Reference_Guide-travel/kruger-park-culture-guide.html (accessed 05 May 2020).
10 As above.
11 As above.
12 As above.

north of the Kingdom of Great Zimbabwe.[13] In the south of Limpopo, Shona-Venda and the Venda stoneware styles advanced during the 14th and the 15th centuries.[14]

Thoho-ya-ndou's home was known as D'zata and the remains of it have since been declared a national monument.[15] D'zata was immensely significant for the Venda people and they buried their chiefs facing it.[16] When Thoho-ya-ndou passed away, disputes were raised pertaining to succession and this led to separations which brought about the establishment of different houses.[17] The Vhavenda people's culture concerning the succession of the throne is very compound, and their history has shown that it is usually accompanied by disputes with regards to who ought to succeed.[18] The dispute which arises in the *Mphephu* case is thus not something new but rather presents a unique set of facts wherein a woman's position as a successor is being challenged.[19] The complex nature surrounding the law of succession within the Vhavenda culture is the reason why this study calls for the transformation of customary law.[20]

When tracing the Vhavenda kinship, the lineage obtained from the first king to the current contested one is as follows: (1) Mambiri (2) Tshilume (Munzhedzi) (3) Tshikalanga (4) Hwami (5) Ntidime (6) Dimbanyika/Lunonye (7) Dyambeu/Vele la Mbeu (8) Thohoyandou (Phophi) (9) Mpofu (10) Ramabulana (Munzhedzi) (11) Makhado (Lion of North) (12) Mphephu/Tshilamulele (Bufallo) (13) Mbulaheni George (14) Ramaano Patrick (15) Phophi Mphephu (Acting) (16) Toni Peter Mphephu.[21] When one looks at this lineage, certain observations are worth entertaining. For example, a woman has never led the Vhavenda kingship/queenship except for Phophi Mphemphu (Makhadzi) who was a leader in-acting.[22] This exclusion of women is one of the reasons why the royal family rejects Masindi's claim to the throne.[23] In an exclusive interview with 'Zwa maramani', Makhadzi submits that a woman cannot ascend to the throne and that if a woman could, she would have been queen herself.[24] This is one of the arguments presented in this study, that rejecting Masindi's claim to the throne based on her gender is unconstitutional and subsequently promotes the principle of male primogeniture which was challenged

13 As above.
14 As above.
15 As above.
16 As above.
17 As above.
18 As above.
19 As above.
20 Ndima (n 3 above) 327.
21 Luonde Vhavenda History https://luonde.co.za/venda-kingship/ (accessed 22 February 2020).
22 As above.
23 As above.
24 SABC News 'Zwa Maramani' https://www.youtube.com/watch?v=CRJtj5-qMgM (accessed 21 February 2020).

in the *Bhe* and *Shilubana* judgment.[25] These two cases are discussed in the latter paragraphs in great detail.

To enhance the argument that this study presents, focus will only be on how Toni emerged as the king of the Vhavenda tribe and why Masindi has a claim to the throne. Before Toni ascended to the throne, the Vhavenda kingship was contested by two other royal families, namely, the Ravhura family and the Mphaphuli family.[26] In January 2010 the Commission on Traditional Leadership Disputes and Claims (the old Commission) decided that the Vhavenda kingship/queenship hould vest in the Mphephu family.[27] As a result, the Vhavenda kingship/queenship now vests with the Mphephu family. The subsequent issue which arises questions who in the Mphephu family should be king/queen. This study responds in favour of Masindi throughout its discourse, and an argument that Masindi's pronouncement as queen will be a step towards the transformation of customary law is presented.[28]

Masindi is the only child of the late king Dimbanyika.[29] When her father passed away in 1997 from a motor vehicle accident, Masindi was supposed to be nominated to be queen by the Makhadzi. Makhadzi is responsible for the nomination of the king/queen but was unable to nominate Masindi as she was only six years old at the time.[30] It is however argued that despite this, Masindi should have been recognised as the rightful heir to the throne and a regent should have been appointed until Masindi became of age.[31] Indeed a regent (which is the currently contested king Toni) was appointed but Masindi was overlooked entirely because she was a girl.[32] That is why to date, the regency of the currently contested king Toni has been legitimised to kingship. There is indeed no argument concerning the question of whether Masindi is the rightful heir or not. The only point of contention is that she is a girl child. This argument does not hold because in the *Bhe* case, the Constitutional Court held that male primogeniture, which prefers male successors over female successors was unconstitutional as it violated section 9 of the Constitution.[33] To give context to the matter pertaining to Masindi, the *Bhe* case will now be discussed.

25 *Bhe* (n 5 above) para 87.
26 Luonde Vhavenda History (n 20 above).
27 As above.
28 Ndima (n 3 above) 327.
29 Luonde Vhavenda History (n 20 above).
30 As above.
31 As above.
32 As above.
33 *Bhe* (n 5 above) para 87.

2.2 The court's approach in previous cases/Ndila ya khothe kha milandu yo fhiraho

In the *Bhe* case, an application was brought on behalf of Ms Nontupheko's two minor daughters and her partner who is now deceased.[34] Ms Nontupheko and her deceased partner were not married but they lived together during the course of their relationship until the deceased passed away.[35] The deceased also took care of Ms Nontupheko and her two daughters.[36] Upon the deceased's death, the relationship between Ms Nontupheko and the deceased's father broke down.[37] Notwithstanding the breakdown of this relationship, the deceased's father was appointed as the representative and sole heir of the deceased's estate in terms of section 23 of the Black Administration Act.[38]

The question that the court was faced with in the *Bhe* case is the same question that this study is confronted with. [39] The contention was that section 23 of the Black Administration Act and section 1(4) (b) of the Intestate succession Act amounted to unfair discrimination against Ms Nontupheko's two daughters and violated their right to human dignity.[40] This was also the contention in the *Shilubana* case which is dissected in the latter paragraphs. Langa DCJ, who writes the majority judgment firstly notes that there is a place for customary law in our constitutional dispensation, and this does not presuppose that customary law should be tolerated, but rather accommodated.[41] This statement made by the DCJ is susceptible to critique but that is discourse for another day. The most important thing that we ought to take away from this statement is that customary law applies in South Africa to the extent that it is not in conflict with the Constitution of the Republic of South Africa, 1996.[42] Langa DCJ writes that section 39(2) of the Constitution imposes a duty on courts to interpret customary law in a way that promotes the spirit, purport and object of the Bill of Rights.[43] Accordingly, although customary law rules apply in South Africa, they are not immune to constitutional scrutiny.[44]

Langa DCJ confirms the constitutional invalidity of section 23(10) (a), (c) and (e) of the Black Administration Act made by the Cape High

34 *Bhe* (n 5 above) para 14
35 As above.
36 As above.
37 As above.
38 As above.
39 As above.
40 *Bhe* (n 5 above) para 73.
41 *Bhe* (n 5 above) para 41.
42 As above.
43 As above.
44 As above.

Court.[45] He writes that these sections unfairly discriminate against Ms Nontupheko's daughters on the ground of gender, and that this also amounts to the violation of their right to human dignity.[46] He explains that courts should be careful not to blindly apply 'official' customary law at the expense of 'living' customary law, which is in harmony with transformation.[47] In conclusion, Langa DCJ asserts that the notion of male primogeniture is unconstitutional as it unfairly discriminates against women and children born out of wedlock.[48] This case is very significant in the argument that is presented throughout this study, which is seeks to invalidate the argument that denies Masindi her title as queen on the basis of her being a woman.[49] Customary law is not immune to the constantly changing and moving society and the reason why Langa DCJ speaks of 'living' customary law is because society is constantly changing. Consequently, customary law should be in touch with society's ever-changing values, practices and needs.[50]

The minority judgment in this case also concurred with majority judgment in so far as to conclude that section 23 of the Black Administration Act and section 1(4) (b) of the Intestate succession Act were unconstitutional.[51] The only dissenting part of the minority judgment held that, although the principle of male primogeniture unfairly discriminates against women, the principle does not unfairly discriminate against younger children because it aims to ensure that someone takes over the responsibility of taking care of the children.[52] The dissenting remarks do not influence the argument that is presented throughout this study. However one could argue that the point raised by the minority judgment is ignorant of the fact that Ms Nontupheko was available to play that role. Replacing the deceased as a bearer of responsibilities is not inherently linked to gender and the argument would hold if there was no one else to take care of the children, where strict constitutional scrutiny and the best interests of the children would have to be taken into account.

In the *Shilubane* case, Ms Shilubane was the daughter of Hosi Fofoza Nwamitwa (hereafter 'Hosi Fofoza') and she is the one who brings an application to the court against Mr Nwamitwa, whose father is Hosi Malathini Richard Nwamitwa (hereafter 'Hosi Richard').[53] The dispute arises when Hosi Fofoza passed away without a male heir in 24 February 1968.[54] The principle of male primogeniture came into

45 *Bhe* (n 5 above) para 7.
46 *Bhe* (n 5 above) para 73.
47 *Bhe* (n 5 above) para 87.
48 *Bhe* (n 5 above) para 15.
49 *Bhe* (n 5 above) para 93.
50 Ndima (n 3 above) 327.
51 *Bhe* (n 5 above) para 224.
52 As above.
53 *Shilubana* (n 5 above) para 3.
54 As above.

play and even though Ms Shilubane was the oldest daughter of the deceased Hosi Fofoza and she was old enough to succeed him, she was overlooked.[55] Consequently, Hosi Richard who was Hosi Fofoza's younger brother, was preferred over Ms Shilubana.[56] The arguable point of law that arises, in this case, is similar to the one in the *Bhe* case, namely, that of the constitutional validity of the principle of male primogeniture. [57]

The Constitutional Court had to determine whether the decisions of both the SCA and the High Court to declare the pronouncement of Ms Shilubane as Hosi as unlawful, were correct.[58] Both these courts had held that the Royal Family had no authority to pronounce on Ms Shilubana as Hosi.[59] The Constitutional Court however reasons in the same way as it did in the *Bhe* Case. In addition to this, the majority judgment held that section 211(2) of the Constitution allows traditional leaders of families to have their own systems and it is in line with constitutional values for royal families to develop their customary laws in accordance with the needs, values and circumstances of their communities.[60] This is furthermore in line with 'living' customary law, which Ndima argues should be the system of customary law that the courts and the legislature adopt.[61] The Court subsequently concluded its judgment by submitting that the principle of male primogeniture is unconstitutional and that the royal family was correct in pronouncing Ms Shilubana as Hosi.[62]

The court emphasises the fact that one cannot argue that someone cannot succeed merely because of their gender.[63] This judgment promotes the argument presented throughout this study. When Masindi's father passed away, Masindi like Ms Shilubana, was supposed to succeed and the only difference in this scenario is that Masindi was still very young.[64] Toni was instead appointed to be a regent until Masindi is of age but now Toni's regency has been legitimalised to kingship merely based on the argument that Masindi is a girl child.[65] This decision is influenced by the principle of male primogeniture which has been shown, through the *Bhe and Shilubane* cases, as being unconstitutional and accordingly invalid.[66]

55 As above.
56 *Shilubana* (n 5 above) para 3.
57 *Bhe* (n 5 above) para 93.
58 *Shilubana* (n 5 above) para 1.
59 As above.
60 *Shilubana* (n 5 above) para 45.
61 Ndima (n 3 above) 327.
62 *Shilubana* (n 5 above) para 31.
63 As above.
64 Luonde Vhavenda History (n 20 above).
65 As above.
66 As above.

2.3 The Mphephu SCA decision/Khathulo ya khothe ya khathululo kha mulandu wa Mphephu

The facts of the case are apparent in the above paragraphs, but to reiterate, Masindi is fighting for her rightful place as the queen of the Vhavenda kingdom.[67] In this part of the study, focus is on how the court dealt with the merits of the case and whether the court reached the correct decision. The SCA in the *Mphephu v Mphephu* case had to determine whether the High Court was correct in dismissing Masindi's claim for the declaration of Toni's kingship of the Vhavenda people.[68] The High Court held that it did not have jurisdiction over the dispute because the dispute had not been lodged first with the Commission in terms of section 21 of the Frameworks Act.[69] This Act provides for lodging of claims, the declaration of disputes over traditional positions and the resolutions of these claims and disputes by the Commission.[70] This resulted in the High Court not adjudicating on the issue of whether Toni is the rightful king or not.[71]

The SCA held that the High Court was mistaken in ruling that it didn't have jurisdiction and thus referred the matter back to the High Court for reconsideration.[72] It held that the procedure given in sections 9(3) and 21 of the Frameworks Act were designed in such a way that by the time a dispute is raised in the courts, the customary institutions or structures: specialist entities on customary laws and custom, shall have had the chance as a matter of preference, to express their views on the customary laws and customs rules applicable.[73] Moreover, the views of these institutions as overseers of customary law forms a part of the record of the decision.[74]

Furthermore, the SCA held that the Commission did not have the necessary authority to identify a person for the recognition of a king or queen.[75] It held that such authority or powers vested in the Royal Family, and in this instance, would vest with the Makhadzi (the sister of the incumbent ruler) of the Mphephu royal family.[76] In essence, according to the Vhavenda customs, the king or queen is nominated by Makhadzi.[77] Consequently, the SCA held that the decision by the eighth Respondent, who was the former president Jacob Zuma, to nominate Toni as king was unlawful.[78] As a result and as things stand,

67 *Mphephu v Mphephu-Ramabulana & Others* 2019 948/17 (SCA) (hereafter '*Mphephu'*) para 4.
68 *Mphephu* (n 66 above) para 10.
69 As above.
70 *Mphephu* (n 66 above) para 13.
71 As above.
72 *Mphephu* (n 66 above) para 15.
73 As above.
74 As above.
75 *Mphephu* (n 66 above) para 22.
76 As above.
77 As above.

Toni is, legally speaking, not the rightful heir and it can be said that the Vhavenda kingship/queenship is vacant unless if there is currently a regent appointed in the interim. The court further held that the argument that Masindi cannot be queen because she is a woman does not stand because it is established law that women can succeed as held in the *Shilubana* case.[79]

3 Critical Analysis/Tsenguluso

The first thing to note is that there is no dispute that Masindi is the rightful heir. The only dispute, as per the Makhadzi of the Mphephu royal family, is that Masindi is a woman and nowhere in the history of the Vhavenda kingship has a woman been a queen.[80] Makhadzi argues that if this was the case then she would have been the queen herself.[81] The only difference between Makhadzi and Masindi is that Masindi wants to be queen at a time when there is a constitution, which is the supreme law and all laws, including customary law being subject to it.[82] Section 9 of the Constitution states that no one may be discriminated against on the basis of sex, gender, race and so forth.[83] This means that any custom, including the Vhavenda custom, which discriminates against any person based on any ground listed in section 9 of the Constitution will be declared unconstitutional.[84] Therefore, the argument made that Masindi cannot be queen because it is against the Vhavenda custom, is unconstitutional. This is an established principle which was adopted in the *Shilubana* case where it was clearly stated that women can succeed.[85]

This study expands and explores upon Ndima's text where he writes about the dichotomy between 'official' customary law and 'living' customary law.[86] Ndima writes that the old 'official' customary law encompasses old customary law rules which were infiltrated and to a lesser or greater extent fabricated by Western civilisation.[87] Consequently, 'official' customary law has been stripped of the moral values of Africans due to the application of repugnancy clauses which have left African law distorted beyond recognition.[88]

78 *Mphephu* (n 66 above) para 46.
79 *Mphephu* (n 66 above) para 30.
80 SABC News 'Zwa Maramani' (n 23 above).
81 As above.
82 Constitution (n 4 above) sec 2.
83 Constitution (n 4 above) sec 9.
84 As above.
85 *Shilubana* (n 5 above) para 31.
86 Ndima (n 3 above) 327.
87 As above.
88 Ndima (n 3 above) 327.

In contrast, 'living' customary is in touch with society's values, needs and circumstances.[89] It moves with time and it is the one that African communities continue to adhere to.[90] Ndima contends that 'living' customary law is the one that should be affirmed by the courts and the legislature.[91] The reason why the *Bhe* and *Shilubana* judgments are adopted in the argument presented throughout this study is that both these judgments speak of the need for courts to follow 'living' customary law.[92] 'Living' customary law would dictate that the African values of Ubuntu, as dissected above, be followed and that would result in Masindi being allowed to be queen.[93] Moreover, 'living' customary law, which is transformative, would acknowledge that the principle of male primogeniture should no longer apply since society is constantly moving and changing.[94] Accordingly, the adoption of 'living' customary law by courts is a step towards the transformation of customary law.

Toni's legitimacy as king was declared by former president Jacob Zuma in 2012.[95] The SCA held that this declaration by the president was unlawful as he acted out of jurisdiction.[96] This means that as things stand, the Vhavenda kingship is vacant. Toni is not legally permitted to call himself the king of the Vhavenda kingship/ queenship. The High Court will then decide on the issue of who the rightful heir is provided that the Mphephu Ramabulana family fails to resolve the matter within the family. However, the High Court is likely to reach the same conclusion that this study reaches as it is bound to the decisions of the Constitutional Court as well as the Constitution itself, which inspires to be transformative adjudication.[97]

The SCA makes a very progressive remark in its judgment. It reveals that it would be in the parties' best interest to sit as a family and try to resolve the matter before the matter is heard by the High Court again.[98] This remark indicates that the SCA acknowledges the superiority of the Constitution but also tries to respect customary law by showing reluctance in dictating or commanding the Royal Family on what it ought to do. In this regard, the SCA's decision is commendable. The remarks by the SCA means that the Royal Family should negotiate amongst each other or in the presence of the

89 As above.
90 As above.
91 As above.
92 *Bhe* (n 5 above) para 239; *Shilubana* (n 5 above) para 76.
93 Ndima (n 3 above) 327.
94 As above.
95 E Mushiana 'We have accepted the decision of the court, says Mphephu royal family' 15 May 2019 https://citizen.co.za/news/south-africa/courts/2116761/appeal-court-sets-asidezumas-decision-that-made-vbs-linked-man-venda-king/ (accessed 22 March 2020).
96 *Mphephu* (n 66 above) para 43.
97 PN Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 353.
98 *Mphephu* (n 66 above) para 43.

necessary stakeholders if needs be. The negotiations would mean that there must be a compromise. In the succeeding paragraphs, potential solutions that entail potential compromises are provided.

The Mphephu Ramabulana family can also employ the transformative stance taken by the Valoyi family in the *Shilubana* case if it believes that it is against their customary law rules for a woman to be a queen.[99] The court in *Shilubana* says that the Royal Family can develop its rules to be in line with the ever-changing society.[100] Nothing is standing between Masindi and the throne except the conflict in the family. The family may also employ the spirit of Africanness 'Ubuntu' or 'vhuthu' in Tshivenda. The court in *S v Makwanyane (*hereafter 'the *Makwanyane* case') introduces us to the principle of Ubuntu in judicial review. The Constitutional Court held that Ubuntu has become a very important part of our constitutional values and is one of the values that ought to be considered when interpreting the Bill of Rights as well as other areas of law.[101]

This study also expands and explores upon Ntlama who writes about the need for traditional leadership to be transformed.[102] This has been the call that this study has been making throughout its discourse. Ntlama reveals how difficult it has been in customary law for women to be treated as equals.[103] Many traditional leadership institutions are presided over by men who disregard women.[104] The argument concerning the existence of traditional leadership in 'post'-apartheid South Africa is discourse for another day. While in existence, traditional leadership like most institutions in South Africa and probably all over the world, needs to be stripped of its patriarchy.[105] The continual domination and subjugation of women by traditional leadership institutions should be dismantled.[106]

The pronouncement of Masindi as queen of the biggest house of the Vhavenda people can help in dismantling the idea of male domination in traditional leadership institutions.[107] It would be unjust for us to call for the transformation of South Africa in unanimity but begin to scatter when we call for the transformation of traditional leadership within South Africa. A transformed traditional leadership institution would have different attributes depending on the traditional practices of each community. However, what should be

99 *Shilubana* (n 5 above) para 31.
100 As above.
101 *S v Makwanyane and Another* 1995 3 SA 391 (CC) (hereafter '*Makwanyane'*) para 225.
102 N Ntlama 'The Changing Identity on Succession to Chieftaincy in the Institution of Traditional Leadership: *Mphephu v Mphephu-Ramabulana* (948/17) [2019] ZASCA 58' (2020) 23 *Pioneer in Peer Review* 3.
103 Ntlama (n 101 above) 3.
104 As above.
105 As above.
106 As above.
107 Ndima (n 3 above) 327.

common in all traditions is that the domination and subjugation of women must be done away with. Women must be seen as equals to their male counterparts and they should have equal access to opportunities. The cases that this study explores have shown that the application of 'living' customary law by courts is significant in the call for the transformation of customary law.

The *Makwanyane* case is important because it introduces Ubuntu in judicial review and emphasises the value that Ubuntu puts on life and human dignity.[108] This means that courts can use Ubuntu to justify their reasoning in judgments.[109] The consequence of this also means that the High Court can adopt Ubuntu if it hears the *Mphephu* case again in the event where the family is unable to resolve the dispute on its own. However, for an illustration of Ubuntu as a concept, the discussion laid out in the *Makwanyane* case will not be followed.[110] This study expands and explores upon an article titled 'Reflections on judicial views of Ubuntu' by Himonga, Taylor and Pope, who contend that the discussion on the concept itself and its origin in the *Makwanyane* case is prone to redundancy, ambiguity, issues of exclusions and perceptions of dichotomies.[111]

The challenge with the concept of Ubuntu as laid down in the *Makwanyane* case lies in the interpretation of what this concept means or denotes.[112] These authors note that the court in *Makwanyane* does not give us the direction on which mutually exclusive interpretation is to be followed.[113] The authors however submit that a jurisprudentially inspired concept of Ubuntu would be one that leads to the realisation of a democratic society based on human dignity, equality and freedom.[114] It must, however, be noted that the authors do not oppose the idea of Ubuntu as humanness, compassion, and so forth but merely argue for legal certainty in judicial review.[115]

When one looks at the *Mphephu* case, it is advised that Ubuntu be employed by the family in their discussions to find a solution. If the family can only show compassion, love and humanness then it is possible that they can come to a compromise that would allow Masindi as the rightful heir to lead. Ubuntu would also presuppose the notion that society is constantly changing, and transformation is for that reason essential. If the family does not reach such a compromise then the High Court must use Ubuntu to realise the democratic values of

108 *Makwanyane* (n 100 above) para 225.
109 As above.
110 As above.
111 C Himonga *et al* 'Reflections on judicial views of Ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 50.
112 Himonga (n 110 above) 50.
113 As above.
114 As above.
115 Himonga (n 110 above) 50.

equality, human dignity and freedom, and this can only be achieved through allowing Masindi, as the rightful heir, to lead. Masindi's taking over as the rightful heir of the biggest royal family in the Vhavenda culture is also a step towards the transformation of traditional leadership in South Africa. This will show that the rigid rules and beliefs of subjugation and dominion over women are cast away.

It is not an issue of contestation that Masindi is the rightful heir. The only challenge was that she was overlooked because of her gender and this is an issue this study has already laid to rest in the preceding paragraphs. Now the issue that is ought to be determined is whether Masindi can be queen. One of the issues raised each time we speak about queenship is that of 'continuation'. This is also argued in the battle of the Mphephus. The argument is, if Masindi is to be the queen then the chieftaincy will move to another bloodline or family.[116] But a good question which then arises is, what if Masindi has no intention of getting married? Transformation also entails the notion that women should be free to decide what they want to do and what they don't. If Masindi decides that she does not want to get married, then she should still be able to become queen and thereafter, any person in line can lead. She cannot just be overlooked merely on the grounds that she is a woman or because it is supposedly every woman's desire to get married.

Furthermore, this study dismisses the argument of 'continuation' as a basis for rejecting Masindi's claim to her throne by expanding and exploring upon the Modjadji royal family. The Rain Queen was married to a woman and her brothers were responsible for procreation to ensure that the bloodline remains in one family.[117] The children born from that procreation are the children of the Rain Queen.[118] This is also one thing that the Mphephu family may look into.[119] Masindi be can Queen given that she complies with the conditions set by the Royal Council. These conditions may include but are not limited to the following; Masindi may not have children unless it is through the route followed by the Modjadji family, Masindi may relinquish any desire to get married to a man unless she does not plan on having children with that spouse and she may accept her uncle Toni as a Ndumi (close advisor) in exchange for Toni stepping down from the kingship to maintain peace in the family. This is essentially what transformation entails, an understanding that the society is not stagnant, society is constantly changing, and laws, customary law included, should avoid being out of touch with the society.

116 SABC News 'Zwa Maramani' (n 23 above).
117 National Museum Publications https://nationalmuseumpublications.co.za/modjadji-the-rainqueen/ (accessed 22 February 2020).
118 National Museum Publications (n 116 above).
119 As above.

4 Conclusion/Magumo

The battle of the Mphephus is characterised by one thing and one thing only, that is, the principle of male primogeniture and how it disallows or sees women as incapable of leading. This principle was declared unconstitutional in the *Bhe* case, and the *Shilubana* case also made it clear that a woman can succeed. The argument with regards to the issue of continuation also does not provide an uncontested logic because Masindi may choose not to get married or she may choose to get married to a woman, following the example of the Rain Queen, and not have children. The family during their negotiations can adopt Ubuntu to reach a compromise or if no such compromise is reached then the High Court can also adopt Ubuntu in deciding the matter. Central to this case is the transformation of traditional leadership institutions. Masindi as the rightful heir must be allowed to be queen and the Royal Family, for the sake of peace and Ubuntu must make his uncle, Toni a Ndumi (close advisor).

Nndaa!!

CRITICAL RACE THEORY AND FEMINIST LEGAL THEORY: PERSPECTIVES ON TRANSFORMATION OF THE JUDICIARY

*by Hayley C. Warring**

1 Introduction

Referring to judicial appointments, Plasket J commented in 2013 that he could see 'no basis on which [the Judicial Service Commission] could refuse to appoint a suitably qualified person' in the presence of qualified white candidates.[1] He was not alone in this view. Others have suggested that the Judicial Service Commission (JSC) is biased in favour of black and female candidates to the detriment of their white male counterparts.[2] In this article, I will not endeavour to determine whether this bias in fact exists. The aim of this article is to explore Feminist Legal Theory (FLT) and Critical Race Theory (CRT) perspectives on transformation and the right to equality, with particular attention paid to transformation of the judiciary. This article consists of six parts. In the first section, the historical context

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1 'JSC in Heated Debate Over Transformation' *News24 Archives* https://www.news24.com/SouthAfrica/News/JSC-in-heated-debate-over-transformation-20130410 (accessed 13 March 2020).

2 N Tolsi 'JSC's Izak Smuts Resigns After Transformation' *Mail & Guardian* https://mg.co.za/article/2013-04-12-izak-smuts-resigns-after-transformation-row/ (accessed 13 March 2020).

of the JSC's establishment, as well as the standard against which its decisions are measured, is explored. Secondly, the right to equality viewed through the lens of transformative constitutionalism is assessed. The third and fourth segments of this article focus on FLT and CRT respectively. Fifthly, I analyse the commentary from CRT and FLT scholars on human rights and transformative constitutionalism. Finally, I attempt to justify the act of abstention from making appointments in relation to FLT and CRT's notion of refusal.

2 The JSC, the rule of law and rationality

The JSC was established in terms of section 178 of the (final) Constitution and is tasked with providing recommendations to the President regarding judicial appointments, conducting public hearings for the appointment of such candidates, and disciplining judges. To better understand the standards against which the JSC's decisions are measured, a brief historical overview of the circumstances leading up to its creation is given below.

Prior to 1994, judges were appointed by the State President, usually at the direction of a cabinet member. The convention was to choose appointees from the ranks of practising senior advocates.[3] This process of 'executive appointment' did not go unchallenged during constitutional negotiations. The issue was considered by the Multi-Party Negotiating Forum (MPNF), which gathered for the first time in April 1993, with 26 participants representing a range of political parties, large and small.[4] By July, it had agreed on a series of steps towards a new constitution, including adopting constitutional principles against which a later draft would be appraised.[5]

While it made much progress, by April 1994 major sticking points remained, including the issue of judicial appointments. This highly contested issue nearly brought negotiations to a standstill.[6] Negotiating parties were aware of the power judges would wield under a justiciable constitution. Consequently, some parties sought to achieve democratic control over the judicial appointment process.[7] The concern with retaining the executive appointment process was that it allowed politics to influence appointments. A government could place political factors over merit when making appointments.[8] The African National Congress (ANC) and the National Party (NP), both dominant negotiating parties, were eager to depoliticise the

3 I Currie & J de Waal *The new constitutional and administrative law* (2002) 301.
4 Constitutional Court of South Africa 'History of the Constitution' https://www.concourt.org.za/index.php/constitution/history (accessed 21 May 2020).
5 No constitutional principle addressed directly the issue of judicial appointments.
6 Currie & de Waal (n 3 above) 301.
7 As above.
8 As above.

appointment process but reluctant to relinquish executive control over it.[9]

Parties agreed that the election of judges by popular vote, as is the practice in the United States of America, would not be appropriate.[10] The Technical Committee proposed that Constitutional Court judges ought to be appointed by Parliament, but this was also rejected.[11] The option of a committee tasked with judicial appointments, as is the choice in many Commonwealth countries, was eventually agreed on.[12]

This background reveals that the JSC is the product of a political compromise, and this is also evident in its composition. It reflects a 'balance of interests' between politicians, political appointees — representing both the executive and legislature — and members of the legal profession.[13] In terms of the interim Constitution, the JSC was to consist of 17 members.[14] Just over half of its membership consisted of politicians or political appointees, and the remainder was made up by members of the legal profession.[15]

In the final Constitution, the membership of the JSC was increased to 23 members. The proportion of politicians and political appointees also increased to approximately 65%.[16] This composition was challenged upon certification. It was argued that Parliament and the executive were over-represented and that the President had been given too dominant a role in the appointment of judges.[17] Nevertheless, this composition survived scrutiny against

9 As above.
10 Currie & de Waal (n 3 above) fn 149.
11 Currie & de Waal (n 3 above) fn 147.
12 Currie & de Waal (n 3 above) 302.
13 As above.
14 Section 105(1)IC — (1) There shall be a Judicial Service Commission, which shall, subject to subsection (3), consist of —
(a) the Chief Justice, who shall preside at meetings of the Commission;
(b) the President of the Constitutional Court;
(c) one Judge President designated by the Judges President;
(d) the Minister responsible for the administration of justice or his or her nominee;
(e) two practising advocates designated by the advocates' profession;
(f) two practising attorneys designated by the attorneys' profession;
(g) one professor of law designated by the deans of all the law faculties at South African universities;
(h) four senators designated en bloc by the Senate by resolution adopted by a majority of at least two- thirds of all its members;
(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet;
(j) on the occasion of the consideration of matters specifically relating to a provincial division of the Supreme Court, the Judge President of the relevant division and the Premier of the relevant province.
15 9 out of 17 members were politicians or political appointees, this is approximately 53% of its membership.
16 This composition was contained in NT 178(1).
17 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 121.

Constitutional Principles VI and VII, concerning the separation of powers and impartiality of the judiciary respectively, and is now contained in section 178(1)(a)-(j) of the final Constitution of 1996.[18] The Constitutional Court held that the mere fact that the executive participates in judicial appointments is not inconsistent with the doctrine of separation of powers or the independence of the judiciary.[19] What is crucial in respect of these Constitutional Principles is that the judiciary functions independently of the legislature and executive, and enforces the law impartially.[20]

It is clear from the proportional representation of politicians and political appointees in the JSC's membership that there is room for political influence in judicial appointments. It is further interesting to note that the *Promotion of Administrative Justice Act (PAJA)* specifically excludes any of the JSC's decisions from the ambit of strictly reviewable 'administrative action'.[21] The reason for this, according to Malan, is that the appointment of judges, specifically those who may review legislative and executive decisions, is in itself political in nature. Accordingly, the government has an interest in excluding it from review in terms of *PAJA*.[22] This does not immunise the JSC's decisions from judicial review. The court in *Judicial Service Commission v Cape Bar Council* noted that its decisions are an exercise of public power, subject to the founding constitutional value of the rule of law and are therefore restrained by the principle of rationality.[23] The parameters of this restraint are important, given

18 (1) There is a Judicial Service Commission consisting of —
(a) the Chief Justice, who presides at meetings of the Commission;
(b) the President of the Supreme Court of Appeal;
(c) one Judge President designated by the Judges President;
(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
(g) one teacher of law designated by teachers of law at South African universities;
(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate design.

19 *Certification* case (n 17 above) para 123.

20 As above.

21 Section 1(gg) Promotion of Administrative Justice Act 3 of 2000.

22 K Malan 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa' (2014) 17 *Potchefstroom Electronic Law Journal* 1969.

23 2013 1 SA 170 (SCA) para 22.

that the Constitution provides little guidance for judicial appointments.

Two direct constitutional mandates of the JSC are relevant to this discussion. The first, contained in section 174(1), sets an absolute criterion for the appointment of judges: '[a]ny appropriately qualified woman or man who is *a fit and proper person* may be appointed as a judicial officer.'[24] This amounts to a hard rule, non-compliance with which will invalidate the appointment. The second mandate is contained in section 174(2): '[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa *must* be *considered* when judicial officers are appointed.'[25] While section 174(2) confers a mandate to the extent that it contains the word 'must', use of the word 'consider' implies a great deal of discretion and flexibility in affording weight to this factor. Consequently, the weight this consideration holds depends on the importance afforded to it by members of the JSC. However, while the JSC enjoys this discretion, it remains bound at all times by the rule of law.

The rule of law is a founding value of our constitutional democracy.[26] As a restraint on state conduct, it is an evasive and abstract concept, which manifests in practical application as the principle of rationality.[27] In the *Pharmaceutical Manufacturers* judgment, it was held that the rule of law requires the non-arbitrary exercise of public power.[28] This requires that decisions taken must be rationally related to the purpose for which the decision-making power was given.[29] As such, a decision devoid of the required rational connections, in respect of both its procedural and substantive components, will not survive constitutional scrutiny.[30]

In *Judicial Service Commission v Cape Bar Council*, the JSC fell afoul of the procedural component of the rationality inquiry.[31] In response to a request to furnish reasons for its decision to leave vacancies open despite the presence of appropriately qualified white candidates, the JSC did not address what motivated the voting outcome, merely stating that it was the result of the majority's votes.[32] Our Constitution brought with it 'a culture in which every exercise of power is expected to be justified'.[33] In light of this, it is

24 Italics for my own emphasis.
25 Italics for my own emphasis.
26 Section 1(c) of the Constitution.
27 *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 para 85; *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) para 179.
28 *Pharmaceutical Manufacturers* (n 27 above) para 85.
29 *Pharmaceutical Manufacturers* (n 27 above) para 79.
30 I Currie & J de Waal *The Bill of Rights Handbook* (2013) 12.
31 *Judicial Service Commission* (n 23 above) para 45.
32 *Judicial Service Commission* (n 23 above) para 38.
33 Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

unsurprising that the court held that the JSC could not be exempted from furnishing reasons for its decision, as this would effectively immunise those decisions from a rationality inquiry.[34]

This article is primarily concerned with the substantive component of the rationality inquiry, in particular how appointments or abstentions from making appointments, which are motivated by the goal of transforming the judiciary may be justified. Nevertheless, the substantive and procedural components are closely entwined. The substance of the reasons given must show a crucial rational connection to a legitimate governmental purpose, and that decision must respect the individual's basic rights.[35] In this article, I propose that the legitimate governmental purpose must be the furtherance of the constitutional transformative project. The following section considers the nature of transformative constitutionalism and the right to equality in terms of our post-liberal Constitution.

3 Transformative constitutionalism and the right to equality

The commitment to transform our society lies at the heart of our constitutional democracy.[36] Former Deputy Chief Justice Moseneke stated that 'the meaning of transformation in juridical terms is as highly contested as it is difficult to formulate'.[37] The late former Chief Justice Langa considered that perhaps it is in the spirit of transformation that no rigid understanding of the concept exists.[38] However, the fact that transformation is an evasive concept does not detract from its existence and centrality to our constitutional democracy.

A useful, albeit deficient, analogy for visualising the constitutional transformative project is the 'bridge'. The Epilogue (or Post-amble) of the interim Constitution first introduced the bridge analogy. The Epilogue provides that the interim Constitution was meant as:

> a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[39]

34 *Judicial Service Commission* (n 23 above) para 44.
35 Currie & de Waal (n 30 above) 13.
36 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8.
37 D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 315.
38 P Langa 'Transformative constitutionalism' (2007) 13 *Stellenbosch Law Review* 351.
39 Constitution of the Republic of South Africa 200 of 1993.

This is fitting in a document that 'seeks to transform the *status quo ante* into a new order'.[40] The Constitution was intended to be a:

> decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive … and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos.[41]

The temporal dimensions of the democratic transition, or passing over the bridge, are interesting. The past is well-defined. Standing on the bridge, it is the society behind us, marked by authoritarianism and human rights abuses. For Langa, the core idea of transformative constitutionalism is clear, 'we must change'.[42] The present and the future pose more of a challenge, less clear are the issues of what the society on the other side of the bridge looks like, and how we go about crossing the bridge to get there.[43] In answering these questions Langa posits two ideas: firstly, that the new society is one based on substantive equality; and secondly, that transformative constitutionalism entails the transformation of legal culture.[44]

Klare considers substantive equality to be equality in 'lived, social and economic circumstances and opportunities needed to experience human self-realization'.[45] Substantive equality is concerned with results and requires an examination of actual social and economic conditions in order to uphold the commitment to achieving equality.[46] Substantive equality requires treating people who are similarly situated similarly and those who are dissimilarly situated differently.[47] Klare states that the Constitution 'envisages equality across the existential space of the social world, not just within the legal process.'[48] This understanding entails that law cannot be neutral with respect to the distribution of social and economic power and opportunities for self-realisation.[49]

In *President of the Republic of South Africa v Hugo*[50] it was stated that the achievement of equal treatment on the basis of equal worth and freedom was not possible by affording identical treatment in every situation. The test for constitutionality, as stated by Sachs J in *Minister of Finance v van Heerden,*[51] is not whether the measure treats everyone identically, but rather focuses on whether the

40 *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 para 157.
41 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 262.
42 Langa (n 38 above) 352.
43 As above.
44 Langa (n 38 above) 352, 353.
45 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* fn 13.
46 Currie & de Waal (n 30 above) 213.
47 Currie & de Waal (n 30 above) 211.
48 Klare (n 45 above) 154.
49 As above.
50 1997 4 SA 1 (CC) para 41.
51 2004 11 BCLR 1125 (CC) para 142.

measure in practise advances or retards the equal enjoyment of rights and freedoms that are promised by the Constitution but have not yet already been achieved. Feminists are often credited with demonstrating that the application of formal equality has unjust results, and substantive equality should be sought.[52]

Section 1 of the Constitution provides that South Africa is 'one, sovereign, democratic state founded on '… [h]uman dignity, the *achievement* of equality and the advancement of human rights and freedoms'.[53] Reference to the 'achievement' of equality is the first textual indicator that a substantive, as opposed to a formal, concept of equality is envisaged. Further textual indicators are contained in section 9 which provides for the right to equality. Section 9(2) provides that equality 'includes the full and equal *enjoyment* of all rights and freedoms' and enjoins the State to implement measures designed to advance persons, or categories of persons, disadvantaged by unfair discrimination.[54] Section 9(3) and (4) prohibit unfair discrimination and provide for grounds upon which discrimination is presumed to be unfair according to section 9(5).

The Constitutional Court in *Harksen v Lane NO*[55] formulated a multi-stage test to determine whether unfair discrimination has occurred in terms of section 9. At the first stage, it must be considered whether there is mere differentiation. If a rational connection can be shown to exist between the differentiation and a legitimate governmental purpose, section 9(1) has not been

52 T Metz 'Is Legal Interpretation Subjective?' in D Bilchitz *Jurisprudence in an African context* (2017) 121.

53 Italics for my own emphasis. Section 1(a) of the Constitution of the Republic of South Africa 1996.

54 Italics for my own emphasis.

55 1998 1 SA 300 (CC) para 50:
(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
(iii) If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the Interim Constitution).

infringed.[56] The second stage of the test considers whether this differentiation amounts to unfair discrimination. To rebut the presumption imposed by section 9(5), it must be shown that this differentiation is not unfair discrimination.[57] What is apparent from section 9 as well as the substantive rationality requirements that the JSC's decisions must comply with, is that the Constitution attempts to create a culture of justification.[58]

A mere absence of manifest forms of discrimination, which might be challenged in terms of section 9 of the Constitution or in terms of the *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),*[59] should not be equated with the achievement of substantive equality or transformation. Returning to the bridge analogy, the Epilogue of the interim Constitution goes further to refer to a 'reconstruction of society'.[60] This reconstruction, according to Albertyn and Goldblatt, requires a 'redistribution of power and resources along egalitarian lines'.[61] Furthermore, the achievement of equality within the transformation project requires the eradication of *systemic* forms of inequality and providing opportunities which allow people to develop to their full potential.[62]

In *South African Police Service v Solidarity obo Barnard*, the then Acting Chief Justice Moseneke, writing for the Constitutional Court, held that the Constitution's transformative mission hopes to re-imagine power relations in South Africa.[63] He stated further that it enjoins us to take active steps to achieve substantive equality.[64] The measures which bring about transformation will necessarily adversely affect some people, particularly those from advantaged communities.[65] In *Soobramoney v Minister of Health, KwaZulu-Natal,*[66] the Constitutional Court stated:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and

56 *Harksen* (n 55 above) paras 42, 53.
57 *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC) para 31.
58 Mureinik (n 33 above) 32
59 Act 4 of 2000.
60 Constitution of the Republic of South Africa 200 of 1993.
61 C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 249.
62 As above.
63 2014 6 SA 123 (CC) para 29.
64 As above.
65 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC) para 74.
66 1998 1 SA 765 (CC) para 8.

> equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

For Langa, the 'levelling of the economic playing fields' is central to any concept of transformative constitutionalism.[67] It goes beyond the fulfilment of socio-economic rights to require the provision of greater access to education and opportunities through mechanisms which include affirmative action measures.[68] In light of this, Langa considers transformation to be a 'social and economic revolution'.[69]

Transformative constitutionalism goes further than this. Langa's second proposition is that it requires a transformation of legal culture.[70] Under the Constitution, new conceptions of the judicial role and responsibility are contemplated.[71] In keeping with this and the shift towards a culture of justification, Langa considers that under our transformative Constitution judges bear the responsibility to justify their decisions not only by reference to authority but by reference to ideas and values.[72] This approach to adjudication requires acceptance of the political and ideological nature of law. Law does not operate in a vacuum. While politics and law are not the same thing, they are interconnected.[73] Judges must acknowledge the effect of extra-legal factors, such as their moral preconceptions, on adjudication.[74] In this regard, the Constitution imposes a shift from denying the influence of extra-legal factors, as was done by most judges under apartheid, to accepting and embracing the role that these factors play in decision-making.[75] That law is ultimately political, and that extra-legal factors influence adjudication are central concepts in Critical Legal Studies (CLS) which are retained by CRT and critical legal feminism.[76]

4 Introduction to feminist legal theory

Feminism has a long and rich history which can roughly be divided into three (possibly four) so-called 'waves' which are defined not so much by time frames as by their preoccupations and methods.[77] The first

67 Langa (n 38 above) 352.
68 As above.
69 As above.
70 Langa (n 38 above) 353.
71 Klare (n 45 above) 155.
72 Langa (n 38 above) 353.
73 As above.
74 As above.
75 As above.
76 J Modiri 'The grey line in-between the rainbow: (Re)thinking and (re)talking Critical Race Theory in post-apartheid legal and social discourse' (2011) 26 *Southern African Public Law* 180.
77 Feminists such as Kira Cochrane and Prudence Chamberlain submit that a fourth wave arose in the early 2010s which is defined by the use of web-based tools, erosion of the gender binary, intersectionality and striving for justice.

wave was concerned with the achievement of equal rights in a formal sense. Initially, these were civil liberties, followed by contract and property rights.[78]

'Personal is political' was the rallying slogan of the second wave, which was concerned with women's roles in the 'separate sphere'.[79] The 'separate sphere', where women's world was domestic, is by definition incompatible with full participation in society.[80] Taub and Schneider consider that the glorification of the 'women's destiny' softened the unfairness of being excluded from the legal profession.[81]

In the third wave, feminists are discussing the same issues of sex, money, reproduction and jobs as in the second wave, but are positing a more complex and nuanced concept of power.[82] Power is considered to be a primarily productive force that shapes people by moulding their desires and self-concepts.[83] Male power is pervasive, it is the foundation of institutions and the norm against which everyone is measured.[84] In this third wave, questions of equality and gender are questions about the distribution of power, and at their roots are questions of hierarchy.[85] It was around the end of the second wave and beginning of the third wave that critical legal feminist movements arose in the United States and Britain.

Before turning to critical legal feminisms in particular, it is useful to consider three main contributions that FLT made, generally speaking, to legal interpretation, according to Metz.[86] Its first contribution was the problematisation of legal concepts such as the 'reasonableness' standard.[87] While the 'man' aspect of the 'reasonable man' standard has been dropped in favour of 'person' FLT scholars argue that standards such as 'reasonableness' are inherently male.[88] A woman will necessarily fall short when measured up to this standard. The second contribution of FLT is that it raised issues about the basic values which determine the distribution of benefits and burdens in society.[89] Here it is argued by some that 'desert claims' or

78 C Huntington & M Eichner 'Introduction, Special Issue: Feminist legal theory' (2016) 9 *Studies in Law, Politics and Society* 1.
79 As above.
80 N Taub & EM Schneider 'Women's subordination and the role of law' (1993) in KD Weisberg (ed) *Feminist Legal Theory: Foundation* 14.
81 Taub & Schneider (n 80 above) 15.
82 Huntington & Eichner (n 78 above) 1.
83 Huntington & Eichner (n 78 above) 5.
84 M Minow 'The Supreme Court 1986 term, Foreword: Justice engendered' in DK Weisberg (ed) *Feminist Legal Theory: Foundation* (1993) 306.
85 C MacKinnon 'Difference and dominance: On sex discrimination' in DK Weisberg (ed) *Feminist Legal Theory: Foundation* (1993) at 281.
86 Metz (n 52 above) 122 – 123.
87 Metz (n 52 above) 122.
88 As above.
89 As above.

individual rights are a characteristically male way of thinking.[90] I will return to the issue of rights discourses later in this article.

The third contribution is the 'difference debate'. There are two overlapping discourses within this debate; the 'sameness versus difference' discourse; and 'difference versus dominance' discourse.[91] The former is essentially concerned with the meaning of gender equality in the law.[92] My understanding is that this debate is one which centres around whether formal equality (sameness) constitutes actual equality. Feminist scholars who equate sameness with equality are in the minority. Most insist that gender equality demands the recognition of and adaptation to gendered realities, issues such as reproduction and economic disadvantage vis-à-vis men.[93]

The latter discourse, 'difference versus dominance', consists of various explanations of the 'bad fit' between law and women's lived realities.[94] My understanding of the debate is that what crucially differentiates the 'difference' from the 'dominance' group is the question of whether character differences between men and women are innate or acquired. 'Difference' or 'cultural' feminists consider these differences to be innate, and consequently, masculinist theories will inherently be biased against women.[95] 'Dominance' or 'radical' feminists consider these differences to be forced upon women.[96] According to MacKinnon, one such radical feminist, '[w]omen care because men have valued us according to the care we give them, women think in relationship terms because our existence is defined in relation to men.'[97] Ultimately it was radical feminist legal scholars within the CLS framework who encouraged the rise of critical legal feminisms and CRT.

Critical legal feminisms and CRT arose within the CLS framework. CLS originated in the 1970s in the United States. The first Conference on CLS in 1977 was organised by scholars who had been students in the 1960s and 1970s. This was a period of American history characterised by political and cultural challenges to authority. Continuing this tradition, CLS scholars set out to challenge prevailing ideas about the objectivity of the law.[98] Within the CLS framework, the fields of CRT and FLT are characterised as 'outsider jurisprudence' as they are concerned with law's relationship with 'outsiders', namely women

90 As above.
91 JA Baer 'Feminist theory and the law' in RE Goodin (ed) *The Oxford Handbook of Political Science* (2011) 308.
92 Baer (n 91 above) 308.
93 As above.
94 As above.
95 As above.
96 As above.
97 MacKinnon (n 85 above) 281.
98 Berkman Klein Centre for Internet & Society at Harvard University: The Bridge 'Critical Legal Studies Movement' https://cyber.harvard.edu/bridge/CriticalTheory/critical2.htm (accessed 24 May 2020).

and people of colour, particularly black people.[99] Indeed, it was the 'outsider' status of feminist CLS scholars and CLS scholars of colour which gave rise to these fields.

In the mid to late 1980s the experience of marginalisation, tokenism and dismissal by the CLS 'malestream' laid the foundations for critical feminist legal movements.[100] Female CLS scholars were 'ghettoised' at CLS conferences into sessions on feminist theory which male scholars did not attend.[101] Frustrated, these feminist scholars eventually started forming their own conferences and levied challenges at CLS scholars for their silence on gender. This approximately marks the beginnings of the critical feminist legal movement.

Hunter considers there to be two fundamental ways in which critical legal feminism departs from 'orthodox' FLT. Firstly, it is committed to anti-essentialism; and secondly, it problematises feminist law reform efforts.[102] Hunter conceptualises anti-essentialism as entailing 'the acknowledgement that there is no singular Woman or 'women's experience' to provide a grounding for feminist theorizing or political action.'[103] Two related strands of thought fed into this position; CRT and lesbian feminists problematised the mainstream liberal discourse's failure to consider black and lesbian women's experiences as the 'women's experience'.[104]

Post-structuralists consider all subjects to be constructed in discourse rather than having rigid identities, consequently, they are all unstable and contingent.[105] Critical legal feminism, unlike mainstream liberal feminism, embraced these discourses. An implication of this is that critical feminist scholars do not purport to present FLT as a 'coherent project'[106] Bottomley argues that feminism should be seen as 'a force, a movement of potentials rather than an identity', or as a field of activity within which scholars pursue divergent interests and needs, held together by the common recognition that they are challengers of the *status quo,* committed to making space for the many diverse voices within the field.[107]

99 S Gilreath 'Examining Critical Race Theory: Outsider jurisprudence and HIV/AIDS - a perspective on desire and power' (2015) 33 *Law & Inequality: A Journal of Theory and Practice* 373.
100 R Hunter 'Critical legal feminisms' in E Christodoulidis, R Dukes, M Goldoni (eds) *Research handbook on critical legal theory* (2019) 46.
101 As above.
102 Hunter (n 100 above) 48.
103 As above.
104 As above.
105 As above.
106 As above.
107 Anne Bottomley, 'Shock to thought: An encounter (of a third kind) with legal feminism' (2004) 12 *Feminist Legal Studies* 29 at 59 – 60.

Another implication, and the second major divergence of critical legal feminisms from orthodox FLT, is that feminist legal reform efforts are problematised.[108] If there is no one 'women's experience', on whose behalf do feminists argue? Anti-essentialism destabilised the feminist law reform project in the third wave, but the problematisation of law reform went further than anti-essentialism.[109] This will be explored in detail in the final section of this article.

5 Introduction to Critical Race Theory

In 1986 radical CLS feminist scholars, frustrated with the shortcomings of CLS, organised a conference to critique patriarchy within the CLS movement.[110] They invited CLS scholars of colour to do the same concerning issues of race. This is considered by many to mark the 'birth' of CRT, at least in the Western context.[111] The following year at the National CLS Conference, CRT scholars criticised CLS on its silence on race. This critique was not well received.[112] Möschel and others suggest that CLS's incapacity to internalise or address CRT and FLT's critiques is what ultimately led to its demise.[113] Instead, CRT and critical legal feminism thrived. In 1989 the first independent CRT workshop took place. Thereafter the field thrived independently.[114]

CLS and radical feminism provided the 'intellectual and political openings' for CRT to develop as a field in its own right.[115] CRT retained some of the central tenets of CLS, and these serve as a useful starting point for introducing CRT. According to Modiri the central thesis of CLS was retained by CRT and FLT, that is: law by nature is political and ideological and serves as a mechanism for preserving existing power relations.[116] Here the role of extra-legal factors in adjudication and 'indeterminacy' is crucial.

Klare highlights the relationship between the issues of interpretative difficulty and indeterminacy on the one hand, and adjudication and the influence of extra-legal factors on the other.[117] Klare explains that legal texts, particularly constitutions, do not 'self-generate' their meanings. Furthermore, in terms of linguistics and underlying norms, they are rife with ambiguities, unanswered

108 Hunter (n 100 above) 49.
109 As above.
110 M Möschel 'Critical Race Theory' in E Christodoulidis *et al* (eds) *Research Handbook on Critical Legal Theory* (2019) 63.
111 As above.
112 As above.
113 Möschel (n 110 above) 64.
114 Möschel (n 110 above) 65.
115 Möschel (n 110 above) 63.
116 Modiri (n 76 above) 180.
117 Klare (n 45 above) 159.

questions and conflicts.[118] In the face of legal indeterminacy, 'what's a decisionmaker to do? … but to invoke sources of understanding and value external to the texts.'[119]

Modiri considers that judges will always be confronted with multiple considerations and options, but their final decision will be the outcome of their political and ideological inclinations, rather than 'legal factors'.[120] These external sources of understanding and value, according to CLS scholars, are political, particularly relating to class and ownership patterns in the economy.[121] CLS scholars, strongly influenced by Marxism, were particularly concerned with class, but their critiques were limited regarding race and gender.

Turning now to CRT specifically, it should be noted that it is a broad and heterogeneous field, which is 'doctrinally and methodologically eclectic'.[122] At the Second Workshop, scholars organised a discussion around a seven-point description of CRT's proposed main tenets.[123] Möschel considers this description to essentially be stating that CRT seeks to challenge mainstream beliefs on racial injustice on three points.[124]

The first point is the issue of systemic anti-black racism; racism is not the malevolent actions of individuals but has social and institutional dimensions which routinely harm black people.[125] In this regard racism is pervasive and it is imbued in the law.[126] CRT attempts to understand people as concrete beings, who are measured up to the white, male norm of law; a shift away from universal rules, processes and categories.[127] This is apparent in CRT methodology

118 As above.
119 As above.
120 Modiri (n 76 above) 181.
121 Metz (n 54 above) 111.
122 Möschel (n 110 above) 65.
123 From the notes of Professor Elizabeth H. Patterson, taken June 13, 1990, at the Second Critical Race Theory Workshop, held in Buffalo, New York. 'According to which CRT:
(i) holds that racism is endemic to, rather than a deviation from, American norms;
(ii) bears scepticism towards the dominant claims of meritocracy, neutrality, objectivity and color-blindness
(iii) challenges ahistoricism, and insists on a contextual and historical analysis of the law;
(iv) challenges the presumptive legitimacy of social institutions;
(v) insists on recognition of both the experiential knowledge and critical consciousness of people of color in understanding law and society;
(vi) is interdisciplinary and eclectic (drawing upon, inter alia, liberalism, post-structuralism, feminism, Marxism, critical legal theory, post-modernism, pragmatism), with the claim that the intersection of race and the law overruns disciplinary boundaries;
(vii) and works toward the liberation of people of color as it embraces the larger project of liberating oppressed people'.
124 Möschel (n 110 above) 65.
125 As above; see also Metz (n 54 above) 115.
126 N Naffine *Law and the sexes: Explorations in feminist jurisprudence* (1990) 8.
127 Modiri (n 76 above) 180.

which is very personal. In providing a counterhegemonic account of the law, minorities' experiences may be heard through a legal narrative.[128] This is why, Möschel notes, CRT writings often incorporate personal stories.[129] This relates to an aspect of the proposition that law is imbued with white culture and values. Naffine explains that at one level it posits the claim that law is made by white people and entrenches their position and power.[130] At a deeper and more personal level, it claims that law is conceived through the white eye, and represents the white perspective, failing to recognise the views and experiences of black people.[131]

The second point is the popular, so-called 'colour-blind' narrative, in other words, the misconception that 'blindness to race will eliminate racism'.[132] 'Colour-blindness', combined with the denial of racial hierarchy and culpability for a racist past, is considered counterproductive.[133] Such a combination only serves to entrench racism.[134] In the South African context, Modiri is critical of the 'grand narrative' of a nation built on 'non-racialism'.[135] Calls for colour-blind politics are misplaced in a country where *de facto* apartheid remains, meaning that the same macro-structure of apartheid persists as wealth, knowledge and power rest with the white minority.[136] To this end, Modiri argues that South Africa's majority black government is merely a 'token achievement'.[137]

The third point is that racism cannot be fought in a vacuum. Attention must be paid to other forms of oppression and injustice, including sexism, homophobia and economic exploitation.[138] In the South African context Modiri considers poverty to be an important form of oppression, and emphasises that we live in a country in which *de facto* apartheid persists, as the apartheid macrostructure of 'imperialist white supremacist capitalist patriarchy' remains although under a different legal and political arrangement.[139] 'White supremacy' does not refer to extremist hate groups but a political,

128 Möschel (n 110 above) 65
129 As above.
130 Naffine (n 126 above) 8.
131 As above.
132 Möschel (n 110 above) 65.
133 Ansell 'Casting a blind eye: The ironic consequences of colour-blindness in South Africa and the United States' (2006) 32 *Critical Sociology* 340.
134 Metz (n 52 above) 116.
135 Modiri (n 76 above) 183.
136 As above.
137 As above.
138 Möschel (n 110 above) 66.
139 JSM Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 228-229.

legal, economic and cultural system which maintains white control and black oppression in its mode as usual.[140]

6 Critical Race Theory and Feminist Legal Theory perspectives on rights and transformation

CLS scholars are generally dismissive of rights, in particular the right to equality. Some argue that appeals to ideas about equality mask real inequality in relationships.[141] According to Williams, CLS's blanket critique of rights is not only ahistorical but also reflects white left privilege.[142] Further, Williams states that the argument that rights are inconsequential or harmful 'trivialises this aspect of black experience specifically'.[143] She suggests that white CLS scholars downplay the importance of rights because they have taken it for granted that society recognises their humanity.[144] There are very mixed views on rights in CRT and FLT, however, they are generally regarded as being more sympathetic to normative categories of rights than CLS.[145]

The history of feminism, according to some, corresponds with the history of the concept of equality.[146] Smart takes this further by stating that feminism also corresponds with the idea that equal opportunities can be achieved through the law in the form of rights.[147] Smart notes that as liberalism gained ascendancy, the desirability of equality of opportunity was inextricably linked to the idea that it could be achieved through the law. Thus, law was conceptualised as a potentially neutral arbiter and means of protecting the oppressed, as opposed to being implicated in that very oppression.[148]

Rights appear to be an attractive tool for advancing the interests of oppressed groups for several reasons. Firstly, interests can be advanced through the 'political language' of rights, to formulate an issue as a rights issue is to make the claim popular, as it enters into

140 JSM Modiri 'The colour of law, power and knowledge: Introducing Critical Race Theory in (post-) apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 406.
141 Metz (n 52 above) 112.
142 PJ Williams 'The alchemy of rights and law' (1991) in S Hassim 'Decolonising equality: The radical roots of the Gender Equality Clause in the South African Constitution' (2018) 34 *South African Journal on Human Rights* 347.
143 Williams (n 142 above) 152.
144 Williams (n 142 above) 347.
145 Metz (n 52 above).
146 See for example; J Mitchell 'Women and equality' in A Phillips *Feminism and equality* (1987).
147 C Smart *Feminism and the power of the law* (1989) 139.
148 As above.

an accessible 'linguistic currency'.[149] Secondly, a claim to rights is loaded, Smart notes that 'it is almost as hard to be against rights as it is to be against virtue.'[150] Thirdly, rights are depicted as a means of protecting the weak from the strong, especially vertically.[151]

Smart accepts that rights amount to legal and political power resources, but proceeds to make what I think is a profound point: 'the value of such resources seems to be ascertainable more in terms of losses if such rights diminish, than in terms of gains if such rights are sustained.'[152] I understand this to mean that the availability of a right is felt less than its unavailability. This is because there are systemic aspects to non-fulfilment of a right, its mere availability does not mean it is taken advantage of. To use loose economic terms, the utility (enjoyment) gained when a right is made available is less than the utility lost when it is denied. I understand the implication of this is that because oppressed groups suffer deeply when the right is denied, there is a false expectation that life will become that much better when that right is made available. Without systemic change, the results of availing that right may be disappointing.

Madlingozi critiques human rights on the basis of humanity. Central to the concept of social justice is the idea that all humans are able to pursue happiness and derive a fair share of the collective good by virtue of being human, and all humans have equal worth.[153] Madlingozi posits the question; 'what kind of 'human' is being invoked here?'[154] Recalling the notion of a non-European 'Other' in colonial history, he points out that the 'human' in human rights has never had a shared, objective normative understanding.[155] Madlingozi considers that if human rights are extended from those advantaged groups who arrogated the status of humanity to those 'Others' the 'coloniality of being' is perpetuated in the absence of revolutionary processes of self-reclamation put forward by Black Consciousness activists in the past.[156] Madlingozi advances what he admits is a controversial argument, that the 'fetishisation' of human rights both conceals and entrenches teleological whiteness.[157] It masks the true struggle, which is the struggle for humanity, or 'quest towards true humanisation'.[158] White supremacy has co-opted the discourse of

149 Smart (n 147 above) 143.
150 As above.
151 As above.
152 As above.
153 T Madlingozi 'Social justice in a time of neoapartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 136.
154 Madlingozi (n 153 above) 136.
155 As above.
156 As above.
157 Madlingozi (n 153 above) 137.
158 As above.

social justice and its fetishisation of human rights.[159] Madlingozi contends that calls for a supreme constitution with a bill of rights largely came from the ranks of the historically privileged.[160] It was seen as a means of blocking rather than promoting change which was achievable through the *de facto* constitutional concretization of historical injustice.[161]

Hassim, on the other hand, argues that the claim that rights were imposed on South Africans or are an innately Western concept inextricable from the condition of coloniality is ahistorical.[162] Rather, rights discourses have a rich history in South Africa, particularly within feminist movements, as the right to equality is a product of a century-long struggle by black women.[163] Hassim draws attention to the two Women's Charters; the first, 'What Women Demand' was adopted by the Federation of South African Women in 1954.[164] The second, 'Women's Charter for Effective Equality' was adopted by the Women's National Coalition in 1994.[165] Hassim considers that these Charters extended the right to equality in three respects; firstly, they included the private sphere in the domain of rights.[166] Secondly, they broadened the scope of human rights to include sexual and reproductive autonomy.[167] Finally, they established the rights of women to full participation and representation in political institutions.[168] These dimensions stemmed from changes women desired in their actual lives.[169] These documents articulate the idea of political community differently than the Freedom Charter in that they include women as full members of the nation.[170] According to Hassim, this exposed the false universalism of Marxism and nationalism, which assumed that women would automatically be accommodated as members of the nation or class.[171] The idea that women are full members of the nation is now entrenched in the Constitution, however, Hassim contends that

> without these struggles, there is little doubt that 'we, the people' would not be a formulation that addressed the particular tensions between citizens of different gender, or the hierarchies of power that sustained a multiplicity of patriarchies.[172]

159 Madlingozi (n 153 above) 139.
160 Madlingozi (n 153 above) 141.
161 A Sachs *Protecting human rights in the new South Africa* (1990) 12.
162 Williams (n 142 above) 343.
163 As above.
164 Hassim (n 142 above) 343.
165 Hassim (n 142 above) 350.
166 As above.
167 Hassim (n 142 above) 350.
168 As above.
169 Hassim (n 142 above) 350.
170 Hassim (n 142 above) 351.
171 As above.
172 Hassim (n 142 above) 351.

Despite this major contribution, these Charters are rarely referred to as being the roots of the Constitution, reference is made to the Freedom Charter instead.[173]

Returning to the issue of rights, Smart argues that there are four major problems with rights and relying on them to further women's interests. The first issue is that rights oversimplify complex power relations, the result being that acquisition of rights may convey that the power imbalance has been remedied.[174] In fact, the right merely draws the state's attention to an issue, but it does not necessarily resolve the problem.[175] The second problem is that resort to rights can effectively be countered by resort to competing rights.[176] This is especially clear in the criminal justice system, where the rights of the victim may be side-lined in favour of the rights of the accused.[177] In the same vein, the third problem is that while rights are formulated to deal with a social wrong, they are focused on the individual who must prove a violation of her rights.[178] The last issue is the issue of appropriation; rights formulated to protect the 'weak against the strong' may be appropriated by the more powerful.[179]

From the above discussion, it is apparent that there exists a range of views on the usefulness of rights and transformative constitutionalism, which is based on rights. It appears that CRT scholars, in general, are sceptical of transformative constitutionalism and the promise of human rights given that South Africa remains in a state of *de facto,* or neo- apartheid.[180] According to Modiri, there are two foundational principles of CRT's approach to transformation. First is the issue of the centrality of racism; racism is not a distortion of reality, but a pervasive, normalised and ingrained feature of our social order. [181] Second, 'white supremacy' does not refer to extremist hate groups but a political, legal, economic and cultural system which maintains white control and black oppression in its mode as usual.[182]

Modiri considers that presently 'black people control white supremacy', a majority black government is a 'token achievement' in a country trapped in the same macrostructure of apartheid.[183] While people are incorporated under the guise of transformation or racial

173 As above.
174 Smart (n 147 above) 144.
175 As above.
176 Smart (n 147 above) 145.
177 Smart gives the example of refusal to alter the procedures of evidence in child sexual abuse cases because, in spite of the child's right not to be abused, the accused has a right to a particular form of trial.
178 Smart (n 147 above) 145.
179 As above.
180 Modiri (n 76 above) 183; Madlingozi (n 153 above) 125.
181 Modiri (n 140 above) 406.
182 As above.
183 Modiri (n 76 above) 183.

integration, we continue the same system of white supremacy.[184] He goes as far as to say that constitutional rights and protections extolled by constitutional lawyers, judges and academics are a 'vicious rumour' to most black people who remain trapped in the structural violence of poverty and other violations of their purported socio-economic rights.[185] He states that the co-option of black people in white-dominated institutions makes them feel that their interests are being served, while patterns of oppression remain undisrupted.[186] Modiri argues further that we need to shift away from thinking that apartheid is a legal mistake which can be fixed by new laws and black judges, we need to recognise that racism is a socially engineered, pervasive power structure that requires radical transformation.[187]

Like Modiri, Madlingozi argues that the promised 'decisive break from the past' did not happen, and states that in fact, the Constitution is transforming society in ways that do not amount to a fundamental rupture from society's configuration under *de jure* apartheid.[188] Furthermore 'social justice', which he states is the mainframe of transformative constitutionalism, is complicit in the continuation of this societal structure.[189] In the constitutional negotiations, the democratisation paradigm triumphed over the decolonisation paradigm, and with that triumph, any hopes of real, societal transformation were quashed.[190]

7 Abstention and the notion of refusal

Shifting the focus of this article to the transformation of the judiciary, there are arguments in favour of transforming the racial and gender identity of the institution. It is hardly disputed that proportional representation of black judges enhances the legitimacy of the judiciary, and this public perception is crucial to the functioning of the legal system.[191] This is because people believe, correctly according to CRT and FLT, that judges do not apply the law impartially. Their dispensation of justice is influenced by their perspectives. This is where shared perspectives play a role in influencing the public perception of the judiciary.[192]

184 Modiri (n 76 above) 188.
185 Modiri (n 76 above) 195.
186 Modiri (n 76 above) 188
187 As above.
188 Madlingozi (n 153 above) 125.
189 As above.
190 Madlingozi (n 153 above) 143.
191 L Fuentes-Rohwer and KR Johnson 'A principled approach to the quest for racial diversity on the judiciary' *Articles by Maurer Faculty, Indiana University* (2004) 28.
192 Klare (n 45 above) 159.

The notion of shared vulnerability explains why the average person before a court and the judicial officer, who are worlds apart in terms of class, education and socio-economic standing, may share similar perspectives. Butler's conception of power as defined by race and gender is a primary productive white, patriarchal and capitalist force which shapes the lives, desires and perspectives of those moulded by it is relevant here.[193] The perspectives of the oppressed group can only be truly acknowledged when heard by other members of that same group.[194]

Van Marle and Brand argue that transformation is distinct from evolution, evolution occurs when the institution changes on its own terms without changing its identity.[195] The identity of the institution will represent patterns of power, especially along racial and gender lines. Transformation is radical enough that the identity of the institution changes.[196] Transformation entails risk and problematising those existing positions of power, it requires acknowledgement of the subjective nature of existing standards and conceptions of merit.[197]

Modiri notes that radical reformation of societal structures and a revisiting of law and its limits are linked to the ethics of refusal.[198] Abstention from voting in the presence of appropriately qualified white male candidates is a radical act in support of transformation. Abstention from voting is an act of refusal, it is a rejection of pressure to make choices the actors fundamentally disagree with.[199] There is nothing in the Constitution that prohibits members of the JSC from abstaining from voting, and I would argue there should never be impediments to the right to refuse, it is a crucial expression of agency. The adoption of refusal signals a revolt against existing forms of power along racial and gender lines.[200] Refusal is a means of disrupting present systems and discourses within law and politics.[201] In the post-apartheid context, it involves rethinking prevalent ideas on law, transformation and democracy.[202] Refusal takes the 'risk of thought' without the burdens of proving immediate success.[203]

193 Huntington & Eichner (n 78 above) 5.
194 SM Smith 'Diversifying the judiciary: The influence of gender and race of judging' (1994) 28 *University of Richmond Law Review* 198.
195 K Van Marle & D Brand 'Ten thoughts on transformation' in Heyns and Visser *Transformation and Faculty of Law of the University of Pretoria* (2007) 56.
196 Van Marle & Brand (n 195 above) 55
197 Van Marle & Brand (n 195 above) 56.
198 JSM Modiri 'Race and rac(ial)ism, the politics of peace and friendship' (2010) 43 *Pretoria Students Law Review* 52.
199 Y Jooste 'What would my mother say? Refusal, forgiveness and the subjectivity of South African women' (2013) 46 *De Jure* 741.
200 Modiri (n 76 above) 184.
201 K Van Marle 'Laughter, refusal, friendship: Thoughts on a "jurisprudence of generosity"' (2007) *Stellenbosch Law Review* 196.
202 Jooste (n 199 above) 744.
203 As above.

Unawareness of the white male norm in law and its role in oppressing black people and women is fostered by the shared belief of legal institutions and actors that process is what matters.[204] Process is a mechanism which can serve to replicate existing power structures, it may pressure the actor to bend to the calculations of political and practical effectiveness.[205] Refusal in the face of pressure imposed by process is an intellectual act of judgment, it decides firmly what is just and what is not. In this way, it is a counterhegemonic action which challenges law in its mode of business as usual and is inextricably tied to transformation.[206]

If vacancies are not held open for appropriately qualified black and female candidates, those positions will continue to replicate themselves, there will be no radical transformation, but incremental change swallowed up by the systematic favouring of white legal professionals.[207]

8 Conclusion

It is clear that there are divergent streams of thought in FLT and CRT, especially relating to the issues of human rights and transformation. Perhaps it is best then, as Bottomley suggests, to think of FLT, and indeed CRT, as a 'force'. This article aimed to explore the various perspectives on the right to equality and transformation in our constitutional dispensation, which are issues relating to transformation in the judiciary. In doing so it explained the standards against which the JSC's decisions are measured and the historical background to its creation. An attempt was made to introduce the fields of CRT and FLT in general, before focusing on the issue of transformation and the right to equality in South Africa. I have argued that the abstention from making judicial appointments is justified as an act of revolt, tied to the notion of radical transformation. Perhaps it is in the spirit of these issues that I am left with more questions than answers.

204 AC Scales 'The emergence of feminist jurisprudence: An essay' in DK Weisberg *Feminist Legal Theory Foundation* (1993) 45.
205 P Hanafin 'The writer's refusal and the law's malady' (2004) 31 *Journal of the Learning Sciences* 10.
206 Jooste (n 199 above) 743.
207 Van Marle
& Brand (n 195 above) 56.

INTERNATIONAL LAW RULES RELATING TO MIGRATION ARISING FROM RISING SEA-LEVELS

*by Keketso G. Kgomosotho**

1 Introduction

Global sea-levels have been on the rise for the past three centuries. Recent trends show that sea-levels rose by at least 20 centimetres (cm) in the 20th century alone.[1] At current global greenhouse-gas emission levels, it is estimated that sea levels will continue to rise by a further 77 cm by 2100. Sea-level rise, a gradual rise in the volume of the ocean, occurs when there is thermal expansion of water levels which is caused by an increase in ocean temperatures, coupled with the gradual melting of glaciers and other frozen water reserves. If global predictions are realised, the rise in water levels will lead to the partial (and at time complete) inundation and depopulation of State territories — specifically low-lying and small island States.[2] This rise in sea water levels is a direct result of climate change, and has

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1 JA Church *et al* 'Changes in Sea Level' in JT Houghton *et al* (eds.) *Climate Change* (2001) 639-693.

2 N Nakicenovic *et al* 'Special Report on Emissions Scenarios: A Special Report of Working Group III of the Intergovernmental Panel on Climate Change' (2000) *Cambridge University Press* 599; RA Warrick *et al* 'Changes in sea level' in JT Houghton *et al* (eds.) *Climate Change* (1996) 359–405.

presented a number of international law challenges, including to areas of law dealing with the continued statehood of inundated States; the law of the sea; and the protection of persons migrating as a result of sea-level rise. The paper will draw focus from this latter issue.

The rise in sea-levels has a direct impact on global migration and the enjoyment of human rights in this context.[3] In 2015 the Internal Displacement Monitoring Centre (IDMC) estimated that in 2014 alone, some 19 million people were newly displaced on account of disasters linked to the climate change or environmental hazard.[4] Of this total, 17.5 million were displaced by natural disasters linked to weather-related or climate-related hazards, specifically floods and storms[5]- accounting for 92% of the 2014 global total of those displaced.[6] 87% of those displaced in 2014 were located in Asia — with China, India and the Philippines experiencing the highest levels of displacement.[7] The IDMC further reported that since 2008, natural disasters and environmental hazards have displaced an average of 26.4 million people per year across the globe, with weather-related hazards accounting for the vast majority of these displacements.[8]

The result, then, is that there is a 'new' category of migrants, who have been displaced on account of adverse consequences related to climate change, and not for reasons linked to political persecution.[9] While the phrases 'climate refugees' and 'environmental refugees' are increasingly used to refer to this category of migrants, these phrases do not have a meaning under international law.[10] The definition of a 'refugee' as currently provided for in the 1951 Refugee Convention[11] extends only to political refugees who flee persecution.

3 For purposes of this report, 'sea level rise' means 'the sole or combined and cumulative impacts of the effects of climate change and subsidence or land uplift on the change of the sea level in a given location.'.

4 Internal Displacement Monitoring Centre (IDMC), *Global Estimates 2015: People Displaced by Disasters* (July 2015) 8, (hereafter '2015 IDMC Global Estimates') http://www.internal- displacement.org/assets/library.

5 1.7 million were displaced by geophysical hazards.

6 2015 IDMC Global Estimates (n 4 above).

7 2015 IDMC Global Estimates (n 4 above) 8 - 9.

8 As above.

9 There is no universally accepted definition of migrant under international law, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has defined an international migrant as 'any person who is outside a State of which they are a citizen or national, or, in the case of a stateless person, their State of birth or habitual residence'. In this way, the word migrant is employed as a neutral term to describe a person with a lack of citizenship attachment to their host country.

10 S Atapattu 'Climate Refugees' and the Role of International Law' (2018), Available at https://www.oxfordresearchgroup.org.uk/blog/climate-refugees-and-the-role-of-international-law.

11 Convention Relating to the Status of Refugees 1951, (hereafter 'Refugee Convention'); United Nations Human Rights: Office of the High Commissioner 'Differentiation between migrants and refugees' https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/MigrantsAndRefugees.pdf.

This definition does not avail itself to migrants who are displaced on account of environmental or climate-related factors. Of course, rising sea levels and the migration it triggers could not have been forecasted by the drafters of the Convention,[12] thus leaving fundamental gaps in the regulation of migration induced by rising sea-levels. Nevertheless, international law rules relating to migration do provide a useful starting point for a more comprehensive international response to this imminent challenge.

The paper begins by providing context to the discussion, specifically, drawing connections between the gradual rise in water levels, and migration. This first section will show that the further the habitability of low-lying and coastal areas is negatively impacted by rising water table, the human rights implications, too, ascend to greater levels of severity and urgency. Next, the paper will provide an overview of existing rules of international law that bear relevance to migration induced by rising sea-levels, while the last section proposes, as starting point, a number of general rules and principles of international law to inform the development of a joint and separate international response to the challenges presented by migration in the context of rising sea levels. Finally, the paper will offer some concluding remarks.

2 Possible consequences of sea-level rise for migration

While there are no global estimates for migration arising out of more gradual environmental changes caused by sea-level rise, it is reported that migration and displacement is progressively linked with gradual or slower environmental changes such as sea-level rise, and that this trend is expected to increase in future, since people are less likely to wait for a crisis situation to develop before they migrate from the risk area.[13] The International Law Association's 2016 Interim Report into international law and sea-level rise provides that rates of migration and displacement on account of factors linked to sea-level rise are

12 Refugee Convention (n <XREF> above) 10.

13 Outcome Report, Nansen Initiative Pacific Regional Consultation 'Human Mobility, Natural Disasters and Climate Change in the Pacific' Rarotonga, Cook Islands (21–24 May 2013); Background Paper, Nansen Initiative Southeast Asia Regional Consultation 'Human Mobility in the Context of Disasters and Climate Change in Southeast Asia' Manila, Philippines (15–17 October 2014) 1-5, 16; Background Paper, Nansen Initiative Greater Horn of Africa Regional Consulattion 'Natural Hazards, Climate Change, and Cross-Border Displacement in the Greater Horn of Africa: Protecting People on the Move' Nairobi, Kenya (21–23 May 2014) 4-6, 16-22, all available at http://www.nanseninitiative.org.

expected to increase even when land is not yet inundated or subsumed.[14] This may be because of asscociated factors such as the land becoming uninhabitable for human beings due to salt-water deposits into fresh groundwater, the contamination of fresh water sources, the diminishing fertility of agricultural and pastural land, or food insecurity.[15]

As with many global challenges, developing countries are the most affected, accounting for 95% of the global total of displaced persons.[16] Small island developing States are consistently the worst hit given that their geographic location makes them particularly vulnerable to earthquakes, floods and storms. In fact, it is reported that relative to their population size, these small island developing States account for three times the global average for displaced persons in the years between 2008 and 2014.[17]

Further, the 2015 Intergovernmental Panel on Climate Change (IPCC) report supports the claim that although estimated to occur over a number of decades or centuries, gradually rising sea-levels will have more immediate impacts.[18] The IPCC's scientific analysis evidence that the already incurred 20 centimetre increase in sea-levels beginning in the middle of the 19th century means that 'there is now much more water riding on a storm surge, which makes flooding, storms and earthquakes more extensive and severe.'[19]

The facts of the 2020 *Ioane Teitiota v New Zealand* case heard by the Human Rights Committee most clearly illustrate these more immediate impacts of rising sea levels on the inhibitants of low lying territories. The Complainant, Ioane Teitiota, claimed that the more immediate effects of climate change and sea level rise forced him and his family to migrate from the island of Tarawa in the Republic of Kiribati to New Zealand where they were later deported. The Complainant claimed that the situation in Tarawa has become increasingly unstable and precarious due to sea-level rise caused by global warming — coastal land had become eroded, arable land and fresh water sources had become contaminated and scarce because of

14 An overview of the IPCC assessment Report is found in ILA, *Interim Report of the Committee on International Law and Sea level Rise*, presented at the 77th ILA Conference, Johannesburg, August 2016 (Hereafter '2016 ILA Interim Report').

15 Climate Council Briefing Statement 'Damage from Cyclone Pam was Exacerbated by Climate Change' (2015) 3 http://www.climatecouncil.org.au/uploads/417d45f46cc04249d55d59be3da6281c.pdf.

16 IDMC Global Estimates (n 4 above) 8-9.

17 As above.

18 As above.

19 RK Pachauri & LA Meyer 'Climate Change 2014: Synthesis Report' (2014) Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Geneva (2015) (hereinafter '*AR5 – Synthesis*') 151; JA Church *et al* 'Sea Level Change' in *Climate Change 2013: The Physical Science Basis*, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) *Cambridge University Press* 1142.

saltwater contamination and overcrowding on Tarawa. In deciding the case, the Human Rights Committee accepted that climate change-induced harm may well arise both through sudden-onset events and slow-onset processes. The Committee explained that sudden-onset events (including intense storms and flooding) are discrete occurrences that have an immediate and obvious impact over a period of hours or days, while slow-onset effects (such as the gradual inundation caused by rising sea levels, salinisation, and land degradation) may have a gradual, adverse impact on livelihoods and resources over a period of months to years. The Committee accepted that both sudden-onset events and slow-onset processes can trigger migration from persons seeking protection from climate change-related harm.[20]

In 2007 the Republic of Kiribati filed its National Adaptation Programme of Action under the United Nations Framework Convention on Climate Change (UNFCCC).[21] The National Adaptation Programme of Action evidenced that a large majority of the population had subsistence livelihoods which were greatly dependent on environmental resources, that coastal erosion and accretion were most likely to affect housing, land and property, which has lead to often violent land disputes. Although 60 sea walls were erected by 2005 already, storm surges and high spring tides continued to cause flooding of residential areas, forcing inhibitants to migrate. The population's health is generally deteriorating — characterised by vitamin A deficiencies, malnutrition, fish poisoning, and other ailments reflecting the situation of food insecurity.[22]

Thus, present and future migration and displacement patterns 'may be triggered by "interim" extreme weather and sea-level events such as storm surges, astronomical tides, and flooding, and not so much for reasons of territorial loss due to sea-level rise'.[23] Some of the more gradual effects of rising water tables include consequences such as erosion of land, saltwater contamination of groundwater sources, and general environmental degradation which will progressively impair that living conditions, livelihood, and human rights of persons inhabiting affected areas — eventually leading to progressive movements out of those areas.

20 Communication No. 2728/2016, *Ioane Teitiota v New Zealand,* Human Rights Committee 7 January 2020 https://tbinternet.ohchr.org/_layouts/15/treaty bodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en (hereafter '*Ioane Teitiota v New Zealand*') para 2.2; Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195) para 18(h), (i), (l).

21 United Nations Framework Convention on Climate Change (UNFCCC), 1994.

22 Republic of Kiribati National Adaptation Program of Action (NAPA) 'Environment and Conservation Division, Ministry of Environment, Land, and Agricultural Development Government of Kiribati' 10 January 2007 https://unfccc.int/resource/docs/napa/kir01.pdf; *Ioane Teitiota v New Zealand* (n 20 above) para 2.3; 2.4.

23 IDMC Global Estimates (n 4 above).

The ILA Committee on International Law and Sea-level Rise notes that 'the overall relationship between the impacts of climate change, including sea-level rise, and human mobility is complex and non-linear, and depends on a range of intersecting factors.'[24] Indeed, displacement and migration relating to climate change has multiple causes, and sea-level rise and climate change intersect directly with political, social and economic factors that are themselves sufficient to trigger migration[25] — often to the extent that it becomes impossible to distinguish the impacts of sea-level rise from other impacts of climate change when it comes to decision to migrate.

What is clear is that sea-level rise and its associated risks poses an almost certain threat to the habitability low-lying and coastal areas, and threatens to negatively affect the life and living conditions of those populations living in these areas. It is inevitable that these persons will move, migrate and may be displaced from their homes in search for refuge, protection and assistance. This is true considering that historically, migration away from the negative environmental and climate-change impacts has long been the natural human adaptation strategy.[26] However, migration involving international borders in these circumstances may face considerable challenges from immigration formalities under international law.[27] The following section provides an overview of the current international law framework regulating migration *vis-à-vis* challenges faced by this category of migrants.

3 An overview of existing rules of International Law applicable to migration arising from sea-level rise

3.1 The 1951 Refugee Convention and its 1967 Protocol

Any discussion on migration under international law must have the centrepiece of international refugee protection as its point of departure — that is the 1951 Refugee Convention and its 1967 Protocol.[28] Immediately following the first World War, millions of

24 LA Nurse *et al* 'Small Islands' in *Climate Change 2014: Impacts, Adaptation, and Vulnerability,* Part B: Regional Aspects, Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, (2014) *Cambridge University Press* 80 – 81 http://ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap29_FINAL.pdf (Hereafter 'Fifth Assessment Report of the IPCC'); J McAdam *Climate Change and Displacement: Multidisciplinary Perspectives* (2012) 84.

25 Fifth Assessment Report of the IPCC (n 24 above).

26 Church *et al* (n 19 above) 1142.

27 Church *et al* (n 19 above) 1142; Fifth Assessment Report of the IPCC (n 24 above).

28 Refugee Convention (n 11 above); see Protocol Relating to the Status of Refugees, 1967.

people, mostly from Europe, were displaced from their homes and in search of refuge often across State boarders. The sum of people displaced increased substantially after the second World War, which saw millions of people forcibly deported, resettled and/or displaced. At this point, it became clear that there was a need for a more formal framework for the protection of refugees under international law.[29]

Accordingly, in 1951, the Convention relating to the Status of Refugees (Refugee Convention) was adopted. Departing from the previous, more fragmented approach, the Refugee Convention fused previous international mechanisms and arrangements relating to refugees, and provided an inclusive codification of the rights owed to refugees at an international level.[30] The Convention was subsequently amended by its 1967 Protocol which broadened the Convention's scope of application by removing the geographical and temporal limits imposed by the text of the Convention — making the Convention applicable to situations beyond Europe.[31]

The main purpose of the 1951 Convention is to define subjects who qualifies for the full scope of protection; to detail all the rights and obligations to which refugees are entitled, and to imposes legal obligations on States to protect, respect and fulfil the human rights owed to refugees.[32] In addition, the Refugee Convention imposes a non-refoulment obligation on States through its prohibition of expulsion or forcible return of refugees to a State or territory where their life or freedoms would be threatened.[33] Both the Convention and its Protocol have provided a blue print for other useful regional instruments such as the 1969 OAU Refugee Convention,[34] the 1984 Cartagena Declaration,[35] and the growth of a common asylum system in the European Union (EU).[36]

29 UN High Commissioner for Refugees (UNHCR) The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis (1990) 10 https://www.refworld.org/docid/53e1dd114.html.

30 UN General Assembly, Draft Convention relating to the Status of Refugees, 1950, A/RES/429 https://www.refworld.org/docid/3b00f08a27.html.

31 These limits initially restricted the Convention to persons who became refugees due to events occurring in Europe before 1 January 1951. The 1967 Protocol expanded the Convention's scope of application as the problem of displacement spread around the world; see https://www.unhcr.org/afr/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html.

32 The Refugee Convention, 1951: The Travaux préparatoires (n 29 above) 11.

33 United Nations Department of Economic and Social Affairs, *International Migration Report* (2013) https://www.un.org/en/development/desa/population/publications/pdf/migration/migrationreport2013/Chapter3.pdf.

34 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (hereafter 'OAU Convention').

35 Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984 (hereafter 'Cartagena Declaration').

36 A Guterres 'The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: The legal framework for protecting refugees' *UN High Commissioner for Refugees* September 2011 https://www.unhcr.org/afr/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html.

Accordingly, in order for any displaced person to qualify for recognition and protection under the Refugee Convention, such person must meet the narrow definition of 'refugee' at Article 1A(2) of the Convention, which provides that a 'refugee' is any person who:

> As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[37]

This definition entails three key requirements: firstly, a refugee is a person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Secondly, this person must be outside their country of nationality, and finally, the person must, owing to such fear, be unable or, be unwilling to avail himself of the protection of that country or, owing to such fear, is unwilling to return to it.[38]

From the definition, it becomes clear that a person displaced owing to environmental or climate change-related reasons would fail to meet this definition owing to the absence of persecution on either of the listed bases — except in the narrow circumstances of environmental degradation resulting from an armed conflict.[39] The Convention only avails itself to political refugees who flee persecution and does not extend to migrants who are displaced on account of environmental or climate-related factors. This narrow definition of who is a refugee is of course a product of its time. This is particularly true considering that the world is only recently facing increasing levels of climate change-induced sea-level rise which in turn leads to displacement.[40] The Convention was negotiated and drafted in the aftermath of World War II, with a war-ravaged Europe in mind, at a time where there was no global warming or threats of sea level rise. Rising sea-levels and the migration it triggers could not have been anticipated or forecasted by the drafters of the Convention.[41]

37 Refugee Convention (n 11 above) Article 1A(2).
38 As above.
39 M Stavropoulout 'Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?' (1994) 5 (1) *Colorado Journal of International Environmental Law and Policy* 105-126.
40 IPCC 'Summary for Policymakers' in Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013).
41 Refugee Convention (n 11 above).

3.2 Non-Refoulment

Another important feature of the Convention is the principle of *non-refoulement* — a fundamental, customary[42] and non-derogable[43] gearwheel to the international mechanism of refugee protection[44] embodied at Article 33(1) of the Refugee Convention, which provedes that:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.[45]

The Article 33 *non-refoulement* obligation is owed not only to migrants who are refugees as defined by Article 1A(2) of the Refugee Convention, but to all migrants presenting at a State's frontier, regardless of their status under international law. A person is entitled to *non-refoulement* protections not because they have been declared a refugee by the host State, but rather because objectively they meet the definitional requirements for a refugee under international law. This means that the refugee status determination is declaratory in nature, not constitutive.[46]

The fundamental and non-derogable nature of the rule is perhaps best illustrated by the reluctance from the drafters to introduce an exception to this rule such as that contained at Article 33(2).[47] It is perhaps further evident from the restrictive language employed in drafting the exception at paragraph 2 of the Article. Thus, it would be problematic to conclude that the first paragraph of the Article applies only to refugees present in the territory of a State party, and excludes refugees who present themselves at the border, even when their rejection would force them to return to a country where their life or liberty would be endangered.[48]

It therefore follows that States have a *non-refoulement* obligation towards all migrants, not only those already recognised as refugees.

42 UNHCR '*Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*' 7 http://www.unhcr.org/home/RSDLEGAI.45fi 7al a4.pdf.
43 Article 42(1) of the Refugee Convention and Article VII(1) of the 1967 Protocol, providing that Article 33 is one of the provisions to which no reservations are permitted.
44 UN *Ad Hoc* Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva* (14-25 August 1950) E/AC.32/8;E/1850 https://www.refworld.org/docid/3ae68c2 48.html.
45 Refugee Convention (n 11 above), Article 33(1).
46 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979), (Reedited in Geneva, 1992) 28.
47 The Refugee Convention (n 11 above) Article 33.
48 As above.

This has been reaffirmed by the Executive Committee of UNHCR, for instance, when it noted 'the fundamental importance of the principle of *non-refoulement* ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.'[49] The use of the phrase 'in any manner whatsoever' at Article 33(1) of the Refugee Convention is indicative that States' *non-refoulement* obligation extends to 'any form of forcible removal, including deportation, expulsion, extradition, informal transfer or 'renditions', and non-admission at the border control'.[50] When interpreting this provision, the UNHCR in its Advisory Opinion on the *Extraterritorial Application of Non-Refoulement Obligations* noted that this obligation is not limited to instances of forced return to the territory of origin or the territory of former habitual residence. Rather, the obligation applied to 'return or expulsion to *any other place* where a person has legitimate reason to fear for his life or freedom or return or expulsion to where they may be sent to such a risk.'[51]

The cornerstone principle of *non-refoulement* is reiterated in regional treaties as well, especially the 1969 OAU Convention,[52] and the American Convention on Human Rights.[53] The United Nations Human Rights Council (UNHCR) also highlighted that the fact that the *non-refoulement* principle has also been a salient feature in the Cartagena Declaration on Refugees and other non-binding international instruments, including the United Nations General Assembly's 1967 Declaration on Territorial Asylum.[54] In the same vein, Articles 6 and 7 of the ICCPR create a broader non-refoulment obligation, where the persecution element is replaced by a threat of

49 Executive Committee of UNHCR, Conclusion No. 6 (XXVIII) '*Non-refoulement*' (1977) para (c).

50 UNHCR Advisory Opinion (n 42 above) 9.

51 UNHCR *Note on Non-Refoulement* (EC/SCP/2) 1977 para 4; The Refugee Convention, 1951: The Travaux préparatoires (n 29 above) 341.

52 Article II(3) provides that '[n]o person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].'

53 American Convention on Human Rights, 1969 (hereinafter 'American Convention'), Article 22(8) which provides that '[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.'.

54 Conclusion III(5) provides that '[t]o reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees ...'.

'cruel, inhuman or degrading treatment.'[55] The scope of the *non-refoulement* obligation under international human rights law is materially broader than under Article 33.[56] *Non-refoulement* entails a complete prohibition on expelling and returning a migrant to a State where 'they are at risk of torture or cruel, inhuman and degrading treatment or punishment or other serious human rights violations such as enforced disappearance, risks to life in the absence of necessary medical care and violations of the rights of the child.'[57]

Understood in this way, the principle of *non-refoulement* becomes of particular relevance to migrants fleeing on account of sea-level rise. While such persons may, in certain circumstance, not be considered refugees, international refugee law demands that they not be expelled or returned pending a final determination of their status.[58] This of course does not mean that a migrant has the right to asylum in a particular country.[59] Instead, it means that even in circumstances where the host State is not prepared to recognise a migrant as a refugee, it 'must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger.'[60] For States to meet their international law obligations here, States are required to provide access to their territory, and to fair asylum procedures to all persons seeking international protection at their boarders or on their territory.

In situations of a mass influx of migrants, State practice supports the view that migrants must at the very least be offered temporary protection.[61] To illustrate, Papua New Guinea justified its admission of Irian Jayans pursuant to the obligation to provide temporary protection,[62] and the UNHCR subsequently welcomed this practice as an extension of the principle of *non-refoulement*.[63] In order to effectively discharge either one of these *non-refoulment* obligations,

55 See Article 6 & 7 of The International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series (999) 171 (ICCPR); UN Doc CCPR/CO/79/RUS.

56 UNHCR *Advisory Opinion* (n 42 above).

57 United Nations Office of the High Commissioner for Human Rights (OHCHR) *'Mapping Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change'* June 2014 http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.asp.

58 UNHCR *Advisory Opinion* (n 42 above).

59 The Refugee Convention, 1951: The Travaux préparatoires (n 29 above).

60 E Lauterpacht & D Bethlehem 'The Scope and Content of the Principle of Non-Refoulement: Opinion' 2003 *Cambridge University Press* https://www.refworld.org/docid/470a33af0.html (accessed 27 August 2020) para 76.

61 UNHCR *Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx*, UN Doc. EC/SCP/16/Add.1 (July 1981); D Perluss *et al* 'Temporary Refuge: Emergence of a Customary Norm' (1981) (26) *Virginia Journal of International Law* 551.

62 Perluss *et al* (n 61 above) 578.

63 UNHCR *Report of the 30th Session of the Executive Committee*, UN doc. A/AC.96/572 para 72(2)(k) (1979) 72, U.N.Doc. A/AC.96/572.

member States cannot return migrants, even those intercepted at sea, without first assessing their individual protection claim for refugee status.[64] Specifically, member States are under an obligation to ensure that *all* migrants have access to fair and effective procedures for the determination of their status as refugees.[65]

3.3 1969 OAU Refugee Convention

The Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)[66] was adopted in 1969 in response to the Refugee Convention's narrow and limited definition of 'refugee' which excludes categories of migrants who otherwise would not be eligible to international law protection. The OAU Convention aims to strengthen African regional responses to novel elements of mass migration and displacements of migrants in need of international protection and assistance. Specifically, Article VIII of the Convention makes clear that the Convention is the 'effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees'.[67] The OAU Convention essentially reflects the collective undertakings of OAU Member States to accept and protect migrants in terms of each member States' internal laws. Member States to this Convention have an obligation to confer on all categories of refugees the rights and benefits of the 1951 Refugee Convention without distinction as to race, religion, nationality, membership of a particular social group of political opinions.[68]

The OAU Convention achieves its purpose by broaden the definition of refugee provided for in the Refugee Convention, to include 'every person who owing to … events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'[69] In theory, this approach operates to afford

64 UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011) 192 HCR/1P/4/ENG/REV. 3 https://www.refworld.org/docid/4f33c8d92.html; Inter-American Court of Human Rights, *Case 10.675 v US* (1997) 155; M Pallis 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 *International Journal of Refugee Law* 329, 347.

65 Executive Commitee 55th session, Contained in UN Doc A/AC.96/1003, see General Conclusion on International Protection No 99 (2004) 1 https://www.unhcr.org/excom/exconc/41750ef74/general-conclusion-international-protection.html (accessed 27 August 2020); UNHCR, General Conclusion on International Protection No 85 (1998) (q) http://www.unhcr.org/refworld/docid/3ae68c6e30.html (accessed 05 October 2019); HRC General Comment No 20 (1992) UN Doc HRI/GEN/1/Rev.6, 151 para 9.

66 OAU Convention (n 34 above).

67 Article VIII of the OAU Convention (n 34 above).

68 Article IV of the OAU Convention (n 34 above).

69 Article I(2) of the OAU Convention (n 34 above).

'environmental refugees' protections owed to refugees under the 1961 Refugee Convention.

Identical wording is used in the definition of refugee under the Cartagena Declaration,[70] effectively providing for legal protections for migrants who are forced to leave their place of habitual residence, to seek protection and refuge in another territory outside the country of origin or nationality for reasons including those related to climate change. Authors have argued that this broadened definition of 'refugee' has acquired a regional customary international law in the Central American Region.[71]

3.4 The 1984 Cartagena Declaration in Latin America

Inspired by the 1969 OAU Convention, the Cartagena Declaration likewise contributed to the international protection of refugees by broadening the concept of refugee in the region, while incorporating the definitional elements at Article 1 of the 1951 Refugee Convention. Specifically, the Declaration provides that:

> the definition of the concept of refugees recommended for use in the region is that which, besides containing the provisions of the 1951 Convention and the 1967 Protocol, considers to be refugees persons who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights and other circumstances which have seriously disturbed public order.[72]

In theory, this broadened definition engages a range of situations including migrants displaced on account of sea-level rise, as these would, in theory, reasonably be able to ascend to the threshold of 'other circumstances leading to a serious disturbance of public order.'[73]

3.5 Definition of Refugee under customary international law[74]

Owing to the fact that the international treaty regime providing for the protection of refugees does not extend to 'environmental refugees' or 'climate refugees' due to the absence of persecution, recourse must be had to customary international law. There is growing evidence pointing to the existence of a broader definition of

70 Cartagena Declaration (n 35 above).
71 GS Goodwin-Gill & J McAdam *The Refugee in International Law* (2007) 38; E Arboleda 'Refugee Definition in Africa and Latin America: The lessons of Pragmatism' (1991) 3 International Journal on Refugee Law 185, 187.
72 Cartagena Declaration, III(3) (n 35 above).
73 As above.
74 Parts of this section are derived in part from an unpublished examination essay authorered by myself, and submitted in June 2019, in fulfillment of the module AIL 802 S1 2019, University of Pretoria, Faculty of Law.

'refugee' under customary international law, alternatively, there may well exist a broader definition of 'refugee' emerging as a result of the operation of the principle of subsidiary protection for migrants who do not satisfy this formal criterion of 'refugee.'[75]

Under international law, a rule of custom is established when the two constitutive elements of State practice are present. The International Court of Justice (ICJ) in its *North Sea Continental Shelf* cases reiterated that Customary International Law (CIL) is the product of the existence of a combination of established, widespread and consistent State practice on the one hand, coupled with the legal conviction that this practice is sufficient to create legal obligations.[76] This is the dominant understanding of CIL which, once established, binds all States with the exception of persistent objectors.[77]

Notably, the Statute of the ICJ does not define what is State practice.[78] However, it has clarified that State practice need not be universal, but must amount to consistent participation of States in a particular conduct, over a sustained period of time.[79] In the same breath, the Court noted that while no definitive period of time is required, the practice of States must be virtually uniform to satisfy the first requirement for the establishment of CIL.[80] The Court in *Nicaragua* underlines, however, that is it not necessary that the practice in question had to be 'in absolutely rigorous conformity' with the purported CIL rule. The Court noted that:

> [i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[81]

Michael Akehurst further notes that 'state practice covers any act or statements by a state from which views about customary law may be inferred'.[82] Thus, State practice can be gleaned from both positive acts as well as omissions by organs of a State.[83] He notes that it is how States behave in practice that forms the basis of CIL, including from

75 Subsidiary protection under customary international law offers this category of migrants the same level of protection as that provided for in the Refugee Convention.
76 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) ICJ Reports* (1969) 3.
77 *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* (1951) ICJ Rep 116 (hereafter 'Fisheries') 131; D Armstrong *et al International Law and International Relations* (2012) 180.
78 Statute of the International Court of Justice, 1946.
79 *Asylum Case (Colombia v Peru)* ICJ Reports (1950) 276–7.
80 *Fisheries* paras 116, 131 and 138 (n 77 above).
81 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits ICJ Reports (1986)98.
82 M Akerhurst 'Custom as a Source of International Law' (1975) *British Yearbook of International Law* 1.
83 MN Shaw *International Law* (2017) 82 (hereafter 'Shaw').

administrative acts, legislation, decisions of courts and activities on the international stage.[84] Once it has been established that a particular practice among States rises to the required level, the enquiry for the formation of CIL turns to *opinion iuris*. In Nicaragua the ICJ noted that:

> for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.[85]

In addition, the Court in *Continental Shelf* notes that conduct of States 'must be evidence of a belief that this practice is rendered obligatory by existence of a rule of law requiring it.'[86] Thus, *opinio iuris* therefore is perhaps the least tangible requirement, which is more difficult to establish given its inherently subjective nature. Accordingly, this element can be gleaned from a range of sources including diplomatic correspondence, press releases, government policy statements, official manuals, domestic legislation, national jurisprudence, international jurisprudence, legal briefs endorsed by the state, historical sources, voting patterns in international forums.[87]

There is a view that a definition of refugee exists only in terms of the 1951 Refugee Convention, and that it does not exist under customary international law.[88] The American Society of International Law has contended that there is no customary international law obligation to offer protection to migrants who do not fall with the narrow definition of refugee at Article 1A(2) of the Refugee Convention.[89] While the author Guy Goodwin-Gill has argues that:

> [P]ractice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries … nearly four decades of practice contain ample recognition of a humanitarian response to refugees falling outside the

84 *Congo v Belgium* ICJ Reports (2002) 3, 23–4.
85 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) Merits*, International Court of Justice (ICJ) (27 June 1986) 349 https://www.refworld.org/cases,ICJ,4023a44d2.html (accessed 26 August 2020) at 349.
86 *North Sea Continental Shelf* (n 76 above).
87 Lecture by Prof S Hobe to LLM Class University of Pretoria, February 2019.
88 Memorandum from the UN Secretariat on Expulsion of Aliens, UN Doc. A/CN.4/565 (2006), citing LB Sohn & T Buergenthal 'The Movement of Persons Across Borders (Studies in Transnational Legal Policy No. 23)' *The American Society of International Law* (1992); R Plender *International Migration Law* (1988) 393.
89 Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law, Thursday, April 18: Morning, American Society of International Law Proceedings (17-20 April 1991) 90.

> 1951 Convention. Whether practice has been sufficiently consistent over time and accompanied by the opinio juris essential to the emergence of a customary rule of refuge, is possibly less certain, even at the regional level.[90]

However, there is evidence suggestive of a broader definition of refugee under customary international law supported both by State practice and *by opinio juris*. Immediately after adopting the 1951 Refugee Convention, the adopting conference adopted a recommendation urging States to extend protection to persons who do not satisfy the narrow definition of refugee under the Convention.

The 1969 OAU Convention broadened the concept of refugee in the Refugee Convention to cover persons fleeing 'external aggression, occupation, foreign domination or events seriously disturbing public order.'[91] The Convention is ratified by countries that are among the largest recipients of refugees globally, including Tanzania, Zambia, Democratic Republic of Congo, Kenya, Cameroon, Chad, Uganda, Sudan, Egypt, Algeria, Ethiopia, and Rwanda. Some States including Tanzania, Uganda and South Africa have gone further and domesticated the OAU Convention's definition of refugee into their national legislations.[92] Mexico, too, has incorporated the OAU Convention's definition of refugee into its national law.[93] Even though it is binding only to member States, and owing to its highly representative character, the OAU Convention has contributed to the growing formation of a broader definition of refugee under customary international law. The 1984 Cartagena Declaration drew inspiration from the OAU Convention and fashioned its definition of refugee after that of the OAU Convention.[94]

Similarly, the Asian-African Legal Consultative Organization adopted the 'Bangkok Principles' which defines refugee by

90 GS Goodwin-Gill *The Refugee in International Law* 171 (1996).

91 OAU Convention (n 34 above).

92 The Refugee Act 2006 (Uganda), 24 May 2006 (although apparently the status determination procedures are not yet implemented), http://www.unhcr.org/refworld/docid/4b7baba52.html; United States Committee for Refugees and Immigrants 'World Refugee Survey 2009 — Uganda' 17 June 2009 http://www.unhcr.org/refworld/docid/4a40d2b5c.html.

93 Ley General de Población [General Law of Population], Diario Oficial de la Federación, 7 de Enero de 1974, as amended Diario Oficial de la Federación [DO], 8 de Noviembre de 1996 (Mex.); Reglamento de la Ley General de Población [Regulations of the General Law of Population] Diario Oficial de la Federación [DO], 31 de Augusto de 1992 (Mex.); Manual de Trámites Migratorios del Instituto Nacional de Migración [Immigration Procedures Manual], Diario Oficial de la Federación [DO], 21 de Septiembre de 2000 (Mex.) TMN-I-07 REFUGIADO (Fracción VI del artículo 42 de la LGP y 166 del RLGP): El extranjero que huyendo de su país de origen, paraproteger su vida, seguridad o libertad, cuando haya sido amenazado por violencia generalizada, agresión extranjera, conflictos internos, violación masiva de derechos humanos u otras circunstancias que hayan perturbado el orden público, y que ingrese a territorio nacional … [TMN-I-07 REFUGEE].

94 E Arboleda 'Refugee Definition in Africa and Latin America: The lessons of Pragmatism' (1991) 3 *International Journal on refugee Law* 185.

incorporating the definitional elements of the Refugee Convention, but further expands the definition to include

> [E]very person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[95]

The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons expressed the hope that the Refugee Convention will have value as an example exceeding its contractual scope, and that all nations will be guided by it in the granting of protections for which it provides — both to Refugees and to persons who may not have been covered by the Convention.[96] However, since the Refugee Convention excludes from its scope of protection environmental or climate migrants, customary international law may, albeit with more development, offer a useful alternative for protection of irregular refugees under international law.

4 A starting point to developing an international response challenges of migration induced by sea-level rise

As highlighted in the previous sections, there are fundamental gaps in the regulation of migration induced by rising sea levels. Of course, there is scope to employ existing mechanisms under international law more effectively to respond to this imminent challenge of irregular migration,[97] however, there are limits to the extent to which current frameworks can be employed to protect migrants in the specific context of rising sea-levels. International law must respond appropriately to the current and anticipated challenges — in the form of standardised and universal legal and policy frameworks, and operational measures to facilitate migration in this context. These initiatives must be aimed at helping affected populations or persons to either remain *in situ* where this is a viable option, or migrate elsewhere ahead of the crisis point of loss of territory due to the rise of water levels. There is further a need to protect and assist displaced

95 Asian-African Legal Consultative Organisation *Principles Concerning Treatment of Refugees*, 40th Session (31 December 1966).

96 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at IV, Recommendation E, reprinted at UNHCR, Convention and Protocol Relating to the Status of Refugees (2007) http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf; The Conference on Territorial Asylum's view is that the definition of Refugee should be broadened.

97 Nansen Principles 'the recommendations stemming from the Nansen Conference on Climate Change and Displacement in the 21st Century, held in Oslo' 5 – 7 June 2011 https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/nansen_prinsipper.pdf. Principle 1 specifically references human dignity.

persons both in circumstances where they migrate internally or across international borders.[98]

Even when global temperatures can be stabilised through preventative strategies aimed at delaying the progression of rising sea-levels, it is reported that sea-levels will nonetheless continue to rise.[99] States globally will be faced with increasing pressure over the coming centuries, with the projected decrease in habitable territory and an increase in the percentages of affected populations.[100] International law relating to migration does offer some tools for a response to these challenges. Seen as a starting point for a more comprehensive international approach, these tools undoubtedly need to be further broadened and developed to respond to these challenges presented by this multi-causal phenomenon.[101] This section proposes as starting points a number of general rules of international law to inform the development of a common and efficient response to the challenges presented by migration in the context of rising sea levels.

4.1 Human Rights Law

The proposal here is that international human rights law must inspire the manner in which States respond to challenges of migration induced by rising sea-levels rise. To achieve this, there is a need for more detailed investigation into the ways in which the paradigm of international human rights law can function as a broader framework through which international strategies can be developed. The Universal Declaration of Human Rights is clear that all persons are entitled to human rights by the simple fact of being human beings.[102] These human rights are guaranteed by a series of international human rights treaties, with an appreciation of the indivisible and inter-related nature of those human rights,[103] and their location in the

98 The Government Office for Science 'Migration and Global Environmental Change: Future Challenges and Opportunities Final Project Report' *Foresight* (2011) 37; Asian Development Bank 'Addressing Climate Change and Migration in Asia and the Pacific: Final Report' *Asian Development Bank* (2012) 4; W Kälin & N Schrepfer 'Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches' *UNHCR Legal and Protection Policy Research Series*, (Geneva, 2012), 32–34 http://www.refworld.org/docid/4f38a9422.html.

99 L Rajamani 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments Under the Climate Regime' *Review of European Community & International Environmental Law* (2002) 9 (2) 120, 121.

100 As above.

101 IDMC Global Estimates (n 4 above).

102 Universal Declaration of Human Rights, 1948.

103 RG Bertrand 'Universality of Human Rights: The Review' *International Commission of Jurists* (1997) 105-117; UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, UN Doc A/CONF.157/23 https://www.refworld.org/docid/3ae6b39ec.html; Amnesty International *What is the*

fundamental and inalienable principle of a person's human dignity.[104]

Recent scholarship from UN treaty bodies and the European Court of Human Rights (ECtHR) articulate more clearly States' obligations to respect, protect and fulfil certain human rights in the context of responding to natural disasters.[105] The author Walter Kälin argues that survivors of natural disasters may make a claim for humanitarian assistance within the framework on international human rights law; that there are certain State obligations inherent in international human rights law that demand that States respond appropriately to the impacts of climate change.[106]

In addition, Article 11 of the Convention on the Rights of Persons with Disabilities[107] as well as Articles 23 and 25 of the African Charter on the Rights and Welfare of the Child[108] speak to the need for disaster relief responses, and implicitly call for the an all-encompassing right to a healthy environment.[109] Jane McAdam *et al* argues persuasively that to some extent the Guiding Principles on

103 *Universal Declaration of Human Rights and why was it created?* (2018) https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/; Report of the Committee of Experts on the Application of Conventions and Recommendations; International Labour Conference, 63rd Session (1977) para 31; South Asian Judiciary Task Force Appeal signed by Justice MNBhagwati (Former Chief Justice of the Supreme Court of India), Chairperson of the Task Force, Justice Dorab Patel (Former Justice of the Supreme Court of Pakistan) and Justice KM Subhan (Former Justice, Appellate Division of the Supreme Court of Bangladesh), in Bangkok on 29 March 1993; UN Sub-Commission on the Promotion and Protection of Human Rights, Report of the Sub-Commission on the Promotion And Protection of Human Rights on its Fifty-First Session Geneva (2-27 August 1999) Rapporteur: Mr. Paulo S Pinheiro (10 November 1999) E/CN.4/2000/2 E/CN.2/1999/54 https://www.refworld.org/docid/3b00f4ac4.html; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Order on provisional measures ICJ Reports 353 ICJ 348 (2008) 70, 109.

104 J McAdam 'Human Rights and Forced Migration' in E. Fiddian Qasmiyeh *et al The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 203.

105 W Kälin 'The Human Rights Dimension of Natural or Human-Made Disasters' (2012) 55 *German Yearbook of International Law* 119–147, 128–29.

106 Kälin (n 106 above) 141–147; J McAdam & M *Limon Policy Report on Human Rights, Climate Change and Cross-Border Displacement: the role of the international human rights community in contributing to effective and just solutions* (2015) 6-20; JH Knox *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Compilation of Good Practices*, UNGA, UN Doc. A/HRC/28/61, 3 February 2015 http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/GoodPractices.aspx.

107 Article 11 of The Convention on the Rights of Persons with Disabilities, 2008.

108 Article 22 and 25 of The African Charter on the Rights and Welfare of the Child, 1999.

109 JH Knox *Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Preliminary Report*, United Nations Human Rights Council (HRC), UN Doc. A/HRC/22/43 (24 December 2012) 18, 19 and 34 http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A- HRC-22-43_en.pdf; JH Knox *Report of the Independent Expert on Issues of Human Rights Obligations relating to the Enjoyment of a Safe, Clean Healthy and Sustainable Environment: Mapping Report*, HRC, UN Doc. A/HRC/25/53 (30 December 2013) para 17 http://www.ohchr.org/EN/Issues/Environment/SREnvironment/PagesMappingReport.as.

Internal Displacement as well as the work of the UNFCC proceeds from this framework of responsibilities for States as primary duty bearers in terms of international human rights law.[110]

The work of the UNFCCC is premised on the recognition that the international community has the collective responsibility to respond to this global challenge of its own making.[111] In this context, the Office of the High Commissioner for Human Rights noted that '[i]nternational human rights law complements the UNFCC by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights.'[112]

The 2020 *Ioane Teitiota v New Zealand* case heard by the Human Rights Committee is a prime example of how the human rights paradigm might prove useful. The matter concerned a challenge to New Zealand's decision to deport the complainant back to the Republic of Kiribati. The complainant claimed that the effects of climate change and sea level rise forced him to migrate from the island of Tarawa in the Republic of Kiribati to seek asylum in New Zealand.[113] While both local courts and the Human Rights Committee accepted that the complainant was not a refugee for purposes of the Refugee Convention, they did not rule out the possibility that environmental degradation resulting from climate change or other natural disasters could 'create a pathway into the Refugee Convention or other protected person jurisdiction.'[114]

The complainant's claim under the Refugee Convention had failed before the New Zealand Supreme Court because the court had found no evidence that the environmental conditions in Kiribati that the complainant would face upon return were so hazardous that his life would be threatened, and on that score, the complainant did not meet the definitional requirement of 'refugee'.[115] Before the Human Rights Committee, however, the matter turned on whether the complainant's deportation to conditions in Kiribati was a violation to his right to life in terms of Article 6 of the International Covenant on

110 IDMC Global Compact (n 4 above) 43 - 44.

111 *Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention*, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011 (hereinafter 'Cancun Agreements'); *Decision 3/CP.18, Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity*, UN Doc. FCCC/CP/2012/8/Add.1, 28 February 2013.

112 United Nations Office of the High Commissioner for Human Rights (OHCHR), *Mapping Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change* (June 2014) 99 http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.asp.

113 *Ioane Teitiota v New Zealand* (n 20 above) para 2.1.

114 *Ioane Teitiota v New Zealand* (n 20 above) para 2.10.

115 *Ioane Teitiota v New Zealand* (n 20 avove) para 4.3.

Civil and political Rights (ICCPR). The complainant claimed that sea level rise in Kiribati had resulted in the scarcity of habitable land and space, which has in turn caused violent land disputes that threaten the complainant's life. The conditions were furhter reported to include environmental degradation and saltwater contamination of the freshwater supply.[116]

In its decision, the Human Rights Committee correctly highlighted the link that exist between the environment and the enjoyment of human rights. In its general comment No. 36, the Committee established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death.[117] The Committee confirmed that the scope of States parties' obligations to respect and ensure the right to life extends also to reasonably foreseeable threats and life-threatening situations that can result in loss of life, such as the conditions that exist in Kiribati and other affected areas.[118] As a result, States may be still in violation of the Article 6 right to life even where such threats to life do not result in the loss of life.[119] This position is further consistent with the jurisprudence of regional human rights tribunals who have reinforced the link between the right to life and the right to a healthy environment (and other socio-economic rights).[120] Seen in this light, severe environmental degradation caused by rising sea levels can lead to a violation of the right to life.[121]

116 *Ioane Teitiota v New Zealand* at para 2.7.

117 General comment No. 36 (CCPR/C/GC/36) para 3; see *Portillo Cáceres et al v Paraguay* (CCPR/C/126/D/2751/2016) para 7.3.

118 *Portillo Cáceres et al v Paraguay* (CCPR/C/126/D/2751/2016) para 7.5 (hereafter '*Portillo Cáceres et al v Paraguay*'); *Toussaint v Canada* (CCPR/C/123/D/2348/2014) para 11.3.

119 *Portillo Cáceres et al v Paraguay* (n 119 above) para 7.3.

120 *Portillo Cáceres et al v Paraguay* (n 119 above) para 7.4; Inter-American Court of Human Rights *Advisory opinion OC-23/17* of 15 November 2017 on the environment and human rights, Series A No. 23 para 47; *Kawas Fernández v Honduras*, judgment of 3 April 2009, Series C No. 196 para 148; African Commission on Human and People's Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) para 3 (States' responsibilities to protect life 'extend to preventive steps to preserve and protect the natural environment, and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies.'); European Court of Human Rights, application Nos. 54414/13 and 54264/15, *Cordella and Others v Italy*, 24 January 2019 para 157 (serious environmental harm may affect individuals' well-being and deprive them of the enjoyment of their domicile, so as to compromise their right to private life).

121 *M Özel v Turkey* ECtHR(17 November 2015) paras 170, 171 and 200; *Budayeva v Russia* (20 March 2008) paras 128–130, 133 and 159; *Öneryildiz v Turkey* (30 November 2004) paras 71, 89, 90 and 118.

The paradigm of international human rights law promises to provide a useful starting point in that it offers a set of minimum standard for the treatment of migrants subject to a State's jurisdiction or effective control.[122] International human rights law is further useful in that it can function as a mechanism for the identification and assessment of which rights and freedoms are negatively impacted by the rising sea-levels, it provides a legal basis from which international protection may be granted, and it demands that host States observe a number of minimum standards of treatment towards migrants.

4.2 The obligation to cooperate

The obligation to cooperate is a primary principle under international law.[123] The International Law Commission (ILC) in its commentary to the Draft Articles on the Protection of Persons in the Event of Disasters characterises this obligation as 'indispensable' in protecting victims of disasters.[124] the Principle's foundational character is demonstrated by its inclusion in the UN Charter as a key objective of the UN,[125] and has been reiterated in a range of human rights[126] and environmental law treaties alike.[127]

While there is a need for greater clarity regarding the material content of this obligation particularly in the context of the international community engaged in joint and separate actions to protect, respect and fulfil international human rights in the specific context of migration induced by rising sea-levels, this principle, expressed through the human rights paradigm, can function as the organising factor on which international strategies can be premised. The obligation to cooperate can be used as the basis for determining the specific role of the international community of States.

122 *Bankovic and Others v Belgium and 16 other Contracting States* (Admissibility Decision) App. no. 52207/99 ECtHR (12 December 2001) para 73 (hereafter '*Bankovic*'); *Hirsi Jamaa and Others v Italy* (Judgment) App. no. 27765/09 (ECtHR, 23 February 2012) paras 76–82; *Loizidou v Turkey* (Preliminary Objections) App. no. 15318/89 ECtHR (13 March 1995) para 62; *Georgia v Russia* (I) (Judgment) App. no. 13255/07 ECtHR (3 July 2014) paras 159, 163; *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) ICJ Reports 163 (9 July 2004) 108–112; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment (19 December 2005) para 216.

123 R Wolfrum 'International Law of Cooperation' in Wolfrum (eds) *The Max Planck Encyclopedia of Public International Law* (2010).

124 ILC *Report of the International Law Commission* 66th Session, UN Doc. A/69/10 (2014) 105 http://legal.un.org/ilc/reports/2014/.

125 Articles, 1(3), 55, 56, United Nations, Charter of the United Nations, entered into force 24 October 1945, 1 UNTS XVI.

126 For example, Articles 2(1), 11, 15, 22 and 23 of The International Covenant on Economic, Social and Cultural Rights, 1966.

127 For a complete list see J McAdam 'Climate Change, Forced Migration, and International Law' *Oxford University Press* (2012) 257 at fn 132.

4.3 Common but differentiated responsibilities

The principle of common but differentiated responsibilities can also function as a useful prism through which the international community could organise its joint and separate responses to the challenge of migration in this context. Article 3.1 of the UNFCCC demands that:

> [t]he parties should protect the climate system for the benefit of present and future generations of human kind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof.

Article 4 adds to this. It requires that member States 'take into account their common but differentiated responsibilities in fulfilling commitments under the UNFCCC.'[128]

The International Law Association Committee on Sea-Level Rise has described this principle as the 'bedrock of burden sharing arrangements crafted in the new generation of environmental treaties,' and as having 'considerable legal gravitas.'[129] The Committee notes that this principle is 'arguably an overarching principle guiding the development of the international climate change regime.'[130] The principle established the shared and common responsibility of the international community while recognising that all States have, to varying degrees, contributed to the creation of the problem, and that different States have varying capacities to respond to it.[131]

The distribution of the impacts of rising sea-levels will be unevenly distributed. States that have contributed the least to greenhouse gas emission will be the worst affected due to their geographic location, and limited capacity to respond effectively to these challenges due to limited resources and support. In addition, this is likely to be further compounded by the existence of additional challenges, including the expansion of their population and weak human rights protections.

States that are directly affected by rising sea-levels will require financial, technical and institutional support to discharge their obligations to respect, protect and fulfil the human rights of those affected. These concerns have already been highlighted in the UNFCCC. For instance, the 2010 Cancun Adaptation Framework

128 UNFCCC (n 21 above).
129 See Report of the International Law Association's Committee on Legal Principles Relating to Climate Change (Washington, 2014) 13 http://www.ila-hq.org/en/committees/index.cfm/cid/1029; see also IDMC Global Estimates (n 4 above).
130 As above.
131 IDMC Global Compact (n 4 above) 47.

highlights the immediate need for international cooperation on adaptation measures.[132] With respect to migration, the Framework encourages States to develop measures to improve international cooperation and coordination on climate change-induced displacement, migration and planned relocation at the national, regional and international levels.[133] To this end, the principle of common but differentiated responsibilities can function as a beneficial prism through which States can develop these measures.

5 Conclusion

Although sea-levels will rise only gradually over decades and centuries, this gradual rise has immediate and hazardous impacts on the low-lying territories, and the inhabitants of those vulnerable coastal areas. These immediate impacts of rising water tables result in the creation of mass migration, as inhabitants of these areas are not likely to stay until crisis point of inundation. Currently, international law rules do not recognise this form of irregular migration — leaving a gap in the international regulation of migration. The definition of refugee in the Refugee Convention does not include environmental or climate refugees. In response, some regional efforts have been made to mend the deficit in protections by expanding the definition of a refugee, potentially to include environmental or climate refugees. However, if we are to realise the current predictions on the gradual rise of sea water levels, then regional efforts will be far from sufficient.

While not completely unhelpful, the current rules and mechanisms under international law have very clear limits regarding the extent to which they can be leveraged to protect these migrants. What is becomes clear then, is that the international community needs develop uniform and universal legal and policy frameworks, and operational measures to facilitate migration in the specific context of rising sea levels. Of course, we are a long way from seeing international rules specifically regulating migration in the context of rising sea-levels. In fact, it was only in May 2019 at its 3467th meeting that the ILC include the topic 'Sea- level rise in relation to international law' in its programme of work, and established an open-ended Study Group on the topic.[134] Over the next two years, the Study Group will work on issues related to the protection of persons affected by sea-level rise as a sub-topic identified in the syllabus prepared in 2018.[135]

132 Cancun Adaptation Framework 14(f) 60, 63 and 68 Doc. FCCC/CP/2010/7/Add.1.
133 As above.
134 *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para 369.
135 As above.

As the international community considers and develops a response to these challenges, this contribution recommends some useful starting points for the organisation of the global response. First, the paradigm of international human rights law, which can function as a broader framework through which international strategies can be developed. Closely linked to this is the international law obligation to cooperate which, seen through the human rights paradigm, can function as the organising factor on which international strategies can be based. Finally, the principle of common but differentiated responsibilities, which establishes shared and common responsibility, while recognising that all States have, to varying degrees, contributed to the creation of the problem, and that different States have varying capacities to respond to it.

CONSUMER OVER-INDEBTEDNESS LANDSCAPE: THE OBLITERATION OF A CREDITOR-ORIENTED APPROACH THROUGH THE DEBT INTERVENTION PROCEDURE?

*by Khalipha Shange**

'You are either alive and proud, or you are dead and when you are dead, you can't care anymore' — Steve Bantu Biko

1 Introduction

As observed by Coetzee and Roestoff, the South African natural person insolvency system remains creditor oriented and as a ramification many over-indebted consumers are excluded from access to debt alleviation measures.[1] There are three debt alleviation measures available to natural persons in South Africa, of which only the sequestration procedure under the Insolvency Act provides an over-indebted consumer with a discharge from pre-insolvency debts.[2]

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1 H Coetzee & M Roestoff 'Rectifying an unconstitutional dispensation? A consideration of proposed reforms relating to No Income No Asset debtors in the South African insolvency system' (2020) *International Insolvency Review* 1.

2 Insolvency Act 24 of 1936 sec 9(1); R Leathern 'Consideration of the proposed debt intervention procedure from a debt relief perspective' (LLM thesis University of Pretoria 2018) IV (thereafter 'Leathern').

However, the principal requirement of proving financial advantage to creditors restricts access for many debtors as they do not have sufficient disposable assets to satisfy the requirement.[3] The other two debt alleviation measures are the administration order provided in the Magistrates Court[4] and debt review under section 86 of the National Credit Act.[5] These measures have been heavily criticised for their reliance on the courts and for only providing debt repayment plans with no provision for discharge.[6]

This article commences with a detailed discussion of the debt intervention procedure provided by the 2019 National Credit Amendment Act.[7] Thereafter, the New Zealand insolvency system is discussed. The purpose is to benchmark the debt intervention procedure against the New Zealand insolvency system in order to ascertain if it obliterates a creditor-oriented approach.

2 The debt intervention procedure

The introduction of the 2019 Amendment Act is inherently embedded in the endeavour to rectify unfair discrimination experienced by over-indebted consumers who have no recourse for debt alleviation.[8] In this regard the 2019 Amendment Act undertakes to alter the legal position regarding debt alleviation mechanisms by providing certain over-indebted consumers with access to the new debt intervention procedure inserted into the National Credit Act as section 86A. During this process the National Credit Regulator (NCR) is empowered to do various evaluations; of the most important being a referral of the matter to the Tribunal (NCT) or court if the consumer is found to be over-indebted.[9]

2.1 Application and access requirements

The scope of application of the debt intervention procedure is restricted by the access requirements stipulated in the definition of a debt intervention applicant and section 86A of the 2019 Amendment Act.[10] Section 86A stipulates that '[a] natural person debt intervention applicant may apply to the National Credit Regulator in order to be declared over-indebted' provided that the total

3 Leathern (n 2 above) IV.
4 Magistrates Court Act 32 of 1944.
5 National Credit Act 34 of 2005 (thereafter 'NCA'); See also Leathern (n 2 above) IV.
6 Leathern (n 2 above) IV.
7 National Credit Amendment Act 7 of 2019 (thereafter the '2019 Amendment Act').
8 Coetzee & Roestoff (n 1 above) 2.
9 2019 National Credit Amendment Act (n 7 above) sec 86A(1).
10 2019 National Credit Amendment Act (n 7 above) sec 86A.

unsecured debt of the 'debt intervention applicant' does not exceed the R50 000 threshold.[11]

Furthermore, with regards to the procedure's application, the definition of a debt intervention applicant refers to unsecured debt only thus implying that over-indebted consumers who are party to a secured credit agreement are not eligible to apply for the procedure.[12] Any consumer party to a 'developmental credit agreement'[13] or a credit agreement in which the creditor has since taken steps to enforce the agreement, is disqualified from admission to the debt intervention procedure, as contemplated by section 86A(2).[14] It is important to note that a secured credit agreement is not mentioned in section 86A(2) as being disqualified. Therefore, as stated by Coetzee and Roestoff, creating the impression that not only are secured credit agreements excluded from the application of the procedure but are further disqualified in total, as it appears that only an applicant with unsecured credit agreements regulated by NCA can access the procedure.[15]

The other notable access requirement is that the applicant must not receive gross income exceeding the prescribed threshold of R7 500 per month on an average for the six months preceding the date of application for admission into the debt intervention procedure or an amount prescribed in terms of section 171(2A), per month.[16] Section 171(2A) empowers the Minister of Finance to annually adjust both the threshold of gross income of R7 500 per month and R50 000 unsecured total debt with due consideration to inflation.[17] Moreover, the procedure applies to the explicit exclusion of consumers who have been sequestrated or have been subjected to an administration order.[18]

11 2019 National Credit Amendment Act (n 7 above) sec 86A(1).
12 2019 National Credit Amendment Act (n 7 above) sec 1(b).
13 According to sec 10(1) of NCA a credit agreement will be a developmental credit agreement irrespective of its form, type, category if at the time the agreement is entered into the credit provider holds supplementary registration certificate issued in terms of sec 41 and the loan must be for educational purposes, acquisition or expansion of low-income housing or development of small businesses.
14 Coetzee & Roestoff (n 1 above) 13.
15 As above.
16 2019 National Credit Amendment Act (n 7 above) sec 1(b)(b).
17 2019 National Credit Amendment Act (n 7 above) sec 171(2A).
18 2019 National Credit Amendment Act (n 7 above) sec 1(b)(b).

2.2 Assessment of application by NCR

Upon receiving the debt intervention application, NCR[19] must adhere to section 86(4) and (6) of the National Credit Act (which deals with the debt review procedure under section 86) in order to initiate the assessment process, mainly by furnishing the debt intervention applicant with proof of application and informing all listed creditors and all registered credit bureaus of the application, so they can all cooperate with the NCR's requests in good faith.[20]

However, when considering the application, there are certain duties imposed on NCR, such as providing an applicant to the procedure with financial literacy counseling and access to training intended to improve the applicant's financial literacy.[21] After having completed the assessment, NCR must accept or reject the application based on whether the applicant qualifies for the procedure or not. Then NCR must further examine whether the applicant is over-indebted or whether any of the applicant's credit agreements appear to be reckless,[22] unlawful,[23] or prohibited,[24] and, if so, refer such a matter to the National Consumer Tribunal (NCT).[25]

It may happen that an applicant does not qualify for the procedure, but is likely to, or experiences difficulty with the satisfaction of credit agreement obligations.[26] In such instances, NCR is empowered to propose that the applicant together with the affected credit providers voluntarily enter into a debt re-arrangement plan.[27] It is important to note that if NCR rejects the application for debt intervention, an applicant may approach the Magistrate's Court directly for an order stipulated in section 87.[28] From an analysis perspective section 87 in its entirety is the most significant part of the debt intervention process as it contains orders which can be made in respect of the procedure which includes, amongst others, the suspension, rearrangement and extinguishment of the whole or a portion of the total unsecured debt.

The NCR's referral to NCT must be accompanied by a recommendation for an appropriate order, for applicants who have qualified for the procedure. The NCR, consistent with section 87(1A),

19 The office of NCR is responsible for economic and social advancement in the credit industry, its tasks include among others investigation of complaints, facilitating research and educational projects, and more importantly ensuring compliance with NCA.
20 Coetzee & Roestoff (n 1 above) 14.
21 2019 National Credit Amendment Act (n 7 above) sec 86A(5).
22 National Credit Act (n 5 above) secs 80-83.
23 National Credit Act (n 5 above) sec 89.
24 National Credit Act (n 5 above) secs 74, 75, 81(3) for example.
25 Coetzee & Roestoff (n 1 above) 15.
26 2019 National Credit Amendment Act (n 7 above) sec 86A(6)(b).
27 As above.
28 2019 National Credit Amendment Act (n 7 above) sec 86A(7).

may recommend that NCT rearranges debt obligations of a qualifying applicant for a period of not more than 5 years.[29] This re-arrangement depends on whether the applicant has enough income and assets to satisfy the obligations in terms of the re-arrangement.[30]

However, for applicants who qualify for the procedure, but who do not have sufficient income and assets to satisfy re-arrangement obligations, NCR must recommend the matter to NCT for a section 87A(3) order of debt extinguishment.[31] Furthermore, NCR must inform all affected creditors of such a referral and extend the invitation to make formal written presentations to NCT at a certain date.[32] Section 87A(3) has been heavily criticised by creditors as amounting to unconstitutional deprivation of property[33] as prohibited by section 25 of the Constitution of the Republic of South Africa[34] and this criticism may serve as an alert of possible future litigation between creditors and the NCT.

In an instance where the consumer has defaulted on his payments and is in arrears with three or more payments such agreement will be classified as being impaired.[35] Therefore where an impaired credit agreement is subject to a debt intervention application procedure, a creditor may terminate the procedure by informing both the applicant and NCR of such termination, but this termination may only be done after a prescribed period (because the Act only refers to a 'prescribed period' but does not explicitly state the period it can be assumed that such a period must be stipulated by the creditor in the notice of termination).[36] It is however not possible for the creditor to terminate the procedure where the matter has been escalated and filed with the NCT.[37] Moreover, regardless of the fact that the procedure was terminated properly, a court or NCT hearing the matter, may order the resumption of the procedure on grounds that it deems just.[38]

2.3 Referral to NCT and consequences of debt intervention

When reflecting on the debt intervention procedure Coetzee and Roestoff observe that it is notable that NCT has the most important functions that are aligned with the best international practices and guidelines of insolvency law.[39] After a referral was made, NCT has an

29 2019 National Credit Amendment Act (n 7 above) sec 86A(6)(d).
30 2019 National Credit Amendment Act (n 7 above) sec 86A(6)(e).
31 As above.
32 2019 National Credit Amendment Act (n 7 above) sec 86A(9)(a).
33 Coetzee & Roestoff (n 1 above) 10.
34 Constitution of the Republic of South Africa, 1996.
35 Coetzee & Roestoff (n 1 above) 3.
36 Coetzee & Roestoff (n 1 above) 16.
37 As above.
38 As above.

obligation to consider information presented by the affected parties as well as any other relevant information to ascertain whether the applicant qualifies for the procedure or not.[40] Subsequently, NCT may reject or approve the application based on further factors provided by section 87 such as whether the applicant is a 'minor heading a household, a woman heading a household or an elderly person'.[41]

Upon approval of the application, section 87A(2)(b) states that NCT may suspend all the credit agreements, partially or in full for a period of 12 months, which after expiry may be extended further by another period of 12 months, and require the applicant to attend further financial literacy training.[42] This order may only be made after consideration of whether the applicant is disabled, a minor heading a household, a woman heading a household, or an elderly person.[43] Further factors to be considered are whether the applicant has ever applied for any of the existing statutory debt relief measures or had their debt discharged by the court or NCT which, if confirmed, may strongly hinder the chances of admission to procedure.[44]

Apart from the abovementioned factors, the applicant's conduct is also taken into consideration with regards to commissions or omissions that have hindered the applicant's ability to qualify for the debt re-arrangement plan stipulated in section 86A(6)(d) and the necessary steps taken to increase or attain an income.[45] Other factors relate to the behaviour of affected creditors for the period when the credit agreements were concluded and during the course of proceedings in section 86A and before the NCT.[46] The behaviour of affected creditors must not amount to the harassment of the over-indebted consumer in the process of debt collection or reckless, unlawful or prohibited lending conduct.[47]

With regards to the suspension of debt for applicants who do not have sufficient income and assets as contained in section 87A(2)(b), NCR must, after 8 months into the 12 month suspension order, review the financial circumstances of the applicant in order to ascertain whether the applicant has acquired sufficient assets and income to qualify for the 5 year re-arrangement plan stipulated in section 86A(6)(d).[48] If NCR ascertains that the applicant has acquired sufficient assets and income to qualify for the section 86A(6)(d) re-

39 As above.
40 2019 National Credit Amendment Act (n 7 above) sec 87A(2)(a).
41 2019 National Credit Amendment Act (n 7 above) sec 87A(3)(a).
42 2019 National Credit Amendment Act (n 7 above) sec 87A(2)(b).
43 2019 National Credit Amendment Act (n 7 above) sec 87A(3)(a).
44 As above.
45 Coetzee & Roestoff (n 1 above) 17.
46 Coetzee & Roestoff (n 1 above) 18.
47 2019 National Credit Amendment Act (n 7 above) sec 86A(6)(c).
48 Coetzee & Roestoff (n 1 above) 18.

arrangement plan, it must make a referral to NCT with a recommendation for a section 87(1A) order.[49]

However, if NCR concludes that the applicant still does not qualify for the 5-year re-arrangement plan, because of insufficient assets and income, the matter must also be referred to NCT with a recommendation for a 12 month extension of the suspension.[50] After the 12 month suspension has been granted, NCR must for the second time, 8 months into the 12 month extension period, assess the applicant's financial situation.[51] If at such a stage the applicant has acquired sufficient assets and income and now qualifies for the section 86A(6)(b) order, NCR makes a referral to NCT with a recommendation for a section 87(1A) order.[52]

The most important objective of the procedure is found in section 87A(5)(c)(ii), which provides for a possibility of a discharge ordered by NCT provided that all other alleviation avenues contained in the procedure have been exhausted.[53] This section provides that after NCR has conducted its second review and it concludes that the applicant still does not qualify for the 5 year re-arrangement plan due to insufficient assets and income, NCR must refer the matter to NCT to consider 'extinguishing the whole or a portion of the amounts stated in section 101(1) under a qualifying credit agreement'.[54]

However, NCR must also extend an invitation to creditors to make written recommendations to NCT in light of the referral for extinguishing the applicant's debt.[55] There are certain factors to be considered by NCT before granting the order for extinguishing the applicant's debt, including among others the applicant's assets and income and the same factors to be considered when granting a suspension order as mentioned above.[56] When granting the order for extinguishing the debt NCT also has the obligation to limit the applicant's right to apply for credit as stipulated in section 60, to a minimum period of 6 months and maximum of 12 months.[57]

3 New Zealand insolvency law

The New Zealand Insolvency Act[58] has been commended for its uncomplicated and accessible entry requirements for debt relief.[59] As

49 As above.
50 As above.
51 As above.
52 As above.
53 Coetzee & Roestoff (n 1 above) 19.
54 2019 National Credit Amendment Act (n 7 above) sec 7.
55 Coetzee & Roestoff (n 1 above) 20.
56 Coetzee & Roestoff (n 1 above) 21.
57 As above.
58 Insolvency Act 2006.

observed by Coetzee this Act reformed the insolvency landscape by specifically providing debt alleviation to all honest but unfortunate over-indebted consumers.[60] The most notable and attractive debt alleviation measure to be discussed is the 'no asset procedure' which, unlike the South African debt alleviation mechanisms, does not unfairly discriminate on the basis of an indebted consumer's financial status.

Notwithstanding that this procedure is used as a benchmark for the purposes of this article, it must be noted that a brief evaluation of the effectiveness of the procedure raised some shortcomings in its jurisdiction. These include criticisms by creditors that this procedure legitimises an easy escape from consequences arising from an indebted consumers previous irresponsible habits.[61] Moreover, this procedure does not contain any provision to encourage indebted consumers to learn from their mistakes.[62]

Keeper states that a significant number of creditors and budget advisors lament the procedure's defect to facilitate change in indebted consumers spending and budgetary habits.[63] Keeper proposes that to remedy this defect financial literacy and budgetary courses must be a precondition for a discharge of debts provided by this procedure.[64] Furthermore this evaluation clearly points out that the procedure does not concern itself with preventing over-indebtedness — instead its primary focus is to rather cure over-indebtedness once it has come into effect.[65]

3.1 No asset procedure

This procedure is the first debt alleviation mechanism to make provision for the inclusion of an indebted consumer 'who has no realisable assets and does not have means of repaying any amount towards his or her debts'.[66] The rationale behind the introduction of such a procedure was to accommodate indebted consumers who are often excluded from the application of other debt relief mechanisms because they do not have sufficient assets or income to repay their debts.[67]

59 H Coetzee 'A comparative reappraisal of debt relief measures for natural person debtors in South Africa' LLD thesis, University of Pretoria (2015) 22.
60 Coetzee (n 60 above) 22.
61 Keeper T 'New Zealand's No Asset Procedure: A fresh start at No cost?' (2014) *Queensland University of Technology Law Review* 14(3) 1.
62 Keeper (n 62 above) 16.
63 As above.
64 As above.
65 As above.
66 Public Act 2006 55 New Zealand sec 363.
67 H Coetzee & M Roestoff 'Consumer debt relief in South Africa-should the insolvency system provide for NINA debtors? Lessons from New Zealand' (2013) *International Insolvency Review* 22-27.

The admission criteria to this procedure is very stringent considering the fact that the 'no asset'-procedure remains active for a twelve-month period, therefore it is susceptible to abuse.[68] An indebted consumer can access the procedure by submitting a completed application form accompanied by a statement of affairs to an assignee.[69] The assignee has been conferred certain conflicting powers such as being an adjudicator, representing the interests of the creditor, being a debt counsellor and being a finder of valid facts, all depending on the circumstances.[70] The assignee may admit or reject an applicant to this procedure after consideration on whether the admission criteria were satisfied on reasonable grounds.[71]

The admission criteria has been divided into criteria relating to the indebted consumer's conduct and criteria relating to his financial position, from an objective perspective.[72] Certain conduct such as the concealment of assets with the intention to defraud creditors may disqualify an indebted consumer from the procedure.[73] An indebted consumer who has previously been admitted to this procedure or been formally declared bankrupt by a court is further disqualified from entry.[74] Financially the total debt must be between the threshold of NZ$1 000 and NZ$40 000 with the indebted consumer having 'no realisable assets and any means of repaying the debts'.[75]

Brown points out that there are no guidelines provided for the determination of an indebted consumer's ability to repay the debts, instead only a budget form requiring disclosure of all household and family expenditure is provided.[76] This creates the impression that the important question is whether the indebted consumer has any disposable net income.[77] To clarify this impression: it appears as if indebted consumers who are employed are ineligible for this procedure as they are in a position to make continuous contributions to service their debts.[78]

After application for admission the assignee must send particulars of the indebted consumers assets and liabilities to known creditors.[79] The indebted consumer is strictly prohibited from obtaining credit in excess of the threshold of NZ$1 000 without prior disclosure to the

68 Coetzee & Roestoff (n 68 above) 28.
69 Public Act (n 67 above) secs 362(1) and 362(2).
70 Coetzee & Roestoff (n 68 above) 24.
71 Public Act (n 67 above) sec 363(1).
72 Coetzee & Roestoff (n 68 above) 28.
73 Public Act (n 67 above) sec 364(a)-(d).
74 Public Act (n 67 above) secs 363(1)(b), (c) and 364(b).
75 Public Act (n 67 above) secs 363(1)(d) and 363(3).
76 Brown D 'The financial health benefits of a quick "NAP" — New Zealand Solutions to consumer insolvency?', paper presented at the INSOL conference academic programme, Vancouver (20 June 2009) 10.
77 Brown (n 77 above) 10.
78 As above.
79 Public Act (n 67 above) sec 365.

credit provider that he or she has applied for admission into such a procedure.[80] For admission to be effected, the assignee must have sent a written notice of admission to the indebted consumer.[81] A notice of admission must be sent to the creditors and advertised by the assignee who must further 'maintain a public register of persons who have been admitted to and discharged from the procedure'.[82]

Admission to the procedure results in a moratorium against debt enforcement hence creditors are not permitted to commence or continue any debt enforcement proceedings after an indebted consumer has been admitted to the procedure.[83] Debts that would normally be provable under bankruptcy and those which the indebted consumer owed on the date of application may not be enforced.[84] It must be noted that this procedure applies to the exclusion of student loans,[85] maintenance orders[86] and debts relating to the Child Support Act (these debts fall under different Acts and cannot be classified into one category as secured or unsecured, except that they are all 'personal debts').[87] The indebted consumer has an obligation to notify the assignee of any change of financial circumstances that would enable repayment of any amount of the debts owed.[88]

Termination of the procedure can take various forms such as discretionary termination by the assignee and through the attainment of a discharge by the indebted consumer whereby the procedure has successfully run its course. The other form of termination permits a 'credit provider entitled'[89] to terminate to bring about an application for termination, this permission extends further to the indebted consumer to bring application to terminate their own procedure.[90] Most important is the fact that any termination, except by discharge, lifts the prohibition imposed on debt enforcement therefore penalties and interest which may have accrued in the duration of the procedure will have to be paid by the indebted consumer.[91]

The assignee may further terminate the procedure if there was wrongful admission by bad faith constituted by the concealment of assets and misleading information.[92] The assignee may also terminate

80 Public Act (n 67 above) sec 366.
81 Public Act (n 67 above) sec 367(1).
82 Public Act (n 67 above) sec 368 & 448(3)-(4).
83 Coetzee & Roestoff (n 68 above) 30.
84 Public Act (n 67 above) sec 243.
85 Public Act (n 67 above) sec 369.
86 Family Proceedings Act 1980.
87 Child Support Act 1991.
88 Public Act (n 67 above) sec 370.
89 Coetzee and Roestoff are of the opinion that a credit provider shall be entitled to terminate in an instance whereby a creditor's debt remains enforceable under a student loan.
90 Public Act (n 67 above) sec 372.
91 Public Act (n 67 above) sec 375.
92 Public Act (n 67 above) sec 373(1)(a).

the procedure if it is satisfied that the financial circumstances of the indebted consumer have changed and repayment of debts is possible.[93] Termination initiated by the assignee becomes effective when the assignee sends a notice to the indebted consumer, regardless of whether or not the indebted consumer received it.[94] After sending the notice, the assignee must further notify known creditors of such termination.[95] The assignee may apply for a 'court preservation order'[96] after termination in an instance where the indebted consumer gained admission by concealment of assets or misleading information.[97]

The procedure permits a creditor to apply for termination to the assignee provided that there are reasonable grounds for the assignee to conclude that the indebted consumer was disqualified according to the grounds of disqualification or the indebted consumer did not meet the admission requirements.[98] The creditor is also permitted to apply for termination on the basis that adjudication in the form of bankruptcy would be more beneficial.[99]

The indebted consumer is automatically discharged from the procedure after a period of twelve-months had there been no termination thereof.[100] However the discharge will be delayed if the assignee is of the opinion that, the procedure should be extended to thoroughly consider termination of the procedure and the assignee must have sent a notice of such a deferral to both the indebted consumer and known creditors.[101] The notice of deferral 'must clearly state the alternative date of automatic discharge, which must not be more than 25 working days after expiry of the twelve-month period'.[102]

Immediately after discharge, the indebted consumer is not liable to pay any amount or portion thereto of debts that became unenforceable and cancelled.[103] This discharge includes interest and penalties.[104] However, debts and liabilities incurred by conduct of bad faith such as fraud or fraudulent breach of trust become enforceable on discharge including interest and penalties.[105] The

93 Public Act (n 67 above) sec 372 read together with sec 373(1)(a).
94 Public Act (n 67 above) sec 373(2).
95 Public Act (n 67 above) sec 373.
96 A 'court preservation order' temporarily protects property or assets for the benefit of the creditors since the assignee gained admission by bad faith of misleading information or concealment of assets.
97 Coetzee & Roestoff (n 68 above) 32.
98 Public Act (n 67 above) 376.
99 Coetzee Roestoff (n 68 above) 32.
100 As above.
101 Coetzee & Roestoff (n 68 above) 33.
102 Coetzee & Roestoff (n 68 above) 33.
103 Coetzee & Roestoff (n 68 above) 33.
104 Coetzee & Roestoff (n 68 above) 33.
105 Coetzee & Roestoff (n 68 above) 33.

discharge is only limited to the indebted consumer and not business affiliates, co-trustees, guarantors or any other person jointly and severally liable with the indebted consumer.[106]

4 Concluding remarks

It is apparent that the introduction of the debt intervention procedure in the South African insolvency system was to accommodate over-indebted consumers with no realisable assets for disposal and who, as a consequence, are often excluded from any form of debt alleviation. The legislature should be commended for taking valuable lessons from New Zealand's 'no asset procedure' and providing an inexpensive and accessible mechanism for debt alleviation.[107]

However, it is important to mention that the introduction of the debt intervention procedure will bring about new challenges to the credit landscape just as the no asset procedure did. Contrary to the no asset procedure, the debt intervention procedure went further to make provision for financial literacy counselling and training to the applicants. This is clearly consistent with the prevention of over-indebtedness by changing the attitudes of indebted consumers to the use of credit. The active participation of NCR and NCT can be compared to that of the assignee, this facilitates low-cost debt alleviation for applicants languishing in over-indebtedness especially because court alleviation measures can be costly.[108]

The debt intervention procedure deviates from the no asset procedure as indebted consumers who are employed can access the alleviation measure provided that their monthly income does not exceed the prescribed threshold of R7 500.[109] Contrary to this Brown asserts that indebted consumers who are employed are ineligible for admission to the no asset procedure.[110] This poses the question whether indebted South African consumers deserve the option of a discharge considering their employment status. From a creditor's perspective the South African legislature drew a very controversial inference from the no asset procedure - that being the discharge of a portion or the entire debt as contemplated by section 87. Creditors have vehemently opposed the provision for discharge of debts, citing concerns that such would amount to unconstitutional deprivation of property.[111] Only future litigation would provide clarity for this uncertainty. New Zealand creditors are of the view that indebted consumers must earn their discharge through financial literacy.[112]

106 Coetzee & Roestoff (n 68 above) 33.
107 Coetzee & Roestoff (n 68 above) 2.
108 Coetzee & Roestoff (n 1 above) 6.
109 2019 National Credit Amendment Act (n 7 above) sec 1(b).
110 Brown (n 77 above) 10.
111 Coetzee & Roestoff (n 1 above) 10.

Lastly the debt intervention only applies to a credit agreement with a total unsecured debt not exceeding the threshold of R50 000.[113] On this threshold it can be said without a doubt that creditors will put more stringent measures in place for accessing credit. This may result in the exclusion of many low-income household credit deserving consumers from the credit market. These low-income consumers would have to make alternative plans to obtain credit, therefore resorting to getting credit from the rogue and unregistered credit providers who charge exorbitant interest.

In conclusion, the debt intervention procedure attempts to remedy unfair discrimination against over-indebted consumers, however this article is of the opinion that, the debt intervention procedure might just do more harm than good.

112 Keeper (n 62 above) 16.
113 2019 National Credit Amendment Act (n 7 above) sec 86A(1).

THE CONSTITUTIONALITY OF WARRANTLESS SEARCH AND SEIZURE OPERATIONS

*by Lehlohonolo January**

1 Introduction

There are various crimes committed in South Africa which have shown an increased rise over the past decade. Most crimes bear the potential to be efficiently combatted through search and seizure operations. According to national crime statistics crimes such as carjacking, illegal possession of firearms and ammunition, drug related crimes and robbery of cash in transit (which in 2018 experienced an increment of 56.6% increase from 2017) are the crimes which have increased and continue to increase.[1] The crimes which have been highlighted are gateway crimes through which other subsidiary crimes such as assault, murder, rape and others are committed.[2] However, it is through the efficient procedure of search and seizure operations that crimes of such a nature have the potential to decrease exponentially.

Search and seizure operations are tools which are designed to help the police carry out their constitutional mandate of '*inter alia*' preventing, investigating and combating crime efficiently. Generally, search and seizure operations are required to be conducted within the confines of a search warrant.[3] A warrant is a legal instrument issued

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1 SAPS 'National Crime Statistics: Crime situation in RSA twelve months' 1 April 2017 – 31 March 2018 https://www.saps.gov.za/services/long_version_presentation_april_to_march_2017_2018.pdf (accessed 11 March 2019).

2 M Schonteich & A Louw 'Crime in South Africa: A country and cities profile' (2001) 49 *Crime and Justice Programme, Institute for Security Studies* 4.

by a judicial officer which sets out the scope, reasons and duration with which the police may search, and it ensures that the police do not invade private property for no particular reason.[4] The search warrant ensures that the State justify and support the intrusion of privacy under oath before an officer of the court prior to the intrusion.[5]

South Africa boasts a widespread legislative infrastructure authorising warrantless search and seizure operations. *The Criminal Procedure Act*,[6] *South African Police Services Act*,[7] *the North West Gambling Act*[8] and the *Drugs and Drug Trafficking Act*[9] are the most commonly used statutes which authorise the police to conduct warrantless search and seizure. However, the empowering provisions of the Drugs Act have recently been repealed after the Constitutional court declared them to be unconstitutional.[10]

It is under the authority granted by section 22 of CPA[11] in which a police official may search any person, premises or container with the purpose of seizing any article referred to under section 20 which has been used to commit an offence; may have been intended to be used to commit an offence or may provide evidence for an offence already committed. The origins of this section emanate from the Apartheid regime under whose authority police officials were granted unfettered powers to effectively limit the rights of citizens.[12] Under this regime powers such as these were abused as they were fundamentally directed at oppressing particular groups of society.[13] Nevertheless, our nation has since progressed from the rule of the Apartheid government and the dawn of our democracy saw the need to protect the rights which are fundamental to the personal freedoms of individuals.

To avoid unjustified intrusions of ones' property and privacy by police officials the Constitution of the Republic of South Africa,[14]

3 A Price 'Search and seizure without warrant' (2015) 6 *Constitutional Court Review* 247.
4 V Basdeo 'The constitutional validity of search and seizure powers in South African criminal procedure' (2009) 12 *Potchefstroom Electronic Law Journal* 313.
5 WT Tongoane 'Warrantless Search & Seizure in terms of the Drugs and Drug Trafficking Act, Criminal Procedure Act and South African Police Services Act: A Comparative Analysis with Canadian Law' unpublished LLM thesis, University of Pretoria, 2017 5.
6 The Criminal Procedure Act 51 of 1977 (thereafter 'CPA').
7 The South African Police Services Act 68 of 1995 (thereafter 'SAPS Act').
8 The North West Gambling Act 2 of 2001 (thereafter 'Gambling Act').
9 The Drugs and Drug Trafficking Act 140 of 1992 (thereafter 'Drugs Act').
10 See *Minister of Police and others v Kunjana* 2016 JOL 36315 (CC) para 47.
11 CPA (n 6 above) sec 22.
12 N Parpworth 'The constitutional invalidity of warrantless drugs searches in South Africa' (2018) 91(2) *The Police Journal: Theory, Practice and Principles* 128.
13 Parpworth (n 12 above) 128.
14 The Constitution of the Republic of South Africa, 1996 (thereafter 'the Constitution').

under the Bill of Rights affords everyone various rights such as the right to privacy in an attempt to curtail unlawful warrantless search and seizure operations. How successful have such fail-safe mechanisms been in so far as ensuring that certain rights aren't unduly violated? Would the use of less intrusive mechanisms provide the same results gained with the use of search and seizure operations? This research will thus consider whether or not section 22 of CPA is inconsistent with the spirit, purport and object of the Constitution.

To provide a brief overview of this paper; the introduction will illuminate the aim of the research followed by an examination of what constitutes 'search' and 'seizure' in terms of CPA. The paper will thereafter consider the existing jurisprudence on search and seizure operations and elucidate the manner in which search and seizure operations affect certain rights in the Bill of Rights. An examination of search and seizure operations under Canadian law will be conducted with the paper culminating in a conclusion containing recommendations regarding the enforcement of search and seizure operations.

2 The Criminal Procedure Act[15]

All warrantless search and seizure provisions are subject to constitutional scrutiny as the Constitution is the supreme law of the country.[16] If any provision authorising warrantless search and seizure operations is alleged to violate a right in the Constitution, it may be declared constitutionally invalid unless the violation is found to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[17]

Chapter 2 of CPA[18] addresses the issuing of search warrants, entering of premises, seizure, forfeiture and disposal of property connected with offences as per sections 19 to 36. The CPA personifies the general provision with regard to the searching of premises and this is evident from section 19 of CPA, which in essence states that any other legislation which confers the power to search and seize articles does so in tandem with the general provisions of CPA. Following the enactment of the Constitution various mechanisms have been employed both by the Constitution and CPA to restrict the power on warrantless search and seizures. This includes constitutional

15 CPA (n 6 above).
16 The Constitution (n 14 above) sec 2.
17 Sec 36(1) of the Constitution; See general discussion in *S v Makwanyane and Another* CCT3/94 1995 ZACC 3 (thereafter '*Makwanyane*').
18 Search warrants, entering of premises, seizure, forfeiture and disposal of property connected with offences.

standards as well as reasonable standards against which such powers ought to be measured. The use of such metrics ensures that whenever such powers are exercised, it is such that they are exercised within the parameters of what is acceptable in a democratic society.

2.1 Articles susceptible to seizure

The CPA provides set categories of items which may be seized by the State. As such, the scope of the search is limited to only 'where the object of the search is to find a certain person or to seize an article which falls into one of the categories of items'[19] which may be seized by the State. The general rule regarding articles that are susceptible to seizure is that if they fall into sections 20(a) – (c) the State may lawfully seize them, however there is an exception to this rule. Documents that are privileged, to which the holder of the document has not withdrawn his or her privilege may not be seized by the State as this defeats the purpose of exercising privilege over the document.[20] In *SASOL III (Edms) Bpk v Minister van Wet en Orde*[21] it was held that such a document may not be seized by the State.[22]

Normally, at the conclusion of the criminal proceedings it is required that the presiding officer make an order regarding the disposal of the article. The article may either: (a) be returned to the person from whom it was seized;[23] be returned to the person who is entitled to it and may lawfully possess it,[24] or if no person may lawfully possess it and the owner is unknown by the police, it is forfeited to the State.[25]

2.2 Search and Seizure

It is thus vital to establish what constitutes a search and seizure in terms of South African law. The terms 'search' and 'seizure' are not defined by CPA and thus the question of what constitutes a search is left to be sourced from the common law. It is maintained that an element of physical intrusion concerning a person or property is necessary to establish a search.[26] The term 'search' where it relates to a person must be given its ordinary meaning according to its context.[27] By extension this would then also apply to the term

19 M Basdeo *et al* 'Search and seizure' in JJ Joubert (eds) *Criminal Procedure Handbook* (2017) 178.
20 M Basdeo *et al* 'Search and seizure' in JJ Joubert (n 19 above) 178.
21 *SASOL III (Edms) Bpk v Minister van Wet en Orde* 1991 3 SA 766 (T) (thereafter' *SASOL*').
22 *SASOL* (n 21 above) par 772E
23 CPA (n 6 above) sec 34(1)(a).
24 CPA (n 6 above) sec 34(1)(b).
25 CPA (n 6 above) sec 34(1)(c).
26 Basdeo (n 4 above) 310.
27 Basdeo (n 4 above) 310.

seizure. In *Ntoyakhe v Minister of Safety and Security*[28] the court held that the word 'seize' encompasses not only the act of taking possession of an article, but also the subsequent detention thereof, otherwise the right to seize would be rendered worthless.[29]

Considering that both these terms are provided for in section 14 of the Constitution the meaning of these terms should thus also be viewed from a constitutional perspective. Sourcing a definition requires an element of physical intrusion to be present, related to the level of privacy provided for in the Constitution and if there is no reasonable expectation of privacy then no search has occurred.[30] A far clearer understanding can be sourced from JUTA's legal terminology dictionary which defines 'seizure' as 'judicial taking into possession of property'. In this context the term is usually associated with the act of a law enforcement officer in seizing evidence, or contraband, or in attaching property under a writ.[31]

Turning to foreign law for clarity, in *Silverman v United States,*[32] heard in the United States the term search is defined as 'a government official's physical touching of a person, or the physical entry into a private area, or the physical handling of papers and effects.'[33] Physical intrusion into private areas is inclusive of surveillance devices such as those used for electronic listening, eavesdropping or telescopic observation.[34] The court went on to define seizures as 'government interference with an individual's liberty or possessory interest and this definition is considered to include both the physically taking of tangible property, and intangibles such as private conversations'.[35] One is now able to deduce that in order for a search and seizure to be established there needs to be a certain measure of intrusion and depravation of privacy by the State.

2.2.1 Search and seizure with a warrant

As briefly mentioned above, it is preferable that search and seizure operations take place in the confines of a search warrant issued by a judicial officer. The procedure of securing a search warrant is governed by section 21 of CPA which states that 'subject to the

28 *Ntoyakhe v Minister of Safety and Security* 2000 (1) SA 257.
29 Basdeo (n 4 above) 313.
30 Basdeo (n 4 above) 310.
31 MW Prinsloo *et al* 'Legal terminology: criminal law, procedure and evidence' *South African Law Journal* (2015), 271.
32 *Silverman v United States* 81 US (S) 679 (1961).
33 *Silverman* (n 32 above) 509 - 510.
34 JP Swanepoel, 'Warrantless search and seizure in criminal procedure: a constitutional challenge' (1997) 34 *The Comparative and International Law Journal of Southern Africa* 341.
35 Swanepoel (n 34 above) 342.

provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued by'[36] a magistrate or justice of peace who on reasonable grounds believes that any such article is at any premises within his jurisdiction as a result of information provided under oath.[37]

Alternatively, if during criminal proceedings, the judge or judicial officer presiding requires an article as evidence before him or her, a warrant may be issued to bring the required article to court.[38] The requirement that a search warrant be issued by a judicial officer serves as an objective mechanism to protect individuals from violations of their right to privacy and other fundamental rights as they function independently and exercise their discretion in a judicial manner.[39] This means that discretion ought to be exercised 'in a reasonable and regular manner, in accordance with the law and while taking all relevant facts into account'.[40]

Additional mechanisms exist to safeguard the rights of the individual as the warrant must clearly define the purpose of the search and the articles that may be seized.[41] This also safeguards the police from any potential civil liability that might ensue as a result of the search. If a warrant appears to define the articles that may be seized in 'broad and general terms'[42] the court will declare that the judicial officer did not apply their mind properly to the question whether there had been sufficient reason to interfere with the liberty of the individual.[43] To prevent further encroachment on the rights of the individual, a search warrant must be executed by day, unless the judicial officer specifically authorises that it be executed by night.[44] Collectively these safeguard mechanisms ensure that, should an individual's right to privacy be violated, a legal justification can be offered in response.

2.2.2 Search and seizure with a warrant

Section 22 of CPA provides for the circumstances under which articles may be seized without a search warrant. A police official may without a search warrant search any person, container or premises for the purpose of seizing any article referred to in section 20 if:[45]

36 CPA (n 6 above) sec 21(1).
37 CPA (n 6 above) sec 21(1)(a).
38 CPA (n 6 above) sec 21(1)(b).
39 VG Hiemstra '*Introduction to the Law of Criminal Procedure*' (1985) 7.
40 *Ismael v Durban City Council* 1973 2 SA 362 (N).
41 M Basdeo *et al* 'Search and seizure' in JJ Joubert (n 19 above) 180.
42 Basdeo (n 4 above) 79.
43 *Smith, Tabata & Van Heerden v Minister of Law and Order* 1989 3 SA 627 (E).
44 CPA (n 6 above) sec 21(3)(a).
45 CPA n 6 above) sec 22(a)-(b).

> (a) the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
>
> (b) he on reasonable grounds believes- (i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and (ii) that the delay in obtaining such warrant would defeat the object of the search.

As indicated above, section 22 of CPA clearly allows for police officials to conduct searches with the objective to seize objects without a warrant. Generally, it is preferable that searches should be conducted on the authority of a warrant, however instances may arise where obtaining a search warrant would delay the search and ultimately defeat the purpose of the search.[46] It is under the ideals of the supremacy of the Constitution as well as the respect for the rule of law that provisions such as section 22 of CPA have undergone judicial scrutiny.

The official in *S v Motloutsi*[47] conducted a warrantless search and seized certain items hidden in a room occupied by the accused. The official claimed that the search took place in terms of section 22 and that a search warrant could not have been obtained timeously. On the facts of the case the court found that, although a search warrant could not have been obtained without delay from a magistrate, a commissioned officer on duty at the time could have been approached to issue a warrant. The warrantless search amounted to a 'conscious and deliberate violation'[48] of the accused's constitutional right to privacy.[49] The evidence obtained was declared inadmissible.

This judgment clearly indicates that the intrusive nature of search and seizure operations undertone the significant importance and accompanying consequences one needs to remember when electing to engage in warrantless search and seizure operations. The regulation of warrantless search and seizure operations within the criminal justice system is evidence that certain circumstances may arise which require the use of warrantless search and seizure operations, however this must be done within the confines of said legislation's internal limits; failure to do so creates the risk of police officials abusing the powers vested in them. 'Absolving the police from the need to obtain a warrant from the relevant judicial officer creates the real risk that privacy and property rights may be infringed where the circumstances do not merit it.'[50]

46 Hiemstra (n 39 above) 8.
47 *S v Motloutsi* 1996 2 BCLR 220 (C) (thereafter '*Motloutsi*').
48 *Motloutsi* (n 47 above) 230C-D.
49 *Motloutsi* (n 47 above) 230C-D.
50 Parpworth (n 12 above) 131.

3 Case law

Search and seizure operations together with the legislation and warrants that authorises them often undergo constitutional challenge on the ground that they violate human rights which are of central importance to the individual. The jurisprudence on the issue of search and seizure operations shows that were a right in the Bill of Rights is alleged to have been infringed the judiciary critically analyses the impugned provision(s) with the utmost vigour which is indicative of a judiciary with a high regard for human rights.

In *Kunjana* the court was faced with the constitutional validity of a warrantless search and seizure operation that took place in terms of sections 11(1)(a) and (g) of the *Drugs and Drug Trafficking Act*[51] where a large quantity of drugs and money was found and seized. The section grants police officials the power to conduct a warrantless search on any premises if there are reasonable grounds to suspect that an offence under the Act has or is about to be committed while also granting them the power to seize anything that would result in an infringement of the Act.

The declaration of constitutional invalidity which was initially granted by the Western Cape High Court was subsequently confirmed by the Constitutional Court on the ground that the impugned provision amounted to an infringement on Ms Kunjana's right to privacy in terms of section 14 of the Constitution.[52] Complying with section 36 of the Constitution the court assessed whether the infringement was justifiable in an open and democratic society and held, *inter alia* that a rational connection did not exist between the limitation of Ms Kunjana's rights and the purpose of section 11(1)(a) & (g).[53] The court also held that officials can prevent and prosecute offences under Drugs Act in a less restrictive fashion than what is contemplated in this section as constitutionally adequate safeguards must exist to justify circumstances where legislation allows for warrantless searches.[54]

It should be highlighted that courts have frequently expressed that exceptions to obtaining a warrant should not become the rule. In 2013, the Constitutional Court found provisions in the *Customs and Excise Act*[55] that provided for a warrantless search procedure to unjustifiably conflict with the constitutionally guaranteed right to privacy.[56] The court stated: 'A warrant is not a mere formality. It is a

51 Drugs Act (n 9 above).
52 *Kunjana* (n 10 above) para 14.
53 *Kunjana* (n 10 above) para 24.
54 *Kunjana* (n 10 above) para 30.
55 The Customs and Excise Act 91 of 1964 (thereafter 'Customs Act').
56 *Gaertner and others v Minister of Finance and others* 2006 10 BCLR 1133 (CC) (thereafter '*Gaertner*').

mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions.'[57]

In 2014, the Constitutional court again found provisions,[58] which allowed for a warrantless search and seizure procedure unconstitutional because of the limitation on the right to privacy.[59] It was held by the court that the provisions in question failed to pass constitutional scrutiny primarily because they were premised on searches being conducted without the requirement of a warrant.[60]

In the same year, the Constitutional court found in *Ngqukumba v Minister of Safety and Security and others*[61] that the retention of a motor vehicle by the police without having obtained a search and seizure warrant or having acted pursuant to a lawful warrantless search procedure, to be inconsistent with the right to privacy and dignity.[62] The court held that:[63]

> … [i]n the face of the privacy right as well as the right to dignity, which are closely linked, it is not overly restrictive to require of police to comply strictly with search warrant requirements. Where there is a need for swift action, the police can always invoke section 22 of CPA. Strict compliance with the Constitution and the law will not hamper police efforts in stemming the scourge of crime.

The jurisprudence highlighted above clearly shows us that our courts do not overtly favour warrantless search and seizure operation due to the far reaching, often negative consequences they result in; it also does not help that they allow police officials to escape the usual rigours of obtaining a warrant in all cases.

4 Affected rights

4.1 Privacy

Taking into consideration that a search may infringe upon various rights such as the right to dignity and bodily security, including the protection against cruel, inhuman or degrading treatment, it must be conducted without violating those rights. Initial analysis of the provisions that empower the searching of both persons and premises

57 *Gaertner* (n 56 above) para 69.
58 Sec 32A of the *Estate Agency Affairs Act* 112 of 1976 & sec 45B of the *Financial Intelligence Centre Act* 38 of 2001.
59 *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd & others* 2014 4 BCLR 373 (CC) (thereafter '*Estate Agency*').
60 *Estate Agency* (n 59 above) para 40.
61 *Ngqukumba v Minister of Safety and Security and others* 2014 7 BCLR 788 (CC) (thereafter '*Ngqukumba*').
62 Tongoane (n 5 above) 20.
63 *Ngqukumba* (n 61 above) para 19.

and the seizing of related articles does seem to go against the spirit and contents of section 12 and 14 of the Constitution,[64] the right to freedom and security of the person and the right to privacy respectively. Both these rights emanate from and seek to advance the value of human dignity which is one of the core values on which the rights in our Bill of Rights are founded.

It should be borne in mind when electing to engage in search and seizure operations that one would be violating the values that underlie these constitutional provisions which ultimately find their genesis in the context of eighteenth century English common law.[65] The English society at the time was premised on the notion that the sanctity of the home and the property owner's need to be secure from government intrusion were considered paramount.[66] The South African Bill of Rights underpins our democracy and espoused in it are the values of human dignity, equality and freedom which are guaranteed to everyone.[67]

However, section 36 of the Constitution reminds us of the 'truism that no right is considered to be absolute and as such implies that from the outset, the interpretation of each right is always already limited by every other right accruing to another citizen'[68] and may accordingly be limited provided that the limitation is reasonable and justifiable. The limitations clause states that 'the rights in the Bill of Rights may be limited only in terms of a 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[…].'[69] Search and seizure operations will therefore considered to be constitutional if it is authorised by a law of general application, such as CPA.[70]

Given the history of South Africa, with a particular focus on the era of apartheid during which there were constant violations of an individual's right to privacy, it comes as no surprise that the Constitution, under section 14 provides a general right that affords 'everyone […] the right to privacy'. It is recognised that the right to privacy grants individuals a domain in which they can enjoy their private intimacy and autonomy. In *Bernstein* the court held that the law recognises a very high level of protection of the individual's intimate personal domain of life and the maintenance of its basic preconditions and that 'there is a final untouchable sphere of human

64 M Basdeo *et al* 'Search and seizure' in JJ Joubert (n 19 above) 177.
65 Swanepoel (n 34 above) 343.
66 *R v Dyment* (1988) 45 CCC (3rd) 244 at 253 (thereafter '*Dyment*').
67 Basdeo (n 19 above) 4.
68 *Bernstein and Others v Bester NO and Others* 1996 2 SA 751 (thereafter '*Bernstein*') para 67.
69 The Constitution (n 14 above) sec 36.
70 Basdeo (n 4 above) 4.

freedom that is beyond interference from any public authority'; with regard to this most intimate core of privacy 'no justifiable limitation thereof can take place'.[71]

Therefore, the scope of an individual's privacy extends only to those areas in which a legitimate expectation of privacy can be exercised.[72] The effect of such an interpretation of privacy is that the 'inner core or sanctum' of an individual's life like his or her home, family life and sexual preference is afforded the utmost protection which accordingly decreases as and when an individual moves into communal relations and activities such as business and social interaction which lie at the peripheries of the sanctum of privacy.[73] As was held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* that 'we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy.'[74]

International courts have also grappled with the question of privacy and the extent to which a reasonable expectation of privacy can be harboured and the European Court of Human Rights has pronounced on the issue, holding that telephone calls and e-mails from a business fall under 'private life' and 'correspondence', and as a result are subject to a reasonable expectation of privacy and that monitoring of these communications constitutes a breach of Article 8 of the European Convention on Human Rights.[75]

Drawing on German law, the Constitutional Court of South Africa has adopted the idea of a 'spectrum' or 'continuum' of privacy protection and the notion of 'the sanctum of privacy' no doubt equates to what Sachs J referred to in *Mistry v Interim Medical and Dental Council of South Africa*[76] as 'a continuum of privacy which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated'.[77]

71 C Okpaluba, 'Constitutional protection of the right to privacy: The contribution of Chief Justice Langa to the law of search and seizure' (2015) 1 *ACTA Juridica* 415.
72 W Freedman *et al* 'Equality, human dignity and privacy rights' in P De Vos (eds) *South African Constitutional Law in Context'* (2017) 463.
73 *Bernstein* (n 68 above) para 67.
74 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (thereafter '*National Coalition*') para 32.
75 J Burchell 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid' (2009) 13.1 *Electronic Journal of Comparative Law* 1.
76 *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 1127 (thereafter '*Mistry*').
77 *Mistry* (n 76 above) para 27.

4.2 Human rights

Another equally important right which is affected by search and seizure operations is the right to human dignity. The Constitution entrenches dignity both as a founding value[78] which is affirmed throughout our Bill of Rights and as an enforceable right[79] it is inherently recognised to be afforded to everyone. All of us have a right to privacy together with the broader, inherent right to dignity, collectively they contribute to our humanity.[80] The right to dignity is understood to implicitly create an expectation to be protected from conditions or treatment which would offend an individual's sense of worth in society.[81] The pervasive nature of a search has the potential to always violate one's dignity and in order to mitigate such harsh outcomes section 29 of CPA prescribes that a search must be conducted with strict regard to decency and order.

Courts often interpret the right to privacy in conjunction with the right to dignity and as a result concluded that a violation of the former is also a violation of the latter. In *Ngqukumba* Madlanga J stated that 'in the face of the privacy right as also the right to dignity, which are closely linked, it is not overly restrictive of police to comply strictly with search warrant requirements'.[82] This interpretation was again put forward in *Gaertner* where it was pronounced that 'privacy is most often seen as a fundamental personality right deserving of protection as part of human dignity'.[83] It can thus be deduced that the right to privacy is not protected in isolation, but is further bolstered by the right to dignity and the two rights are often interpreted in tandem.

5 Limitation of rights

As briefly mentioned above, the Constitution allows for the limitation of all the rights in the Bill of Rights. It allows for any purported conflict in interests between rights contained in the Bill of Rights which stems from a law of general application to be limited in accordance with section 36 of the Constitution, also known as the limitations clause. It is clear from the discussions related to the violation of the right to privacy and the right to dignity mentioned above that the relevant official who is granted the authority to execute a search and seizure operation *prima facie* violates these

78 The Constitution (n 14 above) sec 7.
79 The Constitution (n 14 above) sec 10.
80 Burchell (n 75 above) 3.
81 W Freedman *et al* 'Equality, human dignity and privacy rights' in P De Vos (n 72 above) 457.
82 *Ngqukumba* (n 61 above) para 19.
83 *Gaertner* (n 57 above) para 86.

constitutionally entrenched rights. This thus begs the question whether there can be a justifiable limitation on the right to privacy and dignity in terms of section 36 of the Constitution?

Upon reading sections 10 and 14 of the Constitution, which speak to the right to dignity and the right to privacy, respectively, one might be tempted to believe that the sections provide for an absolute right to dignity and privacy.[84] However, this is not the case as they may be limited, only in terms of a law of general application. Section 36(1) of the Constitution sets out criteria qualifying acceptable restrictions of the rights in the Bill of Rights and the factors to be taken into account when assessing a limitation.[85]

The criteria applied in section 36 is one that requires considerations of what is reasonable and justifiable in an open and democratic society based human dignity, equality and freedom.[86] When assessing the reasonableness or justification of a limit on any right contained in the Bill of Rights, a court is to give due consideration to the factors listed in section 36(1)(a) to (e) as well as any other relevant factors as a mechanism akin to a checklist when assessing the validity of a limitation.[87]

Madlanga J in *Gaertner* held that a warrant is not a mere formality, it guarantees that the state must be able, prior to an intrusion, justify and support intrusions upon an individual's privacy under oath before a judicial officer.[88] The interpretation of the Constitution, especially provisions such as section 36, often require one to engage in a delicate balancing act between the rights of the individual and the rights of the State.[89] Potgieter postulates that '[a]n acceptable [B]ill of [R]ights should ensure a proper balance between individual freedom and state power. Obviously, the state should be prevented from abusing its power. On the other hand, a [B]ill of [R]ights should not render the state powerless to protect law-abiding citizens effectively against their freedom to the detriment of civilised values [...].[90]

When considering who bears the onus of proof it is considered trite law that he who alleges must prove. Therefore, the party that first seeks to establish the existence or violation of a particular right,

84 Parpworth (n 12 above) 127.
85 Swanepoel (n 34 above) 347.
86 The Constitution (n 14 above) sec 36(1).
87 Parpworth (n 12 above) 128.
88 *Gaertner* (n 57 above) para 69.
89 Swanepoel (n 34 above) 347.
90 JM Potgieter 'The role of law in a period of political transition: the need for objectivity' (1991) 54 *Journal of Contemporary Roman-Dutch Law* 806.

bears the onus of proof and the party that seeks to limit that right bears the onus to justify the limitation in terms of section 36(1).[91]

Park-Ross v Director: Office Serious Economic Offences[92] clearly elaborated on the requirements that had to be satisfied in order to discharge the onus to justify a limitation in accordance with section 36(1). In this particular case, it was declared by the court that section 6 of the *Investigation of Serious Offences Act*,[93] which authorises search and seizures without prior judicial authorisation to have been in violation of the right to privacy in section 13 of the *interim Constitution Act*.[94]

The *Park-Ross ratio* makes use of an analogous limitation clause contained in section 1 of the *Canadian Charter of Rights and Freedoms*[95] as put forward in *R v Oakes*.[96] Much to the courts approval, the court cited and applied the dictum from *Oakes* in so far as it stated that '[t]o establish that a limit is reasonable and demonstrably justified in a free democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding constitutionally protected right or freedom'. Secondly, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified.[97] This involves a form of proportionality test. The nature of the proportionality test is such that it will differ depending on the circumstances of the case however, in each case courts will be required to balance the interests of the community with those of the individual despite being applied and approved in many legal systems. The test received approval from the Constitutional Court in *Makwanyane*.[98]

The three components to the proportionality test are, first, the measures taken must be rationally connected to the objective and should not be arbitrary or based on irrational considerations.[99] Secondly, the means should impair as little as possible the right or freedom in question.[100] Thirdly, there must be proportionality

91 *Cf Qozeleni v Minister of Law and Order* 1994 2 SACR 340 (EC) (thereafter '*Qozeleni'*) as approved in *S v Zuma and Others* 1995 1 SACR 568 (CC) (thereafter '*Zuma'*).
92 *Park-Ross v Director: Office Serious Economic Offences* 1995 2 SA 148 (C) at 167D-H (thereafter '*Park-Ross')*.
93 *Investigation of Serious Offences Act* 117 of 1991 (thereafter 'Serious Offences Act').
94 Interim Constitution Act 200 of 1993 (thereafter 'interim Constitution').
95 Part I of the Constitution Act,1982 (thereafter 'Constitution Act').
96 *R v Oakes* (1986) 1 SCR 103 (3rd) 321 (SCC) (thereafter '*Oakes'*).
97 Swanepoel (n 34 above) 349.
98 *Makwanyane* (n 17 above) para 104.
99 *R v Big M Drug Mart Ltd* (1985) 1 SCR 295 (3ed) 385 (thereafter '*Drug Mart'*).
100 *Drug Mart* (n 99 above) n50 at 167D - H.

between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.[101] Upon analysis of the criteria laid out in *Oakes,* one can draw similarities between the due considerations courts are to give to the factors laid out in section 36(1)(a) to (e) and those discussed in the *Oakes* dictum. The Constitutional Court was initially rather unwilling to adopt the criteria set out in *Oakes,*[102] nonetheless, the court did however come to accept that the criteria may offer a certain measure of assistance to our courts and guide the manner in which section 36 of the Constitution should be interpreted.[103]

6 Canadian law

Prior to 1982, the law of search and seizure in Canada was a combination of statutory provisions and common law rules relating to search, seizure and police powers.[104] The harsh reality was that evidence obtained through illegality or impropriety by the authorities was nonetheless admissible in criminal proceedings.[105] Since 1982, there have been many positive developments regarding the law of search and seizure; some of these developments have come as a result of decisions by the Supreme Court of Canada and others have consisted of statutory responses by the federal and provincial governments to Charter jurisprudence.[106] As a result Canada has emerged as a nation that champions legal principles that are based on the values of liberty, dignity, equality and freedom.

The enactment of the *Canadian Charter* in 1982 brought about significant changes in the content and protection of individual rights. This has been particularly true in respect of the legal rights contained in sections 7 to 14 of the Charter.[107] However, section 8 is of particular importance as it shields everyone from irrational search and seizures.[108] In Canada, search and seizure operations are regulated by the *Criminal Code* of Canada.[109] The Criminal Code of Canada grants authority to conduct search and seizure operations in respect of certain stipulated offences. Considering the vague wording used in section 8 one might interpret the section as allowing for intrusion that is considered reasonable however the Supreme Court of

101 *Drug Mart* (n 99 above) n50 at 167D - H.
102 *Zuma* (n 91 above) para 35.
103 *Makwanyane* (n 17 above) para 110.
104 T Quigley 'The Impact of the Charter on the Law of Search and Seizure' (2008) 40 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 117.
105 Tongoane (n 5 above) 30.
106 Quigley (n 104 above) 118.
107 Quigley (n 104 above) 117.
108 The Constitution Act (n 95 above) sec 8.
109 Criminal Code of Canada 1985 c. C-46 (thereafter 'Criminal Code').

Canada views the right to privacy as being 'at the heart of liberty in a modern state'.[110] It is thus imperative to illustrate the context of the terminologies used in section 8.

6.1 Search

A search is said to be any intrusion other than arrest upon an individual's person, property or privacy for the purpose of seizing individuals or things or obtaining information by inspection or surveillance.[111] Once a form of examination by government begins to intrude upon a reasonable expectation of privacy, is it considered to qualify as a search under the Canadian Constitution.[112]

6.2 Seizure

Seizure was defined in *Dyment* as 'the taking of a thing from a person by a public authority without that person's consent'.[113] A seizure also includes compelling a person to give up an item. This type of seizure usually occurs in the regulatory field where documents are ordered to be produced.[114]

Much of the framework for analysing section 8 can be derived from *Hunter v Southam*[115] and *R v Collins*,[116] which are still regarded as the principle authority regarding search and seizures. The relevant principles formulated by these two cases are as follows: the purpose behind section 8 is to protect the privacy of individuals from unjustified state intrusions; this interest in privacy is, however, limited to a 'reasonable expectation of privacy'.[117] When interpreting the rights in the bill of rights, the South African Constitution allows for the courts to consider foreign law which has provided much guidance in the development of human rights. Canadian jurisprudence has had quite significant influence over South African courts,[118] therefore it comes as no surprise that both South Africa and Canada entrench the right to privacy and all search and seizure operations must be conducted while adhering to one's right to privacy. A lesson that can be drawn from Canadian jurisprudence with regards to search and seizure operations would be to clearly define the terms 'search' and 'seizure' so as to provide legal certainty when interpreting search and seizure provisions. Both countries do however

110 Basdeo (n 19 above) 321.
111 Basdeo (n 19 above) 322.
112 Quigley (n 104 above) 129.
113 *Dyment* (n 66 above) para 26.
114 Quigley (n 104 above) 127.
115 *Hunter v Southam* (1984) 41 CR (3d) 97 (SCC) (thereafter '*Hunter*').
116 *R v Collins* (1987) 56 CR (3d) 193 (SCC) (thereafter '*Collins*').
117 Quigley (n 104 above) 142.
118 Tongoane (n 5 above) 39.

protect all against arbitrary intrusion and abuse of power by the police. This is characteristic of nations' that value freedom, liberty and human dignity.

7 Conclusion and recommendations

By their nature warrantless search and seizure operations are very unpredictable and can be unreasonable because they gravely diminish one's constitutional rights. The opposite is true when one takes into consideration the high rate of crime and the effective measures needed to combat crime. However, there are many ways in which police officers can be effective in their fight against crime. The laws authorising search and seizure operations must comply with the constitutionally entrenched right to privacy,[119] as the constitutionalism project necessitates that citizens should be shielded from unjust intrusions of their right to privacy at the hands of the state.[120] Failure to provide this shield could lead to the prejudicial treatment of citizens' personal freedoms and it has been contended that 'uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.'[121]

It would be unfair to characterise the nascent South African democracy of being arbitrary as in the context of criminal justice the search and seizure of an article is considered justified for the purposes of: confiscation because their possession is unlawful,[122] to return the article to its rightful owner,[123] for evidential material in a prosecution,[124] and to be forfeited to the state if they were used in the commission of a crime.[125] Prior judicial authorisation and objective grounds for a search are considered safeguards to ensuring the reasonableness of a search in South African law as well as in Canada and the United States of America.[126]

The Constitutional court has created a consistent chain of authority regarding the constitutionality of search and seizure operations in *Ngqukumba*, *Gaertner*, *Estate Agency Affairs Board* and *Kunjana* therefore, it would be minded that Parliament going forward, align all other pieces of legislation which regulate warrantless search and seizure operations with the principle

119 Okpaluba (n 71 above) 429.
120 Basdeo (n 19 above) 323.
121 *Brinegar v United States* 338 US 160 at 180 (1949).
122 CPA (n 6 above) sec 31.
123 CPA (n 6 above) sec 30(b).
124 CPA (n 6 above) sec 20(b).
125 CPA (n 6 above) sec 35.
126 Basdeo (n 19 above) 323.

legislation on warrantless search and seizure operations, section 22 of CPA.

Any law that doesn't comply with the internal restrictions provided by CPA should be amended so that there is greater clarity on the powers conferred to police officers and those authorised to execute search and seizure operations. The endorsement of section 22 of CPA is in line with the approval it has received by the Constitutional court in *Gaertner* and *Kunjana* rather than Parliament running the risk of further legislation being found unconstitutional and invalid. Clarity defines and protects the interests of all parties to the process and is more easily and cheaply achieved through legislation rather than court cases.[127]

127 Swanepoel (n 34 above) 363.

A COMPARATIVE ANALYSIS OF THE PROPOSED MANDATORY NATURE OF EMPLOYMENT LEGISLATION AND ITS INTERACTION WITH THE CHOICE OF LAW OF AN INTERNATIONAL CONTRACT

*by Marcia van der Merwe**

1 Introduction

In an ever-changing world characterised by globalisation there has been a steep increase in employment contracts with an international character. This may lead to a conflict of laws whereby a forum court is confronted with the application of either the forum's domestic laws or those of a foreign judicial system. In these cases we are confronted with the interaction between party autonomy and the limitations placed on the exercise thereof. The international legal community has yet to reach a consensus on the requirements of the exercise of party autonomy, and thus there are no 'supra-national laws' governing party autonomy.[1]

Only in extraordinary circumstances will the forum court divert from the proper law of the contract and in doing so veer from the

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1 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) *Autonomy in International Contracts* (1999) 46.

principle of freedom to contract.[2] This is illustrated in *Louks v Standard Oil Company of New Jersey*[3] where Cardoza CJ stated so congruously in his *obiter* that 'we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home[4].' This article will endeavour to give an overview of the interaction between the proper law of a contract as chosen by the contracting parties in an international contract and the mandatory rules of a forum court that may be under consideration.

This article will undertake a critical comparison and analysis of the methods and reasoning applied by the courts in the jurisdictions of New Zealand, the United Kingdom and South Africa in respect of the mandatory nature of employment legislation and its interaction with the choice of law of an international employment contract. This will be done in reference to a specific company, Cathay Pacific, its employment contracts and the court cases that flowed from the choice of law clause in the contracts between Cathay Pacific and its employees in both New Zealand and the United Kingdom. A discussion of the possible repercussions of such a clause in a South African legal context will follow.

2 A brief overview of the applicable private international law principles

When a choice of law clause is subject to judicial scrutiny it may lead the court to highly technical questions and considerations. The international legal community does not subscribe to a universal set of rules pertaining to the exercise of party autonomy.[5] Despite this, there are a set of international common law rules that municipal court's favour, which can be said to lead to an 'international consensus'[6] of sorts on the matter. These requirements include, but are not restricted to:[7]

(1) that the contract has an international character;
(2) that the proper law of the contract has a connection with the transaction; parties or that there is a sensible reason for the choice;
(3) the proper law should be of an extant legal system and is bound by any changes thereof;
(4) the choice should not be illegal under the legal system of the forum, made with the intent to evade mandatory rules of the forum or another legal system or be irreconcilable with the public policy of the forum;

2 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (n 1 above) 46.
3 *Louks v Standard Oil Company of New Jersey* (1918) NY.
4 *Louks* (n 3 above) para 99.
5 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (n 1 above) 46.
6 As above.
7 As above.

(5) lastly, the choice must be made freely and voluntarily.

These requirements create a framework wherein the court considers a contract with an international character. It is not compulsory for all of these requirements to be met, nor are the requirements a *numerus clauses*.[8] The law of the *lex fori*, the law of the jurisdiction in which the action is brought, is applied to characterise the dispute and to determine the connecting factors.[9]

2.1 The International character of the contract

The question arises: what gives a contract an international character? Connecting factors that may arise in this characterisation include, but are not limited to, the place of business; nationalities or domiciles of the parties; if the place of contracting or performance is abroad; if remuneration is in a foreign currency or when property that is the subject of the contract is located abroad.[10] Factors that are present at the time of contracting may change, and this change could subsequently lead to the contract taking on a more international or domestic form. The courts may also apply any of a number of tests to determine the internationality of a contract.

The economic test asks whether there is an economic impact on more than one jurisdiction,[11] whereas the subjective test represents a more absolute view whereby the foreign choice of law in a contract makes an otherwise domestic contract, an international one.[12] Another interesting test that will from part of the broader discussion of this article is the so called 'basing test' as laid down by Lord Denning in *Todd v British Midland Airways Ltd*.[13] This test is applied when determining the ordinary place of work of a peripatetic employee.

2.2 Unlawfulness and public policy

In *Vita Food Products Inc. v Unus Shipping Co,*[14] the Judicial Committee of the Privy Council greatly expanded on principle of party autonomy and matters of jurisdiction and proper law of the contract,

8 As above.
9 AV Dicey *et al* 'Characterisation' in L Collins (eds) *Dicey and Morris on the Conflict of Laws* Volume 1 (1993) 36.
10 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) (n 1 above) 50.
11 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) (n 1 above) 51.
12 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) (n 1 above) 52.
13 *Todd v British Midland Airways Ltd* (1978) ICR 959 (CA) (thereafter '*Todd')*.
14 *Vita Food Products Inc. v Unus Shipping Co.*1939 AC 277 (thereafter '*Vita Foods')*.

especially with consideration to public policy and the legality of the choice.

The facts of *Vita Foods* are as follows. The defendant, a Nova Scotian corporation, was the owner of a ship (registered in Nova Scotia) that carried a cargo from Newfoundland to New York. The plaintiff, a New York corporation, was the owner of the cargo. The ship got stranded in Nova Scotia and the cargo was damaged. A waybill for the transportation of the cargo explicitly determined the contract to be governed by the English law. The contract also contained a term under English law that exempted the defendant from any liability for loss incurred as a result of negligence. The action was brought in Nova Scotia and went on appeal to the Privy Council.[15] Lord Wright declared that a real connection with English law in this case was not essential but preferred to focus on public opinion; lawfulness and the proper law of the contract as the law that the parties 'intended to apply'.[16] This case is considered to be a keystone in the modern development of the conflict of laws.

2.3 Free and voluntary

The requirement for a contract to be made freely and voluntarily underscores the need of the law to protect economically weaker parties, especially consumers; employees and the insured.[17] This has become more relevant in the age of globalisation, where the need to protect individual employees is ever increasing.

2.4 Connection with the proper law of the contract

The proper law of a contract may refer to the law expressly chosen by the contracting parties in the so called 'choice of law clause' in a contract, or may be the law applicable to a contract as determined by a number of factors.[18] In the past courts have considered the requirement of a factual connection between the contracting parties and the proper law non-essential.[19] This is in direct contrast with the doctrine of localisation that requires some form of factual connection to apply the proper law of the contract.

Today it is commonplace for parties to choose a neutral legal system to govern a contract. The neutrality of the choice satisfies any

15 *Vita Foods* (n 14 above) 278-279.
16 *Vita Foods* (n 14 above) 290.
17 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) (n 1 above) 69.
18 For the purpose of this article any reference to the 'proper law' of a contract will be in relation to the law applicable to a contract as expressly chosen by the parties in the choice of law clause of said contract.
19 *Vita Foods* (n 16 above) 290.

requirement for a 'rational basis'[20] for the choice of law of a contract. Thus, a connection between the proper law of a contract and the contract itself is not an absolute requirement but is a factor that a court may take into consideration. If parties are absolutely autonomous they will be at liberty to choose the legal system to govern the contract, regardless of connection, neutrality or the possibility of an injudicious choice. It is only where the proper law of the contract is in any way prohibited by a mandatory rule of the forum, is oppressive or unworkable that it will be set aside. [21]

2.5 The Rome Convention and Rome Regulation

Central to this discussion stands both the Convention on the Law Applicable to Contractual Obligations[22] and the Regulation on the Law Applicable to Contractual Obligations,[23] The United Kingdom ratified the Rome Convention with some reservation relating to the application of the legal rules it embodied.[24] This reservation was enforced domestically in the United Kingdom in section 2(2) of the Contracts (Applicable Law) Act[25] which determined that article 7(1) of the Rome Convention had no force of law in the United Kingdom. Article 7(1) of the Rome Convention refers to the application or non-application of mandatory rules.

Rome I replaced the Rome Convention in its entirety.[26] It is important to note that Rome I only finds application in matters heard within the jurisdiction of the European Union and applies to all the member states of the European Union, regardless of ratification (or lack thereof).[27] This of course leaves us with the question: what will the way forward be relating to matters managed by EU instruments for the United Kingdom after its withdrawal from the European Union?.

2.6 Mandatory rules

Article 3.3 of Rome I defines mandatory rules as '… rules of law of that country which cannot be derogated from by agreement'. This is

20 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) (n 1 above) 57.
21 PE Nygh 'The Limits on the Exercise of Autonomy' in PB Carter QC (eds) (n 1 above) 60.
22 Rome Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC). (thereafter 'Rome Convention').
23 Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (thereafter 'Rome I').
24 Rome I (n 22 above) art 27.
25 Contracts (Applicable Law) Act 1990.
26 Rome I (n 22 above) art 24.
27 This is often referred to as the direct effect or application of European Union law.

indicative of the urgent nature of mandatory rules, which can override both the normal rules of the law of conflicts and the proper law as chosen by the parties.[28] When considering mandatory rules one must distinguish between the domestic mandatory rules of a forum, international mandatory rules and mandatory rules of a third country that may be of relevance.

The domestic mandatory rules of a legal system can be viewed as an extension of the public policy of the legal system[29] and may be used to enforce the application of mandatory rules within the jurisdiction of the forum court. In this sense mandatory rules may in certain instances place a limitation on the autonomy of the parties involved.[30]

The forum is not obliged to apply domestic mandatory rules unless said laws are also part of the *lex causae*.[31] It has been submitted that the forum is obligated to apply its own rules that are mandatory in the international sense at the expense of otherwise applicable law.[32] There exists an assumption, which was supported by the wording of article 7(1) of the Rome Convention, that all mandatory rules of the *lex causae* are theoretically applicable,[33] notwithstanding the domestic or international character thereof. In contrast a forum court is obliged to give paramount effect to international mandatory rules when adjudicating transnational matters, irrespective of the law of the cause.[34]

2.7 Under what circumstances will the mandatory rules of a third state be applicable?

An international consensus on the application of the mandatory rules of a third country has not yet been reached and as such it is up to the discretion of each forum to apply its own standards.[35] There seems to be two circumstances in which the mandatory laws of a third state may be appropriate:[36]

a. where the law of the place of performance prohibits the performance as contractually stipulated; and

28 PE Nygh 'Mandatory Rules' in PB Carter QC (eds) *Autonomy in International Contracts* (1999)199.
29 PE Nygh 'Mandatory Rules' in PB Carter QC (eds) (n 28 above) 206.
30 PE Nygh 'Mandatory Rules' in PB Carter QC (eds) (n 28 above) 207.
31 PE Nygh 'Mandatory Rules' in PB Carter QC (eds) (n 28 above) 212.
32 As above.
33 PE Nygh 'Mandatory Rules' in PB Carter QC (n 28 above) 213; See also Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I Official Journal C 282, 31/10/1980 0001 – 0050.
34 PE Nygh 'Mandatory Rules' in PB Carter QC (eds) (n 28 above) 199.
35 PE Nygh 'Mandatory Rules' in PB Carter QC (eds) (n 28 above) 225.
36 PE Nygh 'Mandatory Rules' in PB Carter QC (n 28 above) 226.

b. where the forum views the unlawful conduct of the parties as immoral.

2.8 Renvoi

The doctrine of *renvoi* is often applied when choice of law rules favour foreign legal systems. It is described as a technique applied to problems arising from differences between connecting factors used by the law of country A and the law of country B to which the connecting factors (used by A) lead.[37] Rome I explicitly excludes the application of *renvoi* and the doctrine is not applicable for the purposes of this discussion.[38]

3 Statutes and the conflict of laws

When the application of the domestic statutes of a forum (or statutes foreign to the *lex fori*) are in question, it may in some cases necessitate the consideration of the mandatory nature of the statute itself. Dicey, Morris and Collins categorise statutory provisions, on the occasion of conflicting laws, into the following categories:[39]

a. statutes that impose a substantive or domestic law without indicating its application in space;
b. statutes that impose a unilateral rule of the conflict of laws that appears to indicate when a substantive or domestic law is applicable;
c. statutes that lay down a multilateral rule of the conflict of laws that appears to indicate when what law governs a matter;
d. statutes with a territorial limitation on the scope of their own application as domestic laws;
e. overriding statutes that apply in the circumstances provided for in the statute, even if they are not applicable under the normal provisions of the conflict of laws.

These overriding statutes are mandatory rules. Where a forum court deals with 'overriding' legislation it applies because the legislation is interpreted as mandatory, thus applying to all the cases within its scope. However, if a weaker party is afforded more protection in terms of the proper law of the contract (as determined by the choice of law clause) than the mandatory rules, the choice will be allowed.[40]

Unfortunately, many courts' in different forums falter in the determination of the scope of these laws and rules. When confronted

37 P Rogerson 'Choice of Law Rules' in J Greenwood (eds) *Collier's Conflict of Laws* (2013) 280.
38 Rome I (n 22 above) art 20.
39 AV Dicey *et al* 'Statutes and Conflicts of Laws' in L Collins (eds) *Dicey, Morris and Collins on the Conflict of Laws* Volume 1(2012) 36.
40 This is in accordance with art 8 of Rome I.

with the territorial application of legislation that does not indicate its own application in space, a court may follow one of two methods when determining the territoriality of the legislation. The first is to interpret the statute by way of its purpose and background,[41] the second is to characterise the question on hand and then to apply the rules of conflict to the matter.[42] The first method creates the possibility that a court may interpret the meaning of the Legislature *incorrectly*. It is submitted that, in most cases, where the Legislature considered the territorial application of a statute of importance, it would have been expressly be incorporated in said statute.

In following the second method suggested by Dicey, Morris and Collins a court would apply the rules of private international law; determine the scope of the relevant legislation and thereafter apply the provisions of the legislation, if applicable to the matter at hand. This method relies less on questionable legal interpretation and lends itself to an application that is in line with the laws of private international law as well as the broader consideration of public opinion.[43]

As Norton and Fawcett so rightly state: '… applying the law of the forum, without more … [is] an abandonment of the internationalisation of private international law.'[44] Thus in matters of the application of mandatory rules one must carefully strike a balance between private international common law and the domestic laws of the forum.

4 The United Kingdom

Before delving into the case law that forms the central part of this article, there is referred to the *Todd* case, where the court determined that the 'base' of a peripatetic employee is where he or she is ordinarily working, even though the employee may spend days, weeks or months working overseas. A matter of contention in such instances seems to be the meaning of 'ordinarily working'. For peripatetic employees ordinarily work where they are based. The conduct of the parties to the contract and the way in which they have been operating the contract are indicative to his or her 'base'.[45] In *Crofts v Veta Ltd*[46], Lord Hoffman effectively described the plight of a peripatetic employee as that of the Flying Dutchman of labour law

41 This method is often described the presumption against extraterritoriality. See M Keyes 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 *Journal of Private International Law* 18.
42 AV Dicey *et al* 'Statutes and Conflicts of Laws' in L Collins (n 39 above) 37 – 40.
43 This refers to public opinion as it is considered in the determination of the mandatory nature of a law or rule.
44 GC Cheshire *et al* 'Classification' in PM North (eds) *Cheshire and North's Private International Law* (1999) 6.
45 *Todd* (n 15 above) 5.

'… condemned to fly without any jurisdiction in which they can seek redress…'[47]

4.1 The matter of *Crofts*

In *Crofts and Others v Cathay Pacific Airways,*[48] the applicants were all pilots employed by Cathay Pacific; a company based in Hong Kong. For the sake of comparison, the focus will be on the court's handling of Mr Croft. The employment contract under scrutiny contains the same choice of law and jurisdiction clauses as the contracts considered by the New Zealand courts in the *Brown*-cases, though the matter before the court in this instance constitutes unfair dismissal in terms of section 49(1) of the Employment Rights Act.[49]

Cathay Pacific had a permanent basing policy where certain air crew were assigned a permanent base outside Hong Kong. Mr Crofts was based in London, where his individual flying cycles began and ended, under such policy. The employment contracts of the applicants determined the proper law of the contract to be that of Hong Kong. The pilot's salaries were paid into Hong Kong bank accounts; they had professional Hong Kong pilot's licences and received all their training there.

The application was dismissed the matter was taken to the Employment Tribunal based on unfair dismissal in terms of section 94(1) of ERA on grounds of failure to give written reasons for dismissal and breach of contract. Section 94(1) of ERA only applies to those who 'ordinarily work' in Great Britain. The Employment Tribunal found, after applying the basing-test, that they had jurisdiction over the matter. The appellant airline pilots appealed against the finding of jurisdiction and contractual claims. The Employment Appeal Tribunal dismissed the appeal. An appeal was brought before the Court of Appeal on the grounds that the Tribunal ought to have addressed whether the pilots had a proper connection with Great Britain and that in answering this question the focus must be the location of the pilots and not the locale of their employer.[50]

The court considered the judgment of *Lawson v Serco Ltd,*[51] in which the basing test was applied, but with a 'degree of flexibility'.[52] In his *obiter* Lord Phillips indicates that the degree of flexibility

46 *Lawson v Serco Ltd*; *Botham v Ministry of Defence*; *Crofts and others v Veta Ltd and Others* [2006] 1 All ER 823 [2006] UKHL 3 (thereafter *'Crofts')*. All three cases were heard together.
47 *Crofts* (n 46 above) para 31.
48 *Crofts and Others v Cathay Pacific Airways* (2005) EWCA Civ 599.
49 Employment Rights Act (thereafter 'ERA').
50 *Crofts* (n 48 above) para 15.
51 *Lawson v Serco Ltd* (2004) EWCA Civ 12.
52 *Lawson* (n 51 above) para 28.

applied by the court in Lawson indicates that a temporary absence from Great Britain won't necessarily remove an employee from the protection of the ERA.[53] This in itself is indicative of the mandatory nature of the ERA, but to my eternal disappointment, the mandatory nature of ERA was still not considered by the court.

Airline pilots are directly compared to mariners, which the court considers outside the scope of the *Serco* test.[54] The opinion is held that Great Britain cannot be the pilot's place of work just because it is the place where their flight cycles begin and end. The place of work must be the place to which the employee has the closest connection or where he or she is based.[55]

Despite this, in *Lawson* the court expressly stated that the basing test laid down in *Todd* was not appropriate for the purposes of section 94(1).[56] This created a problematic precedent that was followed by the court in *Crofts*. Lord Phillips expressed his discontent with this precedent therein that the basing test could not be applied to international airline pilots, and questioned whether this was against public policy.[57] Here we see the court touching on the principles of mandatory provisions, but again without due consideration. The claim by the Cathay Pacific pilots, regarding the Tribunal's finding that it had no jurisdiction to entertain claims in terms of the ERA, was dismissed.[58] Both the *Crofts* and *Lawson* cases were appealed to the House of Lords and heard together, and will be discussed hereafter.

In *Crofts* the House of Lords clearly stated the issue at hand was the territorial scope of section 94(1) of the ERA.[59] The court explicitly found ERA to be *prima facie* territorial,[60] and the only question regarding section 94(1) was one of construction where effect is given to the intent of Parliament regarding ERA and its application.[61] With application of the *Todd*-basing test, the Employment Appeal Tribunal found Mr Crofts to be employed in Great Britain and the question of whether section 94(1) of the ERA would be applicable to be a question of law and not fact.[62]

The court drew a distinction between 'expatriate employees' and 'peripatetic employees', and after applying the *Todd* basing test (and determining it to be applicable in this case, in contrast with the findings of the court in *Lawson*) Mr Croft, a peripatetic employee was found to be based in Great Britain and thus section 94(1) was

53 *Crofts* (n 48 above) para 28.
54 *Crofts* (n 48 above) para 35.
55 *Crofts* (n 48 above) para 36.
56 *Lawson* (n 51 above) para 27.
57 *Crofts* (n 48 above) para 37.
58 *Lawson* (n 51 above)) para 30.
59 *Crofts* (n 46 above) para 1.
60 *Crofts* (n 46 above) para 6
61 *Crofts* (n 46 above) para 23.
62 *Crofts* (n 46 above) para 34.

applicable. The court held that section 94(1) was not applicable to expatriate employees.[63]

4.2 Criticism on the handling of *Crofts* by the House of Lords

In *Crofts* the House of Lords failed to reference section 204(1) of ERA which states:

> *For the purpose of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.*[64]

Section 204(2) states section 204(1) to be subject to section 196(1)(b), which determined that certain sections of ERA was not applicable to employees engaged in work 'wholly or mainly outside Great Britain', with certain exceptions. Section 196 was later repealed. Lord Hoffman interpreted the repealment as a sign that '… Parliament was dissatisfied with the working of the provisions and wanted to leave the matter to implication.'[65] It is uncertain how His Lordship came to these conclusions regarding Parliament's intentions surrounding ERA as he did not expand on the matter. The House of Lords seemed to have followed the first method of interpretation, as laid out by Dicey, Morris and Collins, whereby the purpose of statute was interpreted without first characterising the legal problem at hand.[66]

It appears from this judgment that the House of Lords is of the view that statutory employment rights, such as those embodied in ERA, do not have a *sui generis* character that make them mandatory in nature. This matter appeared before the House of Lords in 2006, before the commencement of Rome I. Although the United Kingdom has ratified Rome I's predecessor, the Rome Convention, with certain reservations.[67] It is problematic that the court gave no consideration to choice of law rules, the possibility of the mandatory nature of ERA or to the considerations of public opinion. Here article 8(1) of Rome I, regarding individual employment contracts, is of particular importance:

> An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3 (referring to the freedom to

63 *Crofts* (n 46 above) paras 31-46. The court held that a peripatetic employee's work was considered to be performed in Great Britain if the employee was based there at the time of dismissal (as found to be in Mr Crofts case). In the case of an expatriate employee the court held 'something more' must be present for the section to find application, and Lord Hoffman went on to give to very specific constructions of this 'something more', thus limiting its application.

64 See (n 48 above).

65 *Crofts* (n 46 above) para 9.

66 AV Dicey *et al* 'Statutes and Conflicts of Laws' in L Collins (n 39 above) 37 – 40.

67 The Rome Convention was ratified by the United Kingdom with reservations regarding arts 7(1) and 10(1)(e).

> choose the law governing a contract). Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.[68]

Article 9(2) explicitly allows courts to apply overriding domestic mandatory rules of the forum. Article 9(1) defines overriding domestic mandatory provisions as:

> regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.[69]

Rome I mirrors almost precisely the content of article 6 of the Rome Convention, which dealt with individual employment contracts and explicitly stated that a court must look at the place where an employee 'habitually' carries out his work in the absence of a choice of law in the contract itself. Though this was only where there was a lack of choice, the habitual place of work is a sensible connecting factor to consider.[70]

What makes the non-consideration even more lamentable is that the United Kingdom held no reservations regarding article 6 of the Rome Convention and that the Rome Convention was incorporated into Schedule One of the Contracts (Applicable Law) Act,[71] which was enacted long before this matter was heard.

With this is mind, it seems from this judgment that either the House of Lords did not consider employment rights, specifically the right not to be unfairly dismissed, in a mandatory light or that they did not attach much consideration to EU Regulations that is in effect an embodiment of private international common law.[72]

Contrary to the content of the Rome Convention (and the later Rome I) and the Contracts (Applicable Law) Act the House of Lords followed a traditional common law approach, wherein an employee may only invoke his statutory right if he falls within the territorial scope of the statute. Following this construction the territorial scope of any statutory employment rights is completely separate from the choice of law. Again, the House of Lords solely relied on the statutory construction when considering whether an employee may invoke a statutory right.[73]

68 Rome I (n 22 above).
69 Rome I (n 22 above).
70 TC Hartley 'Choice of law' in J Bomhoff (eds*) International Commercial Litigation* (2015) 559 560.
71 See (n 24 above).
72 Common law as it finds application within the European Union.
73 *Crofts* (n 46 above) para 34.

It is submitted that the House erred in their determination of the intention of the Legislature in regards to the scope and territorial application of ERA. This method leaves too much room for error and courts would do well to first characterise the question and then apply the rules of conflict to the matter.

Furthermore, ERA, and national labour legislation of a forum court in general, is of great importance and is of a mandatory nature and falls within the ambit of a mandatory provision as described in article 9(1) above. Therefore, it is contended that the legal construction followed by the House of Lords in this case is wrong, and that it was not merely a question of statutory construction, but that the question should have been answered with due consideration of the choice of law rules.[74]

In a more recent judgment the Supreme Court in *Duncombe and Others v Secretary of State for Children, Schools and Families (No 2)*[75] veered slightly from the traditional construction followed in *Crofts* and held the proper law governing the employment contract was relevant in determining the territoriality of a statutory right.[76] The court in *Duncombe* held that the statutory protection against unfair dismissal, though not part of contractual terms and conditions of employment, was formulated by Parliament to protect employees where common law was lacking.[77] Why the House of Lords did not consider this approach in *Crofts* can possibly be attributed to the fact that *Duncombe* was heard in 2011, after the enactment of Rome I. It may also be that the court in *Duncombe* merely followed the correct method and application of private international law rules. This illustrates the danger that inferring the intent of the Legislature can hold — the same court attached different interpretations to very similar matters.

The nature of the right, contractual or statutory, did not feature in the reasoning of the court. From the judgment it can be deduced that the court dealt with the right as a statutory one, and not as contractual in nature. If it is argued that a right conferred by employment legislation is contractual, it might be construed that Parliament intended the right to be invoked whenever the law governing said contract is English.[78]

74 This concurs with the position taken by the author in U Grušic 'The Territorial Scope of Employment Legislation and Choice of Law' (2012) 75 *Modern Law Review* 722. This is regardless of the fact that the United Kingdom ratified the Rome Convention with reservations on the applications of art 7(1).

75 *Duncombe and Others v Secretary of State for Children, Schools and Families (No 2)* (2011) UKSC 36 (thereafter *Duncombe*).

76 *Duncombe* (n 75 above) para 16.

77 *Duncombe* (n 75 above) para 16.

78 Grušic (n 74 above) 733.

4.3 Where does this approach stem from?

This traditional approach of the House of Lords seems to cling to and possibly be attributed to the formalistic nature of English courts and the English legal system. The historic background given by the author Uglješa Grušić,[79] paints a picture of a legal culture ruled by a stubborn adherence to long passed 'judge-made' choice of law rules with no consideration (and some measure of contempt) to the legislation adopted by the European Union in Brussels.[80]

4.4 Forum non conveniens

Forum non conveniens is a legal doctrine of the conflict of laws whereby an English court has an inherent jurisdiction to stay proceedings on the ground that another forum is more appropriate to hear the matter or to strike out an action to prevent injustice.[81] The doctrine may apply between forums in different countries or different jurisdictions in the same country. The defendant will carry the burden of proof in such cases and will have to prove that there is a more convenient or fitting forum where the matter can be heard.[82]

Although the Employment Tribunal in *Crofts* held that it had a general power to stay proceedings based on *forum non conveniens,* the House of Lords held (on the same matter) that it would go against principle for a section 94(1) application under ERA to be stayed on these grounds.[83] It is not evident to what 'principle' the court is referring to, but it is submitted that this is further indicative of the mandatory nature of the rights at hand, and that the House of Lords again touched on the *sui generis* character of employment rights, but without due consideration thereto.

5 New Zealand

5.1 The matter of *Brown*

In *Brown v New Zealand Basing Limited*[84] senior Captains' Brown and Sycamore were both employed by Veta Ltd, a subsidiary of Cathay Pacific Airways Ltd, until 2002. Thereafter they were offered new Conditions of Service under New Zealand Basing Limited (thereafter

79 Grušic (n 74 above) 733.
80 Grušic (n 74 above)733.
81 AV Dicey *et al* 'Forum Non Conveniens and Lis Alibi Pendens' in L Collins (eds) *Dicey and Morris on the Conflict of Laws* Volume 1 (1993) 397.
82 AV Dicey *et al* 'Forum Non Conveniens and Lis Alibi Pendens' in L Collins (n 81 above) 397.
83 *Crofts* (n 46 above) para 24.
84 *Brown v New Zealand Basing Limited* (2014) EMPC 229.

'NZBL') a subsidiary of Cathay Pacific. They were given the choice to remain in Auckland with a salary deduction working for NZBL or they could return to Hong Kong without a reduction to their respective salaries. Both Mr Brown and Sycamore chose to accept the 2002 Conditions of Service with a permanent basing in Auckland for NZBL. In 2008 NZBL offered the crew of NZBL new Conditions of Service. These conditions stipulated that pilots who were employed before 1 April 1993 would be able to work until the age of 65, but with a substantial cut to their remuneration. Those who decided to stay on in terms of the 2002 Conditions of Service would receive the same salary they always had, but they would only be able to work until the age of 55. This is in direct contravention of Part 9 of the Employment Relations Act[85] which includes, amongst others, the right not to be discriminated against on the basis of age.[86]

Both the 2002 and 2008 Conditions of Service contained a choice of law clause that explicitly stated that the applicable law was that of Hong Kong and that the parties would submit to the exclusive jurisdiction of the courts of Hong Kong. The Employment Court discarded the proper law of the contract and found that section 238 of ERA 2, which determined that parties could not contract out of any of the provisions in said Act, to be applicable.[87] It was held that the law of the forum court, that of New Zealand, overrode the choice of law clause as the *lex causae* of the contract.[88] The Employment Court held ERA 2 to be an example of a mandatory law or rule. Alternatively, the court found that the choice of law clause would not have been applicable had they found ERA 2 not to have a mandatory nature, seeing as it would have also been contrary to public policy, as the recognition of Hong Kong law under the circumstances would have been 'unjust and unconscionable' in the eyes of the New Zealand public. Furthermore, the court found the '*bona fide* and legal'-test was not infringed upon.[89]

In New Zealand Basing Limited v Brown[90] NZBL took the abovementioned matter in *Brown v New Zealand Basing Limited* on appeal. The Court of Appeal extensively discussed the basic principles of choice of law and found Corkill J to have transgressed by way of two material errors, namely that he did not follow the correct methodology when applying the law regarding the conflict of laws and

85 The Employment Relations Act 2000 (thereafter' ERA 2'), not to be confused with the Employment Rights Act of 1996, referred to as ERA.
86 ERA 2 (n 85 above) subsecs 105(2) and 106. New Zealand has no retirement age, and employees may in theory work until they decide to retire.
87 Thus, with the application of sec 238, they could not contract out of the anti-discrimination provisions of ERA 2.
88 Brown (n 84 above) paras 130 – 134.
89 As above.
90 *New Zealand Basing Limited v Brown* (2016) NZCA 525 (thereafter '*New Zealand Basing Limited*').

that he had misunderstood Parliament's intent towards ERA 2 (as a mandatory law). The methodology set out by the court determines a court considering such a matter must proceed from the assumption that the proper law of the contract is applicable, and will consequently govern the rights and obligations of the parties of the contract. A court may only look toward the possibility of any applicable mandatory laws when there has been determined that the *lex causae* is that of a foreign legal system. The Supreme Court was of the opinion that the intent of the New Zealand Parliament was not that ERA 2 was to have overriding power against the rules of private international law.[91]

The methodology set out by the Appeal Court is of great importance. It lays the groundwork for the correct application of the principles of the conflict of laws. Some argue that the forum court must look at the character of the rules or laws in question before determining the *lex causae,* seeing that a mandatory provision will make the consideration pertaining to the *lex causae* moot. The Court of Appeal followed the approach whereby the right invoked in terms of section 9 of ERA 2 was a contractual right, and following the principles of choice of law, was only applicable where New Zealand law governed the contract or where the legislative provisions from which the right stemmed was mandatory.[92]

On the matter of whether the public policy exception would have been acceptable the court emphasised the extraordinarily high threshold required for the exclusion of the proper law of a contract based on public policy. The court was of the opinion that this particular case of age discrimination did not meet this threshold, and consequently the public policy exception was not justified.[93] The appeal was allowed. In contrast to the position taken by the House of Lords in *Crofts* is *Brown v New Zealand Basing Limited*.[94]

The Supreme Court found the right against discrimination based on age not to be limited to employment agreements where the *lex causae* of the contract is that of New Zealand law. The court confirmed the mandatory essence of ERA 2 and the judgment of the Employment Court was restored. It was held that an employer's right not to be discriminated against, while in this case having a contractual 'flavour', cannot be characterised as such.[95] The court found non-discrimination rights within in the Human Rights Act,[96] as they are contained in ERA 2, to be '… free standing … not dependent on … or related to the terms of the employment agreement between

91 *New Zealand Basing Limited* (n 90 above) paras 30 – 33.
92 *New Zealand Basing Limited* (n 90 above) para 33.
93 As above.
94 *Brown v New Zealand Basing Limited* (2017) NZSC 139 (thereafter '*Brown*').
95 *Brown* (n 94 above) para 53.
96 Human Rights Act 1993 No 82.

parties.'[97] Thus the right to not be discriminated against was held not to be limited to employment relationships governed by the laws of New Zealand.[98]

There is no equivalent to section 204 of ERA (the Employment Rights Act of the UK) in ERA 2, and as the court points out, the legislation (ERA 2) itself gives no indication of its own territoriality.[99] The Supreme Court relied on other criteria to determine the territorial application of ERA 2. Here the Court characterised the issue, identified the choice of law rule applicable and then considered the nature of the statute. This approach gives priority to the choice of law rule for employment contracts when determining the territorial scope of the employment legislation.[100]

5.2 *Forum non conveniens*

It is interesting that the jurisdiction of the New Zealand courts were challenged based on the choice of law being that of Hong Kong, and that the respondent failed to argue that matter with reference to the doctrine of *forum non conveniens*.

5.3 On the nature of the Employee Relations Act

The cases discussed above deal with an employee's right not to be discriminated against, which is in essence different from the *Crofts* case where the courts dealt with the right against unfair dismissal. Human Rights in New Zealand are entrenched within an Act, the Human Rights Act,[101] whereto ERA 2 refers with relation to its anti-discrimination provisions. Despite the fact that these two cases deal with rights that are materially different,[102] one does not lessen the mandatory character of the other. Therefore the rights embodied in ERA 2 can be considered to be of an overriding nature, as they represent 'crystallised rules of public policy'[103] that gives effect to a forum's substantive interests.[104]

97 *New Zealand Basing Limited (*n 90 above) para 69.
98 *Brown* (n 94 above) para 71.
99 *Brown* (n 94 above) para 66.
100 Grušic (n 74 above) 723.
101 See (n 96) above.
102 Materially in the sense that one is an internationally acknowledged human right and the other is a right born from employment statute.
103 AV Dicey *et al* 'Statutes and Conflicts of Laws' in L Collins (n 39 above) 61.
104 M Hook & J Wass 'The Employment Relations Act and its Effect on Contracts Governed by Foreign Law' (2017) 3 *New Zealand Law Journal* 80.

5.4 The influence of Rome I

Despite New Zealand not being a member state of the European Union, and thus Rome I does not find any direct application, the judgments discussed above indicate that the courts involved gave due consideration to principles of private international common law.[105] The New Zealand courts (the Employment Court, the Appeal Court and the Supreme Court) all demonstrated a very thorough, concise and structured approach to the conflict between the proper law of a contract and possible mandatory rules of the forum.

6 South Africa

Cathay Pacific Airlines have subsidiaries in South Africa, but unfortunately for the purposes of this article, their labour practices in South Africa have yet to result in adjudication similar to those in *Crofts* and *Brown*.[106] Therefore, for purposes of this discussion, comparative scenarios that have been brought before the Labour Court, and how they have been adjudicated under South African law will be discussed.

6.1 Related case law

In *Kleynhans v Parmelat*[107] the applicant, a South African employee, was sent to work in Mozambique on a three-year fixed-term contract. The contract was terminated after one year and the employee claimed for breach of contract. Parmelat South Africa claimed not to be the employer as he had worked in Mozambique and not South Africa. The court held that the parties tacitly chose South African law as the law governing the contract, and in the event that this was wrong, they also determined the proper law was South Africa with reference to the connecting factors of the case.[108]

What distinguishes *Kleynhans* from preceding South African judgments on similar issues, is that for the first time a South African court did not treat the place of performance as the most important connecting factor when determining the *lex causae,* but only as *one* of many relevant factors. Pillay J further substantiated South African law as the *lex causae:* 'If the law of the forum subscribes to international labour and human rights standards it is … a factor that favours the law of such forum.'[109] Though *Kleynhans* did not deal with

105 Many of these principles were captured in Rome I.
106 See (n 48 above) and (n 94 above).
107 *Kleynhans v Parmelat* (2002) 9 BLLR 879 (LC) (thereafter '*Kleynhans*').
108 *Kleynhans* (n 107 above) paras 28 – 29.
109 *Kleynhans* (n 107 above) para 82.

mandatory rules (overriding statutes) it is a principle judgment on the determination of the proper law of an international contract in South African courts.

In *Parry v Astral Operations Ltd*[110] a South African company was responsible for the operations of the respondent in Malawi. The applicant was retrenched and claimed damages for breach of contract in terms of the Basic Conditions of Employment Act,[111] unfair dismissal in terms of the Labour Relations Act[112] and in the alternative a claim for infringement of his constitutional right to fair labour practices in terms of section 23(1) of the Constitution.[113] In the absence of a choice of law clause the court held that there was an implied choice of South African law as the proper law of the contract and even if this was incorrect the contract had a more substantial or real connection with South African law.[114]

In the case of a contract not having a choice of law clause the South African courts refer back to the legal system with the 'closest and most real connection.'[115] Van Rooyen refers to this as the '… enigste verbonde regstelsel'.[116] In most cases the legal system with the closest and most real connection is the one 'the Courts would presume to have been intended by the parties.'[117]

The court denoted South African labour legislation to be of a mandatory nature and that it was directly applicable to all employment contracts in South Africa.[118] The court found that 'any law' (with the exception of the Constitution or an amending statute thereto) conflicting with the Employment Equity Act[119] or LRA to be subordinate.[120] 'Any law' may also refer to foreign law.[121]

In the case of the contract having a choice of law clause, the Labour Court was prepared to be guided by section 6 of the Rome Convention on the Law Applicable to Contractual Obligations.[122] The court would only uphold the proper law of the contract if it did not

110 *Parry v Astral Operations Ltd* 2005 (10) BLLR 989 (LC) (thereafter '*Parry*').
111 Basic Conditions of Employment Act 75 of 1997 (thereafter 'BCEA').
112 Labour Relations Act 66 of 1995 (thereafter 'LRA').
113 The Constitution of the Republic of South Africa, 1996 (thereafter the 'Constitution').
114 The latter was determined by way of connecting factors, such as the place of conclusion of the contract was South Africa and the employee was under the direct supervision of the South African employer.
115 As applied by Grosskopf J in *Improvair (Cape) (Pty) Ltd v Establisssements Neu* 1983 (2) SA 138 152.
116 JCW van Rooyen, (1972) 'Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg', LLD Thesis, University of Pretoria, p. 218.
117 *Improvair (*n 115 above) 147.
118 *Parry* (n 110 above) para 62.
119 Employment Equity Act 55 of 1998 (thereafter 'EEA').
120 *Parry* (n 110 above) para 56.
121 *Parry* (n 110 above) para 56.
122 *Parry* (n 110 above) para 71.

deprive the employee of the protection afforded by the mandatory rules of the forum court (South Africa).[123]

The methodology suggested by the court is to first establish whether an employee has been deprived of the protection of a mandatory rule.[124]

6.2 Labour rights in South Africa

It is submitted that in South Africa, labour rights enjoy an elevated status as constitutional rights. In the *Parry* case the court considered, amongst others, a claim for unfair dismissal.[125] In South Africa the right to fair labour practices (and consequently the right against unfair dismissal) is constitutionally entrenched in section 23(1) of the Constitution.[126] As Pillay J stated so eloquently: '… the constitutionalism of labour rights strengthens the public policy and protective components of labour law.'[127] The EEA, LRA and BCEA can be viewed as 'crystallised public policy'.[128]

6.3 Access to justice as a domestic mandatory rule

In *Kleynhans* the Labour Court held that an 'added reason'[129] for assuming jurisdiction in this matter would be that if the court did not do so, the applicant would be left without a forum to pursue his claim.[130] Here the court adds a never before considered reason for assuming jurisdiction,[131] namely the constitutional right of access to courts.[132] In *Parry* the Labour Court again held that a contributing factor for assuming jurisdiction over the matter would be the fact that a Malawian court may refuse jurisdiction,[133] which infers that it again would be in contravention of the applicants right to access to courts, and thus his right to access to justice, if the Labour Court were to refuse jurisdiction.

From these two cases it would appear the Labour Court treats the right to access to courts, as it is entrenched in the Bill of Rights, as mandatory in nature. It is thus submitted that the right to access to courts, and consequently all rights contained in the Bill of Rights, are

123 *Parry* (n 110 above) para 72.
124 As above.
125 *Parry* (n 110 above) para 1.
126 See (n 113 above).
127 *Parry* (n 110 above) para 53.
128 K Calitz 'Globalisation, the Development of Constitutionalism and the Individual Employee' (2007) 10 *Potchefstroom Electronic Law Journal* 2/115 9/115.
129 Calitz (n 128 above) 10/115.
130 *Kleynhans* (n 107 above) para 47.
131 Calitz (n 128 above) p 11/115.
132 The Constitution (n 133 above) sec 34.
133 *Parry* (n 110 above) para 78.

domestic mandatory rules that are to be considered by all courts within South Africa.[134]

The right to access to courts may in future be applied to establish jurisdiction in the same way that the principle of *forum non conveniens* is applied to stay proceedings. This could lead to an influx of litigation in South African courts like what has in recent years been seen in the United Kingdom and may be misused as a foothold for forum shopping. Despite recent judgements and legal development seen in the Labour Court, private international law in South Africa is still its infancy and there is a need for development domestically regarding this area of the law.

6.4 The approach of the South African Labour Court

In *Parry* the Labour Court, much like the Supreme Court in *Brown*, relied on the principles of the Rome Convention, even though South Africa was neither a signatory thereof nor are we a member state of the European Union. The Labour Court substantiated this reliance with the fact that no part of the Rome Convention conflicts with either the Constitution or domestic labour laws.[135] The case of *Parry* was heard before the commencement of Rome I (which replaced the Rome Convention in its entirety), but this does not mean that Rome I cannot be used as a guiding force in these matters.

In the *obiter* of *Parry* the court comments on the scarcity of academic material pertaining to labour law within the field of conflict of laws in South Africa.[136] This may be an area of the law that is underdeveloped and where there is a lack of relevant case law, like the instance of peripatetic employees such as in *Brown* and *Crofts*. In matters pertaining to the conflict of laws South African courts would do well to look to Rome I for guidance. The content of the Convention is not in conflict with any provisions of South African Labour Legislation or the Constitution itself.

It can be said that South African courts 'develop the rules of private international law'[137] in accordance with section 39(2) of the Constitution when they stress the mandatory nature of labour rights and their entrenchment in the Constitution by relying on the Rome Convention.

This comparative approach taken by the court is also in accordance with section 233 of the Constitution, wherein a court may

134 See (n 113 above) chapter 2.
135 *Parry* (n 110 above) para 71.
136 *Parry* (n 110 above) para 30.
137 Calitz (n 128 above) p9/115.

'… refer any reasonable interpretation of the legislation that is consistent with international law …'[138]

The Constitution has not been the catalyst for fundamental change to private international law as it is applied in South Africa, but the possibility does exist. The private international law rules applied by domestic courts has (thus far) been consistent with the Constitution, thusly 'the new constitutional order does not dominate but exerts a beneficial influence of this branch of law.'[139] The methods applied by the Labour Courts in the cases above can be distinguished from that of the United Kingdom and New Zealand. This may be attributed to the era of transformative constitutionalism South Africa is currently experiencing and the courts commitment to constitutional rights and substantive adjudication.

7 Conclusion

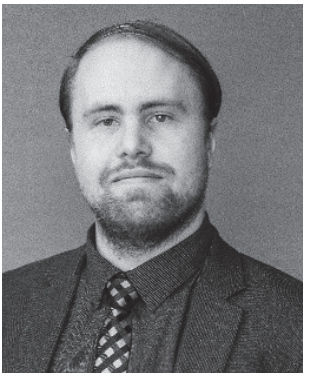
In an ideal world all jurisdictions would submit to a uniform approach and set of rules that govern the conflict of laws in private international law. From the discussion above it seems that the courts of South Africa and New Zealand are, in the absence of clear guiding principles of their own, willing to look to instruments of the European Union in this regard. This is indicative of both the need of countries outside the European Union for academic writing on this matter and to develop regulatory framework that can be applied uniformly to such instances.

In a world characterised by globalisation there is an increase in the need to balance the interests of the individual employee and those of the conglomerates they work for. This gives rise to a duty of the courts from all jurisdictions to protect employees involved in international employment contracts. This, unfortunately, remains a challenge for all parties involved.

138 See (n 113 above) sec 233.
139 C Forsyth 'Introduction' in C Jesseman (eds) Private International Law: *The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2003) 11.

PROPERTY RIGHTS AND THE BASIC STRUCTURE OF THE CONSTITUTION: THE CASE OF THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL*

*by Martin van Staden***



1 Introduction

The land reform debate in South Africa has always been as contentious as it is controversial. Up to now, however, it has not reached the intensity of bringing about changes to South Africa's fundamental law. In February 2018, Parliament resolved in favour of adopting an amendment to the Constitution that would allow government to expropriate private property without being required to pay compensation.[1] This began a process that eventually culminated in the December 2019 publication of the draft Constitution Eighteenth Amendment Bill. This is the first time since the Constitution was enacted that an amendment has been introduced to change a provision in chapter 2, in this case section 25.

* This article is written from a legal-theoretical perspective and does not represent legal advice.

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1 Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').

The basic structure doctrine is a judicial doctrine that features most prominently but not exclusively in the constitutional law of India.[2] The doctrine's essence is that constitutional amendments, despite complying with the formal requirements for amendment set out in the constitutional text, might still be struck down by a court because the amendment offends the constitution's foundational principles, its identity, character, or logic — its basic structure.[3]

In 2005, Devenish wrote that the basic structure doctrine has been implicitly recognised by the Constitutional Court as applicable in South Africa, but that 'the doctrine is waiting in the wings, since, should certain circumstances and a crisis situation arise, the Constitutional Court could invoke its application'.[4] At the time of Devenish's writing, there was no pending amendment of the Bill of Rights, unlike today.

In this paper, I briefly summarise the amendment procedure set out in section 74 of the Constitution, and the process that has taken place between February 2018 and June 2020. Thereafter, I briefly discuss the basic structure doctrine and its potential application in South Africa. Finally, I consider whether the basic structure doctrine could be employed as a viable challenge to the draft Constitution Eighteenth Amendment Bill. The question that is inevitably considered: Has the crisis, that Devenish referred to, arrived?

2 The positive law and *status quo* of constitutional amendment

Section 74 of the Constitution concerns Bills that propose to amend the Constitution.[5] Section 74(1) provides that section(s) 1 and/or 74 of the Constitution can be amended only by a majority vote of at least 75% of the members of the National Assembly. Section 74(2), which concerns amendments to the Bill of Rights, requires a two-thirds (66.3%) majority of the members of the National Assembly to vote in favour of the amendment; and section 74(3) requires the same for other provisions of the Constitution. Wherever the Constitution requires the cooperation of the National Council of Provinces in the adoption of a constitutional amendment, the support of at least six

2 Y Roznai 'Unconstitutional constitutional amendments: A study of the nature and limits of constitutional amendment powers' PhD thesis, London School of Economics 2014 54, 59 https://core.ac.uk/download/pdf/46517697.pdf.

3 Roznai (n 2) 54.

4 GE Devenish 'A jurisprudential assessment of the process of constitutional amendment and the basic structure doctrine in South African constitutional law' (2005) 68 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 252.

5 As opposed to secs 75, 76 and 77 which concern Bills which, if they receive presidential assent and are enacted into law, would create, amend or repeal ordinary Acts of Parliament.

provinces represented in the National Council of Provinces is required for that amendment to pass muster.[6]

At the time of writing, the Constitution has been amended seventeen times. None of these amendments have been to section 1, section 74, or to the Bill of Rights. In other words, the Constitution has thus far only been amended in terms of section 74(3).

3 Expropriation without compensation

3.1 Background

In February 2018, Parliament adopted a resolution that signalled the government's intention to pursue a policy of expropriation of private property without compensation that might require an amendment to section 25 of the Constitution.[7] This was two months after South Africa's ruling party, the African National Congress, adopted expropriation without compensation as a policy pillar, at its December 2017 conference.[8]

Land reform has been a recurring item in public, and particularly jurisprudential, discourse since at least 1990 when Sachs, who would go on to be one of the first justices of the Constitutional Court, wrote:

> In the past three decades, more than three million South Africans have been forcibly removed from their homes and farms, simply because they were black. Apartheid law then conferred legal title on owners whose main merit was that of having a white skin. … Looked at from the perspective of human rights, who has the greater claim to land — the original owners and workers of the land, expelled by guns, torches, and bulldozers from the soil … or the present owners, frequently absentee, whose rights are based on titles conferred in terms of the so-called Native Land Act and the Group Areas Act?[9]

Land reform is an emotive issue that deserves acknowledgment of its importance and continued relevance. Getting into the weeds of the land reform debate is, however, beyond the scope of this paper.

6 Amendments to sec 1 or the Bill of Rights, as contemplated in secs 74(1) and (2), always require the cooperation of the National Council of Provinces. In the case of sec 74(3) amendments, that is, to any provision outside of sec 1 or chap 2 of the Constitution, the support of the National Council of Provinces is only necessary 'if the amendment (i) relates to a matter that affects the Council; (ii) alters provincial boundaries, powers, functions or institutions; or (iii) amends a provision that deals specifically with a provincial matter'. Secs 74(4) to (9) concern ancillary affairs not relevant to this paper.

7 S Mokoena 'National Assembly debates motion on land expropriation' 28 February 2018 https://www.parliament.gov.za/news/national-assembly-debates-motion-land-expropriation (accessed 3 July 2020).

8 L Omarjee 'ANC reaches resolution on land reform' 20 December 2017 https://www.news24.com/fin24/Economy/anc-reaches-resolution-on-land-reform-20171220 (accessed 3 July 2020).

9 A Sachs *Protecting human rights in a new South Africa* (1990) 10-11.

Suffice it to say that I regard the restitution of property, seized for political or ideological — invariably racial — purposes, as an imperative not only of law, but of justice. The February 2018 parliamentary resolution set in motion a process to determine whether an amendment to the Constitution is necessary to enable government's new policy, and if so, what the content of the amendment should be.[10] President Cyril Ramaphosa reaffirmed his party's commitment to changing the Constitution on 31 July 2018.[11]

On 15 November 2018, the constitutional review committee that was established in the February resolution recommended that Parliament make an amendment to section 25 of the Constitution to enable expropriation without compensation. The parliamentary *ad hoc* committee responsible for the amendment published its Draft Constitution Eighteenth Amendment Bill on 13 December 2019.[12]

3.2 Section 25 prior to amendment

The foundation of constitutional property rights in South Africa, section 25(1) of the Constitution, at the time of writing, provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'. Section 25(2)(a) allows for expropriation of property if it is in terms of law of general application and is for a public purpose or in the public interest. Section 25(2)(b) requires any expropriation to be subject to compensation. Section 25(3), in turn, provides that the compensation must be 'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected', and sets out, in an open list, various circumstances that must be factored in by a court when determining such amount.

Both sections 25(2)(b) and (3) refer to an 'amount' of compensation, which, it is submitted, eliminates the possibility that expropriation without compensation has already, up to now, been available to government in terms of section 25.[13] Section 25(4) clarifies that the 'public interest' referred to above includes South Africa's commitment to land reform, and that 'property is not limited to land'.[14]

10 G Crouse 'The NA's resolution on EWC: A clause-by-clause analysis' 2 March 2018 https://www.politicsweb.co.za/comment/the-nas-resolution-on-ewc-a-clausebyclause-analysi (accessed 9 July 2020).

11 C Ramaphosa 'SA's President Cyril Ramaphosa's statement on expropriation of land without compensation, economic stimulus' 31 July 2018 https://www.cnbcafrica.com/insights/ramaphosa/2018/07/31/land-expropriation/ (accessed 3 July 2020).

12 Hereinafter 'the Amendment Bill' (available at: https://www.parliament.gov.za/storage/app/media/CommitteeNotices/2019/december/06-12-2019/Draft_advertised.pdf) (accessed: 20 July 2020).

13 R Hall 'The land question: What is the answer?' (2018) Public lecture, University of the Western Cape.

3.3 Draft Constitution Eighteenth Amendment Bill

Clause 1(a) of the 13 December version of the Amendment Bill adds the following underlined portion to section 25(2)(b) of the Constitution:

> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.

In other words, the Amendment Bill introduces the notion of 'nil compensation' into section 25 of the Constitution as a 'payable' 'amount' in cases of expropriation. Clause 1(b) of the Amendment Bill only brings about changes to section 25(3) that ensure consistency with the above. Clause 1(c) adds a subsection 3A to section 25, which provides as follows:

> (3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil.

In other words, the Amendment Bill empowers Parliament to decide, in ordinary legislation and by simple majority, those circumstances in which the courts may determine that 'nil' compensation is payable. Committee chair Mathole Motshekga has revealed that 'the court' referred to in this clause might be replaced by language vesting the same power instead in the executive.[15] At the time of writing, this had not happened.

In summary, the Amendment Bill brings about a material change in the constitutional property rights dispensation. The notion that it merely makes explicit that which is already implicit — that is, the ostensible reality that 'nil' compensation expropriations have always been possible under section 25 — is disputed for the reason stated

14 Sec 25(8) provides that 'no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)'. At the time of writing, a sec 36(1) justification of the Amendment Bill had not been made in the discourse or, obviously, in a judicial setting. It is submitted that sec 25(8) is irrelevant to this paper and only relevant, *ad hoc*, in cases of litigation. Secs 25(5) to (9) concern ancillary affairs not relevant to this paper.

15 P Saxby 'EWC: There may be more to the parliamentary process than meets the eye' 27 January 2020 https://www.dailymaverick.co.za/opinionista/2020-01-27-ewc-there-may-be-more-to-the-parliamentary-process-than-meets-the-eye/ (accessed 9 July 2020). This does not rule out judicial review and adjudication on the administrative action aspects of an expropriation. It is, however, trite that there is a difference between the courts having the power to finally decide in a case whether 'nil' compensation is to be paid, and the power to review, usually for irrationality, the decision of an executive functionary.

above. However, even if this were the case, clause 1(c) of the Amendment Bill is novel by all accounts, in that it introduces parliamentary discretion into the determination of whether any compensation need be paid upon expropriation. The COVID-19 pandemic and government's resulting declaration of a state of national disaster (commonly referred to as the 'lockdown') has caused the parliamentary committee responsible for the Amendment Bill to lapse. As of June 2020, it has been reported that the committee will be reconstituted.[16] For the purposes of this paper, it is assumed that the Amendment Bill's substance will remain unchanged.

4 The basic structure doctrine

4.1 Unconstitutional constitutional amendments

Roznai, who has written in-depth about the idea of 'unconstitutional constitutional amendments', explains that the notion of implicit limitations on a legislature's amendment power has various roots.[17] In the United States, Calhoun opined that if an amendment 'is inconsistent with the character of the constitution and ends for which it was establishe[d], — or with the nature of the system', or 'radically change[d] the character of the constitution, or the nature of the system', then such a change would go beyond what is allowed by the amendment power bestowed on Congress.[18] Cooley further contends that an amendment to a constitution 'cannot be revolutionary; [it] must be harmonious with the body of the instrument'.[19] According to Machen, an 'amendment must be a real amendment, and not the substitution of a new constitution'. A new constitution can only be adopted 'by the same authority that adopted the present constitution'.[20]

Skinner said that an amendment must be reconcilable with a constitution's scheme and purpose.[21] Marbury submits that the power to amend a constitution does not extend to destroying that

16 J Gerber 'Ad hoc committee to amend Section 25 of the Constitution to be re-established' 11 June 2020 https://www.news24.com/news24/southafrica/news/ad-hoc-committee-to-amend-section-25-of-the-constitution-to-be-re-established-20200611 (accessed 3 July 2020).

17 Roznai (n 2 above) 48-54.

18 JC Calhoun *A disquisition on government and a discourse on the constitution and government of the United States* (1851) 300-301. As quoted in Roznai (n 2 above) 49-50

19 TM Cooley 'Power to amend the federal Constitution' (1893) 2 *Michigan Law Review* 109. As quoted in Roznai (n 2 above) 50.

20 AW Machen Jr 'Is the Fifteenth Amendment void?' (1909-1910) 23 *Harvard Law Rev* 170. As quoted in Roznai (n 2 above) 51.

21 DG Skinner 'Intrinsic limitations on the power of constitutional amendment' (1919-1920) 18 *Michigan Law Review* 223. As quoted in Roznai (n 2 above) 51.

constitution.[22] The German scholar Schmitt posited that a constitution contains certain principles that embody that constitution's identity and are thus beyond amendment.[23] The Bavarian Constitutional Court has also held that:[24]

> There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms … can be void because they conflict with them.

Perhaps most relevantly, another German scholar who was well versed in Indian history and law, Dietrich Conrad, in a lecture in 1965 to the Law Faculty at Banaras Hindu University in India, opined that the legislature, 'howsoever verbally unlimited in its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority'.[25] Conrad also wrote, as quoted by Roznai, that 'there are, beyond the wording of particular provisions, systematic principles underlying and connecting the provisions of the Constitution … [which] give coherence to the Constitution and make it an organic whole'.[26]

There are therefore both scholarly and judicial endorsements of the notion that certain (purported) amendments to constitutions may be invalid if they conflict with those constitutions' existing characters. Judicially, this has been manifested most prominently in the basic structure doctrine, which will be discussed in the succeeding paragraphs with reference to the situations in India, Belize, and South Africa.

4.2 India and the basic structure doctrine

India is the main case study for the application of the basic structure doctrine, where it came about in a judicial setting. India's political context at the time was similar to South Africa's current context, in that land reform was high on the political agenda and gave rise to the events that led to the doctrine's development.

22 WL Marbury 'The limitations upon the amending power' (1919-1920) 33 *Harvard Law Review* 225. As quoted in Roznai (n 2 above) 51.

23 C Schmitt *Constitutional theory* (2008) 150-153. As quoted in Roznai (n 2 above) 52.

24 As quoted in Roznai (n 2 above) 53. Bavaria is a state (or *land*) of Germany. Sec 5 of the Constitution of the Free State of Bavaria, 1998, established this court as a sub-national constitutional court. Art 93(1)(4b) and 100(3) of the Basic Law for the Federal Republic of Germany, 1949, recognise the existence of these sub-national constitutional courts in the German states.

25 AG Noorani 'Behind the "basic structure" doctrine' 11 May 2001 https://web.archive.org/web/20101220120644/http://www.hinduonnet.com:80/fline/fl1809/18090950.htm (accessed 3 July 2020).

26 Roznai (n 2 above) 123.

After gaining independence from the United Kingdom in 1950, the government of Indian Prime Minister Indira Gandhi pursued a policy of land reform. This land reform agenda included amending the Indian Constitution in a way that interfered with property owners' constitutional right to property. However, what followed turned out to be less about property rights in the constitutional scheme, than about the proper powers of the legislature and the judiciary as a matter of constitutional theory.[27]

In 1967, in *Golaknath v State of Punjab,* the Supreme Court of India held that the Indian Parliament's constitutional power to amend the constitution does not empower it to abridge the fundamental rights contained in the constitution.[28] This decision was based on the fact that the Indian Constitution explicitly prohibited Parliament from passing a 'law' infringing on those fundamental rights.

MK Nambyar, Counsel for the petitioner in *Golaknath*, had been exposed to Conrad's ideas of implied limitations on the amending power. With Conrad's permission, Nambyar presented the argument 'that implied limitations exist on the amendment power so that amendments cannot destroy the permanent character or 'basic structure' of the Constitution' before the Supreme Court. The Court did not give an opinion on the basic structure argument, other than to say that it carries 'considerable force', and limited its inquiry to the scope of the amendment power as it related to fundamental rights.[29]

This case set in motion a process whereby the Indian government attempted to curtail the power of the Supreme Court to intervene in constitutional policy questions. The Prime Minister's party introduced the 24th Amendment, meant to empower Parliament to amend any provision of the Indian Constitution without the possibility of judicial review. In *Kesavananda Bharati v State of Kerala*, the Court overruled *Golaknath* but held that Parliament's amendment power 'does not include the power to alter the basic structure, or framework of the constitution so as to change its identity' — the basic structure doctrine was born into Indian constitutional law.[30] Thus, while the Indian Parliament can *amend* any provision of the Indian Constitution, including fundamental rights, the amendment power does not include the ability to change the constitutional identity or basic structure of that constitution. The Court did not, however, enumerate the features of the basic structure of India's constitution.[31]

27 Roznai (n 2 above) 54-55.
28 *I.C. Golaknath & Ors v State of Punjab & Anrs* 1967 AIR 1643 (ISC) para 163.
29 Roznai (n 2 above) 55.
30 *HH Kesavananda Bharati & Ors v State of Kerala & Anr* 1972 AIR 1461(ISC).
31 Roznai (n 2 above) 56.

Prime Minister Gandhi retaliated by appointing a new Chief Justice, who was part of the minority in *Kesavananda Bharati*.[32] Two years later, in 1975, a high court invalidated Gandhi's 1971 re-election, prompting the Prime Minister to declare a state of emergency. The Court also found Gandhi guilty of electoral malpractice. Parliament then attempted to enact two constitutional amendments: The 38th Amendment, which provided that the President's decision to issue a proclamation of emergency, and any laws adopted during the period of the emergency, were exempt from judicial review; and the 39th Amendment, which attempted to change the laws under which Gandhi was convicted, and further prohibit the judiciary from intervening in any matter related to the election of the President, Vice President, Speaker of Parliament, or the Prime Minister.[33] When this matter reached the Supreme Court, in *Indira Nehru Gandhi v Raj Narain*,[34] the majority confirmed the basic structure doctrine in holding that 'the 39th Amendment violated three essential features of the constitutional system: fair democratic elections, equality, and separation of powers, and was therefore invalid'. At the same time, however, the Court validated Gandhi's election.[35]

Parliament then tried to enact the 42nd Amendment which would put an end to any kind of judicial review of the exercise of parliamentary amendment powers. This was challenged in *Minerva Mills v Union of India* in 1980.[36] The Supreme Court held that the amendment 'removed all limitations on Parliament's amendment power, conferring upon it the power to destroy the Constitution's essential features or basic structure, [hence it] was beyond Parliament's amendment power and therefore void'. The Court explained.[37]

> If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.

Roznai writes that after *Minerva Mills*, the basic structure doctrine was accepted in Indian jurisprudence.[38] The basic structure of the Indian Constitution now includes, among other things, liberal democracy, judicial review, freedom and dignity of the individual,

32 As above.
33 As above.
34 *Indira Nehru Gandhi v Raj Narain* 1975 AIR 2299 (ISC).
35 Roznai (n 2 above) 57.
36 *Minerva Mills v Union of India* 1980 AIR 1789 (ISC) (hereinafter '*Minerva Mills*').
37 *Minerva Mills* (n 36) 1824. As quoted in Roznai (n 2 above) 57.
38 Roznai (n 2 above) 57-58.

unity and integrity of the nation, free and fair elections, federalism, and secularism.[39]

4.3 The case of Belize

Before turning to South Africa, it is worth briefly considering a case study of the basic structure doctrine in Belize, as discussed by Roznai and British constitutional scholar O'Brien. The facts of the Belize experience seem to coincide quite closely with the experience in South Africa, as both relate to the constitutional right to compensation upon expropriation. The 2008 Constitution (Sixth Amendment) Bill of Belize exempted 'petroleum minerals and accompanying substances' from the protection of property rights in the Constitution of Belize.[40] O'Brien explains, '[t]he purported effect of the legislation would thus have been to deny to the owners of any such interests in land the right to apply to the courts for compensation ...'. This amendment was challenged in the Supreme Court.[41]

Coneth CJ, in setting aside the amendment, reasoned that the Belizean Constitution's basic structure consisted of the rights guaranteed in its Bill of Rights as well as the beliefs and desires of Belizeans. The special majority required in the Belizean National Assembly by the constitution was nothing more than a procedural guideline and did not finally determine whether an amendment to the constitution is valid or not. According to O'Brien, writing of the judgment, 'any prospective amendment of the Constitution had to conform to the Constitution's *normative* requirements'. Were this not the case, parliamentary sovereignty would replace constitutional supremacy.[42]

Conteh CJ outlined the basic structure of the Belizean Constitution as including, according to Roznai, the sovereignty and democracy of Belize,

> the supremacy of the Constitution; the protection of fundamental rights and freedoms that are enumerated in the Constitution; the limited sovereignty of Parliament; the principle of separation of powers; and the rule of law.[43]

Sometime later and after some related litigation in the meanwhile, the Belizean government enacted the Constitution (Eighth)

39 Roznai (n 2 above) 58.
40 This case is not entirely dissimilar from South Africa's own *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).
41 D O'Brien 'The basic structure doctrine and the courts of the Commonwealth Caribbean' 28 May 2013 https://ukconstitutionallaw.org/2013/05/28/derek-obrien-the-basic-structure-doctrine-and-the-courts-of-the-commonwealth-caribbean/ (accessed 3 July 2020).
42 As above. O'Brien's emphasis.
43 *Barry M Bowen v Attorney General of Belize* 2008 BZ 445 (BSC) 2 para 119. As quoted in Roznai (n 2 above) 74-75.

Amendment Act, which attempted to re-entrench the supremacy of the procedural requirements for constitutional amendment. It provided, among other things, that the said section 69 of the Belizean Constitution was 'all-inclusive and exhaustive and there is no other limitation, whether substantive or procedural, on the power of the National Assembly to alter this Constitution'.[44] The Supreme Court, too, invalidated this constitutional amendment, as it conflicted with the constitution's basic structure. According to O'Brien:[45]

> Since the cumulative effect of the Eighth Amendment was to preclude the Court from determining whether the arbitrary deprivation of property by the Government was for a public purpose, the Eighth Amendment offended the principle of the separation of powers and the basic structure doctrine of the Constitution. To this extent the amendments to the Constitution were unlawful, null and void.

4.4 Does the doctrine apply in South Africa?

The basic structure doctrine appears to be sound legal theory on its own merit, without requiring statutory or case-law validation, as it speaks to the nature of constitutions and of constitutionalism. Indeed, 'the concept of a basic structure giving coherence and durability to a Constitution', observed Conrad, 'has a certain intrinsic force which would account for its appearance in various jurisdictions and under different circumstances'.[46]

To put it in more technical terms, constitutions are *constituent* instruments, and legislatures are *constituted* entities. A constitution *constitutes*, and a legislature *is constituted*, by a constitution.[47] During the height of apartheid and before the Indian Supreme Court developed the basic structure doctrine, Centlivres CJ of the Appellate Division of the Supreme Court of South Africa remarked the following in *Minister of the Interior v Harris*, which spoke directly to the nature of Parliament's constituted power:[48]

> As ordinarily constituted, however, Parliament cannot expand its mandate by deleting the inhibition of its powers in relation to the Cape franchise. … One must keep in mind that this inhibition is in restraint of power and not a regulation of method. *No legislative organ can perform an act of levitation and lift itself above its own powers* by the bootstraps of method. (my emphasis)

As a result, ordinary legislatures that are created by constitutions, like the Parliament of South Africa, have *constituted* powers bestowed upon them by that constitution, and not *constituent* power,

44 O'Brien (n 41 above).
45 As above.
46 Noorani (n 25 above).
47 *Golaknath* (n 28 above) para 163.
48 *Minister of the Interior & Another v Harris & Others* 1952 (4) SA 769 (A).

i.e., a power to create a new constitution — even by purporting to amend the existing one.[49] 'The people', or some special assembly of the people, usually have the constituent power to constitute a new constitution, as was the case with the Constitutional Assembly, in conjunction with the Constitutional Court, in South Africa.[50] The result of this is that despite any powers given to legislatures by their constitutions, legislatures may only ever exercise constituted powers and constituent powers to the limited extent that they are consistent with the constitutional framework within which the legislature itself was constituted, but never beyond. This is to say that legislatures may not enact new constitutions in the place of their already existing constitutions. The basic structure doctrine becomes relevant when legislatures *purport* to exercise their powers of constitutional amendment. If a legislature changes the basic structure — the logic, the character — of the constitution, it is in fact enacting a new constitution rather than amending the existing one, and thus exercising a constituent power that it does not possess. If the amendment does *not* change the basic structure of the constitution, the legislature would be properly exercising its constituted power of amendment — which in the case of South Africa, is granted to Parliament in terms of section 74 of the Constitution.

The basic structure doctrine, however, is not completely unknown in South African jurisprudence, as the Constitutional Court has made remarks about it at least thrice since the advent of constitutional democracy.[51] The Constitution itself also lends some support to the idea that the doctrine might find application in South Africa. In this regard section 167(4)(d) provides that, '[o]nly the Constitutional Court may decide on the constitutionality of *any* amendment to the Constitution'.[52] Unlike other provisions that are referential, like subsections (4)(c) or (4)(f),[53] section 167(4)(d)'s operation does not depend upon other provisions. Thus, it does not say that the Court may decide the constitutionality of amendments *'in terms of'* section 74. Instead, *'any'* amendment is open to constitutional scrutiny. The notion that the Court may not inquire into the constitutionality of an amendment that has been enacted in terms of

49 Roznai (n 2 above) 81-82.
50 Roznai (n 2 above) 83-84.
51 See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC) para 204; *Premier of KwaZulu-Natal & Others v President of the Republic of South Africa & Others* 1996 (1) SA 769 (CC) para 47; and *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) paras 15-17, as discussed below.
52 My emphasis.
53 Sec 167(4)(c) of the Constitution provides that the court may 'decide applications *envisaged* in section 80 or 122'; and sec 167(4)(f) of the Constitution provides that the court may 'certify a provincial constitution *in terms of* section 144' (my emphases).

the requisite procedures in the Constitution does not at first glance find support in the Constitution itself. In *Executive Council of the Western Cape Legislature v President of the Republic*, Sachs J said:[54]

> There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life — the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.

In *Premier of KwaZulu-Natal v President of the Republic of South Africa*, Mahomed DP said:[55]

> There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the constitution, might not qualify as an 'amendment' at all.

Finally, in *United Democratic Movement v President of the Republic of South Africa*,[56] 'the Constitutional Court assumed, for the sake of argument, the application of the basic structure doctrine, but then found that no basic feature was violated'.[57] In *S v Mhlungu*, Sachs J alluded to the idea that the Constitution does in fact have a basic structure, without referring to the basic structure doctrine *per se*. Sachs J explained:[58]

> The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the *basic design* of the Constitution and indicate its fundamental purposes. (my emphasis)

The basic design of the Constitution, according to the Preamble, includes the establishment of a 'society based on democratic values, social justice and fundamental human rights', laying 'the foundations for a democratic and open society', and improving 'the quality of life of all citizens and free the potential of each person'.[59] A major

54 *Executive Council of the Western Cape Legislature* (n 51 above) para 204.
55 *Premier of KwaZulu-Natal* (n 51 above) para 47.
56 *United Democratic Movement* (n 51 above) paras 15-17.
57 Roznai (n 2 above) 67. See *UDM* (n 56 above) para 17.
58 *S v Mhlungu & Others* 1995 3 SA 867 (CC) para 112.

additional theme is the recognition of the injustices of apartheid, and the intention to move away from and heal those wounds. Here one must recall Sachs's remarks on land reform from 1990, highlighting how the apartheid government's deprivations of the property of mostly black South Africans is certainly one of the major injustices of the past that ought never be repeated.[60]

4.5 Arguments against application: The case of sections 74 and 1 of the Constitution

Van Schalkwyk specifically addresses the applicability of the basic structure doctrine in South Africa and concludes that it probably does not apply.[61] Van Schalkwyk approves of the argument that section 74 of the Constitution is explicit about the fact that *any* provision of the Constitution can be amended and, if anything, section 1, which contains elevated constitutional protection against amendment, is a 'surrogate for the basic structure doctrine' as it contains the most important constitutional principles upon which South Africa is founded. She argues that the framers of the Constitution foresaw changes to section 1 — the most entrenched provision — and the Constitutional Court accepted this fact in the *Second Certification* judgment[62]. To Van Schalkwyk, this indicates that an absolute entrenchment of the Constitution's basic structure was never intende[63]d.

Van Schalkwyk further approves of the argument that the Constitutional Court, because of the separation of powers principle, takes a conservative approach to review decisions of this nature and is thus unlikely to enforce the basic structure doctrine.[64] Van Schalkwyk concedes, however, that if democracy becomes so threatened by a proposed constitutional amendment, the Constitutional Court might abandon its conservatism and apply the doctrine.[65] In the following paragraphs the focus will be on legal arguments around sections 1 and 74 of the Constitution, and not the Constitutional Court's judicial mindset.

59 Preamble to the Constitution.
60 Sachs (n 9 above).
61 C van Schalkwyk 'Die basiese-struktuur-leerstuk: 'n Basis vir die toepassing in Suid-Afrika, of 'n skending van die skeiding van magte?' (2015) 12(2) *LitNet Akademies* 359.
62 *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 (2) SA 97 (CC).
63 Van Schalkwyk (n 61 above) 349.
64 Van Schalkwyk (n 61 above) 357.
65 Van Schalkwyk (n 61 above) 359.

4.5.1 Section 74 — Bills amending the Constitution

As previously discussed, is it true that sections 74(1), (2), and (3) of the Constitution provide for amendments to any of the provisions of the Constitution. In this respect, Van Schalkwyk is correct. However, the basic structure doctrine does not purport to deprive the ability of a legislature to *amend* constitutional texts — it does not deny to Parliament any power that is bestowed upon it by the Constitution. Indeed, no constitution is fully rigid. Constitutional modifications are well catered for in most constitutions around the world, including that of South Africa.[66]

The basic structure doctrine, instead, posits that certain changes to the constitutional text *do not* amount to amendments, but rather to a legal revolution not recognised by the Constitution. The doctrine attempts to guard against the destruction of the constitutional identity or character, which would amount to a replacement of the Constitution with another constitution — a power usually not given to the legislature. In other words, the basic structure doctrine concerns itself not with amendments, but only with *purported* amendments that, in reality, are not amendments.[67]

The Constitution of South Africa presupposes its own perpetuity and does not provide or allow for its own demise. Thus, while Van Schalkwyk is correct to say that any provision in the Constitution is *amendable*, it does not follow that the basic structure doctrine does not apply. This can be illustrated with the example of writing a speech. One can write a speech condemning bigotry and racism and give it to a colleague for *amendment* — improvement, modification, etc. — but if that colleague changes the topic to an endorsement of bigotry, or to an altogether different topic, it does not amount to amendment anymore, but to a destruction of the character, and thus replacement, of the speech. This doctrine, in other words, should not be of concern to governments that are committed to the existing characters of their constitutions; it should be concerning to those who approach their constitutive laws with revolutionary intentions.

4.5.2 Section 1 of the Constitution — founding values

Van Schalkwyk appears to endorse the idea that section 1 of the Constitution is a 'surrogate' or proxy for the basic structure doctrine.[68] There are, however, some evident problems with this line of reasoning, which will be discussed in the following paragraphs. Section 1, for instance, does not explicitly prohibit Parliament from

66 Roznai (n 2 above) 23.
67 Roznai (n 2 above) 65.
68 Van Schalkwyk (n 61 above) 356.

abolishing itself or the judiciary. Parliament, particularly the National Assembly, is empowered by section 44(1)(a)(i) to amend the Constitution, and a textual reading of section 74, as discussed above, allows Parliament to amend any provision of the Constitution with the requisite majority support of its members in the National Assembly, and where applicable, the National Council of Provinces. This, in theory, bestows on the legislature the power to radically change provisions in chapter 4 of the Constitution that have the consequence of abolishing Parliament itself, or make changes to chapter 8 abolishing the judiciary. These amendments could then transfer all of the powers and authority of the legislature and courts to the executive. Yet, it would be absurd to suppose that in a system of constitutional supremacy such an 'amendment' to the Constitution would be permissible.

The courts, and particularly the Constitutional Court per section 167(4)(d) of the Constitution, would be justified in setting that amendment aside. Parliament, in theory, can also, with a mere two-thirds majority, oust the testing right of the courts over legislation, by amending sections 167(3) to (5), in terms of section 74(3) of the Constitution. Indeed, judicial review is not expressly contained as a value in section 1. But it is very conceivable that the Constitutional Court will hold such an amendment itself to be unconstitutional, as the revocation of judicial review renders the entirety of the Constitution redundant and unenforceable.[69] Indeed, the political branches of government having the constitutional ability to oust the jurisdiction of the courts to engage in judicial review ceased, with the promise never to be repeated again, with the demise of parliamentary sovereignty in 1993.[70]

Malherbe points out that it would be absurd, hypothetically, were provisions falling outside section 1's strict entrenchment to be regarded as part of the basic structure, but those falling within section 1's strict entrenchment not — precisely because of the section's strict entrenchment. He argues, it is submitted correctly, that the stricter a value is entrenched by the constitutional text itself, the greater the chance there should be of that value being regarded as part and parcel of the Constitution's basic structure.[71] Roederer writes:[72]

69 EFJ Malherbe 'Die wysiging van die Grondwet: Die oorspoel-imperatief van artikel 1' (1999) 2 *Journal of South African Law* 194.

70 See the Preamble to the Constitution, read with secs 165(2), 167(3)(b) and (4)(d). It is also arguable that judicial review is subsumed into sec 1(c) of the Constitution, which entrenches the supremacy of the Constitution and the rule of law. See M Van Staden *The Constitution and the rule of law: An introduction* (2019) 134-135.

71 Malherbe (n 69 above) 196.

72 C Roederer 'Founding provisions' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013 2nd edition) 13.3.

> Although many of [the values underlying the Constitution] appear in FC Chapter 1, several do not. Some are embodied in the Preamble and elsewhere in the Final Constitution. Others are not mentioned in the Final Constitution at all but are implicit in its structure.

Roederer explains his statement with reference to the doctrine of the separation of powers, which is nowhere explicitly stated in the Constitution, but is implicit in the Constitution's basic structure.[73] Section 1 is, however, a useful guide to start identifying the potential content of the Constitution's basic structure. Indeed, Malherbe writes that it could be argued that section 1 includes various constitutional principles by implication.[74]

For instance, section 1(a) proclaims that South Africa is founded, among other things, on the advancement of human rights and freedoms. From this fact one might deduce that an amendment to the Bill of Rights that reduces the scope or weakens the strength of an entrenched right might offend not only section 1 of the Constitution, but the Constitution's very structure, because such a reduction or weakening can never be construed as part of the enterprise of advancing human rights and freedoms.

Furthermore, section 1(c) proclaims the rule of law to be supreme alongside the Constitution. From this fact, too, one can make certain deductions. In *Van der Walt v Metcash*, for instance, Madala J in his minority judgment highlighted some of the principles of the rule of law.[75] Because the rule of law is supreme, it might be possible to argue that its principles permeate every other provision of the Constitution. In other words, no provision in the Constitution can be construed without regard to the rule of law, understood by scholars to refer to such principles as legal certainty, non-arbitrariness, and proportional and rational governance, etc. Undermining these implied principles of section 1(c), then, might amount to undermining the basic structure of the Constitution.

4.5.3 Anti-democratic nature of the basic structure doctrine

Another notable argument that is often raised against the application of the basic structure doctrine is that the doctrine is anti-democratic. This is because it recognises a judicial power to set aside decisions reached by Parliament — the body representative of the will of the people.[76] This argument, however, is beyond the scope of this paper

73 Roederer (n 72 above) 13.4.
74 Malherbe (n 69 above) 194.
75 *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC) paras 65-66.
76 Van Schalkwyk (n 61) 352. This argument will likely be particularly pronounced in South Africa, as any amendment to the Constitution will carry with it at least a two-thirds majority in the National Assembly, meaning it is more than a simple majority of the people's representatives who have chosen a particular course of action.

to address in any detail, as it is more concerned with political science and theories of democracy.

All that need be said on this matter is that it is the judiciary's traditional and constitutional function to interpret the law without fear, favour, or prejudice.[77] In other words, the judiciary must follow wherever the law might lead it. Without the power to set aside legislation that does not comply with the law — in this case, the law of the Constitution as it relates to the latter's basic structure — the promises of constitutional democracy would be unachievable.[78]

5 A challenge to the Amendment Bill?

5.1 Importance of property rights to the constitutional makeup

It is left to be decided, thus, whether property rights, and particularly the right to compensation upon expropriation, is, in fact, part of the basic structure of the Constitution. Responding to this question is far more difficult, not to mention more contentious, than determining whether the basic structure doctrine applies in South Africa. I venture only a cursory attempt at answering this complex question. The Amendment Bill represents the first time in South Africa's history that a provision in the Bill of Rights — section 25 in this case — is to be amended. This is the most opportune time for the basic structure doctrine, if it indeed applies, to be considered.

There is significant disagreement in constitutional and jurisprudential discourse on the place that private property rights occupy, or ought to occupy, in law.[79] For the purpose of this paper, however, it is sufficient to note that private property rights are, in fact, recognised and entrenched by the Constitution. As Badenhorst and Malherbe note:[80]

> The fact that section 25 was eventually included in the constitution is an indication that the negotiators intended to protect property rights more effectively than they are protected by normal private law and other mechanisms.

As a further indication of this entrenchment in the Constitution, one can look to other provisions in the Constitution besides section 25 that in and of themselves *assume* the existence of secure property rights.

77 Sec 165(2) of the Constitution.
78 See also Malherbe (n 69 above) 201.
79 Compare, for instance, AJ van der Walt 'Property rights, land rights, and environmental rights' in D Van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1995) 479, and RA Epstein 'The indivisibility of liberty under the Bill of Rights' (1992) 15 *Harvard Journal of Law and Public Policy* 37.
80 P Badenhorst and R Malherbe 'The constitutionality of the Mineral Development Draft Bill 2000 (part 2)' (2001) 4 *Journal of South African Law* 765.

The first such provision is contained in section 14(b), which provides that everyone has the right to privacy, including the right not to have their property searched. Underlying this provision, clearly, is the assumption that South Africans, individually, may own private property, and that their property is secure under their dominium. An argument can thus be made that the Amendment Bill might render the section 14(b) protection redundant, as, theoretically, it would allow government to — more easily — expropriate property and *then* perform the desired search, instead of going through the judicial motions to obtain a warrant. It is true that other considerations of due process will still limit government's powers in this regard, but by removing certain obstacles, like the right to compensation, Parliament would not exactly be engaged in strengthening or advancing human rights and freedoms.

Another provision that assumes property rights is section 205(3), which provides that it is the duty of the South African Police Service 'to protect and secure the inhabitants of the Republic and their property'. The Amendment Bill might undermine this constitutional mandate, as the words 'and their property' might be rendered less meaningful, in fact if not in law, if South Africans' security of tenure is eroded by allowing for non-compensatory expropriation. Finally, there are sections 228 and 229 which deal with provincial and municipal rates on property. Similar arguments to the above can be made here. All of the above provisions assume a protected character for private property in South Africa.

Other arguments for why property rights might be inherent values within the basic structure of the Constitution can certainly be made, with reference to the values of freedom, human rights and human dignity that ought to underlie the constitutional order, as contrasted with the violently anti-property rights regime of the apartheid era alluded to by Sachs.[81] In this respect, if one accepts that section 1 of the Constitution is, in fact, a surrogate or proxy for the basic structure doctrine, and that the Amendment Bill does offend values such as the advancement of human rights and freedoms, it would be necessary for the National Assembly to approve the Amendment Bill with a 75% majority. Malherbe refers to this as the so-called 'spillover effect', meaning that if there is a constitutional amendment to a provision *outside* section 1, but the amendment nonetheless infringes on a value contained in section 1, it amends section 1 by implication; with the consequence that the higher majority of 75% support in the National Assembly, rather than the lower two-thirds majority, becomes the necessary threshold for the validity of the amendment. If this is not the case, Malherbe argues, section 1 would be rendered constitutionally useless.[82]

81 Sachs (n 9 above).

5.2 Compensation and property rights

But the Amendment Bill does not, and does not purport to, abolish property rights. It simply allows for the possibility of compensation being 'nil' — meaning 'nothing' — and bestows this discretion in part on Parliament. In other words, a protection for property rights is being weakened. In this respect it is worth considering the best constitutional practice of South Africa's neighbours and other open and democratic societies around the world when it comes to compensation.

Article 82(2) of the Constitution of Mozambique provides that 'fair compensation' is a requirement when government expropriates property.[83] Section 19(2)(b)(i) of the Constitution of Eswatini requires that any compulsory taking of property must be accompanied by the 'prompt payment of fair and adequate compensation'.[84] Section 17(1)(c) of the Constitution of Lesotho requires law to make provision for 'prompt payment of full compensation' upon the compulsory acquisition of property.[85] Section 71(3)(c)(ii) of the Constitution of Zimbabwe requires law to make provision for the payment of 'fair and adequate compensation' where property is compulsorily acquired. Given the recent history of Zimbabwe, it is however no surprise that section 72(3)(a) of the constitution provides that no compensation is payable where agricultural land is expropriated, except for improvements.[86]

Section 8(1)(b)(i) of the Constitution of Botswana provides that law must make provision for the 'prompt payment of adequate compensation' upon compulsory acquisition.[87] Article 16(2) of the Constitution of Namibia provides that 'just compensation' must be paid upon expropriation, in accordance with law. The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use, without just compensation'.[88] Section 3(b)(i) of the Constitution of Kenya disallows the acquisition of property by government unless it 'is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that requires prompt payment in full, of just compensation to the person'.[89]

82 Malherbe (n 69 above) 196.
83 Article 82(2) of the Constitution of the Republic of Mozambique, 2004.
84 Section 19(2)(b)(i) of the Constitution of the Kingdom of Eswatini, 2005.
85 Section 17(1)(c) of the Constitution of the Kingdom of Lesotho, 1993.
86 Section 71(3)(c)(ii) of the Constitution of the Republic of Zimbabwe, 2013.
87 Section 8(1)(b)(i) of the Constitution of the Republic of Botswana, 1966.
88 Fifth Amendment to the Constitution of the United States of America, 1791.
89 Section 3(b)(i) of the Constitution of the Republic of Kenya, 2010.

It is clear that compensation is almost always married to expropriation around the world. In those countries that do not have constitutional guarantees of compensation, like Canada and the United Kingdom, the legislation that provides for expropriation itself guarantees compensation.[90] The reason for this is not elusive. Epstein, an American jurist with expertise in the law of eminent domain, writes that just compensation is necessary upon expropriation because it 'ensures that the individual, who has been forced by law to contribute property to some common improvement, is not wiped out in the process'. Crucially, this requirement 'assures that the state's option to compensation can never be exercised at zero price, but only at fair market value'. This, in turn, ensures that 'no one gets hurt, and any social improvements remain'.[91]

In other words, in cases like land reform, compensation ensures that the *bona fide* holder of the property prior to its seizure for land reform purposes, is not placed in a significantly inferior position after the seizure occurs. Exceptions might be made in cases of *mala fide* holders — those who knew the property they possessed was expropriated for ideological and racial purposes prior to 1994 — but as a general rule, holders must be presumed *bona fide*, and therefore entitled to have their dignity, livelihoods, and property rights respected.[92] Finally, the Amendment Bill bestows on Parliament an unrestrained discretion to determine, in legislation, under which circumstances the courts may find 'nil' compensation is payable upon expropriation. If we accept, as discussed above, that the principles of the rule of law as elaborated on by Madala J form part of the basic structure of the Constitution, an argument might be made that the discretion given to Parliament must be circumscribed rather than absolute. Without such a limitation of Parliament's discretion, the Amendment Bill might offend the basic structure of the Constitution and be liable for invalidation.

90 See for instance the Expropriation Act, 1985, of Canada, which contains a provision titled 'right to compensation'. Sec 25(1) of the Act obliges government to pay compensation to the 'owner or holder of an estate, interest or right in the land … to the extent of their expropriated interest or right'. In the United Kingdom, sec 7 of the Compulsory Purchase Act, 1965, provides that when compensation is determined for expropriated land, the value of the land and the damage done to the land in the course of the expropriation must be factored in.

91 RA Epstein 'The common law foundations of the Takings Clause: The disconnect between public and private law' (2014) 30 *Touro Law Review* 274.

92 See variously sec 35(3)(h) of the Constitution; WE Benjamin *A treatise on the law of bills of exchange, promissory notes and checks* (1889) 113; and M van Staden 'A comparative analysis of common-law presumptions of statutory interpretation' (2015) 26 *Stellenbosch Law Review* 558, 573.

5.3 Undermining constitutional democracy?

The basic structure doctrine has featured most prominently in cases where governments have attempted to amend constitutions to advance or entrench political interests.[93] In this respect, it is worth considering some of the context that surrounds the Amendment Bill, particularly the public participation process and the Bill's preamble. According to research by journalist Alicestine October for the Dullah Omar Institute, parliamentary processes often lack meaningful public participation, with Members of Parliament being dogmatic and hostile to those with opposing viewpoints. Parliament 'was overwhelmed and unprepared' for the number of written submissions received during the constitutional review committee's investigation on expropriation without compensation. The hearings at Parliament itself 'often descended to racial insults and nit-picking of issues and views not consistent with some MPs' perspectives'.[94] A possible indication of the fact that the majority of committee members entered the process with a foregone conclusion, and that they would not be dissuaded from their chosen course of action, are remarks by Stanford Maila, Co-Chair of the Committee, that: 'Though it is of no significance, 65% of the submissions were against amending the Constitution. … an overemphasis on numbers would be grossly out of order'.[95]

Finally, it might be worth considering the preamble to the Amendment Bill. The preamble justifies the amendment to the Constitution, among other things, on the grounds that there is a 'hunger for land amongst the dispossessed' and that 'the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern'; that section 25 'must be amended to make explicit that which is implicit'; that 'such an amendment will contribute to address the historic wrongs caused by the arbitrary dispossession of land'; and finally that:

> … such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.[96]

The obvious problem with these premises of the Amendment Bill is that none of them are supported by evidence. In 2015, the

93 Roznai (n 2 above) 59-78; See also Van Schalkwyk (n 61 above) 352.
94 A October 'Land expropriation shambles highlights how public participation at Parliament is not working' 29 November 2018 https://www.dailymaverick.co.za/article/2018-11-29-land-expropriation-shambles-highlights-how-public-participation-at-parliament-is-not-working/ (accessed 3 July 2020).
95 African News Agency 'Public submissions on land expropriation wasn't referendum — ANC' 4 December 2018 https://citizen.co.za/news/south-africa/2045568/public-submissions-on-land-expropriation-wasnt-referendum-anc/ (accessed 3 July 2020).
96 Preamble to the Amendment Bill.

Department of Planning, Monitoring, and Evaluation gave effect to a Cabinet decision by publishing a policy making it compulsory for all new interventions — which include other policies, regulations and legislation — to be accompanied by a socio-economic impact assessment.[97] These assessments must record all the reasonably foreseeable advantages and disadvantages of an intervention, and also make an attempt at foreseeing consequences that hereinto might have been unforeseen or unintended.[98] No socio-economic impact assessment was published, which is a good indication that none had been conducted on the supposed benefits, risks, and consequences of expropriation without compensation.

The public, therefore, have been led to believe that there is, in fact, a majoritarian demand for expropriation without compensation, that those who have been dispossessed of their property in the past are unhappy with existing restitutionary measures, that the Amendment Bill simply makes explicit what is already implicit,[99] that the amendment will, factually, address the imbalances of apartheid, and that the amendment will, factually, lead to empowerment. Consequently, this narrative has been the basis of the democratic discourse around the Amendment Bill.

This is not to say the preamble is incorrect, but simply that all it claims to be the case, remains unproven. Although precarious, it could, therefore, theoretically be argued — if it is successfully demonstrated in court — that the Amendment Bill undermines participatory constitutional democracy.[100] This is because of the arguably invalid premises underlying its preamble, as well as the flawed public participation process that did not adequately factor in opposing viewpoints.[101] Such an argument could then support a contention that the Amendment Bill brings about intolerable changes to the Constitution's democratic, participatory, basic structure, and ought to be set aside.

97 Department of Planning, Monitoring, and Evaluation 'Socio-Economic Impact Assessment System (SEIAS) Guidelines' (2015) 3 (accessed 9 July 2020) (available: https://www.dpme.gov.za/keyfocusareas/Socio Economic Impact Assessment System/SEIAS Documents/SEIAS guidelines.pdf). As executive policy cannot bind Parliament, the SEAIS Guidelines would bind departments and executive functionaries that intend to introduce draft legislation, but not private members' bills.

98 See M van Staden 'Have we been underemphasising public participation?' (2017) http://www.derebus.org.za/underemphasising-public-participation/ (accessed 3 July 2020).

99 See section 3.3 above.

100 As required by *inter alia* secs 195(1)(e) and (g) of the Constitution; See also *Minister of Home Affairs & Others v Scalarini Centre, Cape Town & Others* 2013 (6) SA 421 (SCA) para 72; *e.TV (Pty) Ltd & Others v Minister of Communications & Others* 2016 (6) SA 356 (SCA) para 45. Both of these cases are judicial pronouncements on the importance of public participation.

101 See T Corrigan 'Constitutional Committee fails public participation test on EWC — IRR' 13 December 2019 https://www.biznews.com/thought-leaders/2018/12/13/ewc-ong-difficult-path-lies-ahead (accessed 3 July 2020).

5.4 It depends on the circumstances of the case

None of this is to say that any amendment of section 25 or any other provision in the Bill of Rights is *ipso facto* inconsistent with the basic structure of the Constitution. Indeed, it must always be determined on a case by case basis. Had the Amendment Bill provided, for instance, for expropriation without compensation to only be possible under a small list of defined circumstances; say, abandoned or hopelessly indebted land, then it is submitted no basic structure-challenge could be mounted against it.[102] However, the Amendment Bill goes beyond that: It creates a general principle that property *may* be expropriated without compensation, and it bestows on Parliament an *unrestrained* discretion to determine, in ordinary legislation, in which circumstances the courts may find that no compensation is necessary. If the Amendment Bill is revised to replace the courts with the executive, it is submitted that the basic structure doctrine's viability as a challenge to the Amendment Bill would be significantly strengthened.[103]

6 Conclusion

It is submitted that the more important question during this constitutional event is whether property rights, and particularly the right to compensation that is ubiquitous around the world in cases of expropriation, forms part of the basic structure of the Constitution. On the other hand, questioning whether the doctrine itself is applicable would, in my view, be a waste of intellectual energy: It is trite that the courts, and particularly the Constitutional Court, are the custodians of the Constitution and the rule of law. The courts may not absolve themselves of this important function under the guise of 'deference' to the legislature or respecting the separation of powers. Indeed, section 165(2) of the Constitution puts it beyond doubt that the courts are 'subject only to the Constitution and the law'. The separation of powers principle assumes that each branch of government acts within the law and the constituted powers bestowed

102 Some such circumstances are included in the proposed Expropriation Bill, 2019. However, this bill is an ordinary piece of legislation, and can be amended by Parliament with a simple majority. It therefore does not provide the same level of protection for due process and property rights that a list in the Constitution itself would.

103 It is trite that no suggestions have been made to exclude judicial review entirely. However, the Amendment Bill, in the form in which it was first published, put the decision *per se* whether compensation is payable in the hands of the courts. Committee members have indicated the power to decide must be given to the executive. If this happens, the courts may still conduct rationality or administrative action reviews of the decision, but they themselves would not decide. It is submitted that judicial review is a significantly weaker guarantee of due process and the spirit and purport of the Bill of Rights, than judicial decision-making.

upon it by the Constitution. Where either the executive or the legislature go beyond those constituted powers, the courts would need to correct that violation.

It cannot be said with any degree of certainty whether the basic structure doctrine could successfully be employed to challenge the enactment of the draft Constitution Eighteenth Amendment Bill. However, it has been demonstrated in this paper that an argument can, in fact, be made for such a challenge, which the Constitutional Court would have to consider. Whether the Court will recognise the application of the doctrine and declare the amendment invalid, recognise its application but find that compensation for expropriation does not form part of the basic structure, or simply reject the application of the doctrine, remains to be seen. What is clear is that whatever is decided, such a precedent would dig deep into the nature of the Constitution and constitutional theory in South Africa, and our jurisprudence will be richer for it.

SPEAK NO LAW WITHOUT JUSTICE: EVALUATING THE RETROSPECTIVE FORCE OF DECLARATIONS OF UNCONSTITUTIONALITY WITH SPECIFIC REFERENCE TO *QWELANE V SAHRC & OTHERS* (686/2018) [2019] ZASCA 167*

*by MP Fourie** & Marno Swart****

1 Introduction

On 29 November 2019 the Supreme Court of Appeal handed down judgment in *Qwelane v SAHRC & Others*[1] (*Qwelane*) wherein the notorious hate speech prohibition, section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act[2] (PEPUDA), was declared unconstitutional and invalid.

This decision, predicted by many and applauded by some,[3] now awaits confirmation by the Constitutional Court. However, the focus of this article pertains not so much to the merits of the decision in

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1 (686/2018) [2019] ZASCA 167.
2 Act 4 of 2000, hereafter referred to as 'PEPUDA'.
3 See in this regard, *inter alia,* I Currie & J De Waal *The Bill of Rights Handbook* (6th edition, Juta, 2013) 360; P De Vos & W Freedman (eds) *South African Constitutional Law in Context* (Oxford University Press, 2014) 545; JC Botha & A Govindjee 'Hate Speech Provisions and Provisos: A Response to Marais and

Qwelane, but to the (possible) retrospective force of this judgment and more broadly to declarations of unconstitutionality and their retrospectivity in general. This article will evaluate whether or not it can be regarded as just and equitable to limit the retrospectivity of the *Qwelane* decision. This will be done by examining case law of a similar nature and by exploring the array of decisions taken under section 10 of PEPUDA. This inquiry will also consider the possibility of a special judicial arrangement to be made by the Constitutional Court, as well as some practical considerations that have to be regarded such as costs and the applicable procedural law. The arguments put forward are also applicable to future declarations of unconstitutionality.

The task of the courts is rarely easy and their orders often inconvenient; more so where the injustice was caused by the very instrument that was formulated to protect our fundamental rights — the law. Yet, the severity of the task at hand should never move our judiciary to speak law without justice. For this purpose the current article will firstly examine the facts of *Qwelane* and thereafter we will discuss the theoretical underpinning of declarations of unconstitutionality and constitutional changes in this regard. This will be followed by an analysis of case law in which the retrospectivity of declarations of unconstitutionality was significant, whereafter the nature and scope of decisions taken under section 10 of PEPUDA will be evaluated. The injustice of (potentially) limiting the retrospectivity of *Qwelane* will then be considered and finally, the article will conclude by looking at certain procedural matters.

2 The matter of *Qwelane v SAHRC & Others*

The appellant in this case, Mr John Dubula Qwelane, is a well-known journalist and was an activist against the white minority government that ruled South Africa prior to 1994.[4] More than a decade before the judgment in this matter was handed down by the Supreme Court of Appeal, on 20 July 2008, Mr Qwelane authored an article in the *Sunday Sun* titled 'Call me names — but gay is NOT okay …'. The offensive part stated:

> The real problem, as I see it, is the rapid degradation of values and traditions by the so-called liberal influences of nowadays; you regularly

Pretorius and Proposals for Reform' (2017) *Potchefstroomse Elektroniese Regsblad* 3; D Davis *South African Constitutional Law: The Bill of Rights* (LexisNexis, 2019) 11-11; ND Herd 'Should the Flag fit or must we Acquit?' (2019) *Pretoria Student Law Review* 151 and I Grobbelaar-du Plessis & K Malan 'Call me names, but does ugly make me hateful? The unjustifiable restriction on freedom of expression under the pretence of combatting hate speech' (2020) *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* accepted for publication, article on file with authors.

4 *Qwelane* (n 1 above) para 4.

> see men kissing other men in public, walking holding hands and shamelessly flaunting what are misleadingly termed their "lifestyle" and "sexual preferences". There could be a few things I could take issue with Zimbabwean President Robert Mugabe, but his unflinching and unapologetic stance over homosexuals is definitely not among those. Why, only this month — you'd better believe this — a man, in a homosexual relationship with another man, gave birth to a child! At least the so-called husband in that relationship hit the jackpot, making me wonder what it is these people have against the natural order of things. And by the way, please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views… Homosexuals and their backers will call me names, printable and not, for stating as I have always done my serious reservations about their "lifestyle and sexual preferences", but quite frankly I don't give a damn: wrong is wrong! I do pray that someday a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the constitution of this country, to excise those sections which give licence to men "marrying" other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to "marry" an animal, and argues that this constitution "allows" it?[5]

Together with the above article appeared a cartoon depicting a man on his knees next to a goat, standing in front of a priest to be married. The caption above the man and the goat reads: 'When human rights meet animal rights'. The text inside a speech balloon attaching to the priest reads: 'I now pronounce you, man and goat.' It was, however, common cause that the appellant was not the creator of the cartoon, nor was his approval obtained before it was published.[6]

The publication was met with huge public outcry, with expressions of outrage and disgust. Following the article, the press ombud received numerous complaints against the appellant and the *Sunday Sun*. The South African Human Rights Commission (SAHRC), who is the first respondent in this matter, received 350 complaints relating to the article and the cartoon.[7]

The press ombud found the newspaper to be in breach of the South African press code on three counts. Owing to the fact that the *Sunday Sun* published a poster proclaiming that Mr Qwelane had taken a beating and publishing a page of letters from the public condemning the column, the press ombud held that the newspaper had to some degree made amends. The press ombud ruled that the newspaper should 'complete the amends by publishing an appropriate apology' which was duly published.[8]

In terms of section 20(1)(f) of PEPUDA the SAHRC instituted proceedings against Mr Qwelane in the equality court, alleging that

5 As above.
6 *Qwelane* (n 1 above) para 5.
7 *Qwelane* (n 1 above) para 6.
8 *Qwelane* (n 1 above) para 8.

his article in the *Sunday Sun* contravened section 10(1) (read with sections 1, 12, and 11) of PEPUDA. In the trial court, a Magistrates' Court sitting as the equality court, the constitutionality of the legislation could not be tested and Mr Qwelane was ordered to pay damages to the SAHRC.[9] On application to the Gauteng Local Division of the High Court, before Moshidi J, the Court dismissed Qwelane's constitutional challenge and ruled that the mentioned provisions of PEPUDA were in fact not incompatible with section 16 of the Constitution of the Republic of South Africa, 1996 (the Constitution).[10]

On appeal a full bench of the Supreme Court of Appeal, through the penmanship of Navsa JA, unanimously overturned the decision of the High Court. The Court held that section 10 of PEPUDA could not on any reasonable interpretation be equated with section 16(2)(c) of the Constitution and indicated that it was clear that section 10 extends far beyond the limitation of freedom of expression allowed by section 16.[11]

The order of the Court afforded Parliament a period of eighteen months from the date of judgment (29 November 2019) to remedy the defect of section 10 of PEPUDA. Awaiting amendment(s) to section 10 of PEPUDA by Parliament, section 10 will now read very similar to section 16(2)(c) of the Constitution, the court ordering as follows:

> 10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.
>
> 10(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)*(n)* and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religion or sexual orientation, and that constitutes incitement to cause harm, as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.[12]

Interestingly, in paragraph 95 of the judgment, the Court states that '[t]he exercise of reading-in so as to provide an interim measure cannot, in terms of the fundamentals of the rule of law, have retrospective effect.'[13] This whilst, as will be indicated below, the Constitution itself creates a presumption in favour of retrospectivity.[14] In line with section 172(2)(a) of the Constitution the matter has now been referred to the Constitutional Court for

9 *SAHRC v Qwelane* EqC held at Johannesburg Magistrates' Court (44/2011).
10 *Qwelane* (n 1 above) para 34.
11 *Qwelane* (n 1 above) para 77.
12 *Qwelane* (n 1 above) para 96.
13 *Qwelane* (n 1 above) para 95.
14 As explained in section 3 of this paper.

confirmation of invalidity, which court date has been set for later in 2020.

As already indicated in the introduction above, the object of this article is not so much to evaluate the specific merits of the decision in *Qwelane*, especially in the light of the fact that the decision has not yet been confirmed by the Constitutional Court, but rather to examine the retrospective force of declarations of unconstitutionality in general. The facts of *Qwelane* are, however, tangible and highlight certain topics very well where such orders are to be considered and will thusly serve as a point of reference throughout this article.

3 Declarations of unconstitutionality

When the Interim Constitution[15] came into force on 27 April 1994, the South African judiciary received a complete overhaul. Not only did the South African legislative paradigm shift from one of parliamentary sovereignty to that of constitutional sovereignty, but a new court, the Constitutional Court (of which the status and jurisdiction has changed several times) came to be.[16] Together with this, all Superior Courts received a new competence, namely the authority to invalidate legislation on grounds of unconstitutionality.[17]

Accordingly, we will assess this novel competence by evaluating the position prior to the constitutional dispensation as well as comparing the provisions of the Interim Constitution with the Constitution, whilst taking into account the most relevant jurisprudence. This is done to illustrate the important shift in the wording of the respective constitutions, and highlight the problem with courts following the precedent set under the Interim Constitution.

3.1 Courts' competency to invalidate legislation

As many of the leading cases on declarations of unconstitutionality were decided on the Interim Constitution but the facts *in casu* were decided on the Constitution, both the provisions of the Interim Constitution and Constitution are applicable. In this regard section 98(5) of the Interim Constitution stated that:

> In the event of the Constitutional Court finding that any law or provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the

15 Act 200 of 1993, hereafter referred to as 'the Interim Constitution'.
16 De Vos & Freedman (n 3 above) 209.
17 Section 98(5) of the Interim Constitution and section 172(2)(a) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution'); De Vos & Freedman (n 3 above) 209.

> Constitutional Court may, in the interest of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.[18]

Similarly, the Constitution provides in section 2 that any law or conduct inconsistent with the Constitution is invalid. Furthermore section 172(2)(a) of the Constitution determines that:

> The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.[19]

Before the advent of our constitutional dispensation, South African courts could only invalidate legislation that had not properly been enacted according to the procedures of the relevant legislature, as well as subordinate legislation deemed to be vague or *ultra vires*.[20]

3.2 The doctrine of objective invalidity and retrospective force

The nature of a declaration of unconstitutionality must be considered, as it informs the reasoning underlying the retrospective power thereof. The South African democracy is inextricably founded on the values of constitutional supremacy and the rule of law.[21] In the case of *Ferreira v Levin*[22] the Constitutional Court held that all law is, objectively, either constitutionally valid or invalid. This, often referred to as the doctrine of objective invalidity, argues that from the inception of the legislation under scrutiny, or the inception of the Interim Constitution (whichever came last), legislation inconsistent with the Constitution has been invalid and without any legal force, to the extent of its inconsistency.[23] The timing of the court's adjudication on such invalidity is of no inherent consequence. The court's power lies in *confirming* the invalidity of law, and not in *invalidating* the law.

Differently put, 'old order legislation',[24] having been in existence at the enactment of the Interim Constitution on 27 April 1994,

18 Section 98(5) of the Interim Constitution.
19 Section 172(2)(a) of the Constitution.
20 CJ Botha *Statutory Interpretation: An introduction for students* (5th edition, Juta, 2012) 67.
21 See above discussion and section 2 of the Constitution.
22 1996 (2) SA 621 (CC) para 27.
23 De Vos & Freedman (n 3 above) 394.
24 In terms of Schedule 6 of the Constitution this term refers to all legislation enacted before the commencement of the Interim Constitution. Flowing from 'old order legislation' we will use 'new order legislation' to refer to all legislation enacted after the commencement of the Interim Constitution.

automatically became subject thereto on that date, and all such law inconsistent with the Interim Constitution was from this date objectively invalid, simply awaiting such confirmation by a competent court. As to new order legislation, the Constitution provides for many filters attempting to prevent the enactment of legislation that would not meet constitutional muster. [25] However, where such legislation is enacted the Court in *New National Party of South Africa v Government of South Africa*[26] stated at paragraph 22 that the unconstitutional provision is 'invalid to the extent of its inconsistency with the Constitution, the moment the provision is enacted'.

Both the Interim Constitution and the Constitution have provisions for the retrospective force of declarations of invalidity, however the wording of the sections differ to such an extent that it is worthy of some attention. Section 98(6) of the Interim Constitution reads as follows:

> Unless the Constitutional Court in the interests of justice and good government orders otherwise, and **save to the extent that it so orders** (*our emphasis*), the declaration of invalidity of a law or provision thereof —
>
> (a) existing at the commencement of this Constitution, **shall not invalidate** (*our emphasis*) anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
> (b) passed after such commencement, **shall invalidate** (*our emphasis*) everything done or permitted in terms thereof.

The Interim Constitution thus provided for two different scenarios. Firstly, where old order legislation is declared to be inconsistent with the Interim Constitution having no retrospective force, unless decided to the contrary by the Constitutional Court. Secondly, where new order legislation is found to be inconsistent with the Interim Constitution it will automatically have retrospective force, unless the contrary is decided.[27] The Constitution in section 172(1)(b)(i) states:

> When deciding a constitutional matter within its power a court may make an order that is just and equitable, including an order **limiting the retrospective effect** (*our emphasis*) of the declaration of invalidity.

In the Constitution no differentiation is drawn between old order legislation and new order legislation and the default position is one of retrospectivity unless ordered to the contrary.[28] Although not specifically required by the Constitution, but in line with the rules of statutory interpretation and the rule of law, courts seem to be

25 See in this regard section 79 of the Constitution as well as section 80, the abstract control by the National Assembly.
26 1999 (3) SA 191 (CC).
27 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 83-84.
28 Currie & De Waal (n 3 above) 189.

unwilling to grant declarations of invalidity with retrospective force from a date prior to the promulgation of the Interim Constitution in 1994.[29] This, as Botha argues, is because both the Interim Constitution and the Constitution had no retroactive force.[30]

The objective nature of a law's constitutional validity has important consequences regarding the retrospective power of such a declaration. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[31] Ackermann J stated that the authority granted to courts to limit the retrospective effect in section 172(1)(b)(i) read with the objective nature established in *Ferreira v Levin*,[32] implies an automatic retrospective effect of any declaration of invalidity, despite not being explicitly so stated.

It is pertinent to appreciate that any law found to be inconsistent with the Constitution has always been unconstitutional, and any action flowing from such law is, and has always been, unconstitutional and invalid.

4 Retrospectivity of declarations of unconstitutionality

The competency in respect of retrospectivity of declarations of invalidity granted to the court by the Interim Constitution and the Constitution, has been applied in many forms by the Constitutional Court. A discussion of case law wherein the retrospectivity of declarations of invalidity has been applied is thus apposite:

In the case of *S v Zuma*[33] the court declared section 217(1)(b)(ii) of the Criminal Procedure Act[34] unconstitutional, which placed the burden of proof on an accused person to prove that a confession made to a magistrate was not 'freely and voluntarily' given.[35] It was held to be inconsistent with section 25 of the Interim Constitution, which, *inter alia*, provided that an accused person shall have the right to be presumed innocent and to remain silent during trial, as well as the right not to incriminate himself or herself.[36] The court relied on section 98(6)(a) of the Interim Constitution and held that, generally, a declaration of invalidity of legislation in force at the

29 See in this regard, *inter alia*, *Ferreira* (n 18 above) para 26; *National Coalition* (n 23 above) para 84 and B Bekink *Principles of South African Constitutional Law* (2nd edition, LexisNexis, 2016) 117.
30 Botha (n 20 above) 62, for a detailed discussion of the difference between retroactivity and retrospectivity see pages 55 - 58.
31 *National Coalition* (n 27 above) para 84.
32 *Ferreira* (n 22 above).
33 1995 (2) SA 642 (CC).
34 Act 51 of 1977.
35 *Zuma* (n 33 above) para 3.
36 *Zuma* (n 33 above) para 22.

commencement of the Interim Constitution does not have retrospective effect unless specifically ordered so by the court (see paragraph 3.2 above).[37] In order to assess whether the Court should make such an order, the Court considered the possibility of the numerous appeals that would result from such retrospective force. The Court conceded that notice should be given to the possible injustice of previously accused persons, but declared that they could not 'repair all past injustice by a simple stroke of the pen'.[38] In the interest of the administration of justice, the Court gave the order retrospective force only as it pertained to cases in which no verdict had yet been reached.[39]

Heard together with *S v Zuma*, but decided separately, was the case of *S v Mhlungu*.[40] Herein the Court held that although a presumption against retrospectivity existed based on section 98(6)(a) of the of the Interim Constitution, such a presumption was not inflexible, and was not intended to protect against the invasion of rights. Here, in contrast with *Zuma*, the declaration of invalidity was given retrospective force from 27 April 1994.[41]

The presumption against retrospectivity in these cases was given concrete form in the case of *S v Bhulwana*.[42] Section 21(1)(a)(i) of the Drugs and Drug Trafficking Act,[43] which placed the burden of proof on any accused found in possession of a certain amount of marijuana to prove that they did not also deal in marijuana, was found to be inconsistent with section 25(3) of the Interim Constitution. When deciding on the retrospectivity of the order, O'Regan J stated that the interests of good government had to be weighed against the interests of individual litigants, as unqualified retrospectivity could lead to 'unnecessary dislocation and uncertainty in the criminal justice process'.[44] She emphatically stated that as a general principle no finalised cases should be affected by the court declaring legislation constitutionally invalid. Instead, O'Regan J gave the order retrospective force as far as it pertains to cases where an appeal or review is pending or where an appeal can still be timeously lodged.[45] It is thus implied that cases awaiting verdict would also not be bound by the provision that was declared unconstitutional, as in *S v Zuma*.

Of importance is that all three of the above cases were decided under the Interim Constitution and dealt with old order legislation, where section 98(6)(a) explicitly creates the presumption against

37 Bekink (n 29 above) 514.
38 *Zuma* (n 33 above) para 43.
39 As above.
40 1995 (7) BCLR 793 (CC).
41 *Mhlungu* (n 40 above) para 41.
42 1996 (1) SA 388 (CC).
43 Act 140 of 1992.
44 *Bhulwana* (n 42 above) para 32.
45 *Bhulwana* (n 42 above) para 34.

retrospectivity, at least with regard to legislation in place before the commencement of the Interim Constitution. When the Constitution was promulgated on 4 February 1997, the Constitution reversed this presumption in section 172(1)(b)(i). However, Woolman and Bishop argue that through the precedent set by O'Regan J, the presumption against retrospectivity lives on and has extensively been followed by the courts (see paragraph 6.1 below).[46]

A case especially relevant in this regard is *S v Ntsele,*[47] which also dealt with a reversed burden of proof concerning a provision of the Drugs and Drug Trafficking Act[48] being declared constitutionally invalid. The crucial difference was that *Ntsele* was decided under the Constitution and not the Interim Constitution as *Bhulwana* was. Nonetheless Kriegler J quoted the *Bhulwana* judgment extensively as setting out the relevant factors that need to be taken into account when deciding the retrospective effect of a declaration of invalidity.[49] This in spite of the fact that the constitutional texts are inherently different. The Constitution, as previously indicated, clearly has a different presumption than the Interim Constitution, namely a presumption in favour of retrospectivity instead of against retrospectivity, irrespective of the time of the legislation's inception.

The case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[50] concerned the common law crime and statutory crime of consensual sodomy being declared unconstitutional.[51] This case is vital for three important reasons. The first is that Ackermann J clearly set out the differences between the Interim Constitution's and the Constitution's tests for the retrospectivity of declarations of invalidity (as explained at paragraph 3.1 above).[52] Secondly the Court rationalised the *Ntsele* decision by stating that while the *Bhulwana* decision played an important weighing role in the test for retrospectivity, Kriegler J did not duplicate the test blindly, and that the tests for retrospectivity remained separate and markedly different under the Constitution and its predecessor. This was probably done, Ackermann J argues, because of the great similarity between the facts of the cases, both dealing with provisions in the same Act being declared unconstitutional.[53] The Court found that the Constitution, in section 172(1)(b)(i), is clear in its assumption of retrospectivity pending an order to the contrary.

46 See for example S Woolman & M Bishop *et al* (eds) *Constitutional Law of South Africa* (2nd edition, OS, 2014) 146.
47 1997 (11) BCLR 1543 (CC).
48 Act 140 of 1992.
49 *Ntsele* (n 47 above) para 14.
50 *National Coalition* (n 27 above).
51 *National Coalition* (n 27 above) para 1.
52 *National Coalition* (n 27 above) para 92.
53 *National Coalition* (n 27 above) para 93.

Thirdly Ackermann J explained how the facts of *National Coalition* differ from the cases preceding it. The decisions in *Bhulwana* and *Ntsele* could not be given retrospective effect without great disruptions to the administration of justice, and prejudicing a prosecution who *bona fide* relied on the law as it appeared at such a time. However, in the present case before the Court, it would be 'grossly unjust and inequitable' to allow men who participated in consensual and private sodomy to remain in prison for a crime declared unconstitutional.[54] A need for retrospectivity thus clearly existed. The Court continued and provided reasons for why unconditional retrospectivity was an unfit solution. The Court explained that certain persons convicted under the charge of sodomy could still, if the act had not been consensual, be found guilty of indecent assault. To allow unconditional retrospectivity could result in convictions being overturned without due judicial process being followed, and the release of persons from sentences who may still be guilty of rape, despite consensual sodomy as a crime being declared unconstitutional. The Court's solution to this delicate situation is to limit retrospective force to where a court of competent jurisdiction deems it 'just and equitable' to invalidate anything done by relying on the previous criminal definition of 'sodomy'.[55] It would be 'just and equitable' where the period for lodging an appeal has not yet expired. Where it has expired, a convicted person could bring an application for the condonation of such late lodging. This is to ensure the certainty of justice, through use of existing court structures.[56]

In *Centre for Child Law v Minister for Justice*[57] the constitutionality of the Criminal Law Amendment Act of 1997[58] (new order legislation) and the application of section 172(1)(b)(i) of the Constitution was argued. The Criminal Law Amendment Act had made minimum sentences compulsory in cases concerning accused persons who were 16 or 17 years of age where courts previously had had more leniency in sentencing 16 and 17 year olds. The Court held that the amendment went against the constitutional 'principles of imprisonment as a last resort and for the shortest appropriate period of time' in the case of minors.[59] As no distinction is made between old order and new order legislation in the Constitution, the Court's decision on the retrospectivity of the declaration was informed by section 172(1)(b)(i) of the Constitution, as in *National Coalition*. The applicants had specifically sought an order from the Court to assist minors who had previously been convicted under the provisions in

54 *National Coalition* (n 27 above) para 96.
55 De Vos & Freedman (n 3 above) 402.
56 *National Coalition* (n 27 above) para 97.
57 2009 (6) SA 632 (CC).
58 Act 105 of 1997.
59 *Centre for Child Law* (n 57 above) para 10.

question in having their cases reconsidered.[60] The Court followed the example set in *National Coalition* and allowed retrospective force to the order insofar as it affected cases where an appeal was pending, could still timeously be brought, or could be condoned by the court. In addition, the Court directed the Minister for Justice and Constitutional Development, and the Minister for Correctional Services, respondents one and two in the case, to find and provide the number of cases so affected.[61]

It therefore becomes clear that a court is not in an enviable position, having to strike a delicate balance in terms of section 172(1)(b)(i), weighing up the individual rights of litigants who were prejudiced by law found to be invalid, and the administration of justice and good governance in an open and democratic society.

5 The array of cases decided under section 10 of PEPUDA

To fully appreciate the gravitas of the decision in *Qwelane,* one must have a sense of the quantity of cases decided on section 10 of PEPUDA, as well as the nature and extent of the orders given thereupon. Chapter 4 of PEPUDA[62] does not so much create a new court or system of courts as it endows the existing courts with a new function, namely that of an equality court.[63] This, however, does not mean that all magistrates and judges may hear disputes arising under PEPUDA; rather the intention is to create hearings where specially trained or experienced staff deal with equality disputes.[64] The powers and functions of the equality court envisaged in PEPUDA are set out in section 21 and are wide-ranging.[65] Various remedies may be combined to ensure effective relief to a successful complainant.[66] Moreover the SAHRC has decided, negotiated and mediated many disputes in terms of the hate speech provision in PEPUDA and in terms of section 20(1)(f) of PEPUDA the SAHRC may institute proceedings in the equality court.

60 *Centre for Child Law* (n 57 above) para 72.
61 As above.
62 Sections 16 - 23.
63 Section 16(1)(a) of PEPUDA states that 'Every High Court is an equality court for the area of its jurisdiction' and section 16(1)(c) indicates that the Minister must, after consultation with the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act 32 of 1944) assign the functions of an equality court to certain existing Magistrates' Courts (as indicated in subsubsections (i) to (v)).
64 Currie & De Waal (n 3 above) 247.
65 Currie & De Waal (n 3 above) 248, reference was also made hereto in *Qwelane* (n 1 above) para 10.
66 As above.

The endeavour to discuss all of the cases flowing from the above would be a feat beyond the scope of our current analysis, especially in the light of the fact that many decisions based on section 10 were decided in the Magistrates' Courts and accordingly unreported. Yet a brief look at the eleven cases of the Magistrates' Courts that were readily available on the website of the Southern African Legal Institute under the decisions of the equality court, as well as seven of the most pertinent decisions of the reported High Court judgments, is illuminating.[67] Of the Magistrates' Court cases considered, only one failed[68] and ten were successful in proving hate speech.[69] Of the seven High Court cases considered, four failed[70] and three were successful.[71] The nature of the remedies granted by the courts to successful complainants litigating on section 10 of PEPUDA are relevant to our analysis, as these remedies speak to the (possible) necessity of granting the declaration of invalidity retrospective force.

The ordering of apologies[72] and the awarding of fairly minor damages[73] were the preferred orders made by the Equality Court.

67 Available at http://www.saflii.org/za/cases/ZAEQC/ (accessed 31 March 2020).

68 *Dube v Weston* EqC held at Durban Magistrates' Court (04/2006).

69 *Strydom v Black First Land First and Others* EqC held at Johannesburg Magistrates' Court (11/2018); *ANC v Sparrow* EqC held at Scottburgh Magistrates' Court (01/2016); *SAHRC v Qwelane* EqC held at Johannesburg Magistrates' Court (44/2011); *Sonke Gender Justice v Malema* EqC held at Johannesburg Magistrates' Court (02/2009); *Maqudulela v Gotz* EqC held at Port Shepstone Magistrates' Court (2009); *Smith v Mgoqi and Mgoqi* EqC held at Durban Magistrates' Court (60/2007); *Magubane v Smith* EqC held at Durban Magistrates' Court (01/2006); *Donaldo v Haripersad* EqC held at Durban Magistrates' Court (29/2005); *Cacadu v Van Zyl* EqC held at Victoria West Magistrates' Court (1/2005); *Khoza v Saeed and Essay* EqC held at Durban Magistrates' Court (07/2005); *Mdladla v Smith* EqC held at Durban Magistrates' Court (40/2005); *ENM v KR* EqC held at Durban Magistrates' Court (09/2004).

70 *Gordhan v Malema and Another* 2020 (1) SA 587 (GJ); *Rarayi and Others v Oak Valley Estates and Others* (EC13/2019) [2019] ZAEQC 7 (unreported judgment); *South African National Editors' Forum and Others v Economic Freedom Fighters and Another* (90405/18) [2019] ZAEQC 6 (unreported judgment) and *Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport & Others* (6) SA 589 (SCA).

71 *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* [2019] 4 All SA 237 (EqC); *Afriforum and Another v Malema and Others* 2011(6) SA 240 (EqC); *South African Human Rights Commission obo South Africa Jewish Board of Deputies v Masuku and Another* (EQ01/2012) [2012] ZAEQC.

72 Section 21(2)(j) of PEPUDA determines that an equality court may order an unconditional apology to remedy any of the violations catered for in the Act. Of the ten successful cases in the Magistrates' Court, only one was not ordered to apologise, and of the four successful matters in the High Court only one was ordered thereto.

73 PEPUDA in section 21 makes provision for two different monetary orders to remedy hate speech offences. The first is an order for the payment of any damages suffered in respect of any proven financial loss to the complainant for a wide variety of causes, including both patrimonial and non-patrimonial damages, and the second, more societal justice remedy, is the payment of an award to an appropriate body or organisation. In the cases where damages were awarded to the complainants, the smallest amount was awarded in 2005 at R 3 000, and the

The wide powers of the equality court referred to above also enables the court to interdict certain conduct,[74] where the breach of said interdict amounts to the common law crime of contempt of court *ex facie curiae*.[75] These interdicts were present in four of the cases considered,[76] the most notable (and notorious perhaps), the matters of *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others,*[77] also known as the 'Old flag' case, and *Afriforum and Another v Malema and Others,*[78] or the 'Shoot the Boer' case. It is, however, important to concede that the utterances of Mr Malema in the latter would probably still be regarded as hate speech under the revised wording by the Supreme Court of Appeal of section 10 of PEPUDA.[79] Furthermore, the interdict barring the gratuitous display of the previous South African flag was founded not only on the hate speech provision of section 10 of PEPUDA, but also on grounds of unfair discrimination on the basis of race in terms of section 7, as well as harassment based on section 11.[80] Thus the interdict prohibiting the gratuitous display of the old flag would still stand even if the declaration of *Qwelane* was given retrospective force.

A matter worth mentioning is the conciliation agreement between the SAHRC and Ms Gretha Wiid.[81] In this matter, although no reference was specifically made to section 10 of PEPUDA, the conduct of the respondent was labelled as hate speech.[82] The respondent undertook, *inter alia*, to re-write the problematic areas of her book as well as not to raise the subject of homosexuality in her workshops.[83] In other matters[84] the SAHRC has decided cases based on section 10 of PEPUDA as well as the interpretations thereof by the equality court, and questioning the range of these decisions is perhaps a legitimate probe, but not the subject of discussion for current purposes.

largest sum in 2009 at R 20 000. Where damages were awarded to organisations, the amounts are significantly larger with the smallest sum being R 50 000 awarded in 2010, and the largest R 150 000 in 2016. Even Mr Qwelane was ordered in the trial court to pay damages to the SAHRC for his aggrieved statements in the amount of R 100 000 in 2011.

74 Section 21(2)(f) of PEPUDA.

75 CR Snyman *Strafreg* (6th edition, LexisNexis, 2012) 346.

76 *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* [2019] 4 All SA 237 (EqC); *Sparrow* (n 69 above); *Afriforum and Another v Malema and Others* 2011(6) SA 240 (EqC) and *Mdladla* (n 69 above).

77 *Nelson Mandela Foundation* (n 76 above).

78 *Malema* (n 76 above).

79 *Qwelane* (n 1 above) para 96.

80 *Nelson Mandela Foundation* (n 76 above) para 205; For an informative discussion on the merits of the case see the article by Herd (n 3 above) 130 – 154.

81 *South African Human Rights Commission v Wiid* Ref No: GP/1718/0052/BJ/KAC.

82 *Wiid* (n 81 above) para 5.2.3.

83 *Wiid* (n 81 above) para 6.1.4.

84 See for example 'Findings of the South African Human Rights Commission Regarding Certain Statements made by Mr Julius Malema and Another Member of the Economic Freedom Fighters, March 2019'.

The issue already being alluded to is incidences where certain words, statements, utterances, or songs may have been interdicted on section 10 of PEPUDA, which was *post facto* found to be unconstitutional. This could create the undesired consequence of being found guilty of contempt of court if the interdicted phrase were uttered. Thus, a person could receive a criminal sanction stemming from an order based on a constitutionally invalid legal instrument.

It might be possible to argue that the previous defendants in these matters could also have argued that the section of PEPUDA is unconstitutional, as Mr Qwelane did. However, in terms of section 170 of the Constitution, Magistrates' Courts do not have the jurisdiction to inquire into or rule on the constitutionality of legislation. Although these defendants could theoretically have the matters transferred to the High Court, the cost implication thereof is significant and often insurmountable.[85] Furthermore, had this reasoning been followed in other matters of declarations of unconstitutionality, males convicted and imprisoned for consensual sexual acts of sodomy would have had to remain imprisoned, and child offenders would have had to continue serving significantly longer sentences, despite the Constitutional Court declaring the impugned legislation unconstitutional, in *National Coalition*[86] and *Centre for Child Law,*[87] respectively.

6 The injustice of limiting the retrospectivity in *Qwelane*

Despite the Constitution creating a presumption in favour of retrospectivity, our courts seem reluctant to allow decisions to have retrospective force, as this proves disruptive to the administration of justice. In matters concerning freedom of expression, having a clear and tangible verdict on which speech is acceptable and which is not is paramount.

6.1 A previous reluctancy to grant decisions retrospective force

In *Bhulwana,* the court held that:

> It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants […] the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all

85 C Theophilopoulos *et al Fundamental Principles of Civil Procedure* (3rd edition, LexisNexis, 2015) 62.
86 *National Coalition* (n 27 above).
87 *Centre for Child Law* (n 57 above).

> people who are in the same situation as the litigants […] [but the court should] be circumspect in exercising [its power in this regard].[88]

This passage by O'Regan J has become the default approach of all the Superior Courts. In several cases the retrospectivity has been limited only to matters which are still *sub judice*.[89] This in spite of the fact that the Constitution, which only came into operation after *Bhulwana* and with a significantly different wording than the Interim Constitution, clearly intended for retrospectivity to occur *ex lege* with the court awarded the authority only to limit the extent thereof, where such a limitation would be just and equitable.

The Constitutional Court in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*[90] went so far as to say that there is a 'general rule favouring prospectivity[91] and quoted the earlier decision of itself in *Mistry v Interim Medical and Dental Council of South Africa*.[92] The latter is a matter decided under the Interim Constitution, whereas the former is a more recent decision under the Constitution. The Court acknowledges the difference between the two constitutions at paragraph 51, but then states that 'the general considerations that underlay it apply with equal force in this case.'[93] In this regard the authors can respectfully not agree with the notion that the text of the Constitution did not meaningfully change the legal position from the text of the Interim Constitution. The wording of the Constitution differs significantly, with a clear intention of granting declarations of unconstitutionality retrospective force automatically. Perhaps because the assumption is (or ought to be) that new order legislation would meet constitutional muster. Woolman argues that the continued application of the *Bhulwana*-test fails to appreciate the important differences in wording between the Constitution and its predecessor.[94] The presumption that is created runs counter to the constitutional presumption in favour of retrospectivity and 'privileges non-interference in legal decisions above other concerns that go to justice and eq[95]uity'.

South Africa is a constitutional democracy founded on the principles of constitutional supremacy, the rule of law, the principle of legality, legal certainty and enforceable fundamental rights. [96] The

88 *Bhulwana* (n 42 above) para 32.
89 See for example *Ntsele* (n 47 above) para 14; *National Coalition* (n 27 above) para 94; *Engelbrecht v RAF & Another* 2007 (6) SA 96 (CC) para 45; *S v Mello* 1998 (3) SA 712 (CC) para 13; *Scagell & Others v Attorney-General, Western Cape & Others* 1997 (2) SA 368 (CC) para 35-36; *S v Mbata* 1996 (2) SA 464 (CC) para 31; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 4.
90 2014 (3) SA 106 (CC).
91 *Estate Agency Affairs Board* (n 90 above) para 51 referring to para 44 of *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).
92 *Mistry* (n 91 above).
93 *Estate Agency Affairs Board* (n 90 above) para 51.
94 Woolman (n 46 above) 146.
95 As above.

authors would opine that it should be more difficult to disallow parties whose rights were infringed upon by unconstitutional legislation, to correct that infringement, and more so when the correction is constitutionally entrenched. The Constitution grants courts the authority to limit the retrospectivity only where it would be 'just and equitable'.[97] This is certainly a broader and more flexible provision than the 'interests of justice and good government'[98] constraint of the Interim Constitution. The latter, according to Ackermann J, only making out a part of the former.[99]

6.2 The importance of retrospectivity in *Qwelane*

It is important now to contextualise *Qwelane* within the development of our constitutional dispensation and how the matter distinguishes itself from the examples laid out above in paragraph 4. Firstly, the hate speech provision of section 10 of PEPUDA was promulgated and declared unconstitutional under the Constitution, and not its predecessor. PEPUDA is thus new order legislation and section 10 was accordingly objectively unconstitutional from the moment of its inception.[100] Yet it took almost 20 years for the constitutional validity of it to be successfully questioned, with an abundance of controversial matters being decided thereupon.

As the assessment of case law under paragraph 5 above indicates, albeit somewhat limited in quantity, the monetary penalties faced by those contravening the hate speech provision were not exceptionally large.[101] Moreover, the larger sums were usually paid to independent third parties, usually non-profit organisations labouring for some or other cause aiming to achieve social justice, and not the complainants.[102] An argument could rightly be made that having these organisations repay the sums awarded to them, could neither be just nor equitable.

Having said that, one must appreciate that a verdict of hate speech bears the grunt of a highly stigmatised and heavy social burden, with respondents being judicially labelled racists, homophobes, sexists, etcetera, and wherein their thoughts, utterances, or ideas are declared legally unacceptable by the state. Whether or not the overturning of such a verdict could truly remedy the prejudice faced by the respondents wrongly found to have

96 Bekink (n 29 above) 117.
97 Section 172(1)(b)(i) of the Constitution, as explained at section 3.2 of this paper.
98 Section 98(6) of the Interim Constitution, as explained at section 3.2 of this paper.
99 *National Coalition* (n 27 above) para 94.
100 As explained at section 3.2 of this paper as well as in Currie & De Waal (n 3 above) 400.
101 See section 5.2 of this paper.
102 As above.

committed hate speech is uncertain, but the law surely ought to strive toward correcting a wrong, especially where the law itself is to blame. Likewise, there can be no legality in prosecuting a person for being in contempt of court by violating a court order founded on legislation that was later held to be unconstitutional and declared invalid. Thus, matters where respondents have been interdicted from expressing certain views surely ought to be overturned in light of the declaration of invalidity.

It is furthermore important to acknowledge that hate speech as a legal issue can never be separated from the fundamental right to freedom of expression, entrenched in section 16 of the Constitution. The importance of being allowed to express one's views freely is a right that can never be overemphasised. Dworkin argues that 'freedom of speech is valuable, not just in virtue of the consequence it has, but because it is an essential and "constitutive" feature of a just political society that government treat all its adults […] as responsible moral agents'.[103] Also, the Constitutional Court has acknowledged the importance of this right in several judgments[104] and stated in *South African National Defence Force Union v Minister of Defence*[105] that:

> Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.[106]

In *S v Mamabolo*[107] Kriegler J contextualised the importance of this right in context of our young democracy by stating:

> Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open marketplace of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed.[108]

These judgments, and several others, underpin the undeniable importance of freedom of expression in our post-apartheid South African society today. Notwithstanding the above, freedom of

103 Currie & De Waal (n 3 above) 339 as referenced to R Dworkin *Freedom's Law* (1996) 200.
104 See in this regard also *Banana v Attorney-General* 1999 (1) BCLR 27 (ZS) at 31F and *Kauesa v Minister of Home Affairs* 1995 (11) BCLR 1540 (NmS) at 1554C.
105 1999 (4) SA 469 (CC).
106 *SANDF Union* (n 105 above) para 7.
107 2001 (3) SA 409 (CC).
108 *Mamabolo* (n 107 above) para 37.

expression can never be absolute. In fact, a prominent addition to the Constitution, distinguishing itself from the Interim Constitution, is an internal limitation of the right to freedom of expression.[109] The reality is that many forms of expression might not be palatable, but ought to be permissible in a democratic society. At paragraph 2 *in casu* the Court quoted Mokokoma Mokhonoana in stating that freedom of speech gives us the right to offend others, whereas freedom of thought gives them the choice whether or not to be offended.[110] Yet, certain expression cannot be allowed and must be sanctionable. This remains true even for matters decided upon the impugned section 10 of PEPUDA. In this judgment the Supreme Court of Appeal has little more than asserted that the regulation of speech in terms of section 10 is impermissible. Where the line ought to be drawn between permissible and impermissible speech, now needs to be re-evaluated by the legislature and the courts, within the altered ambit of a different hate speech provision.

It is therefore important, we would argue, that the decision of *Qwelane* be granted retrospective force as it would be unjust and inequitable if such application is not granted to the matter. Previous complainants and respondents should be afforded the opportunity to have their cases re-evaluated in line with the now corrected stance regarding hate speech. In doing this, much needed clarity will be given to the true scope of freedom of expression, as it pertains to hate speech in South Africa.

7 A possible special arrangement and matters pertaining thereto

The Supreme Court of Appeal has been empowered in full by section 172(2) of the Constitution to declare legislation unconstitutional and invalid, subject to confirmation by the Constitutional Court, which it did in *Qwelane*.

In the case of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd*[111] the Constitutional Court confirmed a declaration of unconstitutionality by the High Court, but further explained that section 172 of the Constitution also grants it the authority to alter the High Court's order on retrospectivity.[112] It thus follows that the Constitutional Court in *Qwelane* will have the power not only to confirm or deny the declaration of invalidity, but if they confirm the order will have the authority to limit the retrospective force thereof.

109 Namely section 16(2) of the Constitution of the Republic of South Africa, 1996 see Currie & De Waal (n 3 above) 338.
110 *Qwelane* (n 1 above) para 2.
111 *Estate Agency Affairs Board* (n 90 above).
112 *Estate Agency Affairs Board* (n 90 above) paras 45 – 51.

In addition to the substantive factors, referred to in paragraph 5 above, that should be considered when deciding the retrospective effect of an order, it is apt to also examine certain practical questions pertaining to such a decision. This includes the question of whether an appeal or review process is more appropriate, as well as the awarding of costs where such a decision is taken upon appeal or review.

7.1 To appeal or review, that is the question

Two possibilities exist in procedural law for a person who seeks to have their case re-examined after a verdict has been handed down, namely the process of appeal or that of review. An appeal can be described as 'a rehearing on the merits but limited to the evidence or information on which the decision was given. The only question is then whether that decision is right or wrong'.[113] A review on the other hand is the process by which a decision by the lower court is scrutinised by a High Court to detect any possible gross procedural irregularity or illegality.[114]

In casu, it is clear that we are dealing with an issue that does not neatly fit into either process. It is difficult to argue that the incorrect decision was reached on the merits of a particular case, where the very ground for unlawfulness or wrongfulness has now vanished, and in the light of the doctrine of objective invalidity never truly existed. Moreover, it is difficult to argue gross procedural irregularity as the complainant and presiding officer relied on the legislation in good faith.

The Constitutional Court has in the past dealt with the issue without much deliberation. The basic formula set out by O'Regan J in *Bhulwana*, and subsequently extensively followed in limitations of retrospectivity, is to allow retrospectivity for cases where an appeal or review is still pending, as well as where an appeal could still (timeously) be lodged.[115] The court has alluded to the possibility of aggrieved parties applying to have their late application for an appeal condoned.[116] There thus seemingly exists an assumption that the correct procedure would be one of appeal, probably as the merits of the case would have to be reconsidered, but that a review could be used for the same purpose, where a review of a case is pending. Perhaps problematic is the fact that both matters taken onto appeal or review have to be heard by a higher-ranking judicial body. Litigating in a court ranking higher than the court *a quo* always means

113 DR Harms *Law of South Africa Volume 4: Civil Procedure Superior Courts* (2019) 771.
114 Harms (n 113 above) 711.
115 *Bhulwana* (n 42 above) para 34.
116 *National Coalition* (n 27 above) para 97.

higher legal costs and often requires more manpower by way of judicial officers (be it by way of a full bench in the High Court or a bench consisting of at least three Supreme Court of Appeal judges). This whilst there is no true inherent reason why the trial court is unfit to hear the matter having simply relied on the legislation in a *bona fide* manner.

We therefore opine that the Constitutional Court, having an inherent power in terms of section 173 of the Constitution, could make a special judicial arrangement empowering the respective trial courts to re-evaluate the decisions taken by it in the light of the declaration of unconstitutionality and the wording substituted, where applicable. This, we would argue, would be the most cost effective and least disruptive manner to address the unfortunate predicament caused by the order of retrospectivity, whilst still allowing prejudiced parties the right to a fair and equitable justice system. Whether this offends deeper theoretical procedural law is an interesting question, but one that falls outside the scope of the current enquiry. Ours is primarily concerned with the extent of, and reasons for retrospectivity.

7.2 Costs

The Constitutional Court has in the past declined to formulate any comprehensive rules in respect of cost orders in constitutional litigation.[117] Although the possible appeal against past decisions is not technically constitutional litigation, the legal foundation of such an appeal lies within the declaration of constitutional invalidity. To apply the general rule that costs should follow suit could very possibly result in parties who *bona fide* relied on the law as it stood at the time being unduly prejudiced, as the law on which they relied is no longer constitutionally valid.[118] A legal system where persons could be discouraged from litigating on the law as it stands simply because such law may in future be declared unconstitutional, compromises the very legal certainty on which it was founded. On the other hand, it cannot be just and equitable to have a person ruled to have committed hate speech on constitutionally invalid legislation, be ordered to bear the costs of remedying that injustice.

The most equitable solution, although imperfect, would probably be to have each party carry their own costs, as no party can truly be faulted for the error of the legislature. This suggestion, however, pertains only to matters where the aggrieved party is successful in having a verdict of hate speech overturned. Where a court finds the

117 *Ex Parte Gauteng Legislature: In re Gauteng School Education Bill 1995* 1996 (3) SA 165 (CC).
118 *National Coalition* (n 27 above) para 95.

utterance of a person to be hate speech even under the revised definition thereof, such a matter should surely be decided on its own merit and not by a rule-of-thumb.

8 Conclusion

More than two decades has passed since the enactment of the Interim Constitution, yet South African society is still grappling with the bounds and legal structures of our democracy. This process of continued review and revision of the basic laws and values of our land, and their implications, should not be seen as a symptom of instability, but rather of a living system of law, reflective of its democratic creators — the people.

Critical in this process, which we have largely entrusted onto our judiciary, is the ability to recognise that justice is not confined to the present and the future, but stretches even into the past. This principle is made tangible by the retrospective power the Constitution grants declarations of constitutional invalidity. Thus, our examination of the *Qwelane* judgment is done not only because of its singular importance, but also because it lucidly illustrates the broader challenge the court faces with regard to retrospectivity of declarations of invalidity.

Through an examination of case law it has been seen that, though our Constitution favours declarations of unconstitutionality having retrospective force, our courts have routinely and extensively limited the retrospectivity, following a precedent set under the Interim Constitution. This continued flawed application is a worrying trend. We hope that the Constitutional Court, provided the declaration is confirmed, will depart from this problematic habit of the judiciary. We have made suggestions as to how the Constitutional Court may limit the practical problems when deciding the retrospectivity of the declaration of unconstitutionality. At the very least, the unconstitutionality should have retrospective force in cases where certain expressions have been interdicted, in light of the constitutional importance of the right to freedom of expression.

Courts have a heavy burden and a powerful mandate. The administration of justice is rarely without hindrance, yet this should not deter courts from ensuring that justice remains uncompromised.

A CRITIQUE OF THE DETERMINATION OF A COMPOSITE SUPPLY FOR VAT PURPOSES IN SOUTH AFRICA: LESSONS FROM SELECTED COUNTRIES

*by Mzwandile Ngidi**

1 Introduction

To determine, for the purposes of the Value-added Tax Act ('VAT Act')[1] whether a supply consists of a composite supply or several distinct supplies is paramount. Amongst other reasons, it impacts on how the entire supply should be treated under the VAT Act (i.e. standard, exempt or zero-rated). The treatment of the supply not only affects the applicable tax rate, but it also impacts the value-added tax ('VAT') claimable or payable when acquiring or selling the supplies. The incorrect treatment of the supply puts the taxpayer at risk since the tax authority may raise reassessments and impose penalties. Therefore, where a supply entails the supply of goods or services or both, it is essential for a vendor to correctly treat the transaction to avoid these repercussions.

The aim of this paper is to illustrate that the South African (SA) approach to determining whether a separate part is made is not in line

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1 Act 89 of 1991.

with the international approach. The domestic approach appears to ignore essential elements that are widely accepted when deciding if a supply is single or composite. This paper argues that this approach may in some cases yield unfavourable results in term of VAT.

To provide more clarity and avoid the unintended unfavourable results that may ensue, the European VAT ('EU VAT'), Canadian, Australian and New Zealand systems, collectively referred to as 'CAN countries', in addition to the legal precedent the tax authorities have provided as supplementary guidelines directing a taxpayer on how to treat a supply with several supplies.

The purpose of this paper is to illustrate South African shortcomings in determining whether a separate part of the composite supply is made or not. The comparative analysis is conducted with an aim of gaining the lessons so to improve the South African position.

The discourse limits itself to a composite supply supplied by one vendor to the consumer as oppose two or more vendors making a supply to a consumer. Furthermore, this article does not deal with two or more supplies made to various recipients.

The paper is structured as follows; Part I, briefly discusses the meaning of the composite supply; Part II, provides the South African approach to composite supply; Part III, outlines how the EU and CAN jurisdiction's VAT systems treat the composite supply; Part IV, points out the shortcomings of the South African approach to the treatment of the composite supply; Part V, outlines the recommendations may be implemented so to align the South African approach with the international perspective.

2 The meaning of the composite supply concept

The term 'composite supply' is not defined in the South African VAT Act. Neither the EU VAT nor CAN countries define the term. In the CAN countries, the concept of composite supply is also known as the 'incidental, combined, mixed or composite'[2] supply. Although the composite supply is not defined, the relevant indirect tax acts make provisions which specifically deals with the composite supply transactions.

Generally, the concept of composite supply originates from the supply that entails more than one items which are supplied together for VAT purposes. In such a supply, generally one supply is the taxable

2 E.g. sec 138 of the Canadian Excise Tax Act 1985 (thereafter 'ETA') refers to as 'incidental' supply, sec 139 refers to 'mixed' supply, sec 168(8)(*a*) refers to as 'combined supply', while the Australian GST Ruling 2001/8 refers to as 'mixed or composite' supply.

component and the other part is a non-taxable component.[3] The component that constitutes the taxable supply will be taxed according to the applicable VAT rate (i.e. standard, zero or exempt rate). The part that forms the non-taxable supply will be excluded from VAT.

Notably, each jurisdiction has a unique legislative context. However, there appears to be consensus on the meaning of the composite supply concept. The understanding is that the composite supply is a supply with more than one component partially taxable and partly non-taxable[4]. Due to the absence of the universally and internationally accepted composite supply definition, for this paper the composite supply refers to a supply that consists of two or more taxable or non-taxable supplies whether of goods or services or both supplied together by the same registered vendor to a recipient. The supply will potentially attract VAT at a different rate such as the standard, zero and exempt rates.

The discussion that follows set out the South African treatment of the composite supply.

3 South African treatment of the composite supply

3.1 Legislative framework

Section 10(22) of the VAT Act deals with a composite supply that is partly taxable and partly non-taxable. Here, the portion attributable to a taxable supply attracts VAT. Thus, this section requires that the part representing the taxable and non-taxable supply be treated accordingly.

Section 8(15) of the VAT Act deals with a supply that is partly taxable at standard rate and partly taxable at zero-rate. The section deems each part in the composite supply to be a separate supply. The standard rate applies to the portion representing the standard rate supply while zero-rate applies to the part attributable thereto.

3 *Virgin Atlantic Airways Ltd v Customs and Excise Commissioners, Canadian Airlines International Ltd v Customs & Excise Commissioners* [1995] BVC 93. In this matter, the air-carrier company sold aeroplane tickets to its customers. The services involved were amongst other services, the aeroplane ticket (which was zero-rated) as well as a limousine service (which was standard rated).

4 *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685; *College of Estate Management v Customs and Excise Commissioners* [2005] BVC 704; *Commissioner of Taxation v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20; O Henkow 'Defining the tax object in composite supplies in European VAT' (2013) 2 *World Journal of VAT/GST Law* 189.

Considering the abovementioned, the supply that is made under the relevant provision is deemed to be a separate supply even though the supplies emanate from a combined supply.

3.2 Case law

3.2.1 ABC (Pty) Ltd v Commissioner for the South African Revenue Service[5]

In this case, a taxpayer (a South African resident) supplied a non-resident with advertising and promotional services. As per the service contract, the taxpayer had an exclusive right (i.e. trademarks, intellectual property, equipment, packages and labels) to market, distribute and promote the non-resident's alcoholic products in SA. As part of the agreement the taxpayer integrated and synergetic marketing strategy, the taxpayer supplied the promotional products to the customers to enhance the services,[6] which were distributed and consumed in South Africa. The entire service was a zero-rated supply as it made up an exported service that is zero-rated for VAT purposes. The tax commissioner argued that the promotional products made up a separate supply that must be taxable at the standard rate. The question was whether the taxpayer supplied a composite service or two independent supplies (i.e. advertising and promotional services and promotional goods).

The Tax Court held that this made up two separate supplies since the promotional goods were distributed and consumed in the Republic, whereas the advertising and promotional service was zero-rated as exported services supplied to the non-resident, not present in the country at the time the services were rendered, and not related to movables in the Republic.[7]

3.2.2 Diageo South Africa (Pty) v Commissioner for South African Revenue Service[8]

On appeal, the Supreme Court of Appeal had to determine if the court *a quo* reached a correct decision in that the promotional goods were taxable as a separate supply. The SCA confirmed that the promotional

5 *ABC (Pty) Ltd v Commissioner for the South African Revenue Service* 2018 JOL 40512 TC (thereafter '*ABC v CSRS*').

6 The term promotional products refer to goods given away free of charge by the SA resident in the Republic as the means to build and maintain the brand image of the non-resident. These products include alcoholic products for sampling and branded giveaways items such as glasses, optics, towels, beer mats, lanyards, keyrings, T-shirts, aprons, caps and the like.

7 Sec 11(2)(l) of the VAT Act.

8 *Diageo South Africa (Pty) v Commissioner for South African Revenue Services* 2020 JDR 0555 (SCA) 34 (thereafter '*Diageo SA*').

products were taxable as the independent supply since the promotional goods were not exported and thus consumed in SA.[9]

The importance of the *Diageo SA* decision is that the SCA set out the jurisdictional requirements must be present before section 8(15) applies. According to the court, these requirements dictate that a separate part of the combined supply will be made for VAT purposes. The section 8(15) jurisdictional requirements are as follows;[10]

a) there must be a 'single supply' of two or more types of goods or services or a combination of goods and services;
b) one consideration must be payable as only a single supply is made; and
c) the circumstances must be such that if the supply of the goods or services or both had been charged for separately, part of the supply would have been standard rated, and part zero-rated.

The SCA found that all these requirements were present in the *Diageo SA* case. As a result, the promotional goods constituted a separate part which ought to be taxable. To determine if a separate part is supplied the question is whether a part of the composite supply falls within the ambit of the deeming provisions in section 8(15).[11] If the part of the composite supply fall within section 8(15), the next step is to apply the jurisdictional requirements. The SCA in *Commissioner South African Revenue Service v British Airways Plc* enunciated the significance of this section as follows;

> The section does no more than apportion the rate at which the vendor is required to pay the tax that is levied by section 7 when the vendor has supplied different goods or services as a composite whole.[12]

Section 7(1) of the VAT Act, known as the imposition clause, states that VAT is levied on the supply of goods, services and importation. As per imposition clause, it follows that each supply is deemed as a separate part.

As per *Diageo SA* and *ABC v CSARS*, the enquiry is whether a taxpayer has supplied a separate part, even though combined into a single supply. It appears therefore that South Africa does not concern itself with the question of the composite supply per se. The question seems to be whether the part of the combined supply is a separate

9 *Diageo SA* (n 8 above) para 21.
10 *Diageo SA* (n 8 above) para 13.
11 *Diageo SA* (n 8 above) para 17.
12 *Commissioner South African Revenue Service v British Airways plc* 2005 4 SA 231 (SCA) para 13. The taxpayer is an international carrier service provider who supplies its customers with international transport service ('ITS'). The ITS is taxable as a zero-rated service under VAT. ITS included amongst other charges, the airport services, that the British Airways (thereafter 'BA') obtained from the Airport Company Ltd (thereafter 'AC Ltd') (i.e. the airport operator). SARS argued that the airport service formed a separated supply, thus taxable individually. SARS submitted that the airport service needs to be deemed as a separate supply from the ITS. The question was whether the airport service made up a separate part that must be treated as a separate supply under sec 8(15).

supply or not. In terms of section 8(15), the part of the composite supply will be regarded as a sperate part if all the jurisdictional requirements are met.

In *Taxpayer v Commissioner for South African Revenue Services*,[13] the taxpayer supplied a money-transfer service within the Africa continent. The taxpayer supplied both the taxable and exempt supplies. The court accepted that the taxpayer supplied parts there were identifiable. The VAT was payable on the part that was attributable to the taxable supply in terms of section 10(22). As for section 10(22), it appears that there will be a separate part where the taxpayer makes a supply that comprises both the taxable and non-taxable part. The VAT is payable on the consideration attributable to the taxable supply.

Clearly the above envisages that SA considers the supply of each part as a separate independent part. Whether parts are supplied together in the combined supply seems irrelevant. It can be argued that SA follows the distinct element approach when imposing the VAT on the supply.

The next section examines the treatment of the composite supply that is adopted by the EU VAT as well as CAN countries.

4 The international approach to the treatment of composite supply

This part of the paper shows how other jurisdictions determine if a separate part is made or not.

4.1 The EU VAT system

The EU VAT system has a long-standing history on the treatment of the composite supply transactions. Dating back to 1979 in the decision of *Nederlandse Spoorwegen v Staatssecretaris van Financiën*,[14] the question before the European Court of Justice ('ECJ') was whether the 'cash-on-delivery price' charged by the carrier to deliver the customers' goods to the consignee constituted an ancillary fee to the transport service price collected on the delivery of goods. In this case, the cash-on-delivery fee was taxable under VAT whereas the transport service price was exempted from VAT. The court developed and applied the principle of *accessorium sequitur*. The *accessorium sequitur* principle states that an accessory thing does not lead to but

13 *Taxpayer v Commissioner for South African Revenue Services* 2018 2 All SA 478 (WCC) 81 SATC 79.

14 *Nederlandse Spoorwegen v Staatssecretaris van Financiën* 126/78 [1979] ECR 02041.

rather accedes to the principal thing to which it is accessory.[15] The ECJ found that the cash-on-delivery fee constituted an ancillary or integral to a single price of the transport service price. According to the court, the cash-on-delivery fee was an accessory charge to the principal service which was a transport service fee. As a result, the cash-on-delivery acquired the tax consequences of the principal service that was exempted under VAT. Since then, this principle has been applied constantly in cases dealing with the composite supply in the EU VAT system.[16]

The point of departure in every matter that deals with supply for VAT purposes, whether it is a single or composite supply, is article 2(1) of the Sixth VAT Council Directive, 2006/112/EC ('Sixth VAT Directive').[17] Article 2(1) allows the imposition of VAT on the supply of goods or service or importation payable by the vendor. The ECJ has held that following this provision every supply is deemed to be supplied independently,[18] unless the exceptions as discussed in *Card Protection Plan Limited v Customs & Excise Commissioner* exist.[19]

In the *CPP Ltd* case the ECJ was confronted with the question of whether the supply consists the several parts constituted a composite supply or several separate supplies. *In casu*, a taxpayer supplied its customers with an insurance policy cover. The insurance policy covered the customers against the financial loss, inconvenience resulting from the loss or theft of their cards or loss of items such as car keys, passports and insurance documents (exempt supply) as well as maintenance of the holders' card registration number (taxable supply). Since 1983 the tax authorities have been exempting the entire insurance policy supply under VAT. Notably, in 1990 the revenue authority applied a standard rate in the supply of insurance policies. The tax authority argued that CPP Ltd supplied two distinct supplies that ought to be apportioned by applying a standard rate on the taxable supply portion.

Consequently, the ECJ had to decide if CPP Ltd supplied a composite supply or two distinct supplies. In deciding if a taxpayer supplies a composite or several separate supplies, the court set out the test as follows;[20]

15 Henkow (n 3 above) 196.
16 Henkow (n 3 above) 189.
17 *Airtours Holidays Transport Limited v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 21 paras 13, 19.
18 *Purple Parking Ltd, Airparks Services Ltd v the Commissioner of Her Majesty's Revenue Service* (ECJ 2012) (Case C-117/11) paras 26–31, (thereafter '*Purple Parking* case'); *Field Fisher Waterhouse LLP v Revenue & Customs Commissioners* (Case C-392/11) [2012] BVC 292 paras 14–19.
19 *Card Protection Plan Limited v Customs & Excise Commissioner* [2001] 2 All ER 149 (HL) (thereafter '*CPP* case').
20 *CPP* (n 19 above) par 29.

a) every supply of service must normally be regarded as distinct and independent;
b) however, a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system;
c) essential features of the supply must be considered in determining if the vendor supplies a typical customer with several distinct principal services or with a single service.

Kapteyn J further indicated the circumstances which will most likely point towards a composite supply. The composite supply will be when one or more goods or services serve as a principal component, by contrast, while the other goods or services constitute ancillary components which will share the tax consequences of the principal component.[21] It was held that an ancillary component is that part of the composite supply that does not constitute an aim itself rather enhance the enjoyment of the principal component.[22] In this circumstance, a single price paid by the customers is not a decisive factor. However, in some circumstances, there may be multiple components that are supplied for a single price, in such cases, that single price may point to toward the composite supply. In other cases, a single price may be paid for the supply that consists of multiple parts. However, if the facts dictate that the customer intended to pay for more than one component then it will be necessary to identify that part of the supply which will remain exempt.[23]

The ECJ has applied the *CPP* test in several subsequent cases when dealing with the composite supply. For instance, in the *Purple Parking* case.[24] In this matter, the taxpayer supplied its customers with the 'off-airport park-and-ride' service where the customers could park their cars at a safe parking operation and board a bus or mini-bus provided by Purple Parking to the airport. The question before the court was whether the supply of the 'off-airport park-and-ride' service and transport service to and from the airport constituted a composite service or two distinct services.

The court applied the *CPP Ltd* criteria and concluded that the two services formed a composite service for VAT purposes. Amongst other reasons, the court noted that the taxpayer charged a single price for the parking service. More so, the taxpayer only charged the customers based on the duration or length of the time parked (some customers could park their cars for several days on average),[25] as opposed to the

21 *CPP* (n 19 above) par 30.
22 As above.
23 See the apportionment method in this regard, ECJ, Joined Cases C-308/96 & C-94/97, *Commissioners of Customs and Excise v T.P. Madgett, R.M. and the Howden Court Hotel* [1998] ECR I-6229 paras 45-46.
24 *Purple Parking* (n 18 above); *Město Žamberk v Finanční Ředitelství v Hradci Králové* ECJ, Case C-18/12, [2013] ECR I-0000.
25 *Purple Parking* (n 18 above) paras 33-36.

number of customers transported to and from the airport.[26] According to the court, additional transport service to and from the airport was an inevitable supply as the parking was located at a distance from the parking operation, accordingly, the transport service was just a completion of the supply of the principal parking service.[27] Additionally, in *Finanzamt Burgdorf v Manfred Bog, CinemaxX Entertainment GmbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst, Lothar Lohmeyer v Finanzamt Minden and Fleischerei Nier GmbH & Co. KG v Finanzamt Detmold*,[28] the ECJ had to decide if the supply of beverages (taxable supply) supplied together with the food or meals prepared for an immediate consumption which was taxed at a reduced rate constituted a composite supply or two independent supplies.[29] The court applied the *CPP Ltd* test to conclude that from the consumer's standpoint, this supply constituted a composite supply.

It is also noted that these principles have also been adopted by the EU Member States when face the question of composite supply. The former EU Member State, the United Kingdom ('UK') courts have applied the test consistently in several cases. For example, in the *British Airways* case,[30] the Court of Appeal found that the provision of in-flight catering was, in substance and reality, an integral part of the supply of air transportation.[31]

Therefore, the above proves that this test forms a foundation of the EU VAT system in determining if a supply consists of a composite supply or several individual supplies. In what follows is the demonstration of how the CAN countries treat the composite supply.

4.2 Canadian system

The composite supply provisions are provided in three sections of the Canadian VAT Act. These sections are 138, 139 and 168 which will now be discussed.

26 *Purple Parking* (n 18 above) para 34.
27 *Purple Parking* (n 18 above) paras 12-22.
28 *Finanzamt Burgdorf v Manfred Bog; CinemaxX Entertainment GmbH & Co. KG v Finanzamt Hamburg-Barmbek-Uhlenhorst; Lothar Lohmeyer v Finanzamt Minden and Fleischerei Nier GmbH & Co. KG v Finanzamt Detmold* (Joined Cases C-497/09, C-499/09, C-501/09 & C-502/09) [2011] ECR I-01457 (thereafter '*Bog & Others*').
29 *Bog & Others* (n 28 above) paras 23-24.
30 *British Airways plc v Customs and Excise Commissioners* (1990) 5 BVC 97 (thereafter '*British Airways*').
31 *British Airways* (n 30 above) paras 102-103 notes that '…Catering facilities are part of, and integral to the transportation in that degree of comfort which British Airways have decided is commercially appropriate and indeed necessary to attract passengers'.

4.2.1 Incidental supply

The first provision is the 'incidental supplies' provision, in section 138 of the Canadian Excise Tax Act. This section states that:

> A particular property or service is supplied together with any other property or service for a single consideration, and it *may reasonably* be regarded that the provision of the other property or service is incidental to the provision of the particular property or service, the other property or service shall be deemed to form part of the particular property or service so supplied.[32]

It appears from this section that, an ancillary component is part of the principal supply if the facts dictate that such part must be regarded as an incidental thereto. Therefore, according to this provision, due diligence must be given to the entire facts so to determine if one part constitutes an incidental part of the principal supply. It follows, thus, thereafter it is established that there is an incidental part as well as the principal part, the tax consequences of the principal part are imputed to the incidental part.[33] Put differently, the accessory component acquires the tax implications of the principal component.

The difference between section 138 and section 8(15) is essential because the Canadian law appears to follow a factual analysis in identifying if the taxpayer supplies the ancillary and principal part. It is unnecessary to deem each component as a separate supply if the circumstances in which the composite supply raise point towards the supply of the incidental and principal part. The South African approach appears to follow only the legal context under the distinct element approach. This is arguably irrespective of whether the parts appear as an ancillary or principal part each part is deemed a separate supply. As per South African perspective, the ancillary and principal part acquires the VAT consequences under appropriate rates.

4.2.2 Mixed supply: Financial service

The second composite supply provision is found under section 139 of ETA. Section 139 specifically deals with the financial properties or services supplied together by the same VAT vendor to the same recipient. According to the section, where more than one financial service is supplied together with one or more other services that are not financial services for a single consideration, in the ordinary course of financial service, each supply would be greater than 50% of the total of all amounts if supplied separately, the supply shall be deemed to be a single supply of financial service or property.

32 Excise Tax Act R.S.C.,1985, c. E-15 (thereafter 'ETA').
33 *CPP* (n 19 above) para 30.

This situation may be seen when a financial institution obtains the goods or services from the third party to supply such goods or services as part of a single supply of financial goods or services.

Illustration: A

Big Investment Bank (Pty) Ltd ('BIB') renders financial advice to the directors of the Big Money Co ('BM Co.') concerning the financial investment in the local financial and foreign financial market. Since the BIB does not have an experience of the foreign trade, BIB acquires the foreign investment advice from the Millionaire Investment Bank (Pty) Ltd (MIB Ltd) that is experienced on the foreign financial market.

Assume that the local or foreign investment service is greater than 50 per cent of the total amount generated by BIB if it is supplied individually. Although it appears that the BIB has applied two financial investment services to the directors of MB Co, however, according to section 139 the supply is deemed to be a single composite supply of financial service.

4.2.3 Combination supply

Section 168 of ETA which states that;

> where a supply of any combination of service, personal property or real property […] is made and the consideration for each element is *not separately identified*,
>
> (i) where the *value* of a particular element can reasonably be regarded as exceeding the value of each of the other elements, the supply of all of the elements shall be deemed to be supply only of the particular element; and
>
> (ii) in any other cases, the supply of all the elements shall be deemed
>
> (a)where one of the elements is real property, to be supply only of real property; and
>
> (b)in any other case, to be a supply only of service.

This provision appears to apply generally to the composite supply that does not fall under section 138 or section 139 of ETA. The operative words from section 168 seem to be that 'element is not separately identified' as well as the value of either supply can 'reasonably' be inferred to exceed the value of the other component that is involved. The point of departure is whether it is factually impossible to identify which part constitutes the ancillary or principal part. If it is impossible, therefore it must be considered if it can be determined on the reasonable basis that the value of either the goods or services is greater than the other part that is supplied with. Therefore, the component appears to have a lesser value will accede to the component that has a greater value.

Also, the Canadian tax authority supplemented the above existing rules with further guidelines that the taxpayers may use to ascertain if the taxpayer has supplied one supply or two supplies.

4.2.4 General Guidelines to Composite Supply

The Canada Revenue Agency ('CRA') issued the GST/HST Policy Statement as a guide to the treatment of composite supply.[34] Herein CRA maintains that its position in determining if a supply consists of a composite supply or several distinct elements is based on the analysis of each fact. The policy sets out the three steps approach to be applied in ascertaining if the supply is single or more than one supply. As per the policy, the guiding principles are as follows;[35]

a) every supply should be regarded as distinct and independent.
b) a supply that is a single supply from an economic point of view should not be artificially split.
c) there is a single supply where one or more elements constitute the supply and remaining elements serve only to enhance the supply.

It is also noted that these principles are also relevant where it is already determined that in fact, there are separate supplies for a single consideration, but one supply is incidental to the other.[36] The CRA explicitly provides that due to a variety of circumstances in both traditional and electronic commerce which affect the determination, it is difficult to provide guidance that covers every eventuality. Accordingly, this justifies the Canadian approach to the treatment of a composite supply.

4.3 Australian System

On 1 July 2010, the Australian Taxation Office ('ATO') has issued an amended tax ruling, the GSTR 2001/8,[37] which deals with a supply that includes a taxable and non-taxable part under A New Tax System (Goods and Services Tax) Act.[38] Relevant in this discussion is section

34 Canada Revenue Agency 'Single and Multiple Supplies: GST/HST Policy Statement P-077R2' 26 April 2004 https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/p-077r2/p-077r2-single-multiple-supplies.html (accessed 23 March 2020).

35 See also FCA, *Hidden Valley Golf Resort Assn. v R.* [2000] G.S.T.C. 42 paras 20, 28-29; *TCC, Camp Mini-Yo-We Inc. v R.* [2006] G.S.T.C. 154 paras 6-11; *TCC, Great Canadian Trophy Hunts Inc. v R.* [2005] TCC 612 para 25.

36 R Butcher *Value-added taxation in Canada: GST, HST and QST* (2009) 57; S Conese 'The EU VAT treatment of composite supplies: evolution trends and critical points' LLM thesis, *University of Tilburg* (2017) 58.

37 Goods and Services Tax Ruling 2001/8: 'Goods & services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts' (thereafter 'GSTR 2001/8') https://www.ato.gov.au/law/view/document?docid=GST/GSTR20018A3/NAT/ATO/00001&PiT=20120411000001 (accessed 29 October 2019).

38 A New Tax System (Goods and Services Tax) Act 1999, (thereafter 'GST Act').

9-75 that deals with the value of entirely or fully taxable supplies, and section 9-80, that deals with the supplies which are partly taxable and partly either GST- free or input taxed.[39] Amongst other purposes, the GSTR 2001/8 describes the characteristics of a supply that contains the taxable and non-taxable parts. It refers to such a supply as a 'mixed supply'. The ruling also describes the features of a supply that appears to have more than one part but essentially it is a supply of a single thing. This type of supply is referred to as a 'composite supply'.[40]

4.3.1 Mixed supply

Unlike Canada, the question asked in Australia is whether the composite supply should be regarded as a mixed or composite supply. In terms of the GSTR 2001/8, a mixed supply is a supply that must be separated or unbundled as it contains separately identifiable taxable and non-taxable parts that need to be individually recognised.[41] According to this definition, the supply with the 'separately identifiable' taxable and non-taxable items will be regarded as a mixed supply for VAT purposes. As a result, the tax consequence of the mixed supply is that each part will be treated as supplied individually from each other. It follows that different tax rates will apply.

4.3.2 Composite supply

Composite supply is defined as the supply that contains a dominant part and often includes something integral, ancillary or incidental to that part.[42] Under the composite supply, consideration is given to the most dominant component. The ancillary parts acquire the tax consequences of the most dominant component. As such the whole supply will be treated as a single supply, even though the supply entails more than the component.[43] If the principal part is a taxable supply the entire supply including the incidental parts will also be taxable. Conversely, if the principal part is non-taxable, then the whole supply will be non-taxable including the incidental parts.

39 Input-taxed refers to the supply that is not subject to output tax, but the taxpayer is also not entitled to an input tax credit for tax on any acquisitions to the extent that the acquisition relates to the making of input-taxed supplies. this is equivalent to the exempt supplies in SA. The rendering of the financial supplies is an example of the input taxed or exempt supplies.
40 GSTR 2001/8 (n 37 above) 2 paras 1-6.
41 GSTR 2001/8 (n 37 above) 4 para 16.
42 GSTR 2001/8 (n 37 above) 5 para 17.
43 As above.

4.3.3 Case Law

Australian courts have in several cases called to determine whether the supply with several supplies constitute a mixed or composite supply. For instance, in *Saga Holidays v Commissioner of Taxation*[44] the court had to determine if a portion of the accommodation element that related to accommodation provided in Australia and sold as a package constituted a mixed or composite supply. Stone J concentrated on the 'social and economic reality' of the supply. It was found that the accommodation component that included several parts in addition to the right to occupy a room was a single supply which was properly characterised as a supply of real property, consequently, it was a composite supply.[45] In *Commissioner of Taxation v Luxottica Retail Australia Pty Ltd*[46] the Federal Court of Australia ('FCA') had to determine if the supply comprised the prescription lenses fitted into frames for glasses and sunglasses (i.e. the frame and a pair of lenses) was a mixed or composite supply.

The FCA noted that the supply entailed the sunglasses and lenses prescription may be purchased as separate items. However, a common-sense approach that was comfortable with the 'practical business tax'[47] outcome requires that the supply be to regard a composite supply of the pair of spectacles.[48] Lastly, in *Re Food Supplier and Commissioner of Taxation (Food Supplier)*,[49] the court found that the supply of the promotional items supplied together with food such a jar of coffee (main item) and a mug (promotional item) constituted a mixed supply, as such each part was taxable individually.

The Australian system appears to focus on the element of the supply that is combined or disaggregated to alter the nature of the supply from taxable or non-taxable or vice visa.[50] Since Australia considers the GST a 'practical business tax', the suppliers must determine if they have supplied one supply or two supplies.[51] The ATO also maintains that the distinction between the mixed or composite

44 *Saga Holidays v Commissioner of Taxation* 2006 ATC 4841 (thereafter '*Saga Holidays*').
45 *Saga Holidays* (n 44 above) para 43.
46 *Commissioner of Taxation v Luxottica Retail Australia Pty Ltd* [2011] FCAFC 20 (thereafter '*Luxottica*').
47 The GST is classified as a 'practical business tax' since according to several cases, the supplier as opposed to the consumer the collection of the tax. The tax is collected by the suppliers at the various stage of the supply chain. Last, in exceptional cases, where it is practicable to 'quarantine business' from the ultimate tax burden, the supplier bears the full burden of the GST. See generally *HP Mercantile Pty Ltd V Commissioner of Taxation* (2005) 143 FCR 553 para 66; *Sterling Guardian Pty Ltd v Commissioner of Taxation* (2005) 220 ALR 550 para 39; *Saga Holidays* para 30
48 *Luxottica* (n 46 above) paras 13-15.
49 *Re Food Supplier and Commissioner of Taxation* (2007) 66 ATR 938.
50 A Schenk & V Thuronyi *et al Value added tax: a comparative approach* (2015) 129.

supply is a question of 'fact and degree'. As such, in deciding whether a supply comprises more than one part, the common-sense approach must be adopted.[52]

4.4 New Zealand system

The New Zealand VAT system appears to be well developed in that it has a unique codified procedure to the treatment of the composite supply. The relevant provision is section 5(14) of the New Zealand Goods and Services Act states as follows:

> If a supply charged with a tax under section 8 [standard rate], but sections 11, 11A, 11B, 11AB, 11B or 11C [zero rates] requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being separate supply.[53]

As per section 5(14) of the GST Act, where a supply consists more than one supply, one taxable as the standard rate supply and the other as a zero-rate supply, each part is treated as a separate supply. As such, the standard and zero rates apply to different parts accordingly.

Also, the Inland Revenue ('IR') has provided an Interpretation Statement that is detailed on the 'single supply' or 'multiple supplies'.[54] According to IS 18/04, first is to consider if the so-called 'boundary issues' arise or not when dealing with the composite supply. Boundary issues primarily arise where some supplies in the composite supply are subject to VAT at different GST rates (i.e. exempt, standard, zero rates or not subject to GST).[55] Boundary issues mean that it must first consider if the entire composite supply falls within the specific deeming provisions of the GST Act. Essentially, if the supply falls within one of these specific provisions, irrespective of how the composite supply may be treated under the ordinary principles, the specific provision overrides ordinary rules.[56] The specific provisions are as follows;[57]

a) Section 5(14B) — for rights embedded in shares;
b) Section 5(20) — for warranty services provided to a non-resident warrantor; and
c) Section 5(15) — for supplies including residences.

51 GSTR 2001/8 (n 37 above) 41 para 110; *ACP Publishing Pty Ltd v Commissioner of Taxation* [2005] FCAFC para 2.
52 GSTR 2001/8 (n 37 above) 6 para 20.
53 New Zealand Goods and Services Act 141 of 1985 (thereafter 'GST Act').
54 Inland Revenue, Interpretation Statement: IS 18/04 — *Good and Services Tax— Single Supply or Multiple Supplies* (2018), (thereafter 'IS 18/04') https://www.classic.ird.gov.nz/technical-tax/interpretations/2018/interpretations-2018-is1804.html (accessed 25 March 2020).
55 IS 18/04 (n 54 above) 5 para 14.
56 IS 18/04 (n 54 above) 6 para 20.

If the composite supply does not fall within one of the specific inclusions, then the inquiry continues to consider the main test of the single or multiple supplies. In New Zealand, the High Court judgment in *Auckland Institute of Studies Ltd v CIR*[58] sets out the principles that must apply in determining whether there are single or multiple supplies. According to these principles the IR issued the supplementary guidelines that are based on these principles. As the Canadian guidelines, the Inland Revenue guidelines mirror the *CPP Ltd* criteria as discussed in the following paragraphs.

4.4.1 The true and substantial nature test

The essential question is what is the true and substantial nature of what is supplied to the recipient? The Revenue Commissioner considers the phrase 'the true and substantial nature' as the consideration given to the consumer perspective. In other words, consideration must be given to what the recipient paid for, and the supply that has received for the consideration paid. This consideration is what is provided to the typical consumer based on the objective assessment of all the facts.[59]

4.4.2 The relationship between the elements supplied test

In this regard, the question is the relationship between the elements supplied. The relationship refers to whether a part that is supplied is an integral part of, ancillary or incidental to the essential elements of the entire supply. This is largely depending on the facts of each case.[60] In the *Auckland Institute case* the court had to determine if the supply of the pre-arrival services were ancillary or incidental to

57 IS 18/04 (n 54 above) paras 19-20. Sec 5(14B) requires that if part of a supply of a share in the supply of a right to receive supplies of goods and services that are not exempt supplies, the supply of the right is treated as being a separate supply; sec (20) also requires the supply of goods and services to the final consumer to be treated as the service of remedying a defect to the non-resident warrantor. Sec 5(15) further deems a supply that includes a principal place of residence to be a separate supply from the supply of any other property included in the supply. Sec 5(15) applies to a dwelling that has been rented out by the vendor exclusively for accommodation for at least the preceding five years. For example, when a farm (which includes the farmer's house and its surrounding curtilage) is sold, sec 5(15) provides that the vendor's supply of the farmer's house and curtilage is a separate supply from the supply of the remainder of the farm. The GST treatment of each supply is determined separately.

58 *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685 (thereafter '*Auckland Institute*').

59 *Wilson & Horton Ltd v C of IR* (1995) 17 NZTC 12,325; *British Airways plc Customs & Excise Commissioner* [1990] STC 643 (CA);*Auckland Institute* (n 58 above) paras 44-45.

60 *Customs and Excise Commissioners v United Biscuits (UK) Limited* [1992] STC 325; *Customs and Excise Commissioners v Wellington Private Hospital Ltd* [1997] STC 445 (EWCA) 462; *College of Estate Management v Customs & Excise Commissioners* [2005] UKHL 62.

the principal supply of tuition services? Hansen J ruled that the pre-arrival services constituted the ancillary parts to the supply of tuition services. The court held that this was so because the pre-arrival services facilitated the students undertaking a course of study.[61]

College of Estate Management v Customs and Excise Commissioners stated that the mere fact that the supply of the printed materials could not be described as an ancillary did not mean that it was to be regarded as a separate supply for tax purposes.[62] The question was whether, for tax purposes, these were to be treated as separate supplies or merely as elements in some over-arching supply.[63] *Metropolitan International School v Revenue and Customs Commissioners* succinctly explained the significance of the ancillary.[64] The court held that an element, not an end itself ranked as an ancillary, and ancillary component generally contributed to the better enjoyment of the principal element.[65] It follows that an ancillary part does not constitute a supply itself. As such, it acquires the tax consequences of a principal part.

4.4.3 Whether it reasonable to supply the element separately test

Is it reasonable to serve the element into separate supplies? According to the IS 18/04 this test requires taking an overall view without over-zealous dissection and consider the essential (or dominant) purpose of the supply.[66] As pointed out in the *CPP* case, similarly in the *Auckland Institute* case, the court stated that the supply that comprises a composite service from an economic point of view should not be artificially split.[67]

In this regard, the court cited the judgment *Customs and Excise Commissioners v British Telecommunication plc* in that:

> …it is clear that the fact that one 'package price' is charged without separate charge for individual supplies being specified does not prevent there being two separate supplies for VAT purposes. In my opinion, the fact that separate charges are identified in a contract or on an invoice does not on a consideration of all the circumstances necessarily prevent the various supplies from constituting one composite transaction nor

61 *Auckland Institute* (n 60 above) paras 52; 59.
62 *College of Estate Management v Customs and Excise Commissioners* [2005] UKHL 62 (thereafter '*College of Estate Management*').
63 *College of Estate Management* (n 62 above) para 12.
64 *Metropolitan International School v Revenue and Customs Commissioners* [2015] UKFTT 517 (TC) (thereafter '*Metropolitan International School*').
65 *Metropolitan International School* (n 64 above) para 66.
66 IS 18/04 (n 54 above) 13 para 55.
67 *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9 140 (HC) 144.

> does it prevent one supply from being ancillary to another supply which for VAT purposes is the dominant supply…[68]

It follows, therefore, that at the end of the inquiry if it is found that the supply is multiple supplies, different VAT rates apply to each part in question. Conversely, if the supply is found to be composite supply, the IS 18/04 states that the last step is to consider if the entire composite supply falls within the below sections;[69]

a) Some supplies of land must be zero-rated—section 11(1) (mb) of the GST Act
b) Other supplies may be partly zero-rated—section 11, 11A, 11AB and 11B.[70]

If these partly zero-rated sections do not apply, the GST treatment of that supply will follow the dominant element of the supply. Importantly, if no dominant component is identifiable, in other words, the composite is made up of several equally essential elements, the GST treatment will be determined by the overall characteristics of a composite supply.[71]

Lastly, the IS 18/04 states that where multiple components are supplied with potentially different VAT treatments, a supplier must determine if a single or composite supply is made. In other words, the supplier must inform the IR whether the supply with several parts constitutes a single or composite supply.

While noting the different legislative context, however, a reasonable conclusion is that the general rule is that each supply is regarded as separate and distinct, a supply that is a composite supply from the economic standpoint (supplier or consumer's point of view) should not be an artificial split, and last, there is a composite supply if one or more parts constitute the dominant part and the remaining ones enhance the enjoyment of the supply.

5 Commentary

The above discussion set out the South African and foreign jurisdiction's approach in deciding if a separate part is made or not. It is noted that South Africa follows the distinct element approach. Fundamentally, this means that each supply is considered as a separate part even if it is supplied in the combined supply.

68 *Customs and Excise Commissioners v British Telecommunication plc* [1999] BTC 5, 273.
69 IS 18/04 (n 54 above) 14 paras 63-67.
70 While these sections provide that some taxable supplies must be zero-rated. According to the IS 18/04, while all zero-rating provisions use 'apply' some provisions indicate that part of the supply can be zero-rated by using the phrase 'to the extent that' or other equivalent wording.
71 IS 18/04 (n 54 above) 15 para 68.

South Africa does not subscribe to the general approach. In determining whether the separate part is made in South Africa, the inquiry is done in terms of section 8(15) and 10(22). If the supply falls under section 8(15), in terms of the *Diageo SA* case, one must clearly determine if all the jurisdictional requirements are present. If the supply falls under section 10(20), as per *Taxpayer v CSARS*, the part that is attributable to the taxable supply is deemed as a separate supply. In terms of section 7(1) of the VAT Act, each supply is treated as a distinct and independent element. As such, the VAT is levied on the supply of goods or supply and importation on the individual supply. Therefore, the rationale in sections 10(22) and 8(15) appears to be based on this reasoning.

The South African distinct element approach to composite supply raises concerns. For instance, the distinct element approach may have a limited application. This is where each part may not be identified as such it cannot be separated.[72] In some cases, even if there is an identifiable part, such part may not constitute an end but merely the means to achieve that end. For example, the illustration A above shows that the taxpayer supplies its customers with two financial investment services. This example shows that in some cases, various parts make up a single supply for tax purposes. If one applies the South African perspective, it is likely these supplies will constitute two independent parts. Arguably, this creates unreal commercial outcomes since each part is deemed to have been supplied individually, thus different rates will apply.

The general approach views this as a supply of a composite service. Foreign jurisdictions apply the last two exceptions to the general rule that each supply is regarded as independent. Therefore, the economic standpoint and features of the composite supply are considered. In the EU and CAN countries where the economic standpoint and features of the supply favour the supply to be treated as a composite supply as opposed to a separate part, the supply is treated as such. In principle, this approach is sound in that it the VAT is levied in the completed supply of goods or services.

South Africa appears to only consider the legal context under sections 8(15) and 10(22) — in determining if a separate part is supplied or not. This approach seems to ignore the economic standpoint as well as features of the supply.[73] Arguably, the distinct element approach applies in South Africa even though other

72 E.g. where the advertising is conducted using digital advertising such as display or video or social media ads, native advertising as well as retargeting and remarketing. In these cases, it is not only difficult to apply the South African composite supply provisions. But it might be tricky and difficult to apply the destination principle. This is because the digital service, especially those provided over the internet, 'can be enjoyed anywhere' including outside the Republic, so to determine the exact place of consumption might be a challenge.

components seem to be ancillary, integral to the identifiable supply. As pointed out in the *Diageo SA* case, each part will be deemed as a separate supply, irrespective of whether the insensible commercial reality outcomes may ensue.[74] It is argued that this approach is very narrow as it fails to consider the essential aspect of the economic standpoint and features of the composite supply.

The ECJ has in several cases that deal with the composite supply emphasised the importance of the last two aspects as follows;

> …consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT and that the contractual position normally reflects the economic and commercial reality of the transactions. An exception to the normal rule that the contractual relationship is central was then identified by the court as being where those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions.[75]

This *dictum* is important since it appears to invite courts not only to consider the legal framework but also consider other fundamentals such as the economic and commercial realities when dealing with the question of composite supply. If it appears from the facts that the tax benefit is the sole reason that prompt the taxpayer to categorise the supply as the composite supply, the court should disregard the above principles. In *Diageo SA* the court correctly pointed out that the purpose of section 8(15) is to curb any avoidance that the taxpayer may take advantage of. By an extension, section 10(22) serves the same purpose. It therefore becomes important for the court to examine whether the taxpayer solely avoids the tax consequences by treating the supply as a composite supply, or it is because of the commercial sensibility.

It is argued that the South African treatment of the composite supply does not accord with the international perspective. This perspective focuses only on the determination of the distinct element of the combined supply. The distinct element approach is incorrect since it presupposes that vendors always make single things for each supply in furtherance of their enterprises. Sometimes various parts make up the supply.[76] The foreign jurisdictions approach arguably reflects the commercial realities that supplies are not always

73 D Kruger & C Moss-Holdstock 'Contract manufacturing: across borders selected South African tax implications' (2016) *Business Tax & Company Law Quarterly* 21-26.

74 *Diageo SA* (n 8 above) paras 16-17.

75 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509 para 14; *Revenue and Customs Commissioner v Loyalty Management UK Ltd and Baxi Group Ltd* (Joined Cases C-53/09 and C-55/09) [2010] STC 265 paras 39, 40; *Revenue and Customs Commissioners v Newey* (Case C-653/11) [2013] STC 2432 para 45; *Airtours Holidays Transport Limited* (n 16 above) para 49.

76 R Sieden & N Apkarian 'GST and apportionment in complex transactions' (2017) 52(2) *The Journal for Members of the Tax institute Taxation in Australia* 68.

classified as single parts but may also be made up of various parts. To reflect this reality, the South African Revenue Services ('SARS') need to provide rules that a taxpayer may use in determining if a separate part is supplied.

6 Recommendations

The paper suggests the recommendations as follows, the new rules for special entities and supplementary notes by the tax authority. The proposals are now discussed.

6.1 Special rule for special entities: Specific anti-avoidance provision

This rule will deem specific entities to have supplied the composite supply, irrespective of the ordinary VAT Act rules. The entities may include but not limited to financial institutions, lawyers, international transport service (see the *British Airways* case), medical practitioners' service unless the supply is independent. This is because these enterprises normally make the supply that is made up of various parts. It is argued that the nature of these enterprise justifies their special treatment. The provision will require a narrow interpretation to avoid the misuse.

6.2 Issuance of interpretation note

SARS notes that '… certainty and predictability are undeniably important in the tax arena.'[77] To enhance certainty in the tax system, SARS may supplement the existing composite supply rules with guidelines. This rule will clarify the SARS position in determine the composite supply. As seen in the CAN countries, SARS may provide step-by-step approach giving the taxpayer on how to determine if a supply is separate part or composite supply for VAT purposes.

7 Conclusion

Admittedly, the purpose of the VAT Act is not to ensure that commercial reality outcomes are achieved. It is rather to impose tax on the supply of goods, service and importation. The manner in which such tax is collected ought to accord with the practical common sense. This requires the consideration of the legal context as well as other fundament aspects when imposing the VAT.

77 SARS Discussion paper on tax avoidance and section 103 of the Income Tax Act 58 of 1962 (2005) 46.

As it stands, it is unclear if the supply that falls outside the *Diageo SA* requirements qualifies as the composite supply or not. It also remains uncertainty whether this approach applies equally to the naturally combined supply and/or combined supply intending to achieve the commercial reality results. It is submitted that the distinct element approach should be retained as the general rule. However, to prevent tax avoidance, artificial split and ensuring the sensible economic and commercial results, there should be an exception or — more determinate rules or guidance is warranted.

WORKERS OF THE WORLD, UN-UNITED: A DISCUSSION THROUGH A GENDERED LENS ON WHY STRONGER PROTECTION OF WORKERS IN THE INFORMAL ECONOMY WILL BETTER EQUIP SOUTH AFRICA TO COPE WITH LABOUR MARKET CHANGES OF THE FOURTH INDUSTRIAL REVOLUTION

*by Shaniaé Maharaj**

The process of empowerment cannot be simplistically defined in accordance with our own particular class interests. We must learn to lift as we climb.' – Angela Davis

1 Introduction

South African labour legislation's focus on creating a fair employment structure which balances employer and employee interests is evident in its founding values of economic development and social justice.[1] Labour legislation must be understood and interpreted against the backdrop of deeply imbalanced power dynamics and exploitative, exclusionary labour practices adopted and maintained during apartheid. It is with this in mind that legislators formulated seemingly

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1 S1 Labour Relations Act 66 of 1995 (LRA), S2 of Basic Conditions of Employment Act 75 of 1997 (BCEA).

progressive policy frameworks that seek to equalise the inherent power dynamics at play in labour relations. Over time, labour legislation has failed to adapt to the changing needs and structure of the labour market. While there are several issues with the current framing of legislation, this article will focus on the exclusionary nature of its protective mechanisms. The main thrust is that the future of work in South Africa mirrors that of the current informal sector in its labour flexibility and decentralised workspace. This article will investigate the readiness for labour legislation to cater for the Fourth Industrial Revolution (4IR) by comparing the structure of the current labour market and that of the future, through a gendered perspective.

A brief unpacking of what the Fourth Industrial Revolution is will be done for a contextual understanding of how labour structures are likely to change. These projected changes, specifically atypical work, are mirrored in the existing informal sector, with the key difference being that poverty forces people to opt for atypical work in the status quo, and not technological and structural changes. Women are highlighted as the key actors of labour legislation beneficiaries because they dominate the informal sector, and are therefore largely excluded from labour legislation protections, but also because little to no consideration is given to gendered issues within existing labour legislation. Women are entering the workforce at a higher rate than before,[2] thus having a legislative structure in place that protects their interests is paramount to truly achieving the aim of social justice.

There are two core protections that underpin employee entitlements and rights. The first is the formal recognition of an individual as an employee or worker, which is often formalised through an employment contract. Many South Africans are engaged with work in the informal sector which do not make them privy to most of those rights and entitlements. This is problematic when considering how vulnerable these individuals already are, and that black women are concentrated in this sector. The inadequate protection of informal workers is going to pose challenges for South Africa's ability to cope with changes brought on by the Fourth Industrial Revolution and the projected shift towards labour flexibility and casualisation.

The second is collective bargaining, which empowers other rights to be realised. Collective bargaining is framed through the use of trade unions as its primary mechanism. While they may have been relevant at the time of the Labour Relation's Act's (LRA) inception, they have become an inappropriate medium to further workers' rights

2 This is termed 'the feminisation of labour' by most academics. M Mabilo 'Women in the informal economy: Precarious labour in South Africa' unpublished MA thesis, Stellenbosch University, 2018 71.

and are projected to continue to lose members in the near future, as organisation cannot happen as effectively with a decentralised workspace and an incoherent internal firm structure.

I will conclude the piece by offering recommendations which encourage more progressive labour legislation that takes into account both the changing nature of work and the specific interests of women.

2 The future of work in South Africa

4IR can, according to Schwab, be understood as 'a range of new technologies that are fusing the physical, digital and biological worlds, impacting all disciplines, economies and industries'.[3] Greater technological advances, machine learning, big data, the internet of things, automation, artificial intelligence and robotics are some of the defining features of this revolution.[4] It is estimated that disruptive technologies will cost 5.1 million jobs across China, India, Japan, South Africa, the UK, the US, and Brazil.[5] Importantly, a key feature of 4IR is the shift away from traditional employment structures towards job flexibility. The rise in non-standard forms of employment, such as part-time, short-term, and contractor jobs, has been steady and is expected to continue.[6]

The nature of employment is going to change drastically from a traditional, top-down hierarchy between an employer and an employee, to a flatter system where services and tasks are required by firms or individuals and tendered by atypical workers as they are needed. This has wide-reaching legal implications for labour relations as we know it.[7] The rise of the gig economy,[8] is expected to result in more precarious forms of labour,[9] people are likely going to be self-employed or hire their skills out to firms as and when necessary. The rise in digitised forms of labour is a core characteristic of the gig economy.[10] Increased connectivity through the democratisation of the internet means there will be a shift towards online work. This raises questions around the concept of 'workplace',[11] the status of the employer,[12] and how to ensure protection of workers on a platform as unregulated as the internet. As with all economic

3 Trade & Industrial Policy Strategies (TIPS) 'World Economic Forum and The Fourth Industrial Revolution in South Africa' (2018) *Research Report for the Department of Trade and Industry* 5.
4 TIPS (n 3 above) 6.
5 World Economic Forum (WEF) *The future of jobs* (2016) 13.
6 T Balliester & A Elsheikhi for the International Labour Organization 'The future of work: A literature review' (2018) 18.
7 Balliester & Elsheikhi (n 6 above) 19.
8 Also known as the sharing or platform economy.
9 Balliester & Elsheikhi (n 6 above) 19.
10 M Graham *et al* 'Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods' (2017) 23 *ETUI* 136.

disruptors, 4IR is expected to result in job displacement. This is likely to have a gendered impact given the low concentration of women in STEM fields, which are central to 4IR, and their high concentration in fields at risk of automation, like sales, business and financial operations, and office and administrative work.[13]

The problem South Africa faces is not a lack of awareness of this advent, but a lack of preparedness for the impact this may have on the labour market.[14] Further, the government has only just started looking into various working groups to prepare for the acceptance of 4IR, suggesting that the focus should be on prospectively gearing these groups to be as robust as possible, instead of retrospectively fixing gaps in legislation.[15] In South Africa, the current labour market is, like most developing countries, split between the formal and informal sector.[16] The forms of atypical work anticipated to occur in 4IR are already seen quite prominently in the informal South African labour market already. Flexibility, casualisation, and atypical employment relations characterise the future of work, and many of the jobs in the formal sector.[17] More interestingly, they also characterise the nature of work in the informal sector. This indicates an increasingly blurry line between formality and informality, where their differences are no longer primarily about the nature of work. The increase of workers in the informal economy can be attributed to high unemployment rates,[18] as well as the popularisation of casual work.[19] While increasing casualisation does not necessarily render

11 Section 213(c) of the LRA defines 'workplace' as: 'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation,'.

12 The term 'employer' is not defined by the LRA, but can be understood as the converse of an employee, which is defined as: any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'.

13 World Economic Forum 'The future of jobs' (2016) *Global Challenge Insight Report* 14.

14 In 2019, the 4IR Commission presented a draft report of South Africa's preparedness to the President. While the final draft is yet to be released, there is sufficient evidence to show the government's *awareness* of this advent. Department of Communications '4IR Commission presents draft diagnostic report' (2019) https://www.sanews.gov.za/south-africa/4ir-commission-presents-draft-diagnostic-report (accessed on 10 June 2020).

15 Department of Communications 'Minister Stella Ndabeni-Abrahams: Department's State of readiness to lead 4IR' (2019) https://www.gov.za/speeches/minister-stella-ndabeni-abrahams-department%E2%80%99s-state-readiness-lead-4ir-19-dec-2019-0000 (accessed on 10 June 2020).

16 The informal sector accounted for 17.9% of the workforce in 2018 - R Maluleke for Statistics South Africa 'Labour market dynamics in SA' (2018) *Report No. 02-11-02* 42.

17 International Labour Organisation 'Transitioning from the informal to the formal economy' (2014) *Report V(1)* 5.

workers as participants in the informal sector, they do lack many of the safety nets offered to people engaged primarily or substantially in more formal, secure jobs. The vast majority of South Africans engaged in the informal economy do not have the financial or political capital to vindicate their labour rights. The lack of regulatory oversight and inability to organise or seek recourse outside of contractual claims suggests they are not privy to the same legislative protection as their counterparts with more secure jobs, and even if they were, the barriers to access them remain too high for most to overcome. Thus, in as far as we are unable to protect the flexible work practices seen in the informal sector, it is unlikely that we will be able to cope with an influx of workers in casual work arrangements. The crux of the case is, therefore, that through strengthening labour legislation to account for characteristics associated with the informal sector, we will be better positioned to accommodate and protect workers in future.[20]

3 Contextualising South African labour relations

A defining feature of the South African economy is its duality as it operates formally and informally. The regulation of labour relations is structured such that greater protections are afforded to workers in the formal economy.

The key privilege of working within the formal sector is the recognition and protection of one's labour rights. This recognition and protection are upheld in labour legislation like the Labour Relations Act (LRA), Basic Conditions of Employment Act (BCEA), and the National Minimum Wage Act (NMWA). These protections are manifested in various ways. Firstly, the LRA protects all employees. Merely through the title of employee,[21] workers are privy to the protection under the LRA, even if there is no formal contract of employment.[22]

Secondly, these pieces of legislation allow direct access to courts and tribunals as mechanisms of recourse in instances where employers have breached the terms of employment.[23] Thus, the formal sector

18 There has been an increase of 1.2 million unemployed persons between 2013-2018. In 2018, the unemployment rate was at 27.1% - Statistics South Africa 'Labour market dynamics in SA' 76, 102.

19 I Valodia 'Economic policy and women's informal work in South Africa' (2001) 32 *Development and Change* 873.

20 A Britwum 'Women's future at work: Gender and equality in the Ghanaian informal economy' (2019) 9 *International Journal of Labour and Research* 209.

21 See (n 12 above).

22 See *Kylie v Commission for Conciliation Mediation and Arbitration* 2008 9 BLLR 870 (LC).

23 These include the CCMA, labour tribunals, and the Labour Courts, and the High Court for contractual breaches.

can be characterised as the traditional employer-employee relationship, with a contract of employment, various social protections, entitlements to organisation rights, and specific terms of termination. Its defining feature is legal and social protection — any disputes can legitimately be taken to courts of law or the CCMA on the basis of labour legislation alone, as noted in the preamble of the LRA.

Women in Informal Employment: Globalizing and Organizing (WIEGO) defines the informal sector as 'the diversified set of economic activities, enterprises, jobs, and workers that are not regulated or protected by the state.'[24] In the context of labour markets, 'informality' can be understood as a range of employment forms that fall outside the application of existing labour legislation.[25] More concretely, there are a number of characteristics which, holistically, paint a clear picture of the informal labour market.

Firstly, the nature of employment is markedly different from that of the formal sector. Labour in the informal sector is characterised by entrepreneurship[26] and flexible, insecure employment structures.[27] Entrepreneurs can be thought of as street vendors/hawkers, hairdressers in township areas, waste-pickers, and spaza shop owners. Generally speaking, this form of entrepreneurship is undertaken most often as a survivalist strategy as they require little capital investment and offer an escape from poverty.[28] Flexible employment can be considered as precarious and can take the form of casual workers who are hired on an ad hoc basis, outsourced workers, atypical workers, and temporary employees. These occupations are manifested in domestic workers, car guards who are sub-contracted, and agricultural farm workers. Secondly, there is no employment contract which regulates the terms of employment.[29] Thirdly, there is an absence of social protection.[30] This is due to the insecure and unregulated nature of their work[31] — domestic workers working overtime without compensation and street vendors facing eviction by authorities are some examples of this. This element is wide reaching and also refers to no pension funds, health insurance, access to UIF

24 Women in informal employment: Globalizing and organizing 'informal economy' https://www.wiego.org/informal-economy (accessed on 4 April 2020).
25 Britwum (n 20 above) 201.
26 Mabilo (n 2 above) 18.
27 Britwum (n 20 above) 201.
28 Mabilo (n 2 above) 18.
29 Mabilo (n 2 above) referring to H Bhorat *et al* 'Vulnerability in employment: Evidence from South Africa' (2016) 20.
30 Mabilo (n 2 above) referring to S Groenmeyer 'Intersectionality in apartheid and post-apartheid South Africa' (2011); H Bhorat *et al* (n 29 above); FJ Lund and S Srinivas 'Learning from experience: A gendered approach to social protection for workers in the informal economy' (2000) 20.
31 V Pillay 'A new labour movement: Securing livelihoods and reducing inequality through organisational development and network building in the informal economy' (2016) prepared for the *UN Women Expert Group Meeting* 2.

and other safety nets.[32] Fourthly, organisation and unionisation is a key feature of formal employment that seeks to equalise the power differences between employers and employees.[33]

While there is a distinct nature of either sector, there is an increasing overlap, whereby the formal sector is starting to assume more characteristics of the informal sector by way of more atypical workers, outsourcing, and casualisation.[34] Current labour legislation is insufficient, as will be thoroughly discussed below. One such example is in its definition of 'employee', which necessarily excludes an independent contractor.[35] Therefore, when discussing what the future labour market might look like, the point of departure must be that the lines between the formal and informal sector are blurred and it is likely that labour legislation will have to adapt significantly to cater for the shift towards flexibility.

The International Labour Organisation (ILO) recognises that the emergence and maintenance of the informal economy happens in areas of high unemployment, poverty, gender inequality and precariousness.[36] The people most predominant in this sector are women, specifically in developing countries. This is due to multiple structural reasons. Often the types of work in the informal sector mirror the work done in the household,[37] which women are culturally expected to perform. Due to the compatibility with household skills they have already acquired, the informal sector allows women to participate in this sphere with very few barriers to entry. Importantly, the types of jobs offered in the informal sector require little formal education and academic skill, allowing women in the developing world who often lack or have previously lacked access to education to participate.[38] These factors place women at the bottom of an already precarious system.

When considering the demographic make-up of each sector, one must be cognisant of the significant disparity between the treatment of men and women.[39] These disparities are manifested as unequal 'labour force participation and pay, occupational segregation, working conditions and women's burden of unpaid domestic and care work' and are present in both sectors.[40] Interestingly, despite the looser and arguably flatter structure of the informal sector, it still

32 Pillay (n 31 above) 9.
33 Mabilo (n 2 above), referring to N Pons-Vignon & W Anseeuw 'Great expectations: working conditions in South Africa since the end of apartheid' (2009) and F Lund & C Skinner 'Promoting the interests of women in the informal economy' (1999) 20.
34 Britwum (n 14 above) 202.
35 S213 of LRA.
36 International Labour Organisation (n 17 above) 3.
37 Mabilo (n 2 above) 30.
38 Mabilo (n 2 above) 28.
39 Unfortunately, binary language will be used and analysis will be centred around the binary due to a lack of data on other gender identities.

mirrors the obstacles women face in the formal sector. Women have a lower earning propensity, do not have access to the same level of resources and capital, and lack social protection within the community.[41] The harms of the gender pay gap, the motherhood pay gap,[42] and little to no adequate representation in unions are augmented for women in the informal sector.[43]

It is for these reasons that this article highlights a gendered perspective of the future of work.

4 Shortfalls of protective mechanisms within labour legislation

As mentioned earlier, 4IR can be understood as an increase of the role of technology in the economy. Most importantly, job displacement and changes as a result of increased technologisation is an inevitability of the revolution.[44] If labour laws do no adapt to accommodate this, it could leave a large segment of the future workforce unprotected, given the vulnerability of atypical employees.[45]

4.1 Recognition as an employee

A key protective mechanism in labour legislation is the recognition of the 'employee' and the formalisation of that recognition in the contract of employment. This allows workers to be entitled to protection under the LRA, BCEA and NMWA. In the best-case scenarios, there is a formalised, written employment contract which clearly sets out the terms of the relationship and allows both parties to hold each other accountable where there is a breach. In the worst-case scenario, there is no written or evident oral contract that proves employment. Even in those cases, there is a presumption of employment if an employee meets one of the seven criterions as per

40 L McGowan *et al* 'Women's labor rights and economic power, now and in the future' (2016) prepared for *UN Women Expert Group Meeting* 7.
41 Britwum (n 20 above) 204.
42 C Dicks & P Govender 'Feminist visions of the future of work' (2019) *Friedrich-Ebert-Stiftung* 3.
43 Dicks and Govender (n 42 above) 4.
44 Balliester and Elsheikhi (n 6 above) 17.
45 MA Chen 'Rethinking the informal economy: Linkages with the formal economy and the formal regulatory environment' (2007) DESA *Working Paper No 46* 9.

the LRA, they are privy to its protections.[46] While this is not a flawless clause, it does offer a safety net to employees where comparatively, independent contractors have nothing to rely on.

This core feature of the LRA is problematic in view of the increasing flexibility of the work force and the fact that an expansion of triangular employment relationships is likely to be a core feature when conceptualising the future of work.[47] In the status quo, labour brokering is embedded in the labour market and shows signs of growth.[48] Independent contractors[49] are left largely unprotected by labour legislation as there is no clear definition of 'contract of employment', 'contract of the independent contractor' or 'work'.[50] There are a number of tests that the courts have formulated to determine if someone is an independent contractor, however very little social and legal protection exists for independent contractors.[51] Employees are entitled to social protection and benefits under BCEA whereas independent contractors are only entitled to them insofar as there is an agreement between them and the employer.[52] Apart from not being exposed to hazards, they are not privy to statutory minimum employment benefits.[53] Another hole in labour legislation is that terms of termination for independent contractors is missing; termination of their contract is governed entirely by the parties' agreement.[54] The largest downfall of this is it allows employers to exploit the power differential that is already in their

46 S200A:
(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.

47 Also referred to as labour brokering.

48 In 2014, labour brokering accounted for 6.4% of employment in South Africa — Mabilo (n 2 above) 59.

49 The term used to describe someone who performs work for an employer but is not regarded as an employee.

50 AC Basson *et al The new essential labour law handbook* (2017) 61.

51 Basson *et al* (n 50 above) 62-69.

52 Regulation of working hours, payment at premiums for overtime and irregular work shifts, deductions for the purposes of medical aid or pension funds and entitlement to leave are some of these conditions.

53 L&E Global 'Legal framework differentiating employees from independent contractors' (2020) https://knowledge.leglobal.org/eic/country/south-africa/legal-framework-differentiating-employees-independent-contractors-31/ — Paragraph C (accessed on 6 April 2020).

54 L&E Global (n 53 above) Paragraph D.

favour.[55] Employers are exempt from the peripheral costs of employment[56] and do not have to engage with trade unions. What can conclusively be said about the position of independent contractors is that labour legislation is inadequate in its current form. Independent contractors remain vulnerable to the precariousness of their rights and to potential exploitation by employers.

Independent contracting is anticipated to increase in the future. The demand for skills in the future will mean people are less likely to stay with one firm for the duration of their career.[57] Brassey describes independent contractors as 'selling their job', whereas employees 'sell their hands',[58] which effectively articulates the core difference between them: independent contractors sell the product of their labour, not the labour itself. Remuneration is often only given at completion of the job, unlike employees where the mere capacity to produce warrants remuneration.[59] With the flattening of existing top-down employment structures, and the equalising of positions within the gig economy,[60] it is likely that the demand for labour will be more task-orientated, requiring the work of specialists, instead of indefinitely employed generalists. The demand for skilled work means that it would likely be more profitable for workers to perform tasks for firms on an ad hoc basis and be paid a premium rate for their expertise, than to stay in a secure employment relationship with a set salary. This is as a result of labour flexibility within the market that prioritises mobility of labour. This is achieved by increasing or decreasing employment wage levels to allow for greater movement in and out of short-term jobs, depending on the demand for skill.[61] It is estimated the factors including the 'globalisation of the market economy, the demographic explosion, and information and communication technology' will force companies to reduce labour costs, thereby resulting in downsizing and outsourcing of labour.[62] Thus, a common theme among 4IR literature is the expected proliferation of labour flexibility in the specific form of independent contractors.

55 Mabilo (n 2 above) 58.
56 Including hiring and training costs and employee benefits. SW Mills 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility' 25 *Industrial Law Journal* 1208.
57 The era of lifelong secure employment in permanent jobs is effectively a thing of the past. See Britwum (n 21 above) 201.
58 M Brassey 'The nature of employment' (1990) 11 *Industrial Labour Journal* 889.
59 As above.
60 Balliester & Elsheikhi (n 6 above) 19.
61 Mabilo (n 2 above) 74.
62 Mills (n 56 above) 1212.

The casualisation of workers in future extends beyond independent contractors, however. Casualisation refers to 'displacement of standard employment towards flexible employment such as part-time, project-based or temporary work'.[63] This means that there is likely to be an overall increase in the number of short-term work arrangements. These proliferations are occurring in places they ordinarily didn't in South Africa, showing the extent of the trend towards casualisation.[64] Labour flexibility, therefore, is an important advent that policy makers need to take into account. Labour flexibility, in this context, is an all-encompassing term made up of three core elements:

> wage flexibility (which grants employers the freedom to alter wages without limits); functional flexibility (which affords organisations the freedom to adjust conditions and terms of employment) and employment flexibility (which grants employers the liberty to determine employment levels cheaply and instantaneously).[65]

Evinced here is that the same harms that exist with independent contractors, exist with casual forms of labour. The potential for exploitation and misuse is far greater where there is no regulatory system in place.

It is anticipated that 4IR may cause the displacement of jobs at the lower end of the spectrum, where women are concentrated.[66] Precarious forms of employment, as is the case in the informal sector and will be the case throughout the labour market in future, disproportionately affects women who continue to undertake the burdens of household care and guardianship.[67] Often women who work in the informal sector are forced to compromise on their employment options to accommodate their care responsibilities.[68] In a Sub-Saharan African context, women bear the primary burden of caregiving and household chores, spending up to three times longer on these tasks than men.[69] Women will continue to be excluded from market participation in as far as they are forced to make trade-offs between work and domestic duties. Women engaged in the formal sector often do not, and cannot, contribute to funds that offer social protection.[70] This means that when they are no longer able to work, they rely on state-funded assistance, like grants. These grants are often insufficient to cover costs beyond the most basic necessities, thus often trapping them in a bubble of struggle and impoverishment.

63 Mabilo (n 2 above) 64.
64 Mills (n 56 above) 1212.
65 H Cheadle 'Regulated flexibility and small business: Revisiting the LRA and the BCEA' (2006) 27 *Industrial Law Journal* 665.
66 Britwum (n 20 above) 204.
67 Mabilo (n 2 above) 64.
68 Mabilo (n 2 above) 85.
69 Dicks & Govender (n 42 above) 3. If unpaid household work were to be monetised, it would account for 10-39% of GDP in these countries (OECD 2014).
70 Dicks and Govender (n 42 above) 3.

Thus, as long as labour legislation fails to accommodate and provide for flexible working and employment relationships, it could leave millions unprotected and ultimately fail to achieve its goals of social justice and economic empowerment for all.[71]

4.2 Organisation and unionisation for informal workers

Arguably the most prominent aspect of the LRA is its emphasis on organisation rights and collective agreements as mechanisms to equalise power dynamics between the employer and employee. Importantly, it relies on trade unions to broker these rights and agreements. This is one of the biggest weaknesses of the LRA — not only does it ignore that a large proportion of workers are engaged in the informal sector and therefore are not privy to the rights associated with organisation, but the steady decline in union subscription indicates that unions lack the capital needed to effectively negotiate with employers.[72]

Labour unions played a key role in the subverting the entrenched system of unequal power relations between employers and employees through mass mobilisation and organisation.[73] This not only helped workers achieve better conditions and wages, but given the exploitation of black[74] labour as a cornerstone of the apartheid system, labour unions went a long way in vindicating the dignity of workers.[75] This, in conjunction with the ANC's neoliberal leanings post-1994,[76] rationalises the LRA's laisse-faire approach to labour dynamics. It makes sense that policymakers framed labour legislation around collective bargaining through trade unions. This approach recognised the power of mass mobilisation and the importance of discourse around areas of mutual interest between the employer and employee. While this approach would have been useful and relevant at its conception, there are a number of factors which suggest it is outdated. This section of the essay will therefore focus on why the LRA and BCEA are ill-suited to deal with changing forms of labour relations and why that is problematic in the face of 4IR.

71 S1 of the LRA.
72 R Grinker 'Limping towards irrelevance' 1 August 2018 https://africasacountry.com/2018/09/south-african-labor-federation-limps-towards-irrelevance (accessed 27 July 2020).
73 A Bezuidenhout and S Bulungu 'From compounded to fragmented labour: Mineworkers and the demise of compounds in South Africa' 43 *Antipode* 239.
74 Particularly black, migrant labour engaged in mining activities.
75 This remains true for many African countries. Trade unions were often tied to national independence movements, like in Ghana, Tanzania and Guinea — see M Budeli 'Trade unionism and politics in Africa: the South African experience' 45 (2012) *The Comparative International Law Journal of Southern Africa* 461.
76 This is manifested in the GEAR programme and other economic policies which sought to liberalise the labour market by focusing on integration, trade, low trade barriers and an export-driven trade policy. Mabilo (n 2 above) 51-52.

The LRA primarily promotes collective bargaining through bargaining councils, statutory councils and workplace forums.[77] All these mediums are hinged on trade union representation. The decline of trade union membership and the total absence of such membership in the informal sector renders these equalising mechanisms largely redundant. Unions' power relies on their organisational capacity. The more members they have, the more political and financial capital they have to leverage against employers during negotiation processes.[78] Trade union density dropped by 11% between 1997 to 2013[79] – this is a significant decrease which suggests that the decline has been rapid; and continuing to use unions as the primary vehicle for change needs to be revised. The decrease in membership can largely be attributed to structural changes. A shift away from a traditional 'workplace', structural unemployment, a change in the nature of work performed,[80] and the influx of workers into more precarious forms of work are all factors contributing to its demise. Moreover, increasing flexibility and precariousness has reduced the bargaining power of trade unions.[81]

The second reason the LRA's focus on organisation as a medium to access rights is problematic is because it is highly exclusionary. In 2018, workers in the informal sector accounted for 17.9% of the total employed population.[82]

There are various barriers which prevent workers in the informal sector from organising. Firstly, and intuitively, because relations in the informal sector are individualistic and entrepreneurial,[83] there is no sense of comradery or collective group identity that unionisation relies on. These relationships are competitive in nature, in other words, a woman selling home-made jewellery is often in direct competition with another woman engaged in the same work, unlike wage workers with an incentive to advocate for higher wages.[84] Secondly, poor lines of communication and the absence of a union structure prevents meaningful engagement with employees.[85] Trying to convince the employer of a domestic worker to negotiate with a group without centralised leadership structure is not only difficult but

77 Note that this analysis seeks to prove the growing redundancy of trade unions and does not deal with the flawed systems of collective bargaining. Please consult *The state of collective bargaining in South Africa an empirical and conceptual study of collective bargaining* by S Godfrey *et al* for more on the downfalls of collective bargaining mechanisms.

78 H Bhoorat *et al* 'Trade unions in an emerging economy' (2014) *DPRU Working Paper 201402* 13.

79 Bhorat *et al* (n 78 above) 5.

80 X Msila 'Trade union density and its implications for collective bargaining in South Africa' unpublished article, University of Pretoria, 2018 9 -10.

81 Mabilo (n 2 above) 34.

82 Maluleke (n 16 above) iv.

83 Mabilo (n 2 above) 18.

84 Mabilo (n 2 above) 29.

85 Pillay (n 31 above) 18.

will likely result in them resorting to replacing the domestic worker with someone else. In other words, there is no incentive for them to engage in discussions, given the hundreds of readily available substitutes needing a job. Thirdly, spatial dispersion and underfunding pose barriers for buy-in from the employees themselves.[86] As already noted, people resort to the informal sector for survivalist reasons. The cost of missing a day of work and spending money on transport to attend a caucus often cannot be justified because of their level of precariousness and insecurity. Lastly, disputes are generally handled by the community.[87]

Given the patriarchal structure, perceptions around gender roles, and paternalistic attitudes around work, the discussion is likely to be skewed against women and their interests.[88] These issues suggest that collective bargaining as envisioned by the LRA, between unions and employers, is not practical in the informal sector. The only other viable actor to engage with on this front, therefore, is the state.[89] Given the lack of dialogue between politicians and informal sector workers, and the lack of airtime given to these issues, it is unlikely that organisation can happen effectively.

Mention must be made to the rise of informal labour organisation. With its roots in the Self-Employed Women's Association (SEWA), informal labour organisation has made meaningful strides,[90] representing home-based workers (HomeNet International), street vendors (StreetNet Association), waste pickers (Latin American Waste Pickers Network), and domestic workers (International Domestic Workers Network). While beginning to change the global paradigm on informal work, there has been little tangible difference in the lives of South African women, many of whom are unaware of the mere existence of these organisations. Thus, even if South African policymakers ideologically agree with the trend towards the recognition of informal work, very little has been done to ensure these trends are realised in the lives of people in reality.

With the advent of 4IR, the above-mentioned concerns are likely to continue existing, and perhaps worsen over time. The increase of freelance, atypical work structured around a digitised environment means that there will be no defined 'workplace'. This is problematic as workspaces are going to be shaped be a largely digitised environment with no central point of meeting. Taking factors like globalisation and communicative technologies into account,[91] it could be the case that someone could perform work for one or several

86 Mabilo (n 2 above) 62.
87 Britwum (n 20 above) 207.
88 Britwum (n 20 above) 208.
89 Mabilo (n 2 above) 29.
90 Pilllay (n 31 above) 4.
91 McGowan *et al* (n 40 above) 13.

overseas firms or individuals, with the only semblance to a common workspace being their computer. Having no organised union structure could prove more problematic for future workers than current informal works. Multiple workers engaged in triangular relationships within the gig economy wanting better working conditions, such as Uber drivers demanding a minimum wage per hour from Uber, have no capital to achieve those conditions. Spatial dispersion, and no mechanisms for conflict resolution constitute considerable and perhaps even impossible barriers to overcome in order to organise. When workers who do not have the clout of stopping production, as current trade union members do, because the cost of replacement is lower than the cost of negotiation, future employers or counter-bargaining agents have no incentive to respect their demands. In other words, future employment mirrors that of the informal sector indicating that thousands are likely to be left without protection while legitimately trying to keep up with changing labour demands.

5 Recommendations

Given the problems highlighted above, it is evident that South Africa must undergo aggressive labour legislation reform to stay true to its aims of equality and social justice.[92]

Firstly, chapter three of the LRA needs to be revisited to change the way collective bargaining is conducted to provide for 'bargaining bodies'.[93] The principle of collective bargaining is laudable but needs to adjust to weakened trade unions and take into account actors other than structured firms. The key proposal here is to recognise who informal workers have to bargain with and to facilitate a meaningful negotiation process. Who they bargain with is largely defined by their place of work — domestic workers will bargain with household owners; street vendors will bargain with municipal governments.[94] Moreover, in the face of 4IR, it is likely that workers will have multiple control points and counter-bargaining partners.[95]

It is therefore suggested that legal recognition be given to small-scale associations who functionally play the same role as trade unions, but without the requirement of a centralised workplace. A shift away from majoritarianism towards a more pluralistic recognition of workers' rights is also recommended, not just because that position is better able to vindicate constitutional rights of all workers,[96] but also because the proliferation of atypical jobs in the same sector will likely

92 S1 LRA.
93 Valodia (n 19 above) 884.
94 Pillay (n 31 above) 10.
95 Pillay (n 31 above) 18.
96 See *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd* (2003) 3 SA 513 (CC).

happen at such a high rate that attempts to organise and reach consensus on issues will be difficult. These bargaining bodies should not be limited to associations and their counter-bargaining partners but should include NGOs and civic organisations at the option of the associations, to allow for further support for informal workers. These bargaining bodies must allow for state agents to participate if the specific industry warrants such — municipalities should meet with an association for waste pickers to discuss viable working zones and hours. Thus, through a creative re-imagining of collective bargaining, it is possible to accommodate for workers in the informal sector right now, and 4IR's workforce.

Secondly, job displacement is an inevitability of 4IR. More robust policies must be in place regulating the speed of automation or adoption of machines in labour-intense industries so as to give workers sufficient time to prepare themselves for likely retrenchments. It is likely that most low-skilled workers will be left unemployable, thus forced to operate within the informal sector. Severance packages should therefore include some programme for upskilling or a lump sum that enables workers to invest in education or use as capital for entrepreneurial ventures. At the very least, better social protections must be awarded while people are employed to ensure that they are not completely crippled if they lose their job. While this may seem idealistic, some provision must be put in place to ensure all people have some opportunity to economically engage in the workforce or the risk of leaving the poor behind is high. In the absence of a universal basic income from the government, people will have to rely on work as their primary means of income — equipping people to cope with the technological changes must be at the forefront of revised conditions of employment policies.

Thirdly, the LRA needs to re-define terms that will shape the face of employment structures. These terms include, but are not limited to, 'employee' and 'misconduct'. Most urgently; the 'workplace' needs to be defined and accommodate for unconventional workspaces, such as spaza shops or work-from-home environments. By broadening the scope of 'workplace', there is room for protection on varying levels. In the status quo, this could look like an individual who performs odd jobs being able to hold their temporary employer accountable for unpaid working hours or sub-par working conditions. In the future, this could look like being able to institute claims of sexual harassment in the workplace for inappropriate comments made over a videoconference in one's home.

Lastly, legislators need to be aware of gender disparities that prevent women from being able to access the same level of benefits and entitlements as men. Most obviously, provision must be made to accommodate their role in the care economy.[97] While the ILO has mandated informal care workers, like domestic workers, to be recognised as workers,[98] and the BCEA recognises domestic workers' rights, there is very little room for regulation over those areas. Proposing better regulation over this area is difficult and an ineffective approach. Instead, a removal of downward variation of minimum standards of employment for women in atypical work is recommended. A current drawback of the BCEA is that while it promotes flexibility, it does not consider how this would disproportionately affect atypical women workers, who would likely prioritise a higher wage rate in exchange for a relaxation of working standards, harming her wellbeing. Moreover, the option of downward variation places already precarious workers in an even more vulnerable position and is contradictory to the aim of a minimum standard in the first place.[99] Accommodation needs to be made for women to better balance their household responsibilities with their work. This could manifest in subsidising childcare fees, such as creches, flexibility in working hours, gender-inclusive and transformative policies that place a higher burden on men to take up these activities, and setting strict penalties for labour brokers/ 'employers' for breaching unpaid care work regulations. While there has been some legislative shift towards equalising the burden between mothers and fathers,[100] it is not aggressive enough to substantially lower the burden on women to head these household activities. Given the feminisation of work, legislators need to prepare for a more gender-even workforce during 4IR. To leave half a working population under-protected would be regressive and contrary to the aims of equality and human dignity.

6 Conclusion

With the changing face of labour structures as we know it, movements toward a flexibility, self-employment and atypical working arrangements are inevitable. The casualisation of labour is a large and growing feature of the South African economy, yet it remains largely peripheral in the current structure of labour legislation. Labour legislation is skewed towards protecting people in traditional, formalised employment arrangements, which serves to exclude a large proportion of the working population. Worst affected by this

97 Which is likely to remain largely unaffected by technological advancements.
98 Pillay (n 31 above) 14.
99 Valodia (n 19 above) 886.
100 S25A, 25B, 25C of BCEA.

exclusion are women, who are systematically cornered into low-wage, insecure jobs, and who still bear the patriarchal burdens of domestication. Casual and flexible work is already a core feature of the informal sector, and a growing feature of the formal sector. If legislation is struggling to cope currently, the likelihood of gaping holes in protection and regulation in the future is high. A bottom-up approach that better protects workers in the most precarious position — people in insecure jobs in the informal sector — will automatically position casual, atypical workers who fall within the intersection of the informal and formal sectors better. By aiming to improve the lives of people in precarious labour positions now, future workers who find themselves in similar positions will be better protected.

Labour legislation must change its primary protective mechanisms and adopt a more inclusive approach to the regulation of labour to materialise the economic development and social justice goals as initially envisioned. By starting to pass legislation that protects precarious work and gendered issues, it will be one step closer to being ready for the pervasive and fast-approaching wave of the Fourth Industrial Revolution.

DISMANTLING THE STATUS QUO: PROHIBITING UNFAIR DISCRIMINATION ON THE GROUNDS OF POVERTY UNDER CAPITALISM

*by Sohela Surajpal**

'25 years into our democracy people, Black people in particular, still live under conditions which existed during the apartheid system of government. The dawn of democracy has not changed the lot of the people of Khayelitsha.'[1]

1 Introduction

In *Social Justice Coalition v Minister of Police*, the Equality Court assessed the South African Police Services' (SAPS) presence in poor, predominantly black communities as compared to wealthier, white communities. Upon finding that SAPS allocated significantly fewer resources to impoverished communities, the court held that poverty is an analogous ground on which unfair discrimination may be based and that unfair discrimination had indeed taken place.[2] While the author does not agree with increasing police presence in impoverished areas, this judgment has remarkable transformative potential. In the context of the transformative constitutionalism aims of the Constitution as a tool for transforming society from an unjust past to a more equal future,[3] this paper questions how far the decision in

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1 *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) para 90.

2 *Social Justice Coalition v Minister of Police* (n 1 above) para 65.

3 KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 (1) *South African Journal on Human Rights* 150.

Social Justice Coalition could extend to prevent discrimination on the grounds of poverty in a capitalist society in which access to most goods, services and opportunities is contingent on wealth and in which the state has limited resources.

The first part of this paper discusses the approach of the South African courts to socio-economic rights, arguing that it has resulted in limited progress in alleviating poverty. The Equality Court's incorporation of equality law into socio-economic enquiries in *Social Justice Coalition v Minister of Police* could strengthen the case of claimants and override certain factors that cause the courts to defer to the executive, thus compelling the State to provide more immediate relief. This section also attempts to apply the prohibition of discrimination on the grounds of poverty to commercial entities. By understanding discrimination as the denial of advantages or opportunities, the argument that the economy and private companies depend on discriminating against the poor to function is advanced.

The second part of the paper discusses the requirement that discrimination be unfair in order to be prohibited. It assesses the likelihood of courts finding that budgetary constraints and profit incentives are legitimate purposes served by discrimination on the grounds of poverty.

Finally, the last part of this paper discusses whether anti-discrimination law is an appropriate tool for the eradication of poverty. Several criticisms of transformative constitutionalism, human rights discourse and anti-discrimination law are engaged with to show that anti-discrimination law, as it currently exists, will at most target incidents of poverty-based discrimination using moderate forms of relief that allow for the continuance of an oppressive capitalist order rather than creating systemic change. The courts will have to make radical decisions, which depart from conservative South African legal culture if the decision in *Social Justice Coalition v Minister of Police* is to have far reaching impact.

2 How far could *Social Justice Coalition v Minister of Police* extend?

The Equality Court in *Social Justice Coalition v Minister of Police* assessed SAPS presence in poor, black communities in the Western Cape. The SAPS allocated personnel and resources based on a multiple stage enquiry. First, it used socio-economic factors, crime statistics and other demographic factors to determine the theoretical number

of personnel an area would require.[4] Next, the SAPS considered its budgetary restraints to determine the allocation of resources that would be practically possible. Finally, resources were allocated to specific stations in terms of this weighting.[5] While this system aimed to allocate more resources to disadvantaged areas, the factors it considered (such as available budget, population size, number of gangs present in the area and number of people who commute into the area) ultimately led to the SAPS allocating fewer resources to impoverished black communities.[6] The Court applied the test for unfair discrimination in *Harksen v Lane* and held that unfair discrimination had occurred on the grounds of race and poverty, the latter of which it considered to be an unlisted prohibited ground that 'adversely affects the equal enjoyment of a person's rights and freedom in a serious manner that is comparable to discrimination on a listed ground.'[7]

This section explores the potential of this judgment to facilitate the transformation of South African society in two ways. First, it asks whether the judgment could be used to challenge poverty more effectively through State policies. In doing so, the weaknesses of the current approach to poverty, which has prioritised socio-economic rights based litigation, is discussed and it is proposed that equality based litigation may bypass certain obstacles inherent to this approach. Secondly, this section asks whether the characterisation of poverty as a prohibited ground of discrimination could be applied to instances in which private businesses determine access to resources through differential treatment on the grounds of wealth and poverty.

2.1 Vertical application: fighting poverty through State policies

In a country that remains deeply divided on the grounds of race and class with vast levels of poverty bearing testament to the legacy of Apartheid and colonialism, the decision of the Equality Court appears to be a step towards a more just and equal society for all.[8] Prior to this decision, courts and scholars have primarily used socio-economic rights as a mechanism for compelling the State to deliver services to impoverished communities.[9] Socio-economic rights in South Africa

4 *Social Justice Coalition v Minister of Police* (n 1 above) para 22.
5 *Social Justice Coalition v Minister of Police* (n 1 above) para 23.
6 *Social Justice Coalition v Minister of Police* (n 1 above) paras 41, 47.
7 *Harksen v Lane NO and Others* 1998 (1) SA 300 in *Social Justice Coalition v Minister of Police* (n 1 above) para 65.
8 BC Mubangizi and JC Mubangizi 'Poverty, human rights law and socio-economic realities in South Africa' (2005) 22 *Development Southern Africa* 278.
9 Mubangizi and Mubangizi (n 8 above) 277; S Sibanda 'Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482; S Wilson & J Dugard 'Taking poverty seriously: The South African Constitutional Court and socioeconomic rights' (2011) 22 *Stellenbosch Law Review* 672.

include those related to labour law, an environment that is not harmful to one's health or wellbeing, property rights, the rights to access to housing, healthcare, food, water, education and social security.[10] With efficient enforcement, these rights can ensure a significantly better quality of life for all South Africans.

While socio-economic rights are inarguably important and their application has resulted in several important victories for the impoverished,[11] there are numerous obstacles that have prevented meaningful change through the application of socio-economic rights. In *Soobramoney v Minister of Health KwaZulu-Natal*,[12] Soobramoney made an application for an order compelling a public hospital to provide him with necessary medical treatment. The Court held that the hospital did not have the resources to provide him with this treatment especially given the numerous other patients who were also in need of treatment. This decision has been interpreted as support of the contention that socio-economic rights cannot be effectively enforced and protected by the courts since the allocation of resources should be determined by other branches of government and is dependent on the availability of resources.[13] These institutional concerns have led to the courts adopting a strategy of judicial deference when adjudicating matters related to socio-economic rights. Courts tend to defer to other branches of government that they characterise as more capable or legitimate, resulting in applicants being denied relief or being offered limited and inadequate relief.[14] This approach has been criticised, with scholars such as Brand pointing out that while judicial overreach should be guarded against, the judiciary often mischaracterises other branches of government as uniquely vested with expertise and in doing so, weakens the impact of a transformative Bill of Rights specifically tailored to include justiciable socio-economic rights.[15] Additionally, the obligations placed on the State with regards to socio-economic rights are negative and insofar as they are positive, only oblige the State to take reasonable measures to progressively realise such rights.[16] Despite their potential, practical considerations have led to

10 Constitution of the Republic of South Africa, 1996 Chapter 2.
11 In cases such as *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) and *Minister of Health and Others v Treatment Action Campaign and Others* [2002] (5) SA 703 (CC) the courts held that the State failed to comply with its obligations in terms of socio-economic rights and compelled the State to take steps to provide access to rights such as housing and healthcare.
12 1998 (1) SA 765 (CC).
13 Mubangizi and Mubangizi (n 8 above) 283-284.
14 D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stellenbosch Law Review* 618; EC Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 347-350.
15 Brand (n 14 above) 617-619.
16 Constitution secs 26(2) and 27(2).

socio-economic rights yielding disappointing results and an alternative route is sorely needed.

The approach of the Equality Court in *Social Justice Coalition v Minister of Police* provides a possible alternative to socio-economic rights based litigation when attempting to address poverty. Rather than addressing SAPS policy through the lens of the right to safety and security, the Social Justice Coalition challenged the policy in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[17] It is clear from a reading of the judgment that the reasoning of the Court may be applicable to other instances in which the State fails to allocate sufficient resources to poor communities or implements other policies that lead to unequal access to resources. Much like the allocation of SAPS resources, poor communities often have underfunded schools and hospitals or lack access to other basic needs such as water and electricity.[18] According to PEPUDA, discrimination includes:

> any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly
>
> (a) imposes burdens, obligations or disadvantages on; or
> (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.[19]

Given the Court's characterisation of poverty as an unlisted ground, such a definition of discrimination could be extended to apply to instances in which poor people are denied benefits, opportunities and advantages such as access to quality education, healthcare, water and electricity among others.

While the State may not have many policies in place that purposefully dedicate more resources to wealthier communities, it is undeniable that wealthier areas have higher quality State institutions and infrastructure. An excellent example of this inequality can be found within the public education system. While much is said of the difference between private and public schools, inequality exists even within education provided by the State. Public schools in wealthy areas generally have better facilities since they were better funded under Apartheid and demand private contributions in the form of additional fees.[20] Since such schools only accept students from the wealthy areas in which they are based and make use of other exclusionary policies — such as language policies and discriminatory admission processes — they are able to exclude poor students who

17 Act 4 of 2000.
18 Mubangizi & Mubangizi (n 8 above) 481.
19 PEPUDA (n 17 above) sec 1.
20 See N Soekoe 'Untangling inequality in SA schooling' PoliticsWeb 20 November 2018 https://www.politicsweb.co.za/opinion/untangling-inequality-in-sa-schooling (accessed 22 November 2019).

would ordinarily qualify for a fee exemption at a public school.[21] This ultimately results in public schools in wealthy, predominately white areas offering education of a far higher quality than public schools in poor, predominately black areas. Policies such as limited geographical feeder zones for public schools may not have discriminatory intent but may still qualify as indirect forms of unfair discrimination on the ground of poverty, which, according to the Equality Court, should be challenged.[22]

De Vos argues that these enquiries into socio-economic rights can be strengthened by approaching them through the perspective of substantive equality.[23] He stresses that the provision of socio-economic rights by the State must be analysed in terms of substantive equality's focus on context and relative privilege.[24] Such an approach would ensure that the State targets those communities that need aid most. Additionally, this strategy appears to have the benefit of avoiding the pitfall of judicial deference adopted by the courts when addressing socio-economic rights. The Respondents in *Social Justice Coalition v Minister of Police* attempted to argue that in terms of the doctrine of separation of powers, the Court should refrain from judicial overreach and respect the expertise of the executive and administrative branches of government when allocating police resources.[25] Rather than caving to this argument and deferring to other branches of government, the Court maintained that it was properly suited to decide on a matter regarding the right to equality, stating that:

> The warning by the Constitutional Court to guard against judicial overreach and to defer to the administrative bodies with the necessary administrative expertise is a salutary one. It remains the duty of the Court, however, to protect the Constitutional rights and declare unlawful any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly, imposes burdens, obligations or disadvantages on or withholds benefits opportunities or advantages from any person on one or more of the prohibited grounds.[26]

Since questions of unfair discrimination are viewed as within the scope of the judiciary's decision making power, this approach could help courts avoid falling into the trap of judicial deference to the executive when it is not appropriate. This approach can thus compel the State to address the needs of poor communities.

21 C Soudien & Y Sayed 'A new racial state? Exclusion and inclusion in education policy and practice in South Africa' (2004) 22 *Perspectives in Education* 109-111.
22 *Social Justice Coalition v Minister of Police* (n 1 above) paras 36-37.
23 P de Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 2 *South African Journal on Human Rights*.
24 De Vos (n 23 above) 267.
25 *Social Justice Coalition v Minister of Police* (n 1 above) para 83.
26 *Social Justice Coalition v Minister of Police* (n 1 above) para 84.

2.2 Horizontal application: Could this decision be applied to private businesses?

It appears clear that the *Social Justice Coalition v Minister of Police* decision could be used to compel the State to distribute its resources more equitably and rethink policies that indirectly discriminate against the poor, however, its application to private entities is more doubtful. De Waal and others claim that a distinction should be drawn between the vertical and horizontal application of certain rights. They argue that it would not be fair to impose the same burdens on private entities that we may rightly impose on the State.[27] It is undoubtedly true that certain rights are enforceable to a different degree against private persons due to their nature, however, the prohibition of unfair discrimination applies to both the State and private persons as is made clear in Section 9(4) of the Constitution and Section 6 of PEPUDA. In discussing the importance of the prohibition of unfair discrimination by private businesses, De Vos uses the example of the parent of a disabled child who finds that cellular phone service providers, airlines, grocery stores, hotels and restaurants are unwilling to provide services to the child and parent on the grounds of a hypothetical religious belief. He stresses that without a prohibition on unfair discrimination by private companies, those groups of people who are targeted by prejudice may find themselves 'denied [their] basic rights to live a life in which [their] dignity is respected and protected' and would face disastrous consequences.[28]

Most people and South African courts would likely agree with this assessment. Given that private companies provide not just luxury goods, but many goods that are necessary for survival including food, clothing, transport and goods related to sanitation and hygiene. Denying a person access to the benefits offered by private businesses would likely leave them unable to survive. If this denial were based on a prohibited ground such as race or sexual orientation, it would constitute a disgusting example of unfair discrimination. The logical extension of this line of argumentation is that where a person is denied access to these benefits due to their poverty, or the results of their poverty — in other words, the inability to afford access to these goods — this constitutes unfair discrimination and is no less heinous than discrimination on any other prohibited ground. Take De Vos' reasoning discussed above and imagine that the parent of a disabled child was instead someone who lives in poverty, who finds that

27 J De Waal *et al The Bill of Rights Handbook* (1998) 33 – 34.
28 P de Vos 'Why private "businesses" cannot discriminate against gays and lesbians' Constitutionally Speaking 30 April 2013 https://constitutionallyspeaking.co.za/why-private-businesses-cannot-discriminate-against-gays-and-lesbians/ (accessed 22 November 2019).

cellular phone service providers, airlines, grocery stores, hotels and restaurants are unwilling to provide them with services. Surely, this should be viewed as equally discriminatory given the Equality Court's decision that poverty is a prohibited ground of discrimination.

Unfortunately, I remain doubtful that the courts would make a ruling to this effect any time in the near future, at least insofar as private businesses are concerned. To do so would destabilise the very foundations of capitalist society. The next section explores the likely justification courts would provide for not taking *Social Justice Coalition v Minister of Police* to its logical, but radical conclusion.

3 Possible obstacles to the application of *Social Justice Coalition v Minister of Police*

As was outlined in *Harksen v Lane*, the test for unfair discrimination begins with an enquiry into whether differentiation has occurred on one of the prohibited grounds or an analogous ground.[29] If the discrimination occurred on an analogous ground, unfairness must be proven by the complainant with reference to the impact of the discrimination on the complainant and others in their position. Following the reasoning of the Court in *Social Justice Coalition v Minister of Police*, complainants will most likely succeed in meeting the requirements to prove that they have been denied benefits on the grounds of poverty, an unlisted and analogous ground and that this has had a severe impact on them and other impoverished people. The onus will then rest on the Respondent, be it the State or a private business, to show that their actions were in fact fair. This can be done by showing that the discrimination serves a legitimate purpose.[30] Alternatively, the Respondent could prove that the challenged policy is a reasonable and justifiable limitation of the right to equality, in that the limitation serves an important purpose.[31] Courts have held that affirmative action, measures necessary for the sustenance of the criminal justice system as well as the best interests of children serve legitimate purposes, therefore, rendering such discrimination fair or they constitute a reasonable and justifiable limitation of the right to equality.[32] This section questions to what extent budgetary constraints, market forces and revenue would be considered legitimate purposes, thereby rendering discrimination on the grounds of poverty fair.

29 *Harksen v Lane* (n 7 above) para 54.
30 PEPUDA (n 17 above) sec 14(3).
31 Constitution (n 10 above) sec 36.
32 *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

3.1 Budgetary constraints for the State

The South African State works with limited funds and resources to address poverty. Unlimited funds are not available to pump into public schools, housing and other infrastructure in poor communities. This unfortunate reality has been recognised numerous times by courts adjudicating socio-economic rights.[33] In *Grootboom*, the Court stressed that an enquiry into the right to housing must be framed in terms of the reasonableness of the measures taken by the State, given its limited resources and the Constitution's allowance for the progressive realisation of socio-economic rights.[34] Unless such practical limitations are considered by the courts, any order no matter how progressive or radical would have little impact if the State was unable to implement it.[35] These budgetary constraints could, therefore, function as obstacles to equality-based litigation, in that they could qualify as a legitimate purpose served by the discrimination, in other words, preserving the State's budget and resources, therefore, allowing the State to continue functioning.

It is, however, important to note that the decision in *Social Justice Coalition v Minister of Police* does not necessarily compel the State to immediately solve the problems associated with poverty in order to give poor people the same quality of life as the wealthy. Instead, the Court determined that State policies that allocated more resources to wealthy communities or failed to allocate resources on a proportional, context-driven basis as informed by substantive equality were discriminatory. For example, rather than compelling the State to immediately upgrade all public schools in poorer communities, the State could be compelled to review exclusionary admissions policies or distribute funds from wealthier public schools more evenly. Additionally, the State could be compelled to address inefficiencies in the implementation of its policies or the misuse of resources, both of which often have a far greater negative impact on the success of State policies than a lack of funding.[36] Such an approach does not focus on the circumstances of a poor community in isolation like socio-economic rights based litigation does, but compares such circumstances to those in wealthy communities and asks how the State can be fairer and more equitable in terms of how it distributes its resources amongst those communities. This approach acknowledges that South Africa is not a country that lacks resources, but a country that has consistently failed to share its plentiful resources equitably. While taking cognisance of the practical

33 Christiansen (n 14 above) 360-371.
34 *Grootboom* para 33 cited in Christiansen (n 14 above) 366.
35 Brand (n 14 above) 616.
36 Mubangizi (n 8 above) 279.

limitations present, the Court in *Social Justice Coalition v Minister of Police* stressed that:

> The fact that there are socio-economic and infrastructural challenges which present difficulties to police efficiency and effectiveness in poor, Black areas cannot be a justification for inferior police services.[37]

This quote is a powerful statement, reflecting that while practical limitations must be considered and could in some instances render unequal service delivery fair discrimination, courts following the example of the Equality Court should not be too quick to reach this conclusion. Poor complainants challenging State policies through the lens of unfair discrimination therefore have decent prospects of success even in light of limited State resources.

3.2 Market forces and revenue for private businesses

Under capitalism, private businesses must secure a source of income in order to continue functioning. While some, like Google, have found ingenious ways of profiting without charging fees, the vast majority do so by charging customers a fee for the goods or services on offer.[38] While much of this income lines the pockets of owners and CEOs, the income also covers necessary costs, including those of raw materials, manufacturing, transport, labour and other resources without which the company would fail.[39] Given the necessity of income for private businesses, it is likely that despite the conclusion reached in the previous section, courts would rule that such discrimination is fair and that fees serve the legitimate purpose of allowing the business to continue functioning. One could argue that in most instances of discrimination by private businesses, an attempt to raise profit as a grounds of justifying discriminatory actions would fail. For example, a restaurant in a racist area that refuses to serve black customers because to do so would drive away white customers and therefore lead to a loss of profits, would find that their actions still constitute unfair discrimination. Unfortunately, the level of harm that would accrue to a private business that does not charge fees to the poor is likely to be far greater and would distinguish this circumstance from the former.

An optimist could claim that provided the State fulfils its burden of building a better, more equal society, with time poverty would be reasonably diminished and no such burden need be placed on private

37 *Social Justice Coalition v Minister of Police* (n 1 above) para 188.
38 M Visnji 'How Google makes money' Revenues and Profits 22 January 2019 https://revenuesandprofits.com/how-google-makes-money/ (accessed 23 November 2019).
39 TC Wright 'Why are cost, revenue and profit important?' 22 July 2019 https://yourbusiness.azcentral.com/cost-revenue-profit-important-21609.html (accessed 23 November 2019).

businesses. In terms of a Marxist approach though, capitalism is dependent on the subjugation of the working class in order to function.[40] The working class are kept impoverished so that they remain dependent on selling their labour to survive, thus driving industry, which thrives on the backs of an underpaid labour force.[41] Poverty and class difference are therefore a necessary evil of capitalism, meaning that there will always be those who are unable to afford access to certain goods and services. This is especially disastrous given the above conclusion that private businesses cater to many needs and desires without which a person is incapable of living a decent and dignified life.[42] This leaves us in a situation in which forcing private businesses to provide goods and services to the poor at no cost would doom these businesses to failure, while not doing so dooms millions of South Africans to a life in which their basic needs remain unmet.

4 *Social Justice Coalition v Minister of Police* and transformative constitutionalism

In order for the decision in *Social Justice Coalition v Minister of Police* to have an impact that extends to private businesses, the courts would have to take a radical anti-capitalist stance. This section criticises the Constitution and human rights discourse, illustrating that they ultimately uphold the unequal status quo. To give effect to this judgment, the courts would have to depart from conservative, deferential legal culture and truly take to heart the transformative vision of the Constitution as a tool for systemic change.

4.1 Critique of the Constitution and rights based discourse

Many decolonial scholars criticise the Constitution, framing it as a document of conquest and compromise.[43] While there is no doubt that the Constitution and Bill of Rights have noble intentions, negotiations were significantly influenced by attempts to safeguard the interests of the white minority who wished to ensure that their interests would be protected once they no longer held political power in the democratic dispensation — a strategy that has allowed the white minority to maintain land, wealth and economic power.[44]

40 Engels & Marx *The communist manifesto* (1969).
41 Engels and Marx (n 40 above).
42 De Vos (n 28 above).
43 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 142.
44 Madlingozi (n 43 above) 140.

Given the unjust nature of wealth in South Africa, one of the key failings of the constitutional dispensation is its link to and acceptance of capitalism. The African National Congress, once a revolutionary liberation movement, quickly moved from a model of participatory democracy to neo-liberal capitalism once in power.[45] Vogt points out that the economy was a major consideration both during debates on the Constitution and the Equality Bill:

> During the debates on the Constitution, there was an indication that South Africa had ruled out equality of result since it had opted for a market economy. Indeed, the South African Law Commission and the African National Congress intended to include such an economic policy in the Bill of Rights, even though this is not the function of such a document. During the debates on the Equality Bill, the importance of the economy was stressed again. The choice of a market economy necessarily has an impact on the approach to racial equality. The economy, by its very nature, is driven by competition and thus cannot allow for an outcome where all would have the same standing.[46]

Kapur and Mutua further this analysis, showing that rights based discourse is inherently rooted in Western ideology that promotes individualism, liberalism and capitalism.[47] They claim that rights based discourse will therefore never be successful in disrupting the systems from which it sprung, an argument that could be extended to the Constitution.

The Constitution and rights based discourse can, therefore, be viewed as mechanisms to preserve, rather than challenge the status quo. In a country that prioritises public interest litigation and human rights as an emancipatory scheme, marginalised groups hoping for change are forced to assimilate into the unjust system in order to receive benefits, rather than attempting to fundamentally change it.[48] The role that conservative, market focused legal culture has played in this is evident in Madlingozi's description of poor people's social movements, which are often forced to de-radicalise their aims in order to be more palatable to conservative courts.[49] Rather than radically disrupting the status quo, the Constitution and Bill of Rights were created to maintain it, allowing at most for incremental change for a select black elite so long as it does not disturb the market

45 T Madlingozi 'Post-apartheid social movements and the quest for the elusive 'new' South Africa' (2007) 34 *Journal of Law and Society* 78-79.

46 GS Vogt 'Non-discrimination on the grounds of race in South Africa: With special reference to the Promotion of Equality and Prevention of Unfair Discrimination Act' (2001) 45 Journal of African Law 197-198.

47 M Mutua 'Savages, victims, and saviors: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 17; R Kapur 'In the aftermath of critique we are not in epistemic free fall: Human rights, the subaltern subject, and non-liberal search for freedom and happiness' (2014) 25 *Springer Law Critique* 25.

48 Madlingozi (n 43 above) 128.

49 T Madlingozi 'Social movements and the Constitutional Court of South Africa' in O Vilhena, U Baxi and F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 538.

economy.[50] This poses a clear obstacle to any attempt to apply the *Social Justice Coalition v Minister of Police* decision widely, specifically with regard to private companies since such a decision would at most completely disrupt the capitalist free market and at least significantly damage the economy.

4.2 A call for truly transformative 'transformative constitutionalism'

It is possible that this conservative legal culture, in which courts defer to other branches of government when making policy decisions, is for the best. Judges, unlike the legislature and executive, are not democratically elected and so should not have the power to completely remake society with no democratic input.[51] A shift from a capitalist to an alternative economic system closer to socialism or communism is a radical change that should be made through mass action or with input from all branches of government executing their democratic mandate, provided this shift is the will of the people.

It is difficult though to maintain this stance given that more than twenty years of democracy and constitutionalism have resulted in little economic change in the lives of everyday South Africans.[52] Transformative constitutionalism calls on the legal fraternity to use the Constitution as a tool for large-scale social change.[53] Klare envisaged this change taking the form of 'a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word'[54] but it appears that South Africa has veered too close to reform rather than revolution. The decision of the Court in *Social Justice Coalition v Minister of Police* makes it clear that the Constitution has the potential to steer the constitutional dispensation closer to its revolutionary roots, however, this will require the judiciary, legislature and executive to be brave enough to work together to disrupt the status quo. Perhaps this decision does not ask the courts to change the economic system of the country, but rather to stop prioritising capitalist interests over the values of freedom, equality and human dignity the Constitution mandates it to protect.

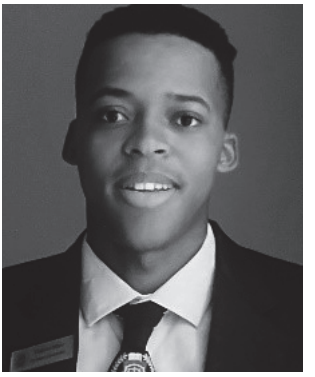
50 Madlingozi (n 43 above) 124-125.
51 Klare (n 3 above) 147-148.
52 JM Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 224 – 225.
53 Klare (n 3 above) 150.
54 As above.

5 Conclusion

The judgment of *Social Justice Coalition v Minister of Police* is not a radical decision standing alone however it has the potential to inspire radical results should it be followed to its logical conclusions. Even a conservative reading of the judgment will lead to victories for the poor, in that they will be able to more effectively compel the State to combat poverty through the equitable allocation of its resources despite budgetary constraints. At its best, the judgment could find some degree of application in the interactions between poor people and private businesses who determine access to their goods and services on the grounds of wealth, although private businesses reliance on revenue for survival will be a significant obstacle. Such a reading will only be possible if courts shake off the conservative, deferential roles they have assumed in which they function to protect the market economy and unjust status quo and fully embrace transformative constitutionalism's vision of a Constitution that actively strives for a better life for all.

NEOLIBERALISM AND INEQUALITY IN POST-APARTHEID SOUTH AFRICA

*by Thabiso Mfete**



1 Introduction

The following article will uncover how the African National Congress's (hereafter 'the ANC') adoption of neoliberal policies and ideologies has resulted in the deepening and perpetuating of socio-economic inequality along racial lines in 'post-apartheid' South Africa.[1] Firstly I will elaborate what neoliberalism is and what it entails, then explain the historical context leading up to the ANC's adoption of neoliberal policies in the local and global context, and then I will show how these policies and its apparatuses perpetuate socio-economic inequalities which render the transformative promises of the Constitution hollow, using specific examples like the privatisation of water and the Marikana massacre.

* Fourth year LLB student and member of the Student Disciplinary Advisory Panel (SDAP) at the University of Pretoria. ORCID: 0000-0003-0487-2319. I draw the inspiration to write this article and challenge neoliberal thought from having had perspicacious discourses with Dr J Modiri and Prof T Madlingozi. I would like to give a special thanks to the almighty and to my family (my younger brother, mother and father) for supporting me through this journey. The article in essence exposes how neoliberalism, as a system of governance adopted by the ANC government, perpetuates racialised socio-economic inequalities and that we ought to challenges these apparatuses.

1 The author refers to 'post-1994' in inverted commas because it is debatable whether South Africa is truly in a post-apartheid term. The formal abolition of apartheid or racial segregation does not transcend to apartheid's demise in our realities or everyday living. This view will hold true to every mention of the phrase in the article.

The article will uncover how socio-economic inequality is prevalent in our democratic dispensation using mainly two theories: Critical Race Theory and Critical Legal Studies. The latter theories provide the lens through which we can evaluate, analyse, and criticise neoliberal policies in our contemporary society. I will argue that it is preposterous to theorise and understand neoliberalism and race as two separate entities that sometimes interconnect.[2] The article will outline how race and neoliberalism are co-constitutive.[3]

In explaining the concept of neoliberalism, the article will also answer pertinent questions arising in South Africa's contemporary context such as: why do the black- majority remain structurally poor in 'post-apartheid' South Africa when it is thought to be the best and most progressive constitution (with first 1st, 2nd, and 3rd general rights) in the world? And who benefits from these policies since socio-economic inequalities have deepened? Lastly, I will come up with a well-thought alternative that best fits our democratic dispensation.

2 Neoliberalism

Neoliberalism can be understood as a new stage in the growth of capitalism evolving from the wake of the 'post-war-boom'.[4] It is mostly understood by the majority of people as encompassing the following three intertwined characteristics: (a) as an apparatus of institutions, policies and practices, (b) a structure of economic, social and political reproduction espoused by financialisation and, (c) as a system of capitalism for the minority and against the majority.[5] Neoliberalism is a complex system of multifaceted features in ideology, practice, and policy.[6]

The most rudimentary principles of neoliberalism are: commercialisation, privatisation of state-owned sectors, decentralisation, deregulation of the market, corporation of public entities and public resources, and the retraction of the state in the provision of social goods.[7] These principles set the foundation of many neoliberal states across the globe. It limits the state from 'interfering' with the market and having governance of public goods.[8]

2 DJ Roberts & M Mahtani 'Neoliberalizing race, racing neoliberalism: Placing "race" in neoliberal discourses' (2010) 42 *Antipode* 248.
3 Roberts & Mahtani (n 2 above) 248.
4 K Bayliss *et al* '13 Things you need to know about neoliberalism' (2016) *New Agenda: South African Journal of Social and Economic Policy* 25.
5 As above.
6 As above.
7 As above.
8 The author recognises the need to insert inverted commas to the word 'interfere' because the author is of the opinion that the state is not interfering but rather intervening. The author reinforces this view on any other time when mention is made to the word 'interfere' in the article.

The most comprehensive definition of neoliberalism, in my view, comes from the following quote by Harvey:

> [N]eoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.[9]

This political-economic theory has reformulated the correlation between the state, the economy, and society.[10] This anatomy advocates for individual entrepreneurship and the ideology of self-sustainability; the political-economic theory which divests individual citizens of their collective social rights and merits the success of the collective groups on each individual while also isolating failures to individuals.[11] Within a neoliberal state, the balance of payment is structurally dependent on foreign investment.[12] The problem with the adoption of neoliberal political-economic policies is that they individualise successes and failures, and they abandon the constitutional mandate of a transformative society; they fail to address 350 years of black subjugation and they leave the quest for social justice to be dependent on an unpredictable free market.[13]

In a neoliberal state, people's sovereignty is substituted by market regulations.[14] The state and its citizens establish a transactional relationship of which citizens take the role of being customers, while that state becomes a service provider.[15] In a neoliberal democracy, the state is run like a business, and its performance is judged by the economic value of efficiency, derived from the privatisation and cuts of public goods.[16] What is key is the maximisation of profit with less costs.[17] The social enhancement of the state's people becomes secondary.[18] The market in a neoliberal state is the arbiter of the delivery of public services.[19]

This theory of economic practice has a cajoling effect on the ways of thought to a point where it has been normalised as a way of life and forms part of common knowledge in the way we understand the world.[20] The term 'neoliberalism' is a new term, which was relatively

9 D Harvey *A brief history of neoliberalism* (2005) 71.
10 Bayliss *et al* (n 4 above) 32.
11 As above.
12 Bayliss *et al* (n 4 above) 33.
13 As above.
14 MH Maserumule 'To fix SA's dysfunctional State, ditch its colonial heritage' *The Citizen* 04 July 2018 14.
15 Maserumule (n 14 above) 14.
16 As above.
17 As above.
18 As above.
19 S Narsiah 'Alternatives to neoliberal governmentality in South Africa' (2007) 89 *South African Geographical Journal* 41.
20 Narsiah (n 19 above) 34.

unknown to many before the 1990s.[21] It gained global circulation after Zapatistas' encounters with neoliberalism in Mexico when there was a commencement of the signing of the North American Free Trade Agreement in the year 1994.[22] It is thought that Victorian liberalism and the classical liberal thoughts are an inspiration to modern-day neoliberalism.[23]

Neoliberal policies tend to objectify institutions that are outside the parameters of the free market such as trade unions, universities and public administrations; the rationale behind this being to bring them inside the market through acts such as privatisation or attempting to reconstruct them in a market-like way to fit the model of neoliberal political-economic practice.[24] In this kind of apparatus, the idea of competitive competition in the economy and the production of structured inequality are embraced as being a positive outcome.[25] Structured inequality, the privatisation of gains, and the socialisation of losses are rudimentary indicators of neoliberal states.[26]

These neoliberal ideologies are justified through phenomena such as 'investor confidence', 'stability' and 'competitiveness'.[27][28] Concepts such as 'investor confidence' are problematic in the sense that they are materially ungrounded, elusive, volatile, self-referential and this systemically leads to the overestimation of investment that arises from financially-friendly policies.[29] The rationale behind free competition is that competition between firms and individuals manifest in increased efficiency, greater innovations and new products are sold at cheaper prices to attract international investors.[30]

21 W Davies 'Neoliberalism: A bibliographic review' (2014) 31 *Theory, Culture & Society* 309.
22 S Springer *et al An introduction to neoliberalism* (2016) 2.
23 Davies (n 21 above) 310.
24 J Mathekganye *et al* 'The nexus between water, neoliberalism and sustainable development in post-apartheid South Africa' (2019) 11 *African Journal of Public* 44.
25 Bayliss *et al* (n 4 above) 32.
26 Davies (n 21 above) 316.
27 The inverted commas in each word mentioned above are placed because the author is of the view that those terms are evasive and are an illusion. They do not signify the true state of affairs and are concepts that the government policies aspire to achieve but are not realistic.
28 Bayliss *et al* (n 4 above) 33.
29 As above.
30 B Ngulube 'The development of neoliberalism and its influence on undergraduate economics curricula at selected South African Higher Education Institutions' unpublished PhD thesis, *University of South Africa* (2016) 4.

According to what the system stands for, markets (which are self-regulating mechanisms) need to be freed from government 'inference' or interference to be at the most efficient, as collectivism is a barrier in economic prosperity.[31]

Hayek suggests that all forms of collectivism (whether socialism or social democracy) suppress efficient market flow and lead to undesirable results and in most cases, a totalitarian state.[32] Neoliberals rationalise government marginalisation and the transmission of responsibility for the provision of public services from the public sector to the private sector.[33]

Those who are in favour of neoliberalism argue that the market is self-efficient and that it is guided by the laws of supply and demand.[34] When supply and demand intersect at the market price, suppliers and consumers won't have any particular reason to increase or decrease prices.[35] As a result, consumers and suppliers will always be happy.[36] Neoliberal governance sees the market as being superior to non-market forms of services and goods.[37]

In South Africa, areas of health, education and welfare are now in the hands of the white minority and direct international investors.[38] The political-economic theory focuses on creating a new social and political regime and has no intention of recuperating the old system.[39] The main ancestries of neoliberalism can be traced back to liberal thought and philosophy, particularly classical liberalism and modern liberalism.[40] Classical liberalism can be traced back to earlier liberals such as John Locke, Alexis de Tocqueville, and Adam Smith.[41] The idea that the state should keep 'interference' in citizen's affairs to a bare minimum stems from this school of thought.[42]

Under this political-economic practice the state is obliged to guarantee the integrity and quality of money.[43] According to Harvey, this system of doing things should not be seen as the continuation of earlier classical liberal thought, but a modification of it.[44] It lives independently as a mainstream practice from its earlier predecessors, although it stems from and has similar characteristics to them. Blomgren is of the view that neoliberalism is deeply ingrained in a

31 D Cahill 'Is neoliberalism history?' (2009) 28 *Social Alternatives* 12.
32 Cahill (n 31 above) 12.
33 J Gilbert 'What kind of thing is 'neoliberalism'?' (2013) 80 *New Formations* 11.
34 Ngulube (n 30 above) 27.
35 Ngulube (n 30 above) 4.
36 As above.
37 As above.
38 Ngulube (n 30 above) 52.
39 Gilbert (n 33 above) 7.
40 Gilbert (n 33 above) 8.
41 As above.
42 Gilbert (n 33 above) 7.
43 Harvey (n 9 above) 71.
44 Ngulube (n 33 above) 5.

political theory which advocates for individual liberty, the protection of property and is subsequently hegemonic in nature.[45]

The rationale behind neoliberalism and its policies is that an unrestrained free market is a beneficial way of conducting commercial transactions at an international and national level.[46] It posits that this way of thought unshackles the innovative entrepreneurial acumen in every individual who wants to succeed.[47] According to this line of thought, wealth distribution in society will go to those who have sweat on their brows, and that one succeeds or lives a life of fiasco in accordance with one's individual choices.[48] Mitchell posits that in a neoliberal state, individuals are not induced by national unity in diversity, but by global competitiveness and individual enrichment.[49]

Neoliberalism is not concerned with the implementation of democratic values as entrenched in the Constitution of the Republic of South Africa.[50] Neoliberalism cannot be condensed to a mere coherent ideology, but should be understood as a spectrum of ideas that rationalises our contemporary context, that sway government policy and other contestations.[51] Neoliberalism can also be understood to be a discursive governmental program, an ideology, an abstract machine, and a hegemonic project.[52] In a neoliberal state, government deficit as well as social welfare spending need to be kept at a low.[53]

This caters to the interests of the South African white minority who are able to participate in the 'free market'.[54] This way of living does not address the racial socio-economic inequality that exists and it indirectly perpetuates socio-economic inequality. There can be no denial of the existence of neoliberalism as its rejection would go hand-in-hand with the rejection of capitalism, the manifestation of racialised socio-economic inequality, and structural subordination of black people.[55]

45 Mathekganye *et al* (n 24 above) 46.
46 Bayliss *et al* (n 4 above) 30.
47 Gilbert (n 33 above) 9.
48 DJ Roberts 'Race and neoliberalism' in S Springer *el al* (eds) *The handbook of neoliberalism* (2016) 209.
49 Ngulube (n 33 above) 50.
50 The Constitution of the Republic of South Africa, 1996 (subsequent reference in text: 'the Constitution').
51 Harvey (n 9 above) 72.
52 Gilbert (n 33 above) 7.
53 Narsiah (n 21 above) 39.
54 The phrase is inserted in inverted commas because the market is not 'free' to all but is free to a few who can participate in it.
55 Gilbert (n 33 above) 7.

Neoliberalism can also be understood as the exposure of national economies to global actors and multinational corporations such as the World Bank and the World Trade Organisation.[56] Its existence manifests in the socio-economic disparities and its 'transformative'[57] policies such as the Growth Employment and Redistribution program (hereafter referred to as 'GEAR').[58] 'From each according to their abilities'- best encapsulates what neoliberalism stands for.[59] It advocates for the restoration of capitalist power and the enhancement of individual egalitarianism.[60]

2.1 What was the historical context leading up to the ANC's adoption of neoliberal policies in the local context?

The 1980s, were characterised by massive internal resistance and violence from local political parties, trade unions and international sanctions which were imposed by international states and bodies against the apartheid regime.[61] During this period of unrest, the country was on the brink of a civil war with the government declaring states of emergency in response to the country's ungovernable state.[62] The value of the South African Rand also fell and inflation became chronic.[63]

Police and military brutality by the apartheid government was there to repress those who were opposed to the implementation of a capitalist government in the upcoming democratic dispensation.[64] The assassination of Chris Hani (a general-secretary of the South African Communist Party and head of Umkhonto we Sizwe [Spear of the Nation] - ANC's armed wing) on 10 April 1993, by a far-right anti-communist immigrant named Janusz Walus was evidence of the government's rejection of communism and the embracement of capitalist system/ neoliberal governance.[65] Talks of the nationalisation of industries and the redistribution of wealth to those who had fallen victim to the apartheid regime laid fears on white businessmen.[66] The apartheid government, led by De Klerk, spearheaded South Africa's period of transition and repealed legalisation that segregated between the black majority and the

56 W Larner 'Neoliberalism?' (2003) 21 *Environment and Planning D: Society and Space* 509-512.
57 The policies are not transformative.
58 Narsiah (n 21 above) 36.
59 Gilbert (n 33 above) 10.
60 As above.
61 C Saunders 'Perspectives on the transition from apartheid to democracy in South Africa' (2004) 51 *South African Historical Journal* 161.
62 RM Byrnes 'South Africa a country study' (1996) *Federal Research Division* lviii.
63 Byrnes (n 62 above) lix.
64 Byrnes (n 62 above) lviii.
65 Saunders (n 61 above) 160.
66 Byrnes (n 62 above) lx.

white minority.[67] The apartheid government surreptitiously aided the Inkatha Freedom Party with the provision of weapons to fight the ANC and create division during this period of unrest.[68]

As a result of the division created by the apartheid government, black-on-black violence had caused as many as 10 000 fatalities by 1994.[69] The Goldstone Commission of Inquiry found that these 'dirty tricks' campaign against the ANC were a ploy advocated for by the South African Defence Force (SADF).[70] Many exiles returned to South Africa during the 1990s and were against Nelson Mandela's conciliatory and multiracial government approach in the negotiation of the new democratic dispensation.[71]

It was, however, not all doom and gloom. The United States of America lifted its international sanctions in 1991 after the five conditions named in the Anti-Apartheid Act were accomplished.[72] These conditions included: the release of political prisoners, the entering of multiracial negotiations, the lifting of the state of emergency, the removal of bans of political parties and the repealing of segregatory legislation,[73] such as the Population Registration Act and the Groups Areas Act.[74]

The decline of communism in Eastern Europe and the catastrophes of socialist systems in Africa meant that the likelihood of the South African government adopting a communistic approach were slim.[75] The ANC government took control of South Africa after winning the 1994 election with over 62.5% of the national votes followed by the National Party with 20.4% and the IFP with 10.5% of the national votes.[76] Mandela was the President of the ANC and South Africa at large, with F.W. de Klerk as his deputy president.[77]

Nelson Mandela's status as the president meant that he was in effective control of all policy considerations. Neoliberalism was adopted after the fall of the apartheid regime in 1994 and it sought to 'make up'[78] for the historical injustice suffered by the black majority at the hands of the white minority.[79] At that time, social corporatism was present in the form of the tripartite alliance of the

67 Byrnes (n 62 above) lix.
68 Byrnes (n 62 above) lx.
69 Byrnes (n 62 above) 74.
70 Byrnes (n 62 above) 82.
71 Byrnes (n 62 above) 76.
72 Byrnes (n 62 above) 77-78.
73 As above.
74 Population Registration Act 30 of 1950; Group Areas Act 41 of 1950.
75 Byrnes (n 62 above) lx.
76 Byrnes (n 62 above) lxii.
77 As above.
78 The phrase is in inverted commas because the system of neoliberalism that advocates for individualism cannot realistically undo injustices suffered by the black majority.
79 Byrnes (n 62 above) lxii.

ANC, the South African Communist Party (SACP) and the Congress of South African Trade Union (COSATU).[80]

Between 1995 and 1996, there were demands for immediate economic developments. Labour unions stood firm for organised workers and the government was under massive pressure to alleviate poverty and attract investor confidence.[81] Trade unions were weak in the 'new South Africa'[82] because they had lost their key leaders when they took office as government officials.[83]

The South African government was under the influence of capitalism at the time. The rationale behind the adoption of neoliberal policies was that this adoption would help to attract international investors, gain confidence, and help boost economic growth since neoliberalism was a global phenomenon.[84] This particular approach gave birth to the reformation of a modernised apartheid that masquerades in 'transformative policies'[85] (such as the BEE, BBBE and affirmative action) and not its deconstruction.[86]

The formal adoption of neoliberal policies took place in 1996, when the then government adopted a policy named Growth, Employment and Redistribution Programme, hereafter referred to as the GEAR.[87]

2.2 The global context leading up to the ANC's adoption of neoliberalism

The adoption of neoliberal policies by the ANC's government was preceded by the ideological warfare which occurred from 1947 to 1991 between the Soviet Union and the United States of America and their allies.[88] The war of ideologies dominated international relations and domestic policies, and to a large extent affected the lives of ordinary civilians.[89] This ideology was between the Soviet Union's communist approach and the United States of America's capitalist approach.

80 Bayliss *et al* (n 4 above) 29.
81 Byrnes (n 62 above) lxii.
82 The 'new' South Africa is inserted in inverted commas because the South Africa we live in is not anyhow new. For further read of this view, the author suggests to the reader the following source: K Bayliss *et al* '13 Things You Need to Know About Neoliberalism' (2016) *New Agenda: South African Journal of Social and Economic Policy* 25.
83 Byrnes (n 62 above) lxii.
84 Ngulube (n 33 above) 50.
85 The phrase is in inverted commas because the policies are not transformative.
86 Byrnes (n 62 above) lix.
87 Byrnes (n 62 above) lxiv.
88 JA Engel *The Fall of the Berlin Wall: The Revolutionary Legacy of 1989* (2009) 2.
89 I Bredenkamp & A Wessels 'A historical perspective on South African military chaplaincy and cold war ideologies during the Border War, 1966-1989' (2013) 38 *Journal for Contemporary History* 46.

This ideological warfare known as the 'Cold War' was not only about ideology but was also about technological developments (the 'arms race' and astronomy). It divided the world into two, the Western capitalist and the Eastern communist. The failure of the soviet-style socialism was epitomised by the fall of the Berlin Wall in 1989; to the contrary the fall of the Berlin Wall signalled triumph for capitalism globally.[90] The fall of the Berlin Wall gave birth to the global phenomenon of the hegemonic neoliberal capitalist doctrine we know today.[91] Neoliberalism gained a fellowship in South Africa in the 1990s.

The 1990s saw communists countries such as the Soviet Union suffer economic meltdowns, resulting in communist ideologies losing credibility.[92] This indirectly endorsed capitalist economic practices globally and was no different in South Africa, as the ANC government was somewhat cajoled to implement these neoliberal policies (the GEAR program and the Reconstruction and Development Programme, hereafter referred to as RDP, which was a people-driven initiative).[93]

African influence also played a massive role in the spread of neoliberalism and this was illustrated by the implementation of neoliberal principles in 1974, by Tanzania's Julius Nyerere.[94]Nyerere named this economic-political theory 'Ujama',[95] which meant that individuals had to be self-reliant to ascertain success and had to divorce state intervention.[96] It resembles the qualities of neoliberalism, which is problematic considering black peoples' historical disadvantage. Expecting the historically disadvantaged black community to reverse the wills of injustice that were exerted on them for hundreds of years by themselves is preposterous.

In the 1980s the world was characterised by the over-commitment of states to politics in the public domain in their policymaking process.[97] This was however not the case in the 1990s, because of the democratisation of states as a result of the coming to the end of the Cold War.[98] As a result, there was a de-politicisation of the policy-making process and naturalisation of economic discourse.[99]

90 Narsiah (n 21 above) 34.
91 As above.
92 Ngulube (n 33 above) 49.
93 As above.
94 Ngulube (n 33 above) 67.
95 The inverted commas to the word indicate that the word is not an English word. It is a Ndebele word which says individuals must be self-reliant.
96 Ngulube (n 33 above) 67.
97 Narsiah (n 21 above) 34.
98 As above.
99 As above.

Most international bodies lifted their sanctions on South Africa after the Group Areas Act, Population Registration Act and Land Act were repealed by the ANC government in the 1990s.[100] They (international bodies) then re-established diplomatic relationships with South Africa, amid the upcoming democracy.[101] The World Bank played a pivotal role in popularising the spread of the neoliberal paradigm globally.[102] The adoption of neoliberalism by the South African government, having regard to South Africa's history of black subjugation by the white minority using the same system, meant that the South African government had not deconstructed colonial apparatuses, but merely administered it.[103]

Neoliberalism gained prominence in the 1970s -1980s under the 'new right' political leaders such as the former British Prime Minister Margaret Thatcher and former United States of American President Ronald Reagan.[104]

3 The methodologies used to evaluate ANC's neo-liberal policies

3.1 Critical Legal Studies

Critical Legal Studies (herein referred to as CLS) is a movement in legal theory that emerged from the United States of America in the 1970s.[105] It presented a challenge to Western legalism (which embraced and legitimised existing power hierarchies).[106] It highlights how the law/ implementation of policies legitimises unequal power dynamics in societies.[107] CLS argues that politics and the law are intertwined; that the law (neoliberal policies) is informed by politics and that politics are informed by the law.[108] Empirical assumptions, epistemology, and moral standards that are in the law operate to advance the interest of an identifiable political assemblage.[109]

The political standpoint of CLS is occupied by feminists, and theorists that are concerned with the role played by the race in the

100 Byrnes (n 62 above) 80.
101 Byrnes (n 62 above) 81.
102 Ngulube (n 33 above) 5.
103 Maserumule (n 14 above).
104 Mathekganye (n 24 above) 43.
105 JWV Doren 'Illusive justice: Applicability of critical legal studies to South Africa' (1989) 4 *SA Public Law* 105.
106 Doren (n 105 above) 105.
107 J Modiri 'The grey line in between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse' (2011) 26 *Southern African Public Law* 180.
108 Doren (n 106 above) 105.
109 M Tushnet 'Critical Legal Studies: A Political History' (1991) 100 *The Yale Law Journal* 1517.

law (critical race theorists).[110] It is tough to understand how people could mainly be concerned or interested in what the law says and how it intends to improve their lives, without being interested in what policymakers' do and how they can participate in these policies.[111]

CLS stems from legal realism as a theory and seeks to expose how the law is indeterminate.[112] It aims to overcome race hierarchies and white domination. The theory also speaks about fundamental and internal contradictions (indeterminacies) within the law, in our context neo-liberal policies.[113] It is relevant in our contemporary context because the policies we have adopted speak of transformation and the achievement of an egalitarian society, while in actuality perpetuate racial inequalities and help maintain structural power — hence there exists a fundamental contradiction in the policies — reference?

These contradictions and tensions emanate between the dominant group (which reflects the current dominant status quo) and the subordinate group (which reflects the black majority who aim to challenge the status quo). The theory criticises and politicises earlier theories such as legal realism and liberalism.[114]

CLS can be of great utility since we are to confront those in power (the white minority and the black elite) and who claim that there is no other alternative to neoliberal policies.[115] CLS views the current status quo as unnatural, arranged by those in power, and that it needs to be reconstructed in favour of the black majority.[116] CLS can be used as a theory that explains hierarchical hegemony.[117]

This article intends to use this theory in our context to re-evaluate, analyse, and criticise the negative contributions that neoliberal policies have brought 'post'-1994. Through this theory, I will be able to show how the politics of law favour global capitalism and neo-liberal policies. I will furthermore use the theory to show the false consciousness of the law/neoliberal policies in normalising the current status quo — creating a misconception that things are the way they are because of factors beyond the control of the government.[118]

110 Tushnet (n 109 above) 1517.
111 Tushnet (n 109 above) 1539.
112 Modiri (n 107 above) 181.
113 As above.
114 As above.
115 Doren (n 105 above) 105.
116 Doren (n 105 above) 106.
117 As above.
118 Modiri (n 107 above) 182.

3.2 Critical Race Theory

I feel it is important that we understand what race is before I dwell deeper into what CRT means and how I intend to use it. Race can be understood as something that is not biological or embedded in our being from birth, but as a social, institutional and cultural construct aimed at categorising persons into the structure of hegemony for one group ('whites') over other ('blacks').[119] Social category of race has since been made biological into a hegemonic system.[120]

'Whiteness' has been created to represent purity, civilisation, wealth, art and everything good, while 'blackness' to the contrary represents bad luck, poverty, witchcraft, and dismay.[121] Decolonial scholars have been able to trace the origin of racial categorisation to the 15th century, during the Portuguese and Spanish exploration to the Americas.[122]

Critical Race Theory, herein referred to as CRT, falls under the broad umbrella of feminist jurisprudence, sometimes it is referred to as 'outsider jurisprudence'.[123] It came about as a result of the inadequacies of its predecessor, Critical Legal Studies, because CLS did not adequately recognise the black interest.[124] CRT calls for the obliteration of white structural supremacy, which goes hand-in-hand with the abolition of capitalism/neo-liberal policies.[125] These structural practices reproduce racialised power dynamics in our everyday living. [126]

One of the basic premises of CRT is that law (neo-liberal policies *in casu*) is not apolitical, and that it pushes a certain political, sociological, hidden presupposition and advocates for a certain ideology- namely that it serves the interest of the white minority in the South African context.[127] This theory problematises the traditional thought or view that the state is neutral and fair arbiters of injury.[128] Policies always legitimise inequality through their association to a particular social power and through their

119 S Chiumbu 'Media, race and capital: A decolonial analysis of representation of miners' strikes in South Africa' (2016) 75 *African Studies* 442.
120 J Modiri 'Towards a "(post-)apartheid" critical race jurisprudence: "divining our racial themes"' 27 (2012) *Southern African Public Law* 244.
121 Modiri (n 120 above) 244.
122 Chiumbu (n 119 above) 442.
123 Modiri (n 107 above) 180.
124 D Bell 'Who's afraid of critical race theory?' (1995) *University of Illinois Law Review* 899.
125 J Modiri 'The colour law, power and knowledge: introducing critical race theory in (post) apartheid South Africa' (2012) 28 *South African Journal of Human Rights* 409.
126 Chiumbu (n 119 above) 442.
127 Modiri (n 120 above) 245.
128 Modiri (n 120 above) 252.

appropriation by particular political interests, specific morals, culture and particular values.[129]

In light of South Africa's history of totalitarian white monopoly and legitimised structural racism over the black majority, it would be preposterous to disregard the importance of CRT in challenging white hegemony (through its implementation of neo-liberal policies in our contemporary context).[130] Modiri articulates that the non-existence of CRT in the context of 'post'-apartheid South Africa runs parallel with structural marginalisation of black needs and values in society.[131]

CRT is needed precisely in South Africa because there are ideological discrepancies and technocratic interpretations of our contemporary liberal approaches to the question of redress in South Africa.[132] CRT enables us to analyse, evaluate and criticise the law (policies) that we are governed by. It gives us a different lens through which we can view and problematise the issues of white privilege, racialised inequality, black marginalisation and question existing apparatuses.[133] CRT is also emancipatory through its criticism and analysis and uncovers possible solutions.[134]

Other theories try to provide solutions within those problematic systems, which makes us assume that major apparatuses of these systems do not need fundamental change but that a mere twitch there and there would suffice.[135] The end result of such solutions will be a synthetic analysis and false premise that favours the current status quo.[136] Theories (like the Marxist theory) that do not put race at the centre of their premise are unconscious to the role played by race in our everyday lives. I agree with Modiri in that race needs to be incorporated in the everyday policies and ideologies that govern us if they are to address the growing socio-economic inequality.[137]

I will use CRT to expose the inadequacies of the neo-liberal policies adopted by the ANC government 'post'-1994. I will use the theory to show how the government fails to address the broader issues of race, how they claim to be 'race-conscious' and radical in bringing about changes.[138] It is much easier to expose neo-liberal policies and how they deal with the question of racialised poverty and the

129 As above.
130 Modiri (n 120 above) 231-232.
131 Modiri (n 120 above) 233.
132 Modiri (n 120 above) 232.
133 As above.
134 Chiumbu (n 119 above) 430.
135 As above.
136 As above.
137 Modiri (n 125 above) 226.
138 The phrase 'race conscious' is inserted in inverted commas because the ANC government policies and its policies are not aware of the role of race in its policies.

perpetuation of white hegemony, since they are structurally ingrained in superstructures.[139] This theory will also be used to reveal the hegemonic role played by the ANC government in this regard.

Transformation is not something that can be readily achieved through each person's individual's work to ascertain socio-economic independence, but rather needs a structural re-evaluation from the top of the ladder going down, in order for it to be initiated.[140] This structural transformation ought to take into account black interests, black experience, black history and must place racial issues at the centre of the debate.[141] I will again use CRT as a tool to evaluate firstly, how our constitutional and legislative promises can be realised and secondly, how to provide a voice for the marginalised.

3.3 A critique of neoliberal ideologies and practices through the lens of CRT with a particular view of the Marikana massacre.

Due to the subjugation of blacks by whites, which has resulted in racialised poverty and socio-economic inequalities during apartheid, there is a need for redress 'post'-1994 and a neutral/global/neo-liberal approach to transformation would be insufficient in light of our contemporary predicaments.[142] Race is a key instrument in understanding how violence and oppression take place in segments, such as the mining sector, because the oppressed belong to the particular racial group categorised as black.[143] There is no other way to understand institutionalised racial inequality than through capitalist exploitation and white supremacy.[144]

Derrick Bell states that in racially structured policies (neoliberal policies), there is an existence of a robust connection between economic resources and race.[145] The majority of black South Africans, twenty-six years after democracy, are employed in unskilled and low-paying jobs such as garbage collectors, cleaners, car guards, security guards, and domestic works.[146] The deepening of socio-economic inequality will continue to grow along racial lines because the means of production and the ownership of the markets that determine value belong to the dominant group and those that serve their interest.[147]

139 Modiri (n 125 above) 409.
140 Modiri (n 120 above) 229.
141 Modiri (n 125 above) 408.
142 Modiri (n 120 above) 231.
143 M Ndlovu 'Living in the Marikana world: The state, capital and society' (2013) 8 *International Journal of African Renaissance Studies* 49.
144 Modiri (n 120 above) 232.
145 As above.
146 As above.
147 Modiri (n 120 above) 231.

When one is in the position of the black miners (one of powerlessness), one is the subject of the ideas, plans, and decisions of the dominant group in that they determine one's life conditions.[148] The South African government's current neoliberal systems have not only led to a catastrophic deepening of socio-economic inequality, but have also led to a moral, physiological impoverishment of black-esteem and powerlessness.[149] Violence is a tool that is used to instil fear to those who dare to challenge the system, and is instrumental in maintaining white supremacy in capitalist states.[150]

What allows the phenomena of violence to succeed is not only the acts of violence themselves, but the circumstances that make it tolerable.[151] In most cases, like it was with the Marikana massacre, the violence is legally sanctioned through police services and targets a certain category of persons (black miners in this case).[152] Young enunciates that these group-targeted acts of violence are legitimised, institutionalised, encouraged and tolerated as social practices.[153]

South Africa has been described as the most unequal country in the world behind Lesotho.[154] Thabo Mbeki ('the former president of South Africa) holds the premise that South Africa is a country divided into two nations, the white nation (characterised by socio-economic superiority regardless of geographic dispersal) and the black nation (characterised by poverty, illiteracy and appalling living conditions).[155]

I now tend to engage with the events that happened at Marikana. The Marikana massacre refers to the killing of 34 black miners on the 16th of August 2012, by the South African police under the influence of the white-dominated Lonmin management (a platinum mine in Rustenburg owned by the British) for exercising their right to strike.[156] It must be borne in mind, when analysing the events which unfolded, that the exercise of the right to strike is entrenched and guaranteed by section 17 of the Constitution.[157]

The strike was a result of wage quarrels that existed between Lonmin management and the black miners.[158] From the findings of the Farlam Commission (a commission of inquiry recruited to

148 Modiri (n 120 above) 234.
149 As above.
150 Modiri (n 120 above) 237.
151 Modiri (n 120 above) 238.
152 As above.
153 As above.
154 G Blooma & D McIntyre 'Towards equity in health in an unequal society' (1998) 10 *Social Science & Medicine* 1529.
155 N Nattrass & J Seekings 'Two Nations'? Race and Economic Inequality in South Africa Today' (2001) 130 *Daedalus* 45.
156 M Ndlovu (n 143 above) 46.
157 The Constitution (n 50 above).
158 JF Boëttgerl & M Rathbone 'The Marikana massacre, labour and capitalism: towards a Ricoeurian alternative'(2016) 81 *Koers* 2.

investigate the massacre), it is clear that the protest was against racialised socio-economic inequality and injustice, black economic exploitation of labour and against appalling living conditions provided by the Lonmin management to black miners.[159]

Neoliberal ideologies have manifested themselves through media outputs (such as the Mail & Guardian). These media platforms criminalise the black miners for exercising their constitutional and industrial right to strike; media platforms in South Africa are highly commercialised and business-centred for the white capitalist and this is at the expense of the black population.[160] These platforms have been captured into neoliberal thought as continuously disseminate ideas that are centred on certain political presuppositions (business stability).[161]

The 'Business Day' (a big media-publishing company) is a typical example of a commercialised and business-centred apparatus. The headline from 'Business Day' read that, black miners ought to 'stay away' from strikes because it negatively impacts foreign investors' confidence.[162] Other institutions like Standard Bank also supported this view by stating that the black miner's strike was 'bad for growth' and for the distribution of payments.[163] Instead of uncovering how white capital and their agencies (SAPS) had exploited and dehumanised black miners, they concern themselves with business branding and how the exercise of the black miner's right to strike affects their profits.

The black miners are categorically excluded from representative participation and they do not have a view on how they are perceived.[164] In a neoliberal state like South Africa, this of course takes place along racial lines.[165] There is also the untruthful rhetoric which justifies black socio-economic marginalisation and holds that blacks are 'lazy' whiners,[166] undeserving of socio-economic readjustments and that they suffer from an 'entitlement complex'.[167]

In South Africa, exploitation and labour have a direct intertwined relationship. Racism is constitutive and woven with the international splitting up of labour and capitalist accumulation at a national level.[168] More often than not in neoliberal states, strikers are stripped of their right to agency and are not given the chance to explain their

159 Boëttgerl & Rathbone (n 158 above) 2.
160 Chiumbu (n 119 above) 424.
161 As above.
162 Chiumbu (n 119 above) 425.
163 As above.
164 Modiri (n 120 above) 233.
165 As above.
166 The insertion of inverted commas is because there is no truth in the phrase the black people are 'lazy' and suffer from an 'entitlement complex'.
167 Modiri (n 12 above) 234.
168 Chiumbu (n 119 above) 428.

side of the story.[169] This is so because the ANC government advocates for a certain hidden political presupposition and ideological viewpoint that puts money first and prioritises attraction of foreign investor capital at the expense of the dehumanisation of black miners.

Neoliberalism has certainly 'denied' black people of their voice through the uneven distribution of narrative resources.[170] Agency (speaking on behalf of others) de-authorises those that are being spoken on behalf of and acts as a silencing instrument in neoliberal societies. Black miners then subsequently become objects, and not subjects of their struggles.[171] The media views the occurrence of the Marikana Massacre in a systematic view and it criminalises miners for being 'violent' and 'irrational';[172] this is done through narrow neoliberal discourse.[173] Neoliberal institutions (like the Lonmin mine) thrive on rendering of black miners invisible and on denying black identity, humanity and social realities.[174]

The argument I make above is exemplified in the way the media described the deaths of the 34 black miners: [175] '[s]everal bodies lay on the ground, some piled on top of the other… one man has half his head blown away.'.

This descriptive article denies the black miners of their subjectivity, humanity and in a way normalises the extermination of black bodies.[176] Fanon has observed that the ontological denial of black humanity is one of the key instruments of white supremacy.[177] This approach to black lives and the prioritisation of capital are some of the reasons why institutions like Lonmin (which are supposed to alleviate poverty through job creation) end up exacerbating socio-economic inequality.

The Marikana Massacre must be viewed as a form of exploitation which has rejected the black mine-workers' neoliberal governance.[178] The event which took place at Marikana is reminiscent of the Sharpeville massacre that took place in 1960 at the hands of the white supremacist regime, and yet here we are 24 years into democracy.[179] This has happened under the watch of the ANC's neoliberal government with the so-called 'best constitution in the world' and best policies which aim to reduce socio-economic inequalities. During the apartheid regime, black mine workers used to

169 As above.
170 Chiumbu (n 119 above) 421.
171 As above.
172 Chiumbu (n119 avove) 427.
173 Chiumbu (n 119 above) 424.
174 Chiumbu (n 119 above) 428.
175 As above.
176 As above.
177 Modiri (n 120 above) 244.
178 M Ndlovu (n 143 above) 46.
179 Boëttgerl (n 159 above) 2.

live in hostels as a solution for the capitalist apartheid government to minimise expenditure in relation to housing issues.[180] Fast-forward to 2012 and the ANC still maintains these structures.[181]

Neoliberal ideologies and policies have three interwoven characteristics of power as held by Chiumbu: [182]'(1) subjectivity (these neoliberal ideologies practice systemic Eurocentric racism), (2) authority (the practice of systemic violence) and lastly (3) labour (a systemic practice of global capital)'.

The Marikana massacre should not be viewed as a phenomenon or something we are not used to seeing, but should rather be viewed as daily lived experiences of the marginalised black communities. The difference is that the Marikana massacre was well televised and documented as opposed to everyday harsh realities faced by the majority black population.[183]

Regarding the massacre, the question that becomes imperative is not 'who began the shooting?' because this question is descriptive of what happened on that day, but the question that should be asked is 'why did it happen?' This question gets to the root of the explanation from the top (the ANC government and the Lonmin management) down.[184] The 'why it happened' question aids in the understanding of superstructures that masquerade under neoliberal government policies and that repeatedly reproduce similar occurrences that silence the black voices to the corners of poverty.[185]

South Africa has a problem in the sense that the black-elite have been incorporated into a structural system which is designed to revive unofficial black subjugation and perpetuate socio-economic inequalities through the adoption of neo-liberal macroeconomic policies.[186] The modern-day segregation policies are not bluntly racial, discriminatory nor are they led by white supremacists, but are now led by the captured black elite.[187]

The incorporation of these 'transformative policies', the adoption of constitutional human rights, and the phenomenon of the infamous fallacy of 'previously disadvantaged'[188] makes it seem as though

180 C Chinguno 'Unpacking the Marikana Massacre' (2013) 124 *Global Labour Column* 124.
181 Chinguno (n 180 above) 124.
182 Chiumbu (n 119 above) 420.
183 Ndlovu (n 143 above) 47.
184 As above.
185 As above.
186 Modiri (n 107) 180.
187 Modiri (n 107 above) 188.
188 The phrase 'previously disadvantaged' does not take historic injustice into account and makes it appear as though the injustice is over. The more appropriate term would be the 'historically disadvantaged'.

racism is a thing of the past and make the black majority oblivious to note that these policies do not address black poverty.[189] Whites still hold top managerial positions, and opportunities are still racialised in that whites are ten times more likely to get employed post-graduation than blacks.[190]

It is evident that neoliberal practices and ideologies through the Marikana Massacre have led to economic marginalisation, the death of the black population, black labour exploitation, the exacerbation of socio-economic inequalities and systemic forms of violence.[191] As a result of the close relationship between the government and the Lonmin Mine, neoliberal ideology and a business-minded approach become a new way of thought and as consequence to this. There is a manifestation of a false growth that mainly favours white business owners and the black elite at the expense of black majority.[192] The neoliberal individualistic approach is hostile to any form of public provision and collective organisation while remaining protective of minority individual needs.[193]

3.3 How neo-liberal policies and ideologies perpetuate socio-economic inequality, viewed through CRT and CLS with a particular interest in the privatisation of water (*Mazibuko* case).

This part of the article will engage with the deepening of socio-economic inequality 'post-1994' through the lens of CLS. One of the basic premises of CLS is the exposure of internal contradictions and tensions within the law or neoliberal policies.[194] Some of these internal contradictions or tensions within neoliberal policies will be highlighted through the provision of water.[195] The argument I make will be furthered by the cost recovery pricing model. The model is aimed towards achieving equitable services that are financially and ecologically sustainable to the masses.[196] It is however submitted that this model is inequitable in that, poorer households pay larger amounts of their incomes towards the building of water infrastructure.[197] This is one of many contradictions found in neoliberal policies.

189 Modiri (n 120 above) 235.
190 Modiri (n 120 above) 238.
191 Chiumbu (n 119 above) 431.
192 DT McKinley 'The making of a myth: South Africa's neoliberal journey' (2007) 35 *Discourse* 16.
193 Gilbert (n 33 above) 16.
194 Modiri (n 107 above) 181.
195 Bayliss *et al* (n 4 above) 30.
196 As above.
197 As above.

In 1955 the ANC government adopted the Freedom Charter as a guiding blueprint of how they tend to govern the 'new' South Africa.[198] One of the most pivotal mandates of the Charter was to restore the national wealth of the country to the black majority.[199] One of the most rudimentary elements of the restoration of the national wealth of South Africa is its water.[200] This sentiment is further shared by section 27 (1)(b) of the Constitution and the Water Service Act 108 of 1997.[201] These initiatives were responsible for the distribution of water to all citizens of the country indiscriminate of race and class.[202]

It did not take the neoliberal ANC government long before it began to disregard its mandate by adopting neoliberal policies that produced the opposite results.[203] The ANC neoliberal government turned to the privatisation and commercialisation of public services, by forming partnerships with international water corporations as a means of generating revenue.[204] As a result of this move to a neoliberal cost-recovery method of governance, there was a massive increase in the price of water services, and people who suffered most belonged to the poor black community.[205]

Under apartheid there was no water metering technology in place and residents paid a flat rate for services,[206] but since 1994 the introduction of neoliberal water metering technologies and policies meant that there would be a growing socio-economic division along race because black communities would suffer most since they would pay for their individual water consumption.[207] The neoliberal way of governance is colour-blind and ignores power dynamics placed by race in a country with a history of white supremacy that spans over hundreds of years when it chooses policies.[208] CRT calls for the obliteration of such policies because they indirectly and blindly enhance structural white supremacy and black marginalisation through affordability.[209]

In South Africa the lack of affordability is directly related to race, thus the marginalisation of the poor-black households pertaining to the provision of water services endorses existing race

198 DT McKinley 'The struggle against water privatisation in South Africa' in B Brennan *et al Reclaiming public water* (2005) 181.
199 McKinley (n 198 above) 181.
200 As above.
201 Water Service Act of 108 of 1997 sec 47(1)(b) subsequent reference in text, Water Services Act.
202 As above.
203 As above.
204 McKinley (n 198 above) 182.
205 As above.
206 Services includes water and refuse removal.
207 Narsiah (n 21 above) 41.
208 Modiri (n 120) 409.
209 As above.

stratifications.[210] The black population makes up the overwhelming majority of the people who find themselves living under conditions of abject poverty.[211] Under the apartheid regime (in 1993) the local community of Fort Beaufort in the Eastern Cape paid a flat rate of R10.60 for services including their water consumption. Fast-forward to 1996 under the ANC neoliberal government and privatisation under the Suez (international body) there was an increase by 600% to a monthly rate of R60.[212]

In the black community of Nelspruit, where the unemployment rate is at a rate of 40% and with an average black household earning R1 200 per month, the price of water increased by 69% post 1994 .[213] As a result of these policies there has been a bifurcation of the South African society into those who can afford water services and those who cannot. The division created by these policies legitimatises structural racial discrimination, black inferiority and maintains unequal power dynamics.[214] This systematic way of regulating water distribution caters to the interest of an identifiable white group based on affordability.[215]

According to Karl Marx, money is the 'universal expression of commodity form'.[216] It is used as a concealing façade of material relationship between resources and a particular privileged group (whites) of people who possess it.[217] These power dynamics hide exploitation (through affordability), renders services as being transparent for all who can afford them and does so as an objective means of exchange.[218]

Neoliberal thought purports to turn the policymaking process into one involving a technocratic process.[219] Water is being reduced to the status of an 'economic good', rather than a 'public good'. This policymaking process is an example of how the country is being run in a business-model-like way.[220] The fact that water needs to be billed according to individual water consumption (water metering) further entrenches white hegemony, considering the fact that those who can afford these water services are the privileged white minority.[221] The fact that municipalities have accepted the World Bank's advice (in that they implemented policies that enabled them to cut off water services to those who can't afford to pay) is problematic because it

210 Modiri (n 120 above) 225.
211 As above.
212 McKinley (n 198 above) 183.
213 As above.
214 Modiri (n 107 above) 180.
215 As above.
216 Narsiah (n 21 above) 39.
217 As above.
218 As above.
219 Bayliss *et al* (n 4 above) 25.
220 Bayliss *et al* (n 4 above) 26.
221 As above.

discriminates based on affordability (race) and violates the constitutional and legislative mandate of making water accessible to everyone, in particular the black communities.[222]

One of the most fundamental human rights (the right to have access to water) has been turned into a restricted privilege for those who can afford it.[223] It is argued that water is life, thus the denial of such a right results in the dehumanisation of the marginalised black community. The right to access water is crucial to the achievement of racial equality and to the revolution within the country.[224] The issue of prepaid water metering services is a key component in the context of privatisation (a neoliberal trademark) because it prioritises the maximisation of profit.[225]

As a consequence of the deepening socio-economic inequalities along racial lines because of these neoliberal policies, black communities find themselves in a state of generational poverty. Poverty affects the black community's moral recognition, dignity, and integrity.[226] Socio-economic inequality along racial lines is not a natural phenomenon but rather a result of a racially structured system that distributes benefits along axes of racial and social powers.[227] These are the basic features of a neoliberal democratic country.[228] Due to the level of importance and interconnectedness of race to socio-economic inequality in South Africa, the production of precarity runs parallel with continued white superiority.[229]

The principle of decentralisation under neoliberal water policy entrenches regional inequality.[230] The decentralisation principle has further led to the fragmentation of the apparatuses; provinces with one of the highest levels of poverty are the ones that have the lowest access to water supply.[231] Joel Modiri asserts that these structural practices reproduce racialised power dynamics in the form of laws (water services), knowledge, labour and ideology.[232] These ideological discrepancies under our contemporary neoliberal government need to put race at the forefront of its policies to address the growing structural socio-economic inequality.[233]

222 McKinley (n 198 above) 183.
223 McKinley (n 198 above) 185.
224 DM Chirwa 'Water privatisation and socio-economic rights in South Africa' (2004) 8 *Law, Democracy & Development* 186.
225 Chirwa (n 224 above) 199.
226 Modiri (n 120 above) 226.
227 Modiri (n 120 above) 239.
228 As above.
229 Modiri (n 120 above) 244.
230 Bayliss *et al* (n 4 above) 26.
231 As above.
232 Chiumbu (n 119 above) 422.
233 Modiri (n 120 above) 232.

The internal contradictions or tensions within neoliberal policies and the privatisation of water are underlined by the contradiction that arises when private water companies are faced with the predicament of meeting the demands of investors, while also having to meet the demands of local customers and stakeholders.[234] Investors want nothing but their returns (profit), while customers want low water prices.[235] This predicament between cost-recovery (recovering the total cost of providing water) and affordability in South Africa takes centre stage and needs addressing.[236]

Considering the fact that the ANC neoliberal government has accepted the World Bank's advice on the cutting off of water supply to those who cannot afford to pay, it has become counterintuitive when the same government fails to meet the requirements set out by the World Health Organisation that each individual should receive free 100 litres of water per day (roughly 30 000 litres per month).[237] It is unavoidable that black households, on average, have a higher number of people than white households and have a higher consumption of water, thus the allocations of a fixed 6000 litres for all households is unfounded and detrimental to black communities at large.[238] The average household size of the black population is 3.3 compared to that of the white household size of 2.7.[239]

The ANC neoliberal government is quick to act when collecting money (the cutting-off of the water supply to those who cannot afford to pay), but slow to meet its mandated water supply requirements. This is one of the rudimentary principles of a neoliberal government which is, 'profit before people'.[240] The people who are most affected by these tensions within the ANC neoliberal policies are the black community.[241] These ideological discrepancies and internal contradictions push a certain political, sociological, hidden presupposition which serves to protect the interest of foreign capital at the expense of the poor black communities.[242]

Those who do not qualify for free basic water supply, but are poor nevertheless through the forced installation of prepayment water

234 Bayliss *et al* (n 4 above) 30.
235 As above.
236 As above.
237 McKinley (n 198 above) 184.
238 Statistics South Africa 'Community Survey 2016 in Brief' (2016) http://cs2016.statssa.gov.za/?portfolio_page=cs-2016-in-brief (accessed 03 May 2020). The 6000 'free' litres of water per household comes from the South African government policy introduced in late 2002. It only amounts to 25 litres per person per day. It does not even meet the basic sanitisation requirement even though the World Health Organisation recommended that each person be granted 100 litres of water per day. Should an average black household have eight people, the minimum amount of water needed 24 000 litres per month.
239 Statistics South Africa (n 238 above)
240 Chinguno (n 180 above) 124.
241 McKinley (n 198 above) 184.
242 Modiri (n 3 above) 245.

meters, are practically forced to self-disconnect their water supply because they can't afford to pay their individual water consumption.[243] Access to water will thus be accessed only by those who can afford it (in most cases, the privileged white minority and the black elite and middle class). These neoliberal water policies indirectly maintain racial hierarchies.

Neoliberal policies have rubbed salt in the wound, by worsening changes in the social-economic structure in 'post-apartheid' South Africa.[244] As a result, the society is stratified along socio-economic rights.[245] Individuals who feel the pain of privatisation (exclusion and cut offs of water because they cannot afford water services) and the commodification of water most are the poor black communities while business elites, bureaucrats and politicians live lavish lifestyles.[246]

4 Possible alternatives and solutions to neoliberal policies that maintain socio-economic inequality along racial lines.

There is a widespread dissatisfaction with neoliberalism and its socio-economic consequences within the country, but there has yet to be a methodology to crystallise a sufficiently potent strategy that critically amasses the masses to challenge the hegemonic apparatus.[247] It must be noted, however, that CRT and CLS are not the comprehensive answers to all the racial neo-liberal policies we face. My argument is not that they should replace other theories or ways of thought, but that they should be used as guidelines and in conjunction with other theories to evaluate, critique and to reject policies or ideologies that are colour-blind to the role played by race.[248]

Andrew Heywood is correct in his view that the political system can function without the Constitution, the judiciary, or without political parties, but that the political system cannot function without the executive branch that makes decisions and formulates policies that govern us.[249] It is therefore imperative that we know where the root of the problem is and attack it. It lies within the ideologies that form the policies that the executive government chooses to implement that cause the growing socio-economic inequalities. Politics are key in deciding a system of governance (this ties in with what the CRT and CLS hold about how the law and policies are

243 Bayliss *et al* (n 4 above) 30.
244 Bayliss *et al* (n 4 above) 29.
245 Maserumule (n 14 above) 14.
246 As above.
247 Gilbert (n 33 above) 18.
248 Modiri (n 107 above) 233.
249 Maserumule (n 14 above) 14.

inseparable), while administration institutionalises policy objectives.[250]

The reshuffling of government servants within the structure will not bear fruit but rethinking and decolonising the ideological edifice that forms the structure will be helpful. The idea that the government should be run as a business model needs to be eradicated and a more humanistic approach needs to be adopted.[251] We need to adopt the notion of public-good over neoliberal prescriptions entrapment.[252] Community mobilisation against every day hardships of neoliberal governmentality is one option in the fight against a neoliberal hegemony that exacerbates racial socio-economic inequality.[253]

One counter-hegemonic movement that has fought against growing socio-economic inequality is the Concerned Citizen's Group, hereafter known as CGG.[254] The movement took legal instruments and turned them against councils, took some policies to court and won those cases and called for the transformation of policy considerations.[255] These types of movements created the potential of a new space and new politics.[256] Forcing the state to act in unconventional ways is counter-hegemonic in the sense that it deprives the state from blindly acting through policy limitations.[257]

During the apartheid regime, black townships were ungovernable and the state was unable to exercise effective control over these areas.[258] The inability of the state to exercise power over a particular area suggests that the particular area becomes a thorn in hegemonic control.[259] These areas can thus become a spatial hotspot for active mobilisation against neoliberal policies.[260] Service boycotts have proven to be instrumental in bringing about effective change in the past, and it is logical that they should be thought of as a way of fighting the growing racialised socio-economic inequality brought by these neoliberal ideologies.[261]

The re-connecting of water and electricity through the use of technological advancements (e.g. professional electricians and plumbers that live in those areas), with regard to one's inability to pay for such services decommodifies public services.[262] The Soweto

250 As above.
251 As above.
252 As above.
253 Narsiah (n 21 above) 37-41.
254 Narsiah (n 21 above) 36.
255 Narsiah (n 21 above) 37.
256 As above.
257 As above.
258 As above.
259 As above.
260 As above.
261 As above.
262 As above.

Electricity Crisis Committee, with its operation Khanyisa, is a formal way of decommodifying public services.[263] These tactics have been shown to be useful during the apartheid era, and can no doubt help to eradicate the growing systematic poverty experienced by black communities.[264]

Campaigns such at the R10 campaign are a necessity in the fight against growing socio-economic inequality as a result of neoliberal ideologies.[265] The campaign was formed in response to the commodification of services and criticised the privatisation of services enforced in an effort to maximise profits.[266] The R10 campaign has had considerable effect in state-society relationships in that the flat-rate that is called for insinuates that water cannot be turned into a commodity for capital accumulation.[267] Water thus remains as a public service and is absolved from minority exploitation.[268]

It makes sense that those who can afford to pay for privatised water (the wealthy white minority) pay for their consumption, and that those cannot afford to pay (mostly black historically disadvantaged individuals) pay what they can afford to pay (if a poor black household can only afford to pay R30 for example, that's what they should pay).[269] This goes in hand with the constitutional mandate to heal the divisions of the past, to ascertain social justice, to improve the quality of life of all citizens (with a recognition of past injustices) and the achievement of substantive equality.[270] Those who are living in geographically poor areas should automatically qualify for tax rebates and this can act as a form of a redistributive mechanism.[271]

In essence, the alternatives that are suggested by these social movements and campaigns, particularly with the provision of water services and South African minerals (mining) are that the state should reclaim control of these resources and should aim to redistribute these riches with cognisance of affordability, equity, and the role played by race in the society.[272] Neoliberalism should be understood as a Eurocentric concept or ideology.[273] African problems cannot be resolved through westernised neoliberal principles.[274]

263 As above.
264 As above.
265 Narsiah (n 21 above) 39.
266 As above.
267 As above.
268 As above.
269 As above.
270 The Constitution (n 50 above), Preamble.
271 Narsiah (n 21 above) 39.
272 Narsiah (n 21 above) 41.
273 Ngulube (n 33 above) 66.
274 As above.

5 Conclusion

This article has set out its problem questions, aims, and explained how it seeks to problematise, evaluate, critique and expose neoliberal policies and how it plans to come up with recommendations or alternatives to these policies that perpetuate socio-economic inequality along racial lines in the 'post'-apartheid South Africa. A particular interest in the Marikana Massacre and the privatisation of water was also shown through the elucidation of these neoliberal policies. As shown in the research above, CRT and CLS are useful approaches to evaluate and critique neoliberal structures that perpetuate white supremacy.

Through the research we have come to understand what neoliberal is, its core principles, its relevance in our growing racialised socio-economic inequality and how it serves the interest of the white minority. It serves to restore structural power dynamics.[275] In the above research, CRT and CLS have exposed neoliberal inadequacies and how affordability and black labour exploitation has deepened socio-economic inequality. The research has also shown how business-like and profit orientated South Africa is and how this has been to the detriment of the black community and to the goal of achieving an egalitarian society.

Major apparatuses, such as the media, have also shown to contribute to these growing socio-economic inequalities. However, social movements, campaigns (to decommodify resources like the R10 campaign) and a review of how the whole neoliberal apparatus operates and who it serves is useful in understanding neoliberal limitations. Using CRT and CLS is instrumental in understanding how race is the key instrument at which everything is organised and it (race) should be placed forward as a lens at which we view future policies in the effort to eradicate systemic racism.

275 Gilbert (n 33 above) 16.

WHEN LIFE GIVES YOU LAW, MAKE LEMONADE: EXPLORING THE 'LEGALISED' OPPRESSION OF BLACK WOMEN IN THE UNITED STATES OF AMERICA AND SOUTH AFRICA AND THEIR MUSICAL RESPONSE THERETO

*by Thandeka N. Khoza**

1 Introduction — Overture

'Oppression' can take a great number of forms, depending on its context, purpose and subjects. The forms of oppression which are the subject of this article are racial prejudice and patriarchy. These two forms of oppression are relevant here to the extent that they are imposed on Black women. Within this context, the struggle of Black women is twofold, in that it is comprised of the Black person's struggle, against racial prejudice, as well as the woman's struggle, against patriarchy. Additionally, this struggle, against racial prejudice and patriarchy, is also twofold in the sense that it exists in society and is also condoned by the law. Therefore, the racial prejudice will be

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discussed as it relates to the Blackness of Black women and the patriarchal prejudice will be discussed as it relates to the 'womanness' of Black women.

This paper, then, recalls the racial and patriarchal oppression of the Black woman by looking at the said oppressions as they have existed in society as well as some ways in which the law has aided or reinforced them. Once the oppressions, their existence and legal enforcement, have been outlined, this paper then visits the topic of music as a documentation of and escape from the experience of these oppressions by Black women. It should also be noted that, due to similarities which will be outlined in the article, the focus of this paper is squarely on the experience of the Black woman in the United States of America (USA) and South Africa. Therefore, some racially prejudicial laws will be sampled from these countries. Furthermore, some music by Black female artists from both countries will be sampled too. Above all, this article is presented as a reminder of sorts that the law does not exist in a vacuum — it applies to, has consequences for and is experienced by people.

2 SUITE I: A synopsis of racial prejudice against the black person in the United States of America (USA) and South Africa

As already alluded to in the introduction, the first form of oppression experienced by the Black woman in the USA and in South Africa takes the form of racial prejudice. To say that the racial prejudice which is presently experienced by Black women in the USA and South Africa is not new, it is old and persistent, would not be an exaggeration. Therefore, it is important to trace and reflect on its roots. To this end, this article will offer a synopsis of the age of slavery and the Jim Crow era, in the context of the USA. Regarding South Africa, particular attention will be paid to the segregation era and the Apartheid era. The topics of slavery and segregation will be discussed tangentially, so as to better place the Jim Crow and Apartheid eras in context. Two things should be borne in the mind for this section. Firstly, this article admits that each of these topic areas are vast and cannot be completely analysed in the space of a few words; be that as it may, it remains necessary to visit these topic areas, even if only as far as the article will allow, in order to make the article complete. Secondly, as is alluded to in the introductory section of this paper, before turning its focus to art as a coping mechanism and machine of awareness, this article focuses on the existence of the sampled prejudices as well as their reinforcement in and by the law. Therefore, these eras enumerated above are chosen because of their clearly racially prejudicial laws, the consequences of which are still persistent in today's society.

2.1 Movement I: The American case study

This article begins the conversation on racial prejudice with the American case study. The Transatlantic slave trade and the practice of slavery in the United States of America need not be unpacked before its racial prejudice is exposed.[1] Racial prejudice is a riff which continues through and joins every component of the trade and practice, from the capture, to the transportation, to the trade and to the use of the slaves.[2] It is important to first discuss this era, then, in order to foster a more wholistic understanding of the Jim Crow era.[3]

The first (chattel) slaves from Africa are said to have arrived in the United States in the year 1619.[4] From this time, up till the abolition of the slave trade,[5] it was common practice to import and exploit slaves in what was then 'the Colonies'.[6] During this time, there were some plainly prejudicial laws which were promulgated against the slaves. The most obviously racially prejudicial was the enactment of laws which allowed Black people to be imported and exploited as slaves, without protection.[7] These Black slaves were exploited as cheap labour, it would be more accurate to call it 'free labour', and this free labour produced large quantities of materials which were in high demand all over the world such as tobacco, sugar and cotton.[8] One of the most important laws enacted against them during this era was that which allowed slave masters to violently beat and kill their slaves.[9] Though present during the time of slavery, the exploitation of Black people in the USA, particularly that of Black women, did not end with slavery; instead, it evolved with the years.

The consideration of legally sanctioned exploitation and free will to physically abuse or kill Black people, is important for the understanding of the, for lack of a better word, 'anxiety' amongst the White population of the United States of America which was carried over after the abolition of the slave trade. Notably, because of the racist attitudes harvested during the age of slavery, even after the

1 JP Greene 'The social origins of the American Revolution: An evaluation and an interpretation' (1973) 88 (1) *Political Science Quarterly* 2.
2 L Angeles 'On the causes of the African slave trade' (2013) 66 (1) *KYKLOS International Review for Social Sciences* 3.
3 M Rosenfeld *Affirmative action and justice* (1991) 96.
4 A Fede 'Legitimized violent slave abuse in the American South, 1619-1865: A case study of law and social change in six southern states' (1985) 29(2) *The American Journal of Legal History* 99.
5 PM Muhammad 'The Trans-Atlantic slave trade: a forgotten crime against humanity as defined by international law' (2003) 19 (4) *American University International Law Review* 9931.
6 Fede (n 4 above) 101 – 105.
7 BJ Nicholson 'Legal borrowing and the origins of slave law in the British Colonies' (1994) 38(1) *The American Journal of Legal History* 38.
8 Angeles (n 2 above) 12.
9 H Kotef 'On abstractness: first wave liberal feminism and the construction of the abstract woman' (2009) 35(3) *Feminist Studies* 509; Fede (n 4 above) 93.

abolition of the slave trade, issues of affirmative action and reconstruction of society were not given attention.[10]

For many years, the American government preached the 'separate but equal' gospel and used this phrase to justify the segregation and oppression which Black people were subjected to during the Jim Crow era.[11] However, the Jim Crow era made peoples separate and *unequal*. Much like the practice of the Apartheid era, Black and White people were kept separate on railroads, in education, at work and in justice.[12] Regarding separation in education, it is interesting, and important, to take note of the case of *Berea College v Common Wealth* (*Berea College*).[13] Berea College was an institution which was privately founded and funded by an abolitionist in the 1850s. In 1904, the College admitted both Black and White learners.[14] The community reacted negatively to the admission of different races to one school, and shared classes, and so the state legislature promulgated a law which stated that schools could admit both races, so long as they offered separate classes, 25 miles apart from each other, otherwise they would have to pay a hefty fine.[15] Berea College approached the Kentucky Trial Court and the Kentucky Supreme Court; however, both Courts ruled in favour of the legislature and the law was upheld.[16]

This case was then taken to the Supreme Court, which has been said to have had some positive race cases in that era which were halted because of White public anxiety at a stage.[17] The *Berea College* case is an example of the 'halt' in positive rulings as the Supreme Court clearly supported the segregation of education between races.[18] There was great support in the public for this segregation-supportive and racially discriminatory and prejudicial case. The then President of Harvard in 1907, soon after the Supreme Court passed the judgment, expressed support for the judgement stating that it was perfectly fine and sensible because of the large number of Black students at Berea College. He went on to state that, had Harvard had more Black students, as opposed to the 30 Black students to the 5 000 White students, then Harvard would have also had to have separate classes.[19] At this point one would ask oneself: why would you need to segregate classes with a large number of Black

10 Rosenfeld (n 3 above) 96.
11 MJ Klarman *From Jim Crow to Civil Rights* (2004) 8.
12 Klarman (n 11 above) 9.
13 *Berea College v. Commonwealth*, 123 Ky. 209, 220-21, 94 S.W. 623, 626, (1906).
14 BC Schmidt 'Principle and prejudice: the supreme court and race in the progressive era. Part 1: The heyday of Jim Crow' (1982) 82(3) *Columbia Law Review* 446.
15 Schmidt (n 14 above) 446.
16 Schmidt (n 14 above) 447.
17 Schmidt (n 14 above) 445 – 446 & 449.
18 Schmidt (n 14 above) 449.
19 Schmidt (n 14 above) 451.

students, when you see no need to do so when there is a small number of students? This thinking shows the unfounded anxiety of the time, which was fuelled only by racial prejudice. The President's words do not make sense, they are not scientific, they are only racially prejudicial. Nonetheless, this state of events highlights the fact that societal prejudice was legitimised by the law. The Supreme Court's decision in *Berea College* was also hailed and supported in the legal publications such as the *Outlook*, *Harvard Law Review* and *Virginia Law Register*.[20]

The United States Supreme Court also heard dozens of other cases dealing with, and requesting it to, legitimatise racial segregation in the 'heyday of Jim Crow'.[21] The Supreme Court's decisions in these cases resulted in the Court legitimising and enabling the Jim Crow laws and the segregation that these cases called for; thus, the Supreme Court entrenched Jim Crow laws.[22] Of particular importance is the Civil Rights Act of 1875 which stated:

> all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations … of inns, public conveyances on land or water, theatres and other places of public amusement … applicable alike to citizens of every race and [colour].[23]

The Supreme Court held that this Act was unconstitutional. The bench further stated that 'it would be running the slavery argument into the ground … to view acts of private discrimination as badges of slavery'.[24] The majority decision further displayed a lack of willingness for equal protection by holding:

> When a man has emerged from slavery … there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special [favourite] of the law.[25]

The Supreme Court's stance clearly reflects the legal legitimisation of the general societal attitude which favoured racial segregation. As a result of its support for racial prejudice in its decisions, the Supreme Court gave power to the law to legitimise the racial prejudice which the Black population was subjected to. The cases discussed above highlight that there was in fact a legal legitimisation of racial prejudice against black people, which came about because of the pressures of (white) society. Therefore, simply stated, segregation along racial lines existed both in society and in law.

20 Schmidt (n 14 above) 451.
21 *The Civil Rights Cases* 109 U.S. 3 (1883); *Plessy v Ferguson* 163 U.S. 537 (1896).
22 Schmidt (n 14 above) 461.
23 Civil Rights Act of March 1, 1875, ch. 114, 18 Stat. 335 (held unconstitutional in 1883).
24 *The Civil Rights Cases* 109 U.S. 3 (1883) para 24.
25 *The Civil Rights Cases* 109 U.S. 3 (1883) para 25.

2.2 Movement II: The South African case study

As stated in the introduction, regarding racial prejudice, this article focuses on the Black experience in the USA and South Africa. Having glossed over the situation in the USA, the focus of this article now turns to the subject of Apartheid as the manifestation of racial prejudice in South Africa. Once again, it is emphasised that there is more to Apartheid, it's history, structure, aims and outcomes, than can be fit into a few pages. However, in order to explain the history of the Black woman's plight, as it has been formed and shaped in South Africa, it would be remis to not discuss the Apartheid era, albeit briefly. Whereas the age of slavery and Jim Crow era were discussed above, segregation and Apartheid will be discussed below.

The history of racial oppression in South Africa stretches over hundreds of years and started in a similar way to how colonisation started in other parts of Africa. It took the West just eleven years to colonise 50 African states, out of what was then 53 states.[26] However, South Africa had a different tale, in that it was tossed between two states- the Netherlands and Great Britain.[27] Depending on the time in history and which part of the history you are referring to, either one of these nations could be named as the colonisers of South Africa.[28] However, what sets South Africa apart is what came *after* the age of colonisation. While other African countries, as well as countries in other parts of the world, such as the Caribbean and Asia, gained their independence after colonisation, South Africa's independence meant independence for the Boer population.[29] The transition for South Africa then became a transfer of power from one Caucasian population to another. In the beginning of the new age, segregation was kept as we understand it; however, after a while, South Africa was dragged into the dreaded 'Apartheid'.[30] Apartheid took racial segregation to another level and it achieved this through the implementation of a large number of laws which validated the oppression of Black people. During the apartheid era, there were hundreds of laws which were enacted; if the legislature did not originally think of a law, once a case had been heard in court, if needed, a new law would follow, almost instantly.[31]

One of the most notable and long-lasting, it would seem it was actually 'everlasting', laws of the age of segregation is the Natives

26 AD Akinmade 'Colonial legacy and the retracted state: Africa in motionless motion' (2014) 3 (9) *Journal of Arts and Humanities* 60.
27 AT Farkash 'The ghosts of colonialism: economic inequity in post-apartheid South Africa' (2015) 3 *Global Societies Journal* 13.
28 Akinmade (n 26 above) 71.
29 Farkash (n 27 above) 14.
30 Farkash (n 27 above) 16.
31 P Maylam 'explaining the apartheid city: 20 years of South African urban historiography' (2009) 21(1) *Journal of Southern African Studies* 25.

Land Act.[32] This was the first major piece of segregation legislation to be passed by the Unionist Parliament. Not only that, it was also particularly notable because its contents applied to *all* Black people across the *entire* country (or as it was called then, the 'Union of South Africa')[33] in one way or another. JBM Hertzog, the Prime Minister of the Union of South Africa from 1924 to 1939, laboured for ten years in attempts to have parliament pass a Bill which would shove the Black population onto insignificant pieces of land spotted all over the country and keep them there. After him, his successors kept this law, as it eventually became, and they intensified it too, taking Herzog's reserves and turning them into homelands.[34] Although Herzog was the Prime Minister during the segregation era, his words, 'we must choose whether we want to keep the land or the native' remained the mantra all through apartheid;[35] and we still see the words manifest every day.

Like in Jim Crow USA, for every act of marginalisation performed by the white communities in South Africa, there followed a law which aimed to validate that act.[36] All the laws which regulated land, labour and freedom, all of which are linked, worked together for the good of the White population, at the expense of the Black population.[37] For example, the Natives Land Act resulted in Black people receiving only 7.3% of the total, and the least profitable or arable, land in South Africa, made it illegal for Black people to own land, made it impossible for Black people to vote, restricted the movement of the Black population, especially in the so-called 'white areas' and secured many agricultural jobs for the White population, at the expense of Black farmers.[38] All these restrictions expose the far reach of this Act.

The Natives Land Act, though particularly notable, was preceded by other Acts, such as the earlier Glen Grey Act.[39] In the late 1800s, most of the Black community, which had previously qualified for the vote because of the amount of land they owned, became disenfranchised.[40] The Glen Grey District, where the Act applied, covered the areas of Queenstown and Wodehouse. In these areas, the

32 Native Lands Act No 27 of 1913.
33 South African History Online 'The Natives Land Act of 1913' 27 August 2019 https://sahistory.org.za/archives/natives-land-act-1913 (accessed 13 June 2020).
34 A Dodson 'The Natives Land Act of 1913 and its legacy' (2013) *Forum* 29 – 30.
35 H Giliomee *The Afrikaners: biographpy of a people* (2003) 308.
36 W Beinart *Twentieth century South Africa* (2001) 55.
37 ST Plaatje *Native life in South Africa* (1996) x.
38 N Worden *The making of modern South Africa: conquest, segregation and apartheid* (2000) 48-49; D Oakes *Illustrated history of South Africa: the real story* (1989) 316.
39 Glen Grey Act 25 of 1894; For more information on the Glen Grey Act, see generally: https://omalley.nelsonmandela.org/omalley/index.pho/site/q/03lv01538//04lv01646/05lv01705.htm (accessed 13 June 2020).
40 CC Crais *White supremacy and black resistance in pre-industrial South Africa* (1992) 193.

Black population, mostly made up of abaThembu, outnumbered the White population. This caused great anxiety for the White population because, if all those Black people could vote, they would surely successfully be ruled by a candidate of their choosing. The abaThembu owned a lot of land in this area; however, they owned it communally. Therefore, in response to the White anxiety, the Glen Grey Commission was set up in 1893 and one of the suggestions made by the Commission was that the land should be split between families so that some Black people would end up without land and so have no right to vote and have to also leave the area in search for work.[41] Cecil John Rhodes, along with his secretary, then drafted the Glen Grey Act in order to deal with the questions of land, labour and franchise.[42] The Glen Grey Act, which had been passed some 20 years before the Natives Land Act, first limited and restricted the amount of land which could be bought by a Black family to 'one man, one plot' as well as restricted the number of people who could live on and own land;[43] and then in a later amendment (1903) it also made illegal the purchase of land by anyone from the Black community.[44] This is important to note because the laws, which existed at that time, gave someone a vote, only if s/he had a certain amount of land. Therefore, if a people could not own land, they could not vote.[45]

In 1887, the South African Government also passed the Parliamentary Voters Registration Act, which discounted communal land tenure from qualifying to vote.[46] As a result of this, more Black people lost their right to vote. In 1882, the Franchise and Ballot Act was introduced, and it demanded that one should, in addition to holding the requisite amount and type of land, be able to sign his or her own name in order to be allowed to vote.[47] Again, more Black people lost their right to vote. The idea of reserves, though extended in the Natives Land Act, was also first contemplated only for the area of Natal, within the Lagden Commission Report of 1903.[48] Collectively, all these laws highlight the legalisation of racial prejudice as well as establishes it as a recurring theme in the law.

Different laws governed different peoples in different ways because the country South Africa did not exist until it was first constituted as the Union of South Africa through the South Africa Act of 1909, which was adopted by the British Parliament after the two

41 South African History Online (n 33 above).
42 South African History Online (n 33 above).
43 Glen Grey Act of 1884 clause 26.
44 Glen Grey Act of 1884 clause 26.
45 Worden (n 38 above) 48.
46 South African History Online (n 33 above).
47 South African History Online (n 33 above).
48 MA Ishangi 'The Origin of Segregation and the Existence Thereof by 1910' 27 October 2015 https://earlyengagements.wordpress.com/tag/lagden-commission/ (accessed 13 June 2020).

Anglo-Boer Wars.[49] By the time the Union was formed, only some Black people in the Cape Colony had the right to vote,[50] subject to the fulfilment of the conditions mentioned above.[51] The colour bar on the right to franchise in the rest of the land, as well as the protection of the remaining Black vote, was transposed into the Act which constituted the Union,[52] and it could only be changed by a two thirds majority vote in parliament.[53] The Natives Land Act would have stripped the Cape Black voters of their right, if it had not been for a judicial decision which barred its operation in the Cape Colony. By disallowing Black people from purchasing land outside the designated reserves, they would not be able to satisfy the property qualification set in the South African Act of 1909; therefore, they would no longer be able to vote.[54] It should be mentioned here that the government finally got the two third majority to strip all Black people of the right to vote through the successful adoption of the Native Representation Act in 1936.[55]

It is also important to mention that the Natives Land Act had a twin, the Pass Laws of February 1913.[56] These two laws worked together to ensure that the movement of Black folk was regulated and restricted, no matter where they found themselves in South Africa. Pass laws, which lasted right through apartheid,[57] meant that the White population maintained control of the movements of the Black population at all times.[58] If a Black person was found without a pass or found in a white area during a time by which s/he had to be gone, the consequence, in the best-case scenario, would be imprisonment.[59] This is a reflection of white anxiety, as it was borne from the Natives Land Act, and its consequences on the Black body and freedom of movement.

The Apartheid era was then borne after the successful legal racial discrimination victories of the late segregation era. Apartheid was based on four main ideas: the categorisation of four racial groups, namely, Black, Coloured, Indian and White; the establishment of the White race as the 'civilised race' which was entitled to the absolute

49 K Skovsholm 'The Right to vote in South Africa — a hundred years of experience' (1999) 32(2) *Verfassung und recht in* übersee / *law and politics in Africa, Asia and Latin America* 237.
50 Skovsholm (n 49 above) 238.
51 See discussion in notes 39 to 45.
52 Skovsholm (n 49 above) 238.
53 South Africa Act of 1909 sec 35; Skovsholm (n 49 above) 239.
54 L Thompson *A History of South Africa* (1990) 163.
55 Skovsholm (n 49 above) 239.
56 Pass Laws of 1913.
57 Notably, the apartheid government promulgated the Abolition of Passes and Co-ordination of Documents Act No 67 of 1952 as its inaugural law which would regulate the movement of the black population by making it law for them to carry a form of identity book whenever moving outside of their reserves.
58 Crais (n 40 above) 194.
59 Maylam (n 31 above) 20.

control of the state; the greater consideration of White interests at the cost and ignoration of Black interests and; keeping the White population in 'South Africa' and the Black population in the 'reserves', which would soon become the 'homelands.[60] In order to create parliamentary supremacy, the Apartheid government passed and used a number of laws to create a larger senate and larger Court of Appeals, both with majority Afrikaner members, who would in turn vote in or rule in favour of laws which gave parliament the power to further reinstate racial discrimination.[61]

There are similarities to be found between the United States' Civil Law Act, as amended after the *Civil Law Cases* decision, and South Africa's Pass Laws. Both restricted the public movement of the Black population and legislated the community sanctioned racial segregation. Besides the carrying over of laws of segregation and limited movement from the age of segregation to the Apartheid era, it is also worth noting that the Apartheid government further restricted relations between races, through the promulgation of the Mixed Marriages Act and the Immorality Amendment Act.[62] These two acts forbade interracial marriages and interracial sexual relations, respectively. Similarly, the United States had such laws regulating romantic relations.

The discussion of the selected laws of segregation and discrimination highlights the presence and irrationality of these laws. Furthermore, the discussion, hopefully, also nudges one to consider the relevance and persistence of the consequences of these laws within the current status quo. Racial prejudice still exists, perhaps not so blatantly in the law, but definitely within society. Therefore, the current status quo both establishes as well as emphasises the existence of a bidirectional relationship between societal attitudes of racial prejudice and the legal legitimisation thereof. Whereas a century and some decades ago it was the attitudes of society which informed the law, it is now more often the past laws which inform the societal attitudes of racial prejudice. That is the beauty and, in this case, danger of the law — its impact and consequence on people is often long-lasting, whether intended to be so or not.

3 SUITE II: Black feminist thought

Having discussed the racial prejudice afflicted on Black women, the paper now turns to a discussion of the intersectionality of racial and patriarchal prejudice. Regarding patriarchal oppression, although it is not discussed here, it should be mentioned that the feminist school of

60 Skovsholm (n 49 above) 190.
61 Skovsholm (n 49 above) 241 – 242.
62 Mixed Marriages Act 55 of 1949; Immorality Amendment Act 21 of 1950.

thought took many forms and morphed a few times over the years, so as to include more issues. Evolution notwithstanding, however, Black Feminist Thought was formed as a direct response to all of the oppressions suffered and experienced by Black women. Again, the feminist school of thought is a kaleidoscope all the contents of which cannot be discussed within a few pages. Even on its own, the Black Feminist Thought strain is also a discussion which can fill books. Thus, in order to further contextualise the music sampled in the following section, this paper will only discuss some themes of Black Feminist Thought. The (mainstream) feminist movement(s) oftentimes excluded Black women. As a result of this exclusion, based on the shared oppression of Black women and understanding thereof, came Black feminist activist tradition.[63] This section, therefore, aims to highlights some arguments and stances regarding the Black Feminist reaction to the exclusion from 'mainstream' or 'White' feminism as well as the formulation of Black Feminist Thought.

Although also reacting to patriarchal oppression, the mainstream feminism excluded Black women by not engaging with their specific experience. This is not surprising as it is possible for a people to be both the oppressed and the oppressors in different settings yet simultaneously.[64] Black women, as an 'intersectionally oppressed' group, in America, but also similarly in other parts of the world,[65] have felt 'between the loyalties that bind them to race on one hand, and sex on the other.'[66] Their call for their rights has often been regarded as a threat to the unity of the community and as being harmful to the common struggle, both in White feminist spaces and in Black critical race theories spaces.[67]

A conversation on mainstream feminism often refers to 'waves' of feminism. One of the reactions to mainstream feminism(s) has been to aver that the wave model of feminism inherently excluded women of colour, both from the history of women's movements as well as feminist theory.[68] This, it is argued, was manifested in the style of the white mainstream movement to ignore the economic and survival issues which were occupying Black Feminist Thought.[69] As a result of the exclusion within the space of (White) feminism, then, Black

63 P Hill Collins 'The social construction of black feminist thought' (1989) 14(4) *Journal of Women in Culture and Society* 746.

64 M Alinia '*On black feminist thought*: thinking oppression and resistance through intersectional paradigm' (2015) 38(13) *Ethnic and Racial Studies* 2335.

65 Alinia (n 64 above) 2336 & N McKay 'Remembering Anita Hill and Clarence Thomas: what really happened when one black woman spoke out' in T Morrison (ed) *Race-ing Justice, En-gendering Power* (1992) 277 – 278

66 McKay (n 65 above) 277 – 278.

67 Alinia (n 64 above) 2336.

68 K Springer 'Third wave black feminism?' (2002) 27(4) *The University of Chicago Press* 1063.

69 B Roth 'Second wave black feminism in the African diaspora: news from new scholarship' (2003) 17(58) *Agenda* 48.

women curated their own feminism, which placed them and their experiences at the centre. When following the argument that the waves construct excluded Black women, it would not follow that Black feminism came at the end of the second or third wave of feminism. To this end, Roth, while talking about the Second Wave, aptly writes, 'Black women formed feminist groups despite a political climate that asked them to choose between fighting racism or sexism'.[70] In the same vain, Hill Collins notes that, 'Black women carried a special burden — not only were they Black, poor and second-class citizens, but they were female as well.'[71] This additional 'special burden' and the intersectional issues peculiar to Black women highlight both their exclusion from the waves of white feminism as well as the difference in their struggle

Alinia posits that Black Feminist Thought developed 'through a dynamic interaction with black women's everyday struggles'.[72] Furthermore, it is not only a method of viewing, constructing or deconstructing social realities; rather, it is a 'way of life and living in general.'[73] When constructing a theory, the infusion of the experience of the group for whom the theory is being constructed is central, it cannot be neglected.[74] Therefore, the *experience* of the Black woman is central to Black Feminist Theory and other theoretical modes (of Black men and White women, who are often both oppressors and oppressed) do not pay sufficient attention to the reality of the Black woman's experience. As a result of this, the theoretical modes of these groups have gaps, in the case of the Black woman, because the Black man's and White woman's experiences are only a part of the Black woman's experience.[75] Because of this paucity, Black Feminists have asserted that nobody but them can speak for them. To this end, Amoah writes that 'neither white women's experience of sexism nor Black men's experience of racism alone, nor simply adding these two together, is equivalent to Black women's experience of both.'[76] Smith posits that 'such a formulation erases the specificity of black women's experience, constituting her as a point of intersection between black men's and white women's experience.'[77]

70 Roth (n 69 above) 46.
71 P Hill Collins 'Gender, black feminism, and black political economy' (2000) 568 *The Annals of the American Academy* 42.
72 Alinia (n 64 above) 2334.
73 J Amoah 'Narrative: *the road to black feminist theory*' (1997) 12(1) *Berkley Women's Law Journal* 97.
74 Amoah (n 73 above) 85.
75 Amoah (n 73 above) 98.
76 Amoah (n 73 above) 98.
77 V smith 'Black feminist theory and representation of the "other"' in CA Wall (ed) *Changing our own words: Essays on criticism, theory and writings by black women* (1989) 47.

Black Feminist Thought, which was similar to but more sophisticated than the Third Wave, had interconnection, rather, 'intersectionality' of issues at its core. Black Feminist Theory includes 'a way of reading inscriptions of race …, gender …, and class in modes of cultural expression.'[78] Black Feminist Thought makes use of intersectional analysis in order to shed light on the 'relationships between the structural, symbolic and everyday aspects of domination and individual and collective struggles in various domains of social life'.[79] It thus concerns itself with the intersectionality between race, class, nation and gender, all of which are important for and to the Black woman.[80] Furthermore, as opposed to the examination of the themes of race, gender, class and nation as separate systems of oppression, intersectionality is constructed in order to reference the manner in which these systems 'mutually construct one another'.[81] Intersectionality implies that a person is never discriminated against based on just one of their qualities.[82] Also, Black Feminist Thought was a 'For Us by Us' construct which, importantly, noted that the resistance generated by Black women was from *their* daily experiences, which were different to those of the 'mainstream' feminists, especially as they regard the 'interlocking systems of race, class, gender and sexuality in Black women's lives'.[83]

On the issue of Black women and feminism, it should be noted that, regrettably, the history of 'third world feminism' is not recorded as extensively as the history of 'first world feminism'. One argument which has been advanced is that, recording such history, which expresses the activism of Black women in Africa, would be 'going against the grain of history'.[84] This is actually true for most third world and, more specifically, black history. For a long time, Africa was known as 'the dark continent' which did not have its own history because African history was not scribed in the same way that Europeans wrote theirs. So, simply put, a history or record of women of colour being strong could not be exposed alongside a history which painted them as weak or subordinate. Thus, the history of imperialism, oppression and colonialism and, where allowed, the strength of White women, was recorded and disseminated while the history of the strength of Black women was concealed. This links in with the 'traditional' definition of third world women. Traditionally, in the white community, women of colour have been defined in terms of, or within the context of, underdevelopment, oppressive

78 Smith (n 77 above) 38 – 39.
79 Alinia (n 64 above) 2334.
80 Hill Collins (n 71 above) 44.
81 Hill Collins (n 71 above) 48.
82 H Barnett *Introduction to feminist jurisprudence* (1998) 7.
83 Roth (n 69 above) 46 – 47.
84 CT Mohanty *et al* (eds) *Third world women and the politics of feminism* (1991) 3 – 4.

traditions, illiteracy and poverty. This stance has been held regarding women in Africa, Asia, the Middle East and Latin America.[85] If we take this statement and apply it to Black women of African descent in America and the Black women in South Africa, we see that such is the picture which has been painted over the years.

Importantly, because of the differences in experiences of the areas of intersectionality mentioned above for Black and White women, a feminism which spoke to the lived experiences of Black women had to be curated. This called for the placement of Black women's experiences at the centre of the analysis and interpretation frameworks which rely on intersectional paradigms.[86] It should be borne in the mind, however, that the concretisation of the Black women's placement and consideration of her experiences within feminist thought do not call for her injection into already existing schools of thoughts and 'waves'. Instead, it called, and continues to call, for the curation of a paradigm formed from her views, opinions, experiences and position within society.

Having discussed the plight of the American and South African Black woman, as manifested by racial prejudice and sexism, this article, finally, will move to highlight some music made by Black women and its place in responding to oppression.

4 SUITE III: The music written by black women in response to oppression

As stated in the earlier sections of this article, the argument is made here that Black women made music to express the consequences of the oppressions they were subjected to, as Black people and as women. This is noted here to remind the reader that the law does not exist in a vacuum, it applies to people and they have to live out the consequences of its application. Furthermore, like the curation of Black Feminist Thought, it is argued that the making of music was a coping mechanism, and sometimes a form of protest too, for Black female artists.

4.1 Allegro: Law and aesthetics

Perhaps before going into a discussion of the sampled songs, it would add value to the discussion to shorty mention the similarities of and links between the law and music. Mumford notes that over the years there has been a 'lessening of subject boundaries', and as a result of this, other subjects, such as sociology, psychology and economics,

85 Mohanty *et al* Torres (eds) (n 84 above) 5 – 6.
86 Hill Collins (n 71 above) 44.

have been transposed into discussions about and scholarship on law.[87] The use of artistic language to interpret the law is called the 'aesthetic approach' to the law, and it reveals that the law, like the arts, has many layers which are open to multiple interpretations.[88] To this end, Frankfurter posits that 'statutory interpretation is not a science but an art',[89] and Frank writes that 'the legislature is like a composer. It cannot be helped: It must leave interpretation to others, principally to the courts.'[90]

Specifically, regarding music and the law, the two disciplines look very different on the surface; however, Levinson and Balkin hold that the study of music enables us to see things in law which were 'there all along but hidden by our very familiarity with it'.[91] It has also been written that music can provide metaphors for law.[92] Scholars, Hibbitts writes, have interrogated the metaphor of music and law 'hoping perhaps to humanise law in the process', while others have offered 'more thought explorations of the similarities between the genres'.[93] Both the law and music have theoretical and practical aspects.[94] Furthermore, both disciplines have a text to be interpreted, build on past practice and both can have political content.[95]

Essentially, the way in which we read music can be transposed to how we read the law.[96] Music compels us to think about the *meaning* and *power* of something, the law included.[97] Therefore, while the interpretation tools from music can be used in law, music itself also helps us to interrogate the law. As the author understands it, 'law and aesthetics' is about the interpretation of the law or laws in the style of literature and the arts, including music, as well as drawing our attention to the 'blurred lines' of the disciplines. This discussion is an important one; more particular to this paper is the discussion on the expression of the oppression of the law through music.

87 A Mumford 'Law and aesthetics by Adam Gearey' (2002) 29(3) *Journal of Law and Society* 528.
88 Mumford (n 87 above) 528 – 529.
89 J Frankfurter 'Some reflections on the reading of statutes' (1947) 47(8) *Columbia Law Review* 527 & 530.
90 J Frank 'Words and music: some remarks on statutory interpretation' (1947) 47(8) *Columbia Law Review* 1264.
91 S Levinson & JM Balkin 'Law, music, and other performing arts' (1991) 139(6) *University of Pennsylvania Law Review* 1628.
92 C Weisbrod 'Fusion folk: a comment on law and music' (1999) 20(5 – 6) *Cardozo Law Review* 1439.
93 BJ Hibbitts 'Making Sense of metaphors: visuality, aurality and the reconfiguration of american discourse' (1994) 6 *Cardozo Law Review* 327.
94 Weisbrod (n 92 above) 1441.
95 Weisbrod (n 92 above) 1442.
96 D Manderson & D Candill 'Modes of law: music and legal theory — an interdisciplinary workshop introduction' (1995) 20(5 – 6) *Cardozo Law Review* 1327.
97 Manderson & Candill (n 96 above) 1327.

4.2 Adagio: Sampled music by American Artists

There are three American artists who will be discussed in this paper. Namely, these are Billie Holiday (born Eleanora Fagan on 7 April 1915, in Philadelphia, Pennsylvania),[98] Nina Simone (born Eunice Kathlean Waymon on 21 February 1933, in Tryon, North Carolina)[99] and Beyoncé Knowles-Carter. Billie Holiday represents the Jim Crow Era, Nina Simone represents a crossover from the Jim Crow Era to the Civil Rights Movement era and Beyoncé represents the current status quo. This vast and varied selection also highlights the continuity of the issues faced by Black women.

Holiday, who has been dubbed 'one of the most influential jazz singers of all time',[100] was originally a solo artist, though she received a number of invites to start and join bands, and her peak years were 1936-1942.[101] When Holiday finally joined Artie Shaw and his band, she became the first woman of colour to sing with a white band. Of course, within the climate of the USA in the early 1900s, this was absolutely unacceptable and so this working relationship proved to be difficult.[102] As a result of this, Holiday later left this band and continued as a solo artist.[103]

Holiday started singing in clubs at the age of 15 and first sang *Strange Fruit* at the age of 23.[104] Of this, Pak writes, 'to great controversy, Lady Day introduced the world to the racially charged protest song "Strange Fruit". In the end, some believe it killed her.'[105] *Strange Fruit,* which speaks about lynchings, was banned by some radio stations and rejected by Holiday's recording label too.[106] Nevertheless, Holiday premiered it at the West 4th Café Society; here, Holiday performed the song as her final number, in a completely silent room where the only light that shone was the spotlight on her face and after she finished singing the song, she disappeared when the lights went off and offered no encore.[107] The way in which she premiered

98 G Gorlinski *The 100 most influential musicians of all time* (2010) 205; 'Billie Holiday Biography' 19 January 2018, updated 24 February 2020 https://www.biography.com/musician/billie-holiday?li_source=Ll&li_medium=mm2m-rcw-biography (accessed 1 August 2020).

99 'Nina Simone Biography' 19 January 2018, updated 17 July 2019 https://www.biography.com/musician/nina-simone#:~:text=legendar%20performer%20Nina%20Simone%20sang,"%20and%20"Four%20Women (accessed 1 August 2020).

100 Gorlinski (n 98 above).

101 Gorlinski (n 98 above) 205 – 206.

102 Gorlinski (n 98 above).

103 A&E Television Networks 'Billie Holiday Biography' 19 January 2018, updated 24 February 2020 https://www.biography.com/people/billie-holiday-9341902 (accessed 21 April 2020).

104 Gorlinski (n 98 above); E Pak 'The tragic story behind billie holiday's "strange fruit"' 5 April 2019, updated 27 July 2020 https://www.bibliography.com/news/billie-holiday-strange-fruit?li_source=Ll&li_medium=m2m-rcw-biography (accessed 1 August 2020).

105 Pak (n 104 above).

106 Gorlinski (n 98 above).

this song is in itself a form of activism, which gave the audience no option but to listen and bask in the message.

When asked, Holiday shared that she did not like to sing the song but knew that she had to, and that it reminded her of her father who had died of a lung disorder at age 39, after he had been turned away from a hospital because he was black.[108] Though personal to Billie Holiday, this song's message stretch farther than her experience or connection to it. White patrons at the clubs where she performed, however, had mixed and often negative emotions about the song. Federal Bureau of Narcotics Commissioner Harry Anslinger was determined to silence her and told her to stop performing the song. Upon her refusal, knowing that she used heroin, Ansingler orchestrated a drug bust which resulted in Holiday's arrest for a year.[109] When she was free, she lost her licence to perform at clubs, but continued to perform (*Strange Fruit* too) in halls. As a result of her resistance, in 1959 when Holiday had checked herself into hospital, it is reported that Ansingler once again had her arrested and this time went further to order the doctors to no longer treat her. As a result of the halt in treatment, Holiday died.[110] This chain of events shows that the law supported an act of racism. Holiday sang about the evils of that time and yet the law allowed her to be silenced, for singing.

Strange Fruit was originally a poem written by a New York school teacher by the name of Abel Meeropol.[111] Holiday sets this poem to a deeply sorrowful and downhearted piano, muted trumpet and bass backing written/played in the key of B♭ minor. The piece is slow, allowing the listener to really take in the lyrics while also setting the regretful tone which the lyrics invite. This musicality coupled with Holiday's uniquely deep and soulful voice, if you allow it to, very easily invites the listener to experience her grief as she felt it as she sang this song. The music, Holiday's voice and the piano, ironically, bring this poem to life; in fact, it is difficult to imagine anyone else could have introduced the world to this song. The opening verse of this piece goes as follows:

> Southern trees bear strange fruit
>
> Blood on the leaves, blood at the root
>
> Black bodies swinging in the Southern breeze
>
> Strange fruit hanging from the poplar trees.[112]

107 Pak (n 104 above).
108 Pak (n 104 above).
109 Pak (n 104 above).
110 Pak (n 104 above).
111 Gorlinski (n 98 above) 207.
112 B Holiday *Strange Fruit* (1939).

With a simple understanding of the Jim Crow era, one can easily deduce that this piece is about lynching. The 'strange fruit' referred to here are the Black bodies which hanged from the trees, left on display as a sign of victory for White people and defeat and oppression for Black people. Specific reference is made to 'southern trees' in the piece; this makes sense as racial oppression was more intense in the southern parts of the United States. The second line is packed with innuendoes. Of course, there may be blood on the leaves, as a result of things such as a prior beating, shooting or violent hanging. However, more interesting is this reference to the blood at the roots. This launches ones imagination in the direction of Black people- with their bodies, lives, labour and blood- nourishing the soil and roots of the trees which offered shade, food, and paper for so many people, even the White people who performed the hangings.

The lyrics of the song are a lesson on the Jim Crow era and its consequence for a number of Black people. Those who performed the lynching during this era were protected by the law, which should have protected those who were being lynched. In its provocation of reflection on issues of racial prejudice and its oppressive nature, this song highlights the link between law and music. This, and Holiday's own experience with the law because of this song prove the claim that music was used by Black women as a coping mechanism.

Nina Simone had a larger repertoire of protest music which, to an extent to the demise of her career, she used as a weapon of resistance, not only for reflection. During the Civil Rights Movement, Nina Simone moved from being just a jazz performer to being a mouthpiece of expression on the subjects of the plight of Black people and of women. She has been described as a 'staunch Civil Rights activist' for songs such as *Mississippi Goddam*, *Young, Gifted and Black*, *Four Women* and *Why (the King is Dead)*.[113] Regarding the first instance, a notable song is *Why (The King of Love Is Dead)*.[114] This song was written following the assassination of Dr ML King Jr.[115] The song asks, rhetorically, about his death — why he was, and had to be, killed. The subject of Dr King is an important one in any discussion of racial prejudice in the USA. Therefore, by singing such a song, Simone may have done so for the cathartic value for herself, as she admits;[116] however, this song is also an important form of protest against racial prejudice and a reminder that racial prejudice continued.

Nina Simone's other important song, for this article, is *Four Women*.[117] *Four Women* is also written in a minor key, the key of

113 Nina Simone Biography (n 99 above).
114 N Simone *Why (The King of Love Is Dead)* (1967).
115 Nina Simone Biography (n 99 above).
116 See the autobiographic documentary 'What Happened Miss Simone?' by Liz Garbus (2015).
117 N Simone *Four Women* (1966).

A minor, with Simone at the piano and the simple support of drums and bass. Through the song, Simone discusses four different Black women and their experiences with racial and patriarchal oppression. In the song, we meet Aunt Sarah, who is from the age of slavery, Saffronia, a product of rape who stands between slavery and Jim Crow, Sweet Thing, who is from the Jim Crow era and Peaches who represents all these women, but is also from an era after them all. In each verse, Simone eloquently describes the plights of Black women, as they existed during these different eras. A consideration of her lyrics for the whole song evokes a discussion about the establishment, and a need for the establishment, of Black Feminist Thought. All the issues discussed within this song are peculiar to Black women. More than this, they recognise the Black woman — they *see* her, and her plight.

Although in the beginning Simone had support from a more diverse crowd, when her songs became more political, the white patrons withdrew their support.[118] This makes her case similar to that of Holiday, her protest music was impactful; however, this impact had negative effects on their careers. This evokes the uncomfortable thought that, had life been kinder to Eleanora and Eunice, we may have never had Billie and Nina — because the contents of their songs were heavy with oppressive themes, which they have personally experienced, but thousands were able to relate to. That oppression, especially at the hands of the white population, led to the demise of their careers makes Ma Rainey's words 'White folks don't understand the blues. They hear it come out, but they don't know how it got there'[119] true for the music of these Black women too. As entertainment, their music was acceptable; however, as a form of protest, it was unacceptable.

Finally, from the American artists sampled here, of importance to illustrate the continuity of the Black woman's plight is Beyoncé's *Formation*.[120] *Formation* was released in 2016, after the devastating Hurricane Katrina hit New Orleans. Regarding this song, it is not so much the lyrics as it is the accompanying music video which is of great importance. Although, it is interesting to note that this song too is written in a minor key, F minor.[121] In her video, Beyoncé includes

118 (n 118 above).

119 The New Yorker 'Rhythm and Blues: "Ma Rainey" and August Wilson's mighty music' 10 February 2003 https://www.newyorker.com/magazine/2003/02/17/rhythm-and-blues (accessed on 3 August 2020).

120 BG Knowles-Carter *Formation* (2016).

121 In addition to the strong, sad or regretful emotions often evoked by songs written in minor key signatures, it must be mentioned here that this song became even more 'Black' when Beyoncé performed it in the theme of Historically Black Colleges and Universities with a full marching band, with strong brass and drumlines at her Afropunk headlining performance (where she was the first Black woman to headline the festival). See: 'Homecoming: A Film by Beyoncé' by Beyoncé Knowles-Carter (2019).

imagery of the devasted community, dilapidated surroundings including lost homes, schools and businesses. Finally, there are images of brutality and of neglect of the Black community, which was in need of assistance. In line with the rest of her album, 'Lemonade', Beyoncé also highlights the issues faced specifically by Black women. Therefore, *Formation* shows us that, even decades after the eras and movements discussed above, oppression persists, and music continues to be a form of protest against the oppressions discussed by Black women.

4.3 Rondo: Sampled music by South African artists

It should be mentioned here that, in addition to the shared experiences of Black women in the USA and South Africa, there is also common ground musically. In fact, anthropologists and ethnomusicologists have interpreted South African jazz as 'a hybrid from combining aspects of African American music and indigenous performance practices'.[122] Furthermore, music in South Africa, especially during apartheid, was also an important tool of activism. Titlestad has written that, the very interconnection of different styles which were amalgamated to make South African jazz was 'in its very emphasis, a critique of apartheid'.[123]

Three key figures are selected here too, namely, Letta Mbulu, Tandie (sometimes also spelt as Thandi) Klaasen and Thandi Ntuli. First is Letta Mbulu, who wrote *Amakhamandela (Not Yet Uhuru)* in 1994. This was a key turning point in South African history as it marked the official end of the Apartheid era. The first two stanzas of the song go as follows:

> (u)Mhlaba wakithi bo (*Oh, our land*)
>
> Usemi ndawonye (*remains at a standstill*)
>
> Akukho mehluko kulelizwe (*there is no change in this nation*)
>
> Qhawul'amakhamandela (*loose/break the chains*)
>
> Ah thin'asina voti (*ah, we do not have a vote*)
>
> Silal'emikhukhwini (*we sleep in shacks*)
>
> Akukho mehluko kulelizwe (*there is no change in this nation*)
>
> Qhawul'amakhamandela (*loose/break the chains*).[124]

This song, which Mbulu released in 1994, spoke to a South Africa which was promised freedom then; and continues to speak to such a South Africa even today. The song essentially speaks about a yearning to be

122 M Titlestad 'Jazz discourse and black South African modernity, with special reference to "Matshikese"' (2005) 32(2) *American Ethnologist* 210.
123 Titlestad (n 122 above) 211.
124 L Mbulu *Not yet uhuru* (1994).

free vying with a yearning to withhold freedom — and this message is encapsulated almost entirely in these first two stanzas. In the song, there are those who are longing for and pointing out all the things which are still serving as a hindrance to attaining freedom; while others, those whom the grievances are being voiced to, are responding 'not yet uhuru'. Mbulu also does a good job of highlighting some problems which the Black people faced — the same problems which made them call for the end of apartheid — the chains, poor living conditions, no suffrage. Most importantly, she highlights the continued presence of these chains.

Interestingly, this song is still relevant in the 'new' South Africa. The governments may have changed, and the colour thereof; however, a lot of these problems and struggles still exist today. Thus, it is suggested that, whereas this song applied in a racially divided South Africa almost 30 years ago, it now applies to a South Africa divided in terms of class. Yes, on paper people have the vote, but that is not the issue. The issue is that, notwithstanding the right to vote being extended to the Black community, all the hopes which were attached to the rallying for this right, are still not being realised or seen to by even this new government. In other words, it is still 'not yet uhuru' because many Black people still live in shacks, have an ineffective vote, are still chained- economically speaking, for example — and for them, there is, or has been, no change in the land. This is a sad reality of many Black souls here in South Africa. It is especially regrettable for the Black woman who, because of this reality, has to struggle against the anger of the Black man, as formed by social dynamics.

Thandi Mpambane Klassen was a 'great' from Sophiatown.[125] Tandie Klaasen's notable song is her *Sophiatown*.[126] Sophiatown was a very important Black suburb in Johannesburg which was destroyed during apartheid,[127] for its centrality to black identity. Sophiatown was used as a meeting place for fun as well as discussions of politics during Apartheid.[128] In her melancholic, and surprisingly written in the key of C major, *Sophiatown*, Klaasen recalls her home, Sophiatown, and how the Apartheid government took it apart. Klaasen recalls:

125 M Rörich 'Shebeens, Slumyards and Sophiatown. Black women, music and cultural change in urban South Africa c 1920 – 1960' (1989) 31(1) *The World of Music* 95.
126 T Klaasen *Sophiatown* (1996).
127 Rörich (n 125 above) 100.
128 See generally: Rörich (n 125 above).

I can see my past passing by

I had no chance to say goodbye to romance

I had no time to leave it all behind

It was a place I knew, where my dreams came true

Until they broke it down, Sophiatown

[…]

I can see police on a winter night

Breaking down the place where I was born.

This recollection may be personal; however, in the general sense it highlights the violence of the apartheid era, from the perspective of a Black woman. While, on a personal level, this song may be an outlet for pain, the general contribution of this song to the rest of us is a lesson about the violence of the Apartheid era. Forced removals of whole communities during the Apartheid era were not uncommon; however, the complete demolition of Sophiatown, not only as a place of residence and business, but also as a place of importance for the Black identity and resistance movement, raises its own issues.

Finally, to express the continued dual oppression of Black women in South Africa, reference is now made to Thandi Ntuli's *New way*.[129] Ntuli's *New Way* comes off of her 2018 album titled 'Exiled', which she described as 'grappling with the traumas that have been experienced in the pasts, traumas we have not healed from. All this leaves us feeling displaced and exiled.'[130] It is so timely, true and important within this current climate of 'reconciliation', 'transformation' and 'decolonisation'. Whereas there are efforts to highlight the need for conversations around these themes, the silencing of these utterances is just as present. From the point of view of a Black woman, Ntuli writes:

Why can't we tell the truth about how it feels?

Perhaps, we are afraid that if we say too much, it might become real?

Yet, here we are, trapped by all these insincerities.

I wear a smile, bow down to serve your insecurities.

This could be the start of a new way,

You stand by me, and say that it is okay.

And let me be broken and hurting, process my healing.

Let me cry, release all of this pain.

129 T Ntuli *New Way* (2018).

130 'Full Concert: South African songbook — jazz at Lincoln Centre Orchestra with Wynton Marsalis' 24 March 2020 https://www.youtube.com/watch?v=VOJxZmgnpkA (accessed on 2 August 2020).

> You're free to stay, free to walk away.
>
> But don't dare say that 'it's been a while now, move on from the past, child'.

The two stanzas repeated above reveal themes of racial and patriarchal prejudice as well as the added trouble of being silenced. When the song continues, it mentions younger people demanding 'the same as these old folk' and refers to the taking of land, diamonds and gold and the taking of dignity and healing. Ntuli eloquently uses metaphors to refer to both racial injustices as well as sexism throughout the piece. Therefore, she emphasises the interconnectedness, intersectionality and inseparability of the oppressions of racial prejudice and patriarchy for the Black woman. In doing so, in one song, Ntuli exposes the bottom line arguments of this paper: that Black women suffer dual oppression and they use that dual oppression as a subject of their music; and in so doing, they remind us that the law does not exist in a vacuum — it applies to and has consequences for people. Alas, she also exposes the seemingly everlasting nature of this dual oppression.

6 Conclusion: Cadence

In concluding this article, a few things should be highlighted. Firstly, the argument that the Black woman suffers injustices as a Black person and as a woman simultaneously. In both spaces, those which rally against racism and those which rally against sexism, far too often, she is neither central nor is she protected. As a result of this, her experiences have moved her towards Black Feminist Thought, which places her experiences as a woman and as a Black person, at the centre of the issues, discussions and resolutions. Moreover, this Black Feminist Thought also does not require her to choose between addressing issues of racism or addressing issues of sexism. Finally, Black women have written songs which have been a personal catharsis for them, and very often for us, but have also been a form of protest. I am inclined to say that the music discussed above, and all other music written in its style, is an extension of Black Feminist Thought, if not the musical form of Black Feminist Thought. Most importantly, there is a link between the law and the people to whom it applies, again, the law does not exist in a vacuum. Therefore, when promulgating or amending laws, we should be mindful of this. The law should never oppress, it should always protect.

THE FOURTH INDUSTRIAL REVOLUTION: A CASE FOR EDUCATIONAL TRANSFORMATION

*by Thembekile M. Mtsweni**

'Every industrial revolution brings along a learning revolution' - Alexander De Croo

1 Introduction

The fourth industrial revolution (the 4th IR) is a technological innovation whose velocity, scale, scope, complexities and transformative power will be nothing like anything humankind has experienced before.[1] In the paradigm of the 4th IR, automation and artificial intelligence will disorganise the current model of demand for skills, ensuring rapid replacement of traditional jobs with new unknown ones.[2] These new jobs will be characterised by high-level cognitive and social interaction skills.[3] Standardised, routine and manual tasks will be left to robotic and artificial intelligence.[4] This unprecedented wave of change will cause problems in countries

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1 M Marope 'Reconceptualizing and repositioning curriculum in the 21st Century: A global paradigm shift' (2017) *International Bureau of Education* 23.

2 Marope (n 1 above) 23.

3 International Bureau of Education ILO and OECD Report *Global Skills Trends, Training Needs and Lifelong Learning Strategies for the Future of Work* (2019) 2 https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_646038.pdf (accessed on 18 October 2019).

4 ILO and OECD Report (n 3 above) 5.

where the demand for high-level skills is rising faster than the supply.[5] Owing to their lack of relevant skills, people will lose jobs and not be able to find new ones. The recent retrenchment plight involving South African banks evidences the kind of dilemma people will be subjected to in this evolving world of work. Absa, Standard Bank and Nedbank Group have all consulted with their staff members about cuts in recent months.[6] These banks closed some of their branches due to economic pressure to encourage self-service instead, with clients using their mobile phones and computers, rather than physically walking into a branch to access banking services.[7] Many people have already lost their jobs and yet, plans to get rid of more tellers still continue as the banking industry evolves.[8] Loss of jobs in this regard can easily be attributed to the fact that banking tellers' skills are slowly losing relevance due to digitalisation. General Secretary of the South African Society of Bank Officials, Joe Kokela, stated in an interview that 'Absa is restructuring operations across its business units; Standard Bank is closing 91 branches, while Nedbank is in talks with about 1,500 employees over job cuts or redeployments'.[9] South Africa's unemployment rate stands at 29.1% of which 55.2% consist of our youth.[10] Banking Association South Africa (BASA) gave the following remarks with respect to these changes in the banking industry:[11]

> The global banking industry is evolving in response to economic pressures, digital innovation and, most importantly, the changing way their customers use and consume financial services. The reduction of staff numbers in many traditional banking services is a worldwide phenomenon.

Deputy President, David Mabuza recently responded to a question in Parliament involving what 'the plans of government are in ensuring alignment of education with the 4th IR for the production of relevant human resources'.[12] He alluded, *inter alia*, that government will need to direct its focus to: realignment of the curriculum at basic education level to prepare learners for the changing world; the introduction of several new technological subjects; and the specialisation and training of teachers to respond to the emerging technologies including

5 ILO and OECD Report (n 3 above) 12.
6 SASBO NEWS 'Why the Strike' May/June 2019 https://www.sasbo.org.za/sasbo-news-vol-41-no-3/ (Accessed on the 28th October 2019).
7 As above.
8 As above.
9 As above.
10 SASBO NEWS '4IR humanity needed' May/June 2019 https://www.sasbo.org.za/sasbo-news-vol-41-no-3/ (accessed 28 October 2019).
11 The Banking Association South Africa 'SASBO Protest' 23 September 2019 https://www.banking.org.za/news/19-sept-sasbo-protest/ (accessed 15 October 2019).
12 Government of the Republic of South Africa Newsroom 'Deputy President David Mabuza: Response to questions in Parliament' 27 February 2019 https://www.gov.za/speeches/deputy-president-david-mabuzaresponds-questions-parliament-27-feb-2019-0000 (accessed 15 October 2019).

the internet of things, robotics and artificial intelligence.[13] With the destruction of traditional jobs and the rise of new ones, a fundamentally important and urgent need of new competencies is mounting. Any such need for new skills and competencies can only be adequately catered for by education and skills training. Basic education will have to play an imperative role in the curbing of the many challenges that the changing world of work is threatening us with. Education will have to be adequate enough to ensure optimum contribution of curriculum in meeting demands and opportunities in light of the 4th IR.[14] Only a relevant, responsive, and foresighted education, whose anticipator capacity is capable of catering for present and future needs of the people will be able to assist people to adapt to the changing world of work. An anticipatory education system is one capacitated with built-in mechanisms and sub-systems that allow for constant self-renewal, adaptation and innovation, in order to maintain relevance with the changing world. Contrary to traditional education reform duration, which takes years on end, an anticipatory education is more fast paced in its response to environmental changes, and sometimes it also plays a proactive role to change.

Needless to say, the 4th IR will affect humankind at all different levels and facets of life. Preparation thus will have to engage as many stakeholders as necessary including those in political, economic and social spheres. However, a case here is made for preparation for the 4th IR specifically at the level of basic education. This case is significant for two reasons: Firstly, any focus away from children today will build an entire generation of children without the cognitive skills necessary to tackle the new world presented by the 4th IR. Children are especially vulnerable to the kind of education conveyed to them because they are unable to distinguish between an education system that caters for their best interest and one that does not.[15] Consequently, they are at the mercy of those who have the power to act on their behalf. The government must ensure that children are not jobless and poor in the near future merely because they are unemployable owing to the calibre of education they received. This would not be harmonious with the purpose of education which is to empower children not just for the present, but for the future as well. Secondly, an irrelevant education should be deemed an infringement on children's constitutional right to education in as far as it is preparing them for a world that will not be in existence when they

13 As above.
14 Marope (n 1 above) 25.
15 S Woolman and M Bishop 'Education' in S Woolman and others (eds) *Constitutional Law of South Africa* (2013 2nd edition) 57.

leave school.[16] If the latter is true, the courts must be in a position to give a corresponding order for the immediate enforcement of the right to basic education where the executive fails to carry out its mandate to provide for education relevant for the 4th IR.

In this article, I use the aims and objects of education to argue that educational empowerment involves skills development for 4th IR. At the backdrop of the meaning of 'basic education', I argue that any lack of adequate educational preparation for the 4th IR is an infringement on children's constitutional right to basic education. Considering the wealth of jurisprudence centring on the right to basic education, it is further demonstrated that courts might be reluctant to grant remedies for the immediate realisation of curriculum change and other like-measures relevant for the 4th IR. This reluctancy is an aftermath of policy considerations to keep powers of the different arms of government purely separate.

The conclusion reached is that: If the current judicial interpretive inflexibility and narrowness in approach to the right to basic education is maintained, and if this right is not fully fleshed out by the time the 4th IR is in full swing, the judiciary will not have an adequate, receptive and accommodating body of jurisprudence to refer to and rely on when adjudicating for educational changes required by the 4th IR. Courts will thus not be willing or positioned to find violations of the right as per the new *de facto* standards of the 4th IR. Consequences of this are: In the intermediate, the courts are unlikely or, on the jurisprudential approach, even unable, to find violations of the right to education where the Department of Education fails to take the necessary steps to give effect to the right; and that, given this judicial reticence and fettering, the jurisprudential position may continue to lag behind the dynamic lead of (global?) educational development in the wake of the 4th IR, meaning that the Department will likely not be compelled to catch-up to 4th IR progress if or when it, too, lags. And, assuming that landmark cases shift the jurisprudence on the right to education so as to catch-up to the 4th IR, outpacing a Department of Education which has been compliant with then previous jurisprudential standards, given the current and intermediate judicial reticence and fettering, the courts could plausibly then be left in a position of potentially ordering the executive to do the impossible and make-up the difference between a lagging education system and the 4th IR revolutionary requirements.

16 S29(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that everyone has the right to a basic education, including adult basic education.

2 Education, empowerment and skills development

Donnelly and Howard in their assessment of human rights in the Bill of Rights of South Africa investigated what purpose each right in the Bill of Rights serves. They identified four groups within which rights can be categorised. They argue that rights can be aimed at: (1) survival of the people (e.g. the right to life, food and health care); (2) membership of the people (e.g. the right to equality and family rights); (3) protection of the people (e.g. *habeas corpus* and independent judiciary); and (4) empowerment of the people (e.g. the right to education, association and expression).[17] Education is categorised as an empowerment right. This interpretation of education as empowerment finds great support in international law. The United Nation Committee on Economic, Social and Cultural Rights (the UN Committee on the ESCR) in its commentary on the right to basic education stated the following:[18]

> Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities … education is recognized as one of the best financial investments States can make.

The right to basic education serves as an empowerment right in two identified ways.[19] Firstly, it enables citizens 'to set rules of the game, and not merely be assured that the rules are applied as written'.[20] Secondly, it 'allows the individual to determine the shape and direction of his or her life'.[21] It also facilitates the enjoyment of other constitutional rights. Many socio-economic rights such as the right to equal-work-for-equal-pay and the right to collectively bargain can only be exercised in a meaningful way after a minimum level of education has been achieved.[22] Education enables people to voyage freely in the world to create a meaningful life for themselves and those around them. It liberates and it empowers. It is impossible to imagine education without empowerment. If education is educating at all, those subject to it should be empowered to participate in their communities in meaningful and rewarding ways. More emphasis must be put on the understanding and enforcement of the right to education as an empowerment right, having an empowerment

17 J Donnelly and R Howard 'Assessing national human rights performance: A theoretical framework'(1988) 10 *Human Rights Quarterly* 214.
18 Article 13 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).
19 Donald and Howard (n 17 above) 234.
20 Donald and Howard (n 17 above) 235.
21 As above.
22 As above.

function outside which education is impossible. Education is essential for socio-economic development: when individuals are duly educated, they have a greater chance to secure both the basic necessities for survival and other material goods required for flourishing.[23]

The attainment of empowerment should be judged against the constantly evolving society and societal needs. Education must assist human beings to constantly evolve and grow to secure their continued existence in societies. When education is not malleable, empowerment will certainly be compromised when change engulfs the spaces for which people are being educated. In the Constitutional Court case of *Governing Body of the JumaMusjid Primary School v Essay* (*JumaMusjid*),[24] Nkabinde J summarised the empowering effect of the right to education as follows:[25]

> Basic education is an important socioeconomic right directed, among other things, at promoting and developing a child' features personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities.

If children are not taught in such a way so as to have the abilities and skills required to secure or create employment opportunities in the near future and if ultimately, they are unable to provide for their basic necessities for survival due to the same, then we cannot speak of having educated them. There is no purpose served by an education, and entitlement to education, whose subjects are certified but unable to feed themselves and their families mainly because they are not prepared for the kind of work available in their labour market. This means education should be rejected if it lacks the necessary skills development and preparation for one's life. Education systems in South Africa must provide good foundational skills as well as reskilling and upskilling opportunities for the 4th IR.[26] In terms of basic education, skills imbalances should inform changes in teaching methods and curriculum content to ensure that high-level problem solving, critical thinking, and the ability to manage complex social interactions are developed.[27] This empowerment function of education underpins the greater protection that the right to education receives in comparison to other socio-economic rights under the Constitution.[28] The constitutional assembly believed that:[29]

23 As above.
24 2011 (8) BCLR 761 (CC).
25 *JumaMusjid* (n 24 above) para 42.
26 ILO and OECD Report (n 3 above) 22.
27 ILO and OECD Report (n 3 above) 14.
28 Woolman and Bishop (n 15 above) 57.16.
29 As above.

> An adequate education provides the quickest route to a polity of a creative, productive and self-sufficient population of citizens-and not a country in which the majority of decisions relied on some form of state largesse.

When the empowerment goal of education is attained, only then will the state be said to have disposed of its obligation for the provisioning of education.

3 The meaning of the right to basic education

The courts are yet to interpret the meaning of the term 'basic education'.[30] There are two possible interpretations of this term.[31] It could either refer to a specific period of schooling (i.e. primary school) or it could refer to a certain standard of education, namely its quality or adequacy.[32] The Constitutional Court in *JumaMusjid* has been criticised for following the quantitative interpretation when deciding the meaning and scope of the right to basic education.[33] In *casu*, the meaning of 'basic' was woven into the fabric of section 3(1) of the South African Schools Act[34] which makes attendance of school compulsory for children from the ages of 7 years until 15 years or until grade 9, whichever comes first;[35] and the Court's reasoning was woven into the fabric of the words used in section 29 of the Constitution which distinguishes between basic and further education.[36] Academic critics have argued that the court erred in its interpretation of the meaning of basic education when it defined the parameters of the right by limiting education to a number of years.[37] Skelton, in criticising the *Jumamusjid* interpretation of the term 'basic', argues that such a narrow interpretation can easily be misused in pursuit of limiting the financial impact of the right to basic education.[38] Such misuse can easily be perpetuated since courts have not yet pronounced on whether a child who is older than 15 years and yet beyond grade 9 is entitled to enjoy the right to basic education.[39] Neither has anything been said about the educational rights of a child younger than 15 but above grade 9. A court might rely on the *JumaMusjid* interpretation to find that the state has no obligation

30 A Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *South African Public Law* 403.
31 Woolman and Bishop (n 15 above) 57.15.
32 Woolman and Bishop (n 15 above) 57.16.
33 *JumaMusjid* (n 24 above) para 42.
34 84 of 1996.
35 *JumaMusjid* (n 24 above) para 38.
36 Sec 29 of the Constitution; *JumaMusjid* (n 24 above) para 38; South African Schools Act 84 of 1996.
37 A Skelton 'The role of courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) *De Jure* 1.
38 Skelton (n 30 above) 403.
39 As above.

towards these children.[40] Thus it seems that to follow such an interpretation would limit the right to education. Other reasons which have been advanced against the quantitative interpretation of basic education include that the wording of section 29(1)(a) makes the right to basic education to extend to adults as subjects to the right to basic education, making it impossible to confine basic education to particular ages, or to time spent in school.[41] The *JumaMusjid* interpretation which links basic education to a period of school as opposed to the quality of education received by learners was only mentioned in *obiter dicta;* the Court was not required to determine what is meant by 'basic education'.[42] Its interpretation will therefore not prevent another court from elaborating on the right to education with emphasis on its qualitative meaning.[43] It is thus justified, from observing policy and previous precedents, to say that the quantitative approach to basic education has found little to no support in our jurisprudence. A more acceptable interpretation of the right to basic education focuses not on the number of years within which education is provided but rather on the quality or adequacy of the education that the child receives.[44] Woolman and Fleisch have argued that international law can be invoked to support an interpretation of basic education that relates to content, and not duration.[45] The origin of the phrase 'basic education' can be traced back to 1990 where it was included in the World Declaration on Education for All.[46] Article 1 of the World Declaration explains that the right to a 'basic education' is a guarantee that:[47]

> Every person — child, youth and adult — shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

In June 1995, South Africa ratified the United Nations Convention on the Rights of the Child.[48] The United Nations Committee on the Rights

40 As above.
41 Skelton (n 30 above) 403.
42 Skelton (n 30 above) 403-404.
43 As above.
44 C McConnachie *et al* 'The Constitution and the right to a basic education' in R Veriana and A Thoom (eds) *Basic Education Rights Handbook* (2017) 23.
45 As above. According to sec 39(1)(b) of the Constitution, when a court interprets any right in the Bill of Rights, including sec 29, and therefore when a court determines the meaning of the qualification 'basic' in sec 29, the court must consider international law.
46 Skelton (n 30 above) 404.
47 Article 1 of the World Declaration on Education for All (1990).
48 As above.

of the Child (UNCRC) General Comment 1, regarding the aims of education, states that the child's right to education is not only a matter of access, but also content.[49] Article 29(1) focuses on the individual and subjective right to a specific quality education.[50] According to the latter, 'basic skills' include:[51]

> not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions, to resolve conflicts in a non-violent manner, to develop a healthy life-style, good social relationships and responsibility, critical thinking, creative talents and other abilities which give children the tools needed to pursue their options in life.

Section 39(1)(c) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.[52] In *Campaign for Fiscal Equity Inc v The State of New York* it was held that:[53] 'a sound basic education should not be linked to completing a certain number of grades, but rather to a measurable goal'.[54] The Court alluded further that education had to enable people to obtain competitive employment and full civil participation.[55] In another foreign judgment, *Pauley v Kelly*,[56] the West Virginia Supreme Court also adopted a qualitative interpretation of the right to basic education by handing down a detailed list of 'scholastic and societal achievements that a thorough and efficient education system should produce', including among other things, a knowledge of government, self-knowledge and knowledge of the environment, work training, recreational pursuits, creative arts and social ethics.[57] A study of recent South African courts' adjudication of the right to basic education now shows that the pendulum in our jurisprudence favours quality-based education. In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*,[58] the High Court used a qualitative analysis of the right to basic education, when it required that basic education for learners with intellectual disabilities should be made adequately suited for their needs.[59] The Court alluded that a learner should receive an education that 'will enable him or her to make the best possible use of his or her inherent and potential capacities; physical, mental and moral, however limited these capacities may be'.[60] In *Madzodzo v Minister of Basic*

49 UNCRC Committee General Comment 1 on the Aims of Education (2001) (UN Doc. CRC/GC/2001/1) para 9.
50 As above.
51 As above.
52 Sec 39(1)(c) of the Constitution.
53 100 NY 2d 893; Skelton (n 30 above) 405.
54 As above.
55 As above.
56 255 SE 2d 859 (1979).
57 The court spelt out these requirements more fully at para 39 of the judgment. See Skelton (n 23 above) 405.
58 (5) SA 87 (WCC).
59 As above.
60 As above.

Education,[61] the Court stated the following in relation to the right to basic education:

> The state's obligation to provide a basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials, and appropriate facilities for learners.

The Court followed a qualitative interpretation in its judgment when it shifted its focus from the availability of school places, to determining what are the essentials that must not be compromised when providing for basic education.[62] Most recently, the Supreme Court of Appeal confirmed that every learner has the right to adequate textbooks.[63] This is intrinsic to their right to basic education.[64] If the right to a basic education was only concerned with the period of schooling, that is the completion of a certain number of years in a place of school, it would have nothing to say about the developmental needs of learners.

4 Realisation of quality basic education

How then is quality basic education determined and how can it be tested? Put differently, what are the measures in place to determine what education is inadequate and therefore an infringement on a child's right to basic education? 'How basic is basic' in relation to the content of the right to basic education? 'What must be made available immediately and at no cost to provide for basic education?'.[65]

In international law, the 'minimum core' approach has received ample support in determining the content of adequate basic education. The International Convention on Economic, Social and Cultural Rights (ICESCR) in clarifying the right to basic education, defined the minimum core as 'the minimum essential levels of a right'.[66] Yacoob J described it as 'the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation'.[67] The minimum core of a right means that if a state fails to provide for certain defined minimum standards, such failure would *prima facie* constitute a violation of that state's international obligation in terms of that particular right.[68] The UN Committee on

61 2014 (3) SA 441 (ECM).
62 As above.
63 As above.
64 *Minister for Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) para 41.
65 T Boezaart *Child law in South Africa* (2017) 519.
66 As above.
67 *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC) para 31.
68 Boezaart (n 65 above) 518.

the ESCR issued a general comment regarding the right to education as well as its regime.[69] The UN Committee on the ESCR's General Comment 13 states that parties to the ICESCR are obliged to ensure the 'Availability, Accessibility, Acceptability, and Adaptability' of education, otherwise known as the '4-A's Framework' for education.[70]

The 4-A's Framework is an international guide to determining the adequacy of the content of basic education. It is the minimum core or *raison d'etre* of basic education.[71] Which is to say, if basic education is to claim its continued existence as an 'adequate education', it must at all costs and times exhibit these four features prescribed in the framework.[72] An action or inaction that results in education falling short of any of the above features in the framework violates the right to basic education.[73] It is essential to shortly examine the meaning of each 'A' in the framework. 'Availability' of education means that educational institutions and programs necessary for learning have to be available sufficiently to all learners.[74] This feature is satisfied when government creates functioning educational institutions, by among other things supplying sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, and teaching materials; to name a few.[75] An 'Accessible' education is one that is non-discriminatory and physically reachable to all learners.[76] Accessibility has been interpreted as constituting three fundamental components, including: (1) Non-discrimination, which means education must be accessible to all, especially the most vulnerable groups, without discrimination on any of the prohibited grounds; (2) Physical accessibility, which means that education must be within a safe physical reach, either by attendance at some reasonably convenient geographic location or via modern technology; and (3) Economic accessibility, which means that education must be affordable to all.[77] An 'Acceptable' education refers to an education whose form and substance, including curricula and teaching methods, are acceptable to students and in some cases, their parents as well.[78] The requirement of acceptability extends also to the question of the relevance and cultural appropriateness of the education.[79] Regarding 'Adaptability', the government is required to develop policies and programs that it can adapt to the needs of changing societies and

69 As above.
70 As above.
71 Boezaart (n 65 above) 519.
72 As above.
73 I Currie and J De Waal *The Bill of Rights Handbook* (2005) 133.
74 CECSR General Comment 16(6)(a); Boezaart (n 65 above) 518.
75 McConnachie (n 44 above) 23.
76 CECSR General Comment 16(6)(b); Boezaart (n 65 above) 518.
77 McConnachie (n 44 above) 23.
78 CECSR General Comment 16(6)(c).
79 As above.

communities, and responds to the needs of students within their diverse social and cultural settings, including those learners who have disabilities.[80] This framework consists of the standards that have to be used to determine the adequacy of education in context of the 4th IR. Requisite curriculum, infrastructure, learning tools, trained teachers etc. have to align themselves to the educational needs resultant of the 4th IR. Otherwise, our education is devoid of its minimum core.

It is important to also determine the nature of the corresponding obligation of the state in the provisioning of this 'basic education'. The right to basic education encompasses both a negative and positive obligation of government for its realisation.[81] The positive obligation modelled by the right to education is among the reasons why it is distinct from other socio-economic rights.[82] The wording of this right is said to reflect a strong, unqualified right; free from promises and aspirational language.[83] There are a number of reasons that justify the right to education having such a strong characterisation.

First, in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,[84] the Constitutional Court held that section 32(a) in the Interim Constitution,[85] the predecessor of section 29(1)(a) of the Final Constitution, created a 'positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education'.[86] Given the identical wording of the two aforementioned sections, the characterisation which applied to the former should apply to the latter as well.[87]

Secondly, in *Government of the Republic of South Africa and others v Grootboom and others*,[88] the Constitutional Court explained that the inclusion of the word 'access', as in the case of section 26 of the Constitution which provides for the right to access to housing, means that the state could fulfil its constitutional obligation by merely enabling people to provide for their own housing.[89] The state is only obliged to create conducive conditions for access.[90] The

80 CECSR General Comment 16(6)(d).
81 As above.
82 Woolman and Bishop (n 15 above) 57.9.
83 Skelton (n 30 above) 404.
84 1996 (3) SA 165 (CC).
85 Constitution of the Republic of South Africa, Act 200 of 1993, sec 32(a) of the Interim Constitution provided that 'Everyone shall have the right- (a) to basic education and to equal access to educational institutions'.
86 Woolman and Bishop (n 28 above) 57.8.
87 As above.
88 2000 11 BCLR 1169 (CC); *Minister of Health and others v Treatment Action Campaign and others (no 2)* 2002 (5) SA 721 (CC).
89 Woolman and Bishop (n 15 above) 57.10.
90 As above.

corollary meaning, therefore, must be that the absence of the word 'access' in section 29(1)(a) means that over and above granting access, which is a negative obligation, the state must itself, provide the basic education to all.[91] Ergo, the government must create new ways of educating as far as may be necessary in light of the evolving societal needs and not just give access to education in its current shape or form. The latter is a more passive obligation.

Thirdly, the right to basic education is distinct from the species of socio-economic rights exemplified by the cases of *Grootboom* and *Treatment Action Campaign,* whose realisation is made subject to limitations such as 'reasonable legislative measures'.[92] This limitation does not apply when it comes to the right to basic education. Basic education can only be realised when its core content are provided and no reasonable measure is required.[93] This right is not contingent on the availability of resources for its realisation.[94] Whether the state claims that it does not have enough resources to fulfill its constitutional obligation or not, it is not released from its duties as imposed by this right.[95] Finally, the right to education is not subject to progressive realisation.[96] In *Grootboom*, Yacoob J described progressive realisation in the following terms:[97]

> It means the accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible to … people as time progresses.

The right to education in the Constitution is not a right that can be made gradually available to more people 'over time'.[98] In *JumaMusjid* the Court asserted that[99]

> the right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education progressively available and accessible.

Therefore, the right to education can only be provided for when its minimum core is made available to all learners today.

91 As above.
92 Woolman and Bishop (n 15 above) 57.10.
93 As above.
94 As above.
95 As above.
96 As above.
97 *Grootboom* (n 88 above) para 45; M Seleoane 'The right to education: Lessons from *Grootboom*' (2003) 7(1) *Law, Democracy and Development* 137, 140-142; Woolman and Bishop (n 15 above) 57.10.
98 Woolman and Bishop (n 15 above) 57.10.
99 *JumaMusjid* (n 24 above) para 37.

5 Role of courts in realising basic education

The role of courts in the enforcement and realisation of the right to basic education — an unqualified, immediately realisable right as envisaged in our Constitution — must be perceived through the lens of the phenomenon of the separation of powers. The separation of powers doctrine is a strong precept ingrained in our South African constitutional democracy which involves the impartation of separate powers to various arms of government.[100] The doctrine ensures the protection of individual rights by way of the distribution of political power between different institutional actors, and includes mechanisms to ensure that such power is not unduly exercised.[101] There is no doubt of the merits of the operation of this doctrine, especially in curtailing the violation of human rights that would otherwise ensue from the abuse of excessive concentration of power.[102] The second rationale for separation of powers — in addition to the latter — is that functional distribution leads to specialisation which, in turn, enhances state efficiency.[103] Thus, when specific functions, duties and responsibilities are allocated to distinctive institutions with areas of competence and jurisdiction, state efficiency typically creases.[104]

In South Africa, the delivery of the right to basic education involves all arms and spheres of government.[105] The legislature establishes the legislative framework, the executive puts practical measures in place to ensure the realisation of the right, and where the executive fails to carry out its mandate, the judiciary is engaged to hold the latter to account.[106] In our constitutional democracy, the judiciary also has the power to strike down laws as invalid if they are in conflict with the Constitution.[107] The separation of powers delineates the terrain within which all the branches of the state should exercise their functions and thus it imposes a responsibility on each branch to guard itself against encroaching upon the functions of another branch.[108] In relation to the judiciary, this doctrine means, before handing down any order, or granting any relief, courts must always and consciously endeavour to find the exact point at which

100 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), Skelton (n 30 above) para 393.
101 Skelton (n 30 above) 393.
102 *S v Dodo* 2001 (3) SA 382 (CC) para 8.
103 Skelton (n 30 above) 393.
104 As above. 2016 (4) SA 63 (SCA) para 41.
105 As above.
106 As above.
107 As above.
108 As above.

their power begins and where such power terminates.[109] This, to avoid the undesired amalgamation with the powers of other spheres of government.[110]

The Constitutional Court has held that the judiciary should 'be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively'.[111] The rationale for this is that courts are generally not possessed of the requisite expertise or do not have the advantage of ready access to sources of information necessary for decision-making and are thus required to acknowledge their own limitations.[112] The effort by the courts not to interfere with the pre-eminent domain of the executive has been particularly tested in the enforcement of socio-economic rights which, like the right to basic education, reflect a positive, direct, strong, and unqualified right.[113] In *Soobramoney v Minister of Health (Kwazulu-Natal)*,[114] the first decision in which a substantive socio-economic right was at issue, the Constitutional Court demonstrated extra caution against intruding into the domain of the executive, in that it failed to give content to the right that was at issue. In subsequent judgments, the Constitutional Court has time and again rejected contentions relating to the content of the minimum core of a right, holding that it is not appropriate for it to give content to what constitutes sufficient provision of a right as this was outside the purview of its domain and a matter best left to the executive.

Examples of cases where the Constitutional Court has been criticised for failing to take the opportunity to give substantive content to rights in question include: *Treatment Action Campaign*,[115] and *Grootboom*.[116] These cases exemplify the reluctancy of courts to adjudicate a transformational case involving socio-economic rights interpretation. This reluctancy is due, in part, to cautious observance of the separation of powers. Extrapolating on this issue, Sachs J stated that the large number of interlocking and interacting interests and considerations, including, political compromises, cost-benefit analysis, budgetary priority decisions, etc, which determine how best to realise values articulated in the constitution, are far better left in the hands of the executive rather than the judiciary.[117] In *Grootboom* it was decided that, while there might be a 'core' responsibility

109 S Seedorf and S Sibanda 'Separation of Powers' in S Woolman and others (eds) *Constitutional law of South Africa* (2013 2nd edition) 12 12.56.
110 As above.
111 *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 41.
112 *Gauteng Gambling Board v Silverstar Development* Ltd 2005 (4) SA 67 (SCA) para 29.
113 Seedorf & Sibanda (n 109 above) 12-62.
114 1998 (1) SA 765 (CC).
115 *Treatment Action Campaign* (n 87 above) paras 33-38.
116 *Grootboom* (n 87 above) para 33.
117 *Du Plessis v De Klerk* (CC) 1996 (3) SA 850 (CC) para 180.

resting on the state, people are not entitled to demand — via courts at least — the direct delivery of such 'core' services.[118] This was reiterated in the *Treatment Action Campaign* case where the Court stated that 'it is impossible to give everyone access to a 'core' service immediately'.[119] Berger gives reason to why this alleged 'impossibility' in providing for a right immediately would potentially limit a courts interpretation of the same. He alludes that to proclaim impossible standards would cheapen the Constitution as and when people begin to realise that those standards do not improve their lives.[120] The foregoing exposition of the Constitutional Court's existing socio-economic rights jurisprudence indicate that courts are inclined to limit the impact of both qualified and unqualified socio-economic rights.[121] Similarly, Woolman and Bishop predict, based on the current jurisprudence, that the courts might not be willing to give full content to the right to basic education.[122] Berger argues that this is because a narrow interpretation of the constitution is better than an empty one.[123] Which is to say it is better to read the unqualified right to basic education, for example, in such a way that it promises very little rather than too much.

In South Africa, we do not follow an absolutist approach to separation of powers.[124] The political settlement of the Republic of South Africa at the end of the era of Apartheid was an inauguration of courts as being among important law-making sites for the democratic transition. The introduction of a justiciable Bill of Rights, a culture of justification, the doctrine separation of powers involving a system of checks and balances, and the demise of sovereignty of Parliament in exchange for a supreme constitution and concomitant, albeit to an unknown extent, increase in the law-making powers of the judiciary, are among indicators of South Africa's faith in the institution of the judiciary. A huge part of socio-economic as well as socio-political shift in South Africa, whether for the societal good or bad, depends on the efficacy of the institution of the judiciary becoming alive as holders of their responsibilities. In the context of enforcement of socio-economic rights, this increase in judicial power will require courts to tread a fine line in abiding by the separation of powers. It must be noted, however, that the involvement of the judiciary in policymaking is not an all-or-nothing issue.[125] Upholding the separation of powers

118 *Grootboom* (n 87 above) para 33.
119 *Treatment Action Campaign* (n 87 above) paras 26 and 39.
120 E Berger 'The Right to Education Under the South African Constitution' (2003) 103 Columbia Law Review 642. Woolman and Bishop (n 15 above) 57.11.
121 Woolman and Bishop (n 15 above) 57.11.
122 Woolman and Bishop (n 15 above) 57.13.
123 Berger (n 120 above) 642.
124 *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 33.
125 D Bilchitz 'Health' in S Woolman and others (eds) Constitutional Law of South Africa (2005 2nd edition) 56A.24.

does not mean courts are completely barred from actively partaking, albeit with caution, in the insurance of the realisation of the right to a basic education for South Africa's children.[126]

Certainly, there are instances where the judiciary will be required to vindicate socio-economic rights. In getting involved, the courts have to interrogate, *inter alia*, the reasonableness of the policies adopted.[127] A formal or strict approach to the separation of powers, with courts refusing to engage in the interpretation of core standards of a right, means that in an inquiry into the reasonableness of a given policy, 'reasonableness' will stand for whatever the court regards as desirable in that given context.[128] Which is problematic as it leaves courts without clear, consistent and principled jurisprudential basis upon which to found decisions on socio-economic rights.[129] Furthermore, given the ambiguity of the judiciary in such cases, courts may fail to intervene in the enforcement of socio-economic rights even when it is necessary to do so, and their orders may lack practical efficacy.[130] In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another*,[131] Mokgoro and Sachs JJ argued that:[132]

> while courts should exhibit deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account.

The empirical question of whether it is possible to provide the minimum benefit envisaged by the right immediately to everyone affected should not hinder the correct interpretation of the values in the constitution.[133] Bilchitz argues, in the relationship between the content of and limitations on the right, that the process of defining the content of a right should be done independently of the consideration of the availability of resources.[134] He provides three justifications for this claim: First, the recognition of an existing entitlement entails that the government is required to modify the *status quo* so as to fulfil people's rights as soon as possible. Secondly, the continued existence of these entitlements can influence the behaviour of those who have resources available but are not legally obliged to provide for those suffering from deprivation. Finally,

126 Skelton (n 30 above) 407
127 Bilchitz (n 125 above).
128 Bilchitz (n 125 above).
129 As above.
130 Bilchitz (n 125 above).
131 2002 (3) SA 265 (CC).
132 *Bel Porto School Governing Body and Others* (n 131 above) para 62.
133 Seleoane (n 97 above) 153.
134 Bilchitz (n 125 above) 56A.40.

recognising that a right exists even when not fulfilled entails that, as soon as resources do become available, the government is required to act in order to realise the rights that have been abrogated.[135] However, this does not mean that the right to education is without limitation: the right to a basic education is capable of being limited in terms of section 36 of the Constitution or through a creative remedy.[136]

Given the dawn of the 4th IR, the financial impact the interpretation of the right to basic education could have, and the current jurisprudence as delineated above: it is doubtful that courts will become involved in the assessment of the quality or adequacy of education in context of the 4th IR. Will the judiciary, as it has before, regard the matter relating to provisioning education for the 4th IR as the 'core content' of the right to basic education, and thus a question falling within the terrain of the executive? Is this an area in which the courts will show deference on the basis that the executive, rather than the judiciary, has the appropriate knowledge to determine adequacy of educational provisioning? Suppose the executive fails to provide adequate education required by the 4th IR, will the judiciary hold the latter to account? A particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and separation of powers can, sometimes, be used to avoid holding other spheres of government to account.[137] In this respect, undue judicial adventurism, which is curtailed by separation of powers, can be as damaging as excessive judicial timidity.[138] Judicial timidity implies that a court hides mousy and irresolutely behind the veil of the separation of powers, failing in their role of adjudicating for positive and immediately realisable rights.[139] The doctrine of the separation of powers is not an abortion of the role of courts as overseers who ensure that all exercise of governmental power is in line with the Constitution.[140] The separation of powers doctrine importantly involves the principle of checks and balances where each branch of government is assigned special powers in order to keep a check on the exercise of the functions of other branches.[141] A sense of balance is needed to determine when it is suitable to defer to other branches of government and when courts have to step in to cure a constitutional wrong.[142]

135 As above.
136 Skelton (n 30 above) 407
137 As above.
138 *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC) paras 155-156.
139 As above.
140 As above.
141 As above.
142 Seedorf & Sibanda (n 109 above) 12-56.

6 Conclusion

Whether we accept this or not, the 4th IR is undoubtedly true to life and it is upon us. In a report reviewing how technological transformation, among other factors, is shaping skills demand and which was prepared by the International Labour Organisation(ILO) and Organization for Economic Co-operation and Development (OECD), South Africa was one of the countries observed to be experiencing the most critical shortages in skills needed in this new digital age.[143] If South Africa is already proven to be in shortage of skills listed as essential for the 4th IR, the call for skills development is of utmost urgency.

Education must provide for skills development to empower people to navigate this new world introduced by the 4th IR. The Constitutional Court in *Christian Education South Africa v Minister of Education*,[144] stated that education must be flexible so that it can adapt to the changing needs of learners due to changes in society.[145] Adaptability as a requirement for education (one of the 4-A's) speaks to the content of such education and the means used to deploy it.[146] In this regard, Woolman and Bishop point out that 'the advent, and ubiquity of computer technology probably requires that learners leave school properly equipped for the modern society and work environment'.[147]

As delineated above, the right to basic education is not subject to a reasonableness standard, or availability of resources or progressive realisation. Seen in this light, this right to education is capable, if allowed, of preparing us for and leading us to the new dawn of the 4th IR. With this entitlement, the government can be persuaded (or ordered) by courts to make all the changes which are necessary to fully realise the right to basic education for the 4th IR. Regrettably, litigation of such a right is easier said than done.

The assessment of the quality or adequacy of education seems to be a terrain courts in South Africa have been reluctant to engage in and it seems that in the debate regarding the 'core content' of the right to education, courts will show deference on the basis that the executive, rather than the judiciary, has the appropriate knowledge to assess adequacy of the content of a right.[148] Thus, even though this right is unqualified *ex lege*, it is not obvious that the right can be immediately realisable *de facto*. Courts are reluctant to stretch their interpretative powers in holding that certain rights are immediately

143 ILO and OECD Report (n 3 above) 12.
144 2000 (4) SA 757 (CC).
145 As above.
146 Woolman and Bishop (n 15 above) 57.
147 As above.
148 Skelton (n 30 above) 405.

realisable;[149] especially if it involves positive timeous measures required to be taken by another sphere of government.[150] The Constitutional Court in *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal,*[151] held that for the sake of 'procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively'.[152] This means that the courts will be less inclined to interpret the right to basic education as one that is immediately and positively realisable. Put differently, the courts will not order government to provide adequate education for the 4th IR immediately.

The Constitutional Court's now well-established approach to these rights is to measure the 'reasonableness' of the plans and measures that the other arms of government have taken towards fulfilment of their obligation. If the measures are found to be reasonable, heedless of the adequacy of the same, the government will have fulfilled its obligation. This self-imposed restraint has been criticised, particularly the Constitutional Court's refusal to involve itself in determining the core content of socio-economic rights, preferring instead to apply a rationality review that focuses on a justification analysis without a detailed analysis of the right.[153] However, criticism notwithstanding, the Court reiterated in *Mazibuko v City of Johannesburg* that it will not engage in detailed debates about the content of rights.[154] What it will do is call upon the government to explain why the policy is reasonable and to disclose how the policy was formulated — including what investigation and research was undertaken, what alternatives were considered and why the particular option was selected.[155] The Court also stated that the Constitution does not hold government to impossible standards of perfection, and that the courts will not take over tasks that in a democracy should be left to other arms of government.[156]

With how courts have constrained themselves, it seems that when the need for adjudicating for changes in the provisioning of education for the 4th IR, courts will be faced with a tremendous challenge. The 4th IR poses a challenge to courts to adjudicate for the immediate provisioning of education, otherwise we will fail to produce leaders, breadwinners, employers and employees equipped to navigate this new world.

149 Skelton (n 30 above) 395.
150 Skelton (n 30 above) 393.
151 1999 (2) SA 91 (CC).
152 1999 (2) SA 91 (CC) para 41.
153 Skelton (n 30 above) 406.
154 2010 (4) SA 1 (CC) para 68.
155 As above.
156 As above.

THE *GABRIEL FERNANDEZ* CASE: A COMPARATIVE ANALYSIS OF A 'MANDATED REPORTER' IN LIGHT OF THE CHILDREN'S ACT

*by Thiavna Subroyen**

1 Introduction

Children's rights are a category of human rights that are required to be afforded care and protection as they are one of the most vulnerable groups in society.[1] Both international law and South African municipal law place rights and duties on parents, families and the State to ensure that the maintenance of a child is of paramount

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1 Child Rights International Network 'Children in vulnerable situations' 2018 https://archive.crin.org/en/home/rights/themes/children-vulnerable-situations.html (accessed 20 March 2020).

importance.[2] Unfortunately, many individuals fail to comprehend their criminality when they engage in acts of abuse and maltreatment. Child abuse is one that is regarded as an imminent evil of society that seeps into the morality and law of respective jurisdictions. To eradicate such acts, workers known as 'mandated reporters' are recognised to ensure that the best interests of the child are justifiably upheld by reporting child abuse to the necessary authorities.

'Mandated reporters' are a category of professionals who are required by law, to report any known or suspected cases of child neglect or abuse to governmental authorities.[3] Section 110 of the Children's Amendment Act recognises this category of professionals as being health practitioners, social workers, correctional officials, educators, legal practitioners and staff of youth and child care centres.[4] Many countries implement mandatory reporting in their general policies and statutes to prevent child maltreatment.[5] The importance of mandated reporting is reflected in Article 19 of the United Nations Convention on the Rights of the Child (1990) which states:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.[6]

The recognition of mandated reporting in international human rights proves that the State and its citizens must ensure that there are mechanisms in place to protect the interests and welfare of a child.[7]

This paper is written in response to the recent decision of the 2nd District Court of Appeal of California in its dismissal of charges against four social workers for failure to report child abuse and for the

2 Constitutional Court of South Africa 'Children's Rights' 2005 https://www.concourt.org.za/index.php/children-s-rights (accessed 21 March 2020).
3 D Pollack 'International legal note: Should social workers be mandated reporters of child maltreatment? An international legal perspective' (2007) 50 (5) *International Social Work* 700-701.
4 Act 41 of 2007.
5 Pollack (n 3 above) 700.
6 United Nations, Convention on the Rights of the Child, 1989 https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed 3 August 2020).
7 Pollack (n 3 above) 704.

falsification of records.[8] These charges were linked to the notorious torture and murder of Gabriel Fernandez in 2013 by his mother Pearl Fernandez and her partner Isuaro Aguirre.[9] Along with a charge of first-degree murder by the aforementioned parties, the prosecuting authority had charged the four social workers for criminal negligence in their failure to take reasonable steps, as mandated reporters to protect a child from being subjected to abuse.[10]

An analysis of the *Gabriel Fernandez* case will be presented in chronological order from 2012 to 2013 of the periods in which reports of abuse were made by various parties to the Los Angeles County Department of Children and Family Services (DCFS). Further scrutiny will be given to responses of the four social workers in their failure to respond to the reports and failure to take reasonable action to ensure the safety of the child and their intention to falsify records which had resulted in the death of Gabriel Fernandez on 23 May 2013. The social workers were charged with a section 273 Penal Code violation for child endangerment and were faced with a penalty of ten-year imprisonment if they were found guilty. This analysis will examine the final judgment that was handed down in January 2020 in which all charges were dismissed. The discussion of events leading up to Fernandez's death must be considered with the failure of social services in intervening and upholding the paramount interests of a child in an event where their rights may be violated, and where such environments may pose a risk to their health and safety.

This paper then seeks to expand upon the discussion of the Gabriel Fernandez case in illustrating: firstly, the aspects which make up a mandated reporter in the case of child abuse. Secondly, the roles or obligations similar to the mandated report in the context of South African law, primarily, the Children's Act and thirdly, a comparative analysis against South African law, to determine if the Appellate Court was correct in its decision to acquit the social workers involved in the *Gabriel Fernandez* case.[11]

8 *Bom v Superior Court* C/W B292846, B292914, & B292944 2-3; See also Y Villarreal & M Brennan 'Timeline: The horrific story depicted in Netflix doc: 'The Trials of Gabriel Fernandez' *Los Angeles Times* 26 February 2020.

9 *Aguirre v Superior Court of Los Angeles County* LASC S244413; *Bom* (n 8 above) 2; See also H Soen 'The Trials of Gabriel Fernandez: What happened to the four social workers?' February 2020 https://thetab.com/uk/2020/03/06/gabriel-fernandez-social-workers-146799 (accessed 15 March 2020).

10 Soen (n 9 above).

11 Act 38 of 2005; Soen (n 9 above).

2 The Trials of Gabriel Fernandez: when the law fails a child

In the *Bom et al (Petitioners)*,[12] the Appellate Court in this matter had to determine if the four social workers — namely Kevin Bom, Patricia Clement, Stefanie Rodriguez and Gregory Merritt could be charged for their failure to reasonably protect a minor from ongoing child abuse. In their position as mandated reporters, the trial Court had concluded that due to the negligence of the petitioners, the death of Fernandez was 'foreseeable' and had denied the motion to dismiss the child abuse charges against the social workers.[13] On appeal, the Court had to determine if the petitioners had violated section 273 of the Penal Code in the event of child endangerment.[14]

2.1 Factual summary

Gabriel Fernandez was a seven-year-old boy who had been in the care of his maternal grandparents from 2005 to 2012. In October of 2012, Fernandez then lived with his mother Pearl Fernandez and her partner Isuaro Aguirre.[15]

The first report of child abuse was made on the 30th of October 2012, when Fernandez's teacher Jennifer Garcia had contacted the DCFS to notify the services of bruises found on Fernandez's body after he was allegedly assaulted by his mother.[16] Based on Garcia's allegations, an investigation into potential child abuse was opened and assigned to Stefanie Rodriguez until January of 2013. In this period, Rodriguez had visited the family on various occasions as Garcia continuously reported more incidences of assault against Gabriel. In the social worker visits, Pearl Fernandez denied allegations of child abuse and stated that his injuries were the result of him playing roughly with his siblings, falling down the stairs or cutting his hair.[17] By 30 January 2013, Rodriguez and her supervisor Kevin Bom signed a case transfer list to the Family Preservation Unit with the findings of their report of physical abuse as being

12 *Bom* (n 8 above).
13 R Winton & C Knoll 'Charges upheld against L.A. social workers in death of 8-year-old Gabriel Fernandez' (2018) https://www.baltimoresun.com/la-me-ln-gabriel-fernandez-social-workers-abuse-20180913-story.html (accessed 23 March 2020).
14 *Bom* (n 8 above) 2.
15 *Bom* (n 8 above) 3.
16 *Bom* (n 8 above) 2; M Gajanan 'The Heart-breaking Story Behind Netflix's Documentary Series: The Trials of Gabriel Fernandez' 3 March 2020 https://time.com/5790549/gabriel-fernandez-netflix-documentary/ (accessed 04 August 2020).
17 *Bom* (n 8 above) 3-4; G Therolf 'Why did no one save Gabriel?' 3 October 2018 https://www.theatlantic.com/family/archive/2018/10/la-county-dcfs-failed-protect-gabriel-fernandez/571384/ (accessed 4 August 2020).

'inconclusive', with no cause of endangerment to the minors in the Fernandez household and were rather a placed in a 'high-risk' category of 'general neglect' based on Pearl Fernandez's method of corporal punishment.[18]

The case was transferred to the Family Preservation Unit who had assigned the case to Patricia Clement, who was under the supervision of Gregory Merritt.[19] The Unit itself works alongside the DCFS to provide parent training programmes, counselling and child-orientated activities to assist dysfunctional families in meeting their child welfare duties.[20] Before Clement made her visit to the Fernandez family home, a family risk assessment was taken by an in-home counsellor, who had found that the children were exposed to a high-risk environment of abuse. On 27 February 2013, the counsellor had reported the matter to the DCFS and the authorities, but no arrests were made.[21] In March 2013, Clement and the counsellor had visited the family home. According to their findings, the children were healthy and not subjected to any acts of abuse. On 6 March 2013, Clement had presented a recommendation to the DCFS to close its investigation with the Fernandez matter and made observations that Pearl Fernandez was deemed fit as a parent to protect her children from any threat to their wellbeing. She did not suffer from any mental health issues and had created a safe environment for the upbringing of her children.[22] Such findings were contested by the People in the Trial Court and alleged that Clement had falsified her observations and should be charged for violating Government Code 6200.[23] On 7 April 2013, Merritt approved Clement's findings on the reason that there was a reduced risk of neglect and had permitted her recommendation for the case to be closed.

On 23 May 2013, Pearl Fernandez contacted 911 and reported that Gabriel Fernandez had been severely injured after falling in the bathtub. Upon his arrival at the emergency room, the medical officer found that Gabriel had suffered internal injuries, open skull fractures, broken ribs, burns, cuts, lacerations, swelling and bruises on his entire body. Many of the injuries sustained ranged from being hours-days-weeks-months old and due to his worsened condition of neglect and malnutrition, Fernandez had died as a result of blunt force trauma to his head. Pearl Fernandez and Isuaro Aguirre were then charged and convicted of murder.[24]

18 *Bom* (n 8 above) 5-7; Therolf (n 17 above).
19 *Bom* (n 8 above) 8-9.
20 C Lee & C Ayon 'Family preservation: The parents' perceptions' (2007) 10(1) *Journal of Family Strengths* 43-45.
21 *Bom* (n 8 above) 9; Therolf (n 17 above).
22 *Bom* (n 8 above) 10.
23 *Bom* (n 8 above) 30-35; Government Code of 1943 as amended; Gajanan (n 16 above).
24 *Bom* (n 8 above) 11-12.

2.2 Majority judgment (Rothschild, P.J; Weingart, J)

The findings of the court in its majority judgment to dismiss the charges was based on three categories:[25]

I. The standard of review of probable cause.
II. Child Abuse in terms of the Penal Code section 273(a).[26]
III. Government Code Section 6200.[27]

In the review of the petitioners' motion to dismiss the charges, the courts held that in terms of section 995 of the Penal Code, a matter may be set aside if it has been found that the charges of the defendants were committed without any 'reasonable or probable cause'.[28] The court then illustrated that probable cause can be determined if a reasonable person can believe that there is a strong suspicion of an accused being found guilty of an alleged crime.[29] The Appellate Division ruled a *de novo* review on the matter, with the reasoning that they would not substitute their opinion to the greater weighing of evidence in the lower court and will primarily rely on the interpretation of statutes in their judgment to uphold or dismiss the motion of the case.[30]

Section 273 (a) of the Penal Code concerning child abuse states the following:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, wilfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, wilfully causes or permits the person or health of that child to be injured, or wilfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.[31]

The Court then relies on the *Sargent* case to illustrate the four categories of conduct to child abuse and must prove that in each category, the crime was 'wilful' and had resulted in 'great bodily harm or death.'[32] The People in the Trial Court case had to prove that the social workers had been categorised as either:

i. Persons who would cause and permit a child to suffer;

25 *Bom* (n 8 above) 12,14,21,30.
26 Penal Code of 1872 as amended.
27 Government Code (n 23 above). This provision refers to 'Crimes relating to public records, documents and certificates'.
28 Penal Code (n 26 above).
29 *Bom* (n 8 above) 19-21. See also *Rideout v Superior Court* (1967) 67 Cal. 2d 471,474.
30 *Bom* (n 8 above) 13. See also *The People v Gonzalez (2017) 2 Cal.5th 1138, 1141* on a discussion of a *de novo* review.
31 Penal Code (n 26 above).
32 *People v Sargent* (1999) 19 Cal 4th 1206, 1215.

ii. Persons who would inflict unjustifiable physical/mental suffering of a child;
iii. Persons who wilfully permit injury to a child while having custody/ care of the child;
iv. Persons who wilfully places a child in circumstances that could potentially endanger their health and safety.[33]

Due to the People's failure to rely on the second category, the Court had to determine if the social workers could be held criminally liable to allow a child to suffer as envisaged in the first category and if they also had 'care or custody' of Gabriel during the timeframe of abuse, as envisaged in the third and fourth category.[34] With the first category liability, the courts narrowed their interpretation of the Penal Code to the relationship between the defendant and the abuser to determine if the defendant had a legal duty to control and supervise the abuser's conduct. In this case, the Court had to determine if the social workers had a duty to control Pearl Fernandez and Isuaro Aguirre to prevent abuse from taking place. Based on the decision of *People v Heitzman* the Appellate Court overturned the findings of the Trial Court on the basis that the social workers did not have a relationship with Fernandez and Aguirre and were under no legal obligation to supervise and control their conduct.[35] The Court also stated that the People failed to present any case law and legislation in their evidence to prove that the petitioners had an 'affirmative duty' to control Fernandez and Aguirre.[36] The third and fourth categories concerning care and custody shifts from the relationship of the defendant and abuser to the abuser and the victim (child).[37] Physical and legal custody of Gabriel by the petitioners was not the apex of discussion in the Trial Court, rather it was on whether the petitioners had the 'care' of Gabriel when certain conduct had resulted in his health and safety being endangered.[38] The Court broadly interpreted the definition of 'care' to go beyond familial bonds to one which assumes the role and duties of a caregiver of providing basic needs to the child.[39] On this interpretation, the court

33 *Bom* (n 8 above) 13-14. See also *The People v Valdez* (2002) 27 Cal.4th 778, 788. The court asserted that a wilful act that resulted in bodily harm or death had amounted to criminal negligence.
34 *Bom* (n 8 above) 13-16.
35 *The People v Heitzman* (1994) 9 Cal.4th 189, 197, 204
36 In the matter of *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 893, the court had established that an 'affirmative duty' arises when there is a special relationship between a vulnerable plaintiff and a defendant who has some control over the plaintiff's welfare. Furthermore, this special relationship places a duty on the defendant to protect the plaintiff from 'foreseeable harm.'
37 *Bom* (n 8 above) 20-26.
38 *Bom* (n 8 above) 22. See also *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 for a discussion on the special relationship that is created when there is a duty to control the behaviour of someone who may potentially endanger the lives of other persons.
39 *Bom* (n 8 above) 22-23. See also *The People v Cochran* (1998) 62 Cal.App.4th 826, 832, in which the court held that the concepts of 'custody' and 'care' went beyond one's formal familial relationship.

had ruled that based on the absence of provision of basic needs to Gabriel Fernandez, there was no evidence to prove that any of the social workers had assumed the role of caregivers and cannot be held liable for the care and custody of Fernandez.[40]

In the case of the falsification of records, the People had alleged that there was a violation of section 6200 of Government Code (the Code).[41] The People presented the argument in the Trial Court that social workers were 'officers' in terms of the Code and committed a crime intending to knowingly include false information in their entries into the DCFS records.[42] Clement and Merritt contested this allegation by claiming that they were not 'officers' as envisaged in the Code and the Court agreed with the defendants on the basis that it is only applicable to those who have governmental functions to serve the public.[43] There is a further reference to the California Constitution in which county 'officers' are assessors, sheriffs and district attorneys.[44] Social workers, according to the Court, are not vested with sovereign duties of the State as envisaged in the Code, they are under the control and direction of the DCFS director and fall under the category as 'professional' employees.[45] Based on this distinction, the courts concluded that the social workers were not 'officers' in terms of the Government Code and charges in terms of section 6200 were dismissed.[46]

2.3 Minority judgment (Chaney J)

In the minority judgment, Chaney J discusses the decision of the majority judgment with the Penal Code section 273 violation and the section 6200 Governmental Code violation.[47]

In the analysis of the Penal Code violation, Chaney J believes that the petitioners were the enablers of the abuse that Fernandez had endured. In the falsification of documents, the omission of

40 *Bom* (n 8 above) 24.

41 Government Code (n 23 above) provides:
'Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment according to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer wilfully does or permits any other person to do any of the following: (a) Steal, remove, or secrete; (b) Destroy, mutilate, or deface; (c) Alter or falsify.'

42 *Bom* (n 8above) 30-31.

43 *Bom* (n 8 above) 30. See also *Kirk v Flournoy* (1974) 36 Cal.App.3d 553, 557.

44 *Bom* (n 8 above) 32-33. See also *People v. Pearson* (1952) 111 Cal.App.2d 9, 17, in which courts have accepted that county officers and their deputies are 'officers' for the purposes of the Government Code section 6200.

45 *Bom* (n 8 above) 33-34. See also *Cleland v Superior Court* (1942) 52 Cal.App.2d 530, 537, in which the court held that a superintendent of a county hospital was not an officer in terms of the Government Code.

46 *Bom* (n 8 above) 35.

47 *Bom* (n 8 above) (Chaney J. concurring/dissenting opinion) 3-8.

information on records, failure to disclose to Garcia of the case transfer and making reasonable inferences in risk assessments, the petitioners had failed in their responsibilities and prevented a system from effectively protecting Gabriel Fernandez. Although the minority judgment agrees that the social workers could not control the conduct of the abusers, Chaney relies on the dissenting opinion of *Heitzman* in that 'bystander liability' should be included in which certain acts could have prevented endangerment to the health and safety of an individual.[48]

Chaney J agreed with the ruling of the majority judgment in the dismissal of the section 273 Penal Code charges due to the absence of a special relationship and control between the abusers and the social workers.[49]

Chaney J, however, dissents with the majority judgment in its ruling of the dismissal of the Governmental Code charges. The minority judgment expresses that the petitioners are 'officers' in the case of the Government Code and should be prosecuted under the statute. The *Vaughn v English* case presents the concept that a public officer acts in the capacity of an agent to perform governmental functions in the best interests of the public.[50] As representatives of child services, social workers have a responsibility to make quick and reasonable decisions to act in the best interests of children to report and follow through with investigations in the cases of abuse. In this case, the minority judgment concludes that social workers are public officers in their provision of services to minors and that they may be prosecuted under the Code. Chaney J then proceeds to criticise the petitioners in their misconduct to undermine their duties as mandated reporters by placing their interests above the interests of a child's health and safety and concludes the judgment on the basis that their actions have tarnished the integrity of the social welfare as the system had permitted actions with the absence of accountability and honesty.[51]

48 *Bom* (n 47 above) 3. See also the discussion of 'bystander liability' in *Thing v. La Chusa*, 48 Cal.3d 644.

49 The court relied on the decision *Megeff v. Doland* (1981) 123 Cal.App.3d 251, to prove that the petitioners did not assume responsibility for Pearl Fernandez and Isuaro Aguirre.

50 *Vaughn v. English* (1857) 8 Cal. 39, 42.

51 *Bom (*n 47 above) 8. See also *Alicia T v County of Los Angeles* (1990) 222 Cal.App.3d 869, 880, in which the court establishes the importance of a social worker to exercise reasonable and independent judgment when they decide to investigate alleged child abuse cases.

3 Who are mandated reporters? California v South Africa

3.1 California

The application of mandated reporters to various professions had undergone great development within the Californian jurisdiction. When the law against child abuse was enacted in 1963, the duty of reporting child abuse was only applicable to those working in health services and the scope of application was limited to physical abuse. But, with the expansion of knowledge of child law, it was deemed necessary to broaden the definition of 'abuse' to mistreatment in the cases of neglect and any other conduct that undermined the interests of a child.[52] It was further noted that with the broadening of the concept of 'child abuse', it became a necessity for other professions to be assigned as mandated reporters to identify the various forms of abuse.[53] In 1980, the Child Abuse and Neglect Reporting Act (CANRA) was enacted to set out the broadened definition of child abuse and to statutorily blanket designated groups as reporters.[54]

The Penal Code 11164-11174.3 then sets out a list of who is identified as a mandated reporter and includes groups such as educators, health practitioners, social workers, the clergy and employees of public protection.[55] A mandated reporter must then report any cases of suspected child abuse when they have 'reasonable suspicion' within their professional capacity that a child may be subjected to abuse and maltreatment. The yardstick of 'reasonable suspicion' bases itself upon the standard of probable cause and is defined as being objectively able to draw upon one's skill and experience to believe a suspicion of child abuse.[56] Such an observation must then be reported to any law enforcement departments telephonically and a written report must be made within 36 hours after information about the incident had been provided, which is then addended to an SS8572 form. The form, in turn, is submitted to the Department of Justice for further investigation.[57]

52 California Department of Social Services Office of Child Abuse Prevention (2003) *The California Child Abuse and Neglect Reporting Law: Issues and Answers for Mandated Reporters* 1.
53 California Department of Social Services (n 52 above) 1.
54 Los Angeles Community College District Human Resources Division and the Office of General Counsel (2009) *A guide to the Child Abuse and Neglect and Reporting Act* 1-4.
55 Los Angeles Los Angeles Community College District Human Resources Division and the Office of General Counsel (n 54 above) 3.
56 Los Angeles Los Angeles Community College District Human Resources Division and the Office of General Counsel (n 54 above) 4.
57 California Department of Social Services (n 52 above) 21.

To prevent mandated reporters from being targeted for their reportative duty, the CANRA specifically makes provision for the legal protection of these persons. Such provisions include immunity from criminal and civil claims, the confidentiality of the reporting party, prohibition of a superior in interfering with a report and a State Board of Control body to assist a mandated reporter in the event of civil action being brought against them.[58] The penalty for a mandated reporter failing to make a report of suspected child abuse may result in six months imprisonment in county jail or a $1 000 fine. Should the suspected abuse result in severe bodily injury or death of a minor, the mandated reporter may be found guilty and this could result in one-year imprisonment, a maximum fine of $5 000 or a combination of the mentioned penalties.[59]

The input of a mandated reporter is imperative to the outcome of a child abuse case. The involvement of the mandated reporter ranges from providing information to social welfare services in their investigation into a report to being required to provide testimony where a matter may be litigated in a court of law. The Penal Code also goes into great depth of indicators to aid a mandated reporter to identify child abuse, types of assessment to determine reasonable suspicion and informs them of their duties and liabilities with having to report any cases of abuse.

3.2 South Africa

The protection of children's rights must be viewed against the historical background of South Africa. The 'culture of violence' embeds itself in the strategy of the apartheid government relying on violence to maintain their power which became applicable in social sanctioning to the treatment of detained political prisoners.[60] The struggle for freedom was met with many political insurgents also resorting to violence.[61] The inclusion of the black youth as active participants in the struggles had resulted in the government justifying its use of violence to target them during the 1970s revolts.[62] As a defenceless group, black children had suffered under the regime of apartheid. Many were killed during rebellions such as the Soweto Uprising, were detained without trial, assaulted and tortured by the State police force.[63] In the social environment, violence was further

58 California Department of Social Services (n 52 above) 23.
59 *Landeros v Flood* (1976) 17C.3d 399.
60 Department of Social Development/Department of Women, Children and People with Disabilities/UNICEF *Violence Against Children in South Africa* (2012) 3.
61 JA Robinson 'Children's rights in the South African Constitution' (2003) 6(1) *Potchefstroom Electronic Law Journal* 56.
62 D Nina 'Child soldiers in Southern Africa' (1992) *Institute for Security Studies Today* 46-60.
63 Robinson (n 61 above) 56.

exacerbated by discrimination faced in public amenities such as sufficient healthcare, safe school environments, protective police services and access to services.[64] Children were also victims of the discriminatory practices whose human rights were undermined by the repressive dynamics of apartheid.[65] But, in its assent, the adoption of the Constitution of the Republic of South Africa, 1996, the Final Constitution, had intended to eradicate the culture of violence and also bring special protection and status to the rights of children.[66]

In light of its radical constitutional dispensation, South Africa pays homage to the international recognition of child law by being a signatory to the United Nations Convention on the Rights of the Child (the Convention).[67] Article 19 of the Convention specifically mandates signatories to implement legislative measures to protect children from different forms of abuse as well as to ensure that preventive measures are enforced with factors of investigation, reporting and referrals of child abuse cases.[68] In its echo of the Convention obligations, section 28(2) of the South African Constitution specifically sets out the rights of children and their protection to be of 'paramount importance'.[69] This constitutional recognition paved the way for the promulgation of the Children's Act which specifically addresses the prominence of children's rights.[70]

The recognition of 'mandated reporting' of child abuse came into force in 2010 with the Children's Act.[71] Section 110 of the Act, similar to the Penal Code, sets out a list of professional groups who are compelled to officially report any reasonable suspicion of child abuse and maltreatment.[72] Medical practitioners, educators, social workers, legal practitioners, officials and religious leaders are required to report child abuse that has resulted in physical, sexual, emotional abuse and deliberate neglect.[73] The general public does have the discretion to report incidents of child abuse but is not legally required to so do.[74]

64 Robinson (n 61 above) 56-57.
65 Robinson (n 61 above) 2-4.
66 Robinson (n 61 above) 57.
67 United Nations Children's Emergency Fund; Convention on the Rights of the Child (1989) http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx. (accessed 20 March 2020).
68 ML Hendricks 'Mandatory reporting of child abuse in South Africa: Legislation explored' (2014) 104 (8) *South African Medical Journal 550.*
69 Section 28(2) of the Constitution of the Republic of South Africa 1996.
70 Preamble of the Children's Act 38 of 2005 as amended; Hendricks (n 68 above) 551.
71 Children's Act (n 4 above).
72 Hendricks (n 68 above) 551.
73 Section 110 (1) of the Children's Act; Department of Social Development *Children's Act Explained: The courts and the protection of children* (2009) 8.
74 Section 110 (2) of the Children's Act; The Sexual Offences and Related Matters Act 32 of 2007 provides an exception to this rule, where all citizens are compelled to report sexual abuse of children to the necessary authorities.

Persons who are legally obligated to report child abuse must refer the matter to the South African Police Service (SAPS), the provincial Department of Social Development or a child welfare organisation.[75] All reports must then be referred to the provincial department to investigate the child abuse allegation and then take reasonable measures to ensure that the safety of the child is not compromised.[76] The response of the SAPS to a report must be referred to the child welfare organisation or the provincial department within 24 hours to enable all relevant parties to commence with an investigation into the allegation.[77] A designated social worker is then tasked to assess the victim's family home. If there has been a finding that the child is in immediate danger, the social worker may fill in a Form 36 to have the child temporarily removed from the family home to a safe care environment.[78] The decision of removal may then be reviewed by the court in the best interests of the child's safety.[79] Once the safety of the child has been confirmed, the social worker may then conduct house visits to the victim's home and conduct interviews with their family members, educators and the alleged perpetrator themselves. If the report from this investigation finds that the child requires care and protection, the social worker may then open a Children's Court inquiry within 90 days and provide alternative care placement or intervention programmes.[80] Should the court agree with the social worker's findings, the child will be placed in alternative care under the supervision of the social worker.[81] All reports of child abuse and neglect will be placed on record in the National Child Protection Register to monitor the cases and ensure that the abuse does not continue and if the children are receiving adequate care and protection.[82]

75 Provincial websites tend to set out a list of registered child protection organisations in terms of section 107 of the Children's Amendment Act.
76 Hendricks (n 68 above) 551.
77 L Jamieson *et al* '*Out of harm's way? Tracking child abuse cases through the child protection system in five selected sites in South Africa: Research Report*' (2017) Cape Town: Children Institute, University of Cape Town.
78 Form 36 as prescribed in the Children's Act.
79 Section 151 of the Children's Act; The *C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC) decision ruled that section 151 and section 152 of the Children's Act are unconstitutional as they had failed to provide an automatic review of the removal of children by state officials. The majority judgment held that the provisions had the objective of promoting the best interests of a child as envisaged in section 28 of the Constitution but failed to provide a safeguard to review the decision of the removal of a child from their family home. These provisions had therefore limited the rights of a child in an unjustifiable manner. An order was then made to read the requirement of 'review' into these relevant provisions.
80 Section 155 (2)-(9) of the Children's Act.
81 The *Hay v B and Others* 2003 3 SA 492 (W) decision ruled that courts are the upper guardians in the decision of the best interests of the child in a court order.
82 Section 113 and section 114 of the Children's Act; Department of Social Development (n 73 above) 10.

Persons in South Africa with an obligation to report abuse must act in good faith and as soon as the suspicion of child abuse is concluded on 'reasonable grounds'. [83] A report done in 'good faith' ensures that those who are legally obligated to report act in an honest, impartial, and open manner to ensure that the interests of the child are protected. The principle of 'good faith' is further measured against the public interests and moral convictions of society to determine if the report was made without any malicious intention or falsification of information.[84] In the matter of *LSD v Vachell*, the court had interpreted 'reasonable grounds or suspicion' as the belief in the existence of a current state of affairs.[85] This interpretation was further addended to the decision of *Van Heerden* where the 'reasonable grounds' test was objectively determined by the five senses to determine the facts of a matter to draw upon their belief or suspicion.[86] This measure of 'reasonable grounds' then determines if a reasonable person under the similar circumstances of the case would draw up the same conclusion upon the facts of an incident.[87] The Sexual Offences and Related Matters Act also places a legal obligation on specific professions to report incidents of child abuse based on the disclosure of information of the victim.[88]

The duty of mandated reporting in good faith does not result in one incurring liability where there was no abuse or neglect found in a reported case, but rather where an obligated individual fails to report alleged child abuse to relevant authorities.[89] The failure to report sexual abuse constitutes a criminal offence that may be punishable with a fine or imprisonment of five years.[90] The courts have the discretion to apply both remedies if the individual is found guilty of their omission.[91] Medical practitioners who fail comply with their legal obligation as mandated reporters may be fined, suspended or struck off the register by the Health Professions Council of South Africa in the event of a guilty finding.[92] At present, there is no explicit penalty clause in the Children's Act for the failure to report child abuse, but in 2019, the Women and Men Against Child Abuse organisation (WMACA) has proposed an amendment to s 110(2) of the Act for legally obligated persons to be held accountable. The non-profit organisation recommended that the duty to report child abuse should be applicable to professionals and ordinary citizens and that

83 Hendricks (n 68 above) 551.
84 Hendricks (n 68 above) 551.
85 *LSD Limited and Others v Vachell and Others* 1918 WLD 127.
86 *R v Van Heerden* 1958 (3) SA 150 (T) at 152E; See also *Ahmed v Minister of Police and Others* [2019] ZAGPJHC 256 para 16.
87 Hendricks (n 68 above) 552.
88 Hendricks (n 68 above) 552; 32 of 2007.
89 Section 110 (3) (b) of the Children's Act.
90 Section 54 (1) (b) of the Sexual Offences and Related Matters Act.
91 Hendricks (n 68 above) 552.
92 Section 15B of the Health Professions Act 56 of 1974.

any person who fails to fulfil this obligation must be arrested.[93] The Social Service Professions Act 110 of 1978 sets out the repercussions for social workers who fail in their official duties to report child abuse and neglect matters.[94] In the event of unprofessional or improper conduct, the South African Council for Social Service Professions may hold an inquiry into the misconduct of the social worker.[95] Should the alleged individual be found to be guilty of unprofessional or improper, they may be penalised with a warning, a suspension period determined by the council, cancellation of their registration for professional practice or a fine not exceeding more than R 5000.[96]

Certain professions, such as social workers, are legally bound to report child abuse and maltreatment. Due to their age and vulnerability, many children are incapable of being able to complain of abuse and maltreatment to the necessary authorities and seek assistance.[97] Thus the State and Judiciary are bound by the special status of children's rights that is set out in section 28 of the Constitution .[98] Since its constitutional dispensation, the courts have developed the common law to meet the constitutional rights of a child.[99] The decision of *S v M* emphasises the view that the law enforcement system needs to be 'child-sensitive' and that children are also entitled to enjoy their constitutional rights and are also entitled to be protected from any violence and trauma.[100] The judgment also states that while the best interests of a child are paramount, they are not absolute and are also subject to limitation.[101]

The development of the common law by our courts have allowed for the extension of protection of children. In the case of *Christian Education South Africa v Minister of Education*[102] the Court ruled that corporal punishment in schools is unconstitutional as the weighing of a child best interests, human dignity and right to bodily integrity was greater than the freedom of religion. This approach also applied in the recent landmark case of *Freedom of Religion South Africa v Minister of Justice* in which the common law defence of reasonable chastisement was determined to violate the best interests of a child

93 The Citizen 'Bid to amend the Children's Act to ensure the arrest of people who fail to report child abuse' 18 October 2019 https://citizen.co.za/news/south-africa/crime/2193064/bid-to-amend-childrens-act-to-ensure-the-arrest-of-people-who-fail-to-report-child-abuse/ (accessed 10 April 2020).
94 Act 110 of 1978
95 Section 1 and section 21(1) of the Social Service Professions Act 110 of 1978.
96 Section 22(1)(a)-(d) of the Social Service Professions Act.
97 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.
98 *Freedom* (n 98 above) para 56.
99 Section 172 of the Constitution.
100 *S v M* 2007 ZACC 18 para 9.
101 *S v M* (n 100 above) para 46; See also section 36 of the Constitution.
102 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 41.

and enabled past institutionalised violence with parents being able to abuse their children 'under the guise of religion'.[103] The court places emphasis on the fact that chastisement will always be recognised as a criminal act of assault.[104] The outcome of this judgment found the common law defence of reasonable and moderate chastisement to be unconstitutional.[105]

Drawing on my comparative analysis of mandated reporting, I will now critically analyse the outcome of the *Gabriel Fernandez* case in the context of South African law.

4 In the best interests of a child? A South African perspective

The decision of the Appellate Court in the *Petitioner's* case comes with controversy in its decision to dismiss charges of professional negligence and child endangerment. Child advocate Elizabeth Bartholet criticises the system in the regulation of child law. She is of the opinion that the system focuses more on parental rights and family preservation instead of children's rights.[106] This view may provide a reason on why the *Petitioners* had permitted Pearl Fernandez to retain custody over her children. In response to the *Petitioner's* case, the DCFS had released a statement to outline the reformatory measures that will be taken to improve the provision of children's social care services.[107] The Los Angeles County District Attorney Jackie Lacey was of the opinion that the appellate court was erroneous in the rejection of criminal liability of the social workers and referred to it as being a 'disheartening but well-reasoned opinion'.[108] Consequently, Lacey then states that the District Office has decided to not appeal the court's decision to California's Supreme Court and has alternatively decided to work on proposing legislation to improve the duty of care entrusted to mandated reporters.[109]

I acknowledge the differences between Californian and South African jurisdictions and how they have developed their yardsticks in the law to determine cases of child abuse and mandated reporting.

103 *Freedom* (n 97 above) para 9.
104 *Freedom* (n 97 above) para 72.
105 *Freedom* (n 97 above) para 73.
106 E Bartholet 'Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimised Children' (2012) 60 *Buffalo Law Review* 1331-1334.
107 County of Los Angeles Department of Children and Family Services 'Statement from the Department of Children and Family Services on the Trials of Gabriel Fernandez' *Netflix Documentary Series* (2020).
108 Los Angeles County District Attorney's Office 'Statement by Los Angeles County District Attorney Jackie Lacey on the outcome of the *Gabriel Fernandez* case' (2020).
109 As above.

The comparison between these two jurisdictions is important as it highlights the issue that the Californian legal system explicitly facilitates the existence of mandated reporting in legislation such as CANRA and the Penal Code.[110] These forms of legislation set out the rights and duties of mandated reporters and their criminal liability in the event of improper or unprofessional conduct. This evidently provides a wide scope for mandated reports on a legal and ethical basis. Mandated reporting in South Africa does not explicitly exist independently in legislation. Although the Children's Act refers to specific professions who are obligated to report abuse, there is an absence of court cases that address the liability of those who have a legal obligation to report child abuse. The scope for criminal liability of a social worker in a South African court of law is limited. This results in parties having to only rely on the process of the South African Council for Social Service Professions in conducting an inquiry and charging the social worker according to the Act.[111] Persons in the health profession who have acted in an improper or unprofessional manner may be referred to an inquiry in which the professional board or committee may make a finding and impose penalties where necessary.[112] These may be in the form of a warning, suspension, removal from the register, a fine or payment of costs of proceedings or restitution.[113] A person who produces false evidence at this inquiry may be guilty of an offence and liable on conviction on the basis of perjury.[114]

Police officers are also subject to disciplinary action in the event of improper or professional misconduct as set out in the South African Police Service Discipline Regulations.[115] Regulation 12 set out the penalties that may be issued to alleged misconduct of police officers may be in the form of verbal or written warnings, suspension and dismissal.[116] Based on this comparison, it is evident that the failure to report child abuse and mistreatment is generally handled in internal disciplinary hearings and proves that the absence of mandated reporting legislation is a barrier to the protection of children from abuse and neglect. So, one is hopeful with the effluxion of time that the South African legislative system will evolve to a point that will address mandatory reporting of child abuse and take it out of the realm of internal disciplinary hearings.

110 Penal Code (n 26 above).
111 Section 2 of the Social Service Professions Act.
112 *Aguirre* (n 8 above). See also section 41(1) of the Health Professions Act.
113 Section 41(1) (a)-(f) of the Health Professions Act.
114 Section 46 of the Health Professions Act.
115 South Africa (2016) The South African Police Service Discipline Regulations (Proclamation No.R. 1361) *Government Gazette* 40389, November 1.
116 Section 12 of The South African Services Discipline Regulations; See also section 40 of the South African Police Service Act 68 of 1995.

I now wish to explore the majority and minority judgments of the *Petitioner's* case by analysing the decision to acquit the social workers from a South African perspective. Firstly, the issue of 'probable cause' to determine the social worker's liability was not thoroughly discussed in the majority judgment due to the *de novo* review.[117]

A *de novo* review is based on the principle that appellate courts in legal proceedings do not rely on the decisions of lower courts in order to present their findings.[118] Upon review, the court deals with a matter by providing its legal questions and findings without being constrained by lower court decisions.[119] This contrasts the South African system which bases its legal precedent on the *stare decisis* principle.[120] This principle recognises that courts are bound by the judicial decisions of lower courts in line with the rule of law that is upheld in the Constitution.[121] In the *Petitioners* matter, the appellate court standard of review being *de novo* enabled it to approach the liability of the social workers on its own findings based on the evidence provided before it.

In South Africa, legal precedent plays an imperative role in correcting erroneous decisions of lower courts and developing law from the outcome of these findings.[122] Drawing on the comparison of standard of review, it is evident that the principle of *stare decisis* would compel a court to consider the liability of a social worker if it was considered in the *court a quo*. Such review is necessary to promote legal certainty and ensure that legal principles in relation to a matter align with the objectives of the Constitution.

In the case of 'probable cause', the majority judgment in this matter relies on the matter of *Rideout v Superior Court* to illustrate that probable cause is evident when 'a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused'.[123]

In determining the liability of an accused with abuse, the court in *Heitzman* had narrowed the application of Penal Code to refer to persons who had a special relationship with the individual who had inflicted the abuse on the victim and to also determine if they had the ability to control that individual's [abusive] conduct.[124] This decision

117 *Bom* (n 8above) 13.
118 C Oldfather 'Universal De Novo Review '(2009) 77 (2) *George Washington Law Review* 308.
119 Oldfather (n 119 above) 308-310.
120 B Maswazi 'The doctrine of precedent and the value of s39 (2) of the Constitution' (2017) *De Rebus* 28.
121 Maswazi (n 121 above) 28. See also section 1 of the Constitution.
122 H Campbell-Black 'The Principle of Stare Decisis' (1886) *The American Law Register* 748. See also Section 39 of the Constitution.
123 *Rideout* (n 29 above).
124 *Bom* (n 8 above) 14-15.

was applied in the context of section 273a of the Penal Code in using the relationship between the social workers, Fernandez and Aguirre to illustrate that there was no special relationship between the social worker and the accused. Therefore, the majority had relied on the absence of a special relationship to eliminate probable cause of the death of Gabriel Fernandez. I believe Chaney J was reasonable to consider the aspect of 'bystander liability' to determine probable cause. The minority judgement considers this principle to determine if certain acts could have prevented the endangerment of the victim and that the majority should have focused on 'bystander liability' rather than the 'degree of relationship.'[125]

But in the case of probable cause in the alternative, the standard of review in South African criminal cases discharges the onus of proof on the State to prove that the accused is guilty beyond a reasonable doubt.[126] Could the State prove beyond a reasonable doubt in the *Petitioner's* case that the social workers were found to be negligent in the assessment of Gabriel Fernandez's report?

If one had to apply the *Van Heerden*-test based on 'reasonable grounds or suspicion' to the reporting child abuse, it is probable that a reasonable person would have concluded that the numerous reports made of the abuse during the 2012 to 2013 period presented an imminent threat to the welfare of the child.[127] A reasonable person would expect in the assessment by a social worker that the child being abused would be interviewed to determine if they require medical attention or to be removed from the family home. Any alleged injuries should have been marked on a body chart in the report of the alleged abuse for evidentiary purposes where a court order would be required to remove a child to temporary safe care.[128] In South African law, emergency removal of a child to temporary safe care could have been used in the event where a child required immediate protection and medical attention.[129] In the alternative, a court order could have been obtained for the removal of the child to ensure their wellbeing.[130] There is no evidence that any of the social workers had taken reasonable steps to remove Fernandez from the endangerment of his family environment. Had the social workers acted timeously to assist Gabriel Fernandez, it would have not resulted in his death, owing to physical assault.[131] Contravention of section 110 and section 152 of the Children's Act in failure to report or the misuse of power could result in improper/unprofessional conduct of the Social Service Professions Act.[132]

125 *Bom* (n 8 above) 3.
126 *S v T* 2005 (2) SACR 318 (E) para 37.
127 *Van Heerden* (n 86 above).
128 Section 151 of the Children's Act.
129 Section 152 of the Children's Act.
130 Section 151(2) of the Children's Act; Form 38 of the Children's Act.

I submit that on the reasoning of probable cause, the social workers, in this case, were negligent in their intervention in the case of child abuse. Social workers are clothed with the duty to uphold the special status of children's rights in society and that negligence resulting in the death of a minor should not be taken lightly in a court of law.

Secondly, I refer to the minority judgment of the *Petitioner's* case to prove the duty of social workers as mandated reporters in the case of child abuse.[133] Justice Chaney asserts that social workers have to make reasonable decisions that are in the best interests of a child where abuse and maltreatment arises.[134] The need to place a child's interests above the interests of a mandated reporter is in line with the Constitution in the recognition of children's rights being of 'paramount importance'.[135]

I also agree on the dissenting opinion of the minority judgement for the dismissal of the section 273 Penal Code charges where it was found that there was no 'affirmative duty' on the social workers to control the perpetrators of abuse in the matter as well as providing 'care' to Fernandez. The court, in this case, referred the responsibilities and duties of 'care' to a caregiver who provides basic needs to a child.[136] With the consideration of the common law principle of '*in loco parentis*', social workers, must act in the best interests of society to ensure that a child is protected from foreseeable or imminent harm to their integrity.[137] In the consideration of 'control' of a perpetrator, South African law accommodates this element with a Form 24 to remove the potential perpetrator from the family home where there is no arrest of the perpetrator or they have been released on bail.[138] A court order may then be issued to prevent the perpetrator from contacting the child and/or being prohibited from entering the family home.[139]

I believe that the court should have extended its interpretation of the social worker's duties to the responsibility to ensure that a child's

131 In CR Snyman's *Criminal Law* (2014) 58-59, criminal liability can be established where there a person is legally obligated to actively perform a certain type of conduct. Such an omission is measured against factual and legal causation, unlawfulness and culpability. In this case, the duty to act positively can be envisaged in the duty of mandated reporting set out in S 110 of the Children's Act and absence of such legislation, one may refer to the best interests of a child set out in S 28 of the Constitution as the backdrop for determining the legal convictions of society.

132 L Jamieson *Children's Act Guide for Child and Youth Care Workers (*2013) 44; Social Service Professions Act 110 of 1978.

133 *Bom* (n 8 above).

134 *Bom* (n 8 above) 3-5.

135 Section 28(2) of the Constitution.

136 *Bom* (n 8 above) 17-18.

137 Section 12 of the Constitution.

138 Jamieson (n 77 above) 28.

139 Section 153(6) of the Children's Act.

basic needs were met and to protect them from potential abuse. As mandated reporters, social workers have a statutory duty to act in the best interests of a minor and should take reasonable steps in their official capacity to intervene where there is evidence of abuse and maltreatment.

Finally, the majority judgment had dismissed the charge based on the falsification of records envisaged in section 6200 of the Government Code. I submit that this decision would be in contrast to South African legislation that recognises falsification of information as a criminal offence.[140] The Social Service Professions Act explicitly states that the tendering of false evidence and information may result in an individual being charged on the case of perjury and may be found guilty of improper/unprofessional conduct.[141] The Children's Act also highlights the importance of social workers keeping making professional reports of abuse cases as an aid for authorising investigations, court orders and for admissible evidence in disputes in court.[142] In this case, it is evident that social workers, as mandated reporters have a constitutional duty to uphold the rights of a child who requires protection and care.

5 Conclusion

The death of Gabriel Fernandez sent shockwaves around the world. Greater weighting was placed on the failure of the social workers in the matter to take action to ensure that the safety of a child. As a vulnerable group in society, children need the assistance of mandated reporters such as family members, educators, health and legal practitioners, and social services to report abuse and maltreatment.

In this essay, I have demonstrated that South Africa has enforced a statutory duty on various groups to report the necessary authorities of alleged child abuse and have proven that the law is in constant development to ensure that the scope of protection broadens to the rights of a child. I have acknowledged the shortcomings of the decisions made in the *Petitioner's* case to illustrate how alleged negligence could have been interpreted within the South African jurisdiction. Child protection can only holistically be achieved where multifaceted responses are being made in the interests of justice.

140 SAPS 'Common Law Offences — Definitions' 2014 https://www.saps.gov.za/faqdetail.php?fid=9 (accessed 12 April 2020).
141 South African Council for Social Service Professions 'Policy guidelines for Course of Conduct, Code of Ethics and the Rules for Social Workers' 11.
142 Section 62 and section 63 of the Children's Act.

TRANSFORMATIVE ADJUDICATION AND THE PLACE OF ADMINISTRATIVE LAW IN SOUTH AFRICAN JURISPRUDENCE: *ABSA BANK LIMITED v PUBLIC PROTECTOR**

*by Tshepo Twala** & Mpho Mogadime****

1 Introduction

The primary purpose of administrative law is to regulate the exercise of public power and the performance of public functions, which is informed by the constitutional principle of the rule of law.[1] This paper argues that what underlies this objective in post-1994 mainstream transformation jurisprudence is a transformative approach in interpreting the Constitution,[2] by which all exercises of power must be justified, including judicial interpretations.[3] Klare coined this

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1 G Quinot *Administrative Justice in South Africa: An introduction* (2015) 2.

2 The Constitution of the Republic of South Africa, 1996 (hereinafter, 'the Constitution').

3 Judges Matter 'The accountability for judges' June 2016 https://www.judgesmatter.co.za/opinions/the-accountability-for-judges/ (accessed 5 May 2018). This is done, for example, through judicial precedent, the Judicial Services Commission, internal tribunals, and other relevant mechanisms.

approach as 'transformative constitutionalism'.[4] This paper critically examines the decision in *Absa Bank and Others v The Public Protector and Others* (*Absa* case)[5] concerning the High Court's approach to adjudication in the administrative law and the role of a transformative constitutionalist approach to adjudication.

The first part of this paper contains a brief exposition of the place of administrative law in the South African legal regime. In the second part of the paper, we provide a summary of the *Absa* case. We then provide a focussed discussion on procedural fairness as a cornerstone of good governance with respect to administrative conduct in the third section of the paper. The fourth part of the paper sets out what a transformative approach to adjudication is, including a discussion on how the Court in *Absa* dealt with the standard of fairness in relation to the Public Protector's conduct from a transformative constitutionalist lens, on the one hand, and a critique on the Court's application of the established principles of administrative law, on the other hand. Lastly, we conclude with recommendations in response to the Court's seemingly split approach to transformative adjudication.

2 The place of administrative law in South African law

2.1 Tenets of South African administrative law

The primary sources of administrative power in South Africa include the Constitution, legislation, judicial precedent, the common law,[6] and other relevant empowering provisions.[7] For our purposes, we focus on the relationship between the common law principle of legality, section 33 of the Constitution, the Promotion of

4 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147-150. We must mention that the authors' reference to transformative constitutionalism in this paper should not be construed as subscription to the transformative constitutionalist paradigm, but merely highlights its impact/role in the South African administrative law jurisprudence, for purposes of this paper.

5 *Absa Bank and Others v The Public Protector and Others* 2018 JDR 0190 (GP).

6 Quinot (n 1 above) 61-62. According to Quinot, sources of *administrative power* are those sources of law that empower persons or institutions to perform a public power.

7 Sec 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). 'Empowering provisions' are defined in PAJA in a wider sense than legislation as an empowering source, in that 'empowering provision' includes 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'. Compare with the minority judgment given by Langa CJ in *Chirwav v Transnet Limited and Others* 2008 3 BCLR 251 (CC) paras 154-196. In his separate but concurring judgment, Langa CJ explains the narrow interpretation of power exercised in terms of legislation. This, when read in opposing comparison with the definition of 'empowering provision' in terms of sec 1 of PAJA, makes for sound legal analysis.

Administrative Justice Act (PAJA),[8] and other relevant empowering provisions as sources of administrative law.

Administrative law is grounded on the rule of law.[9] Quinot argues that the rule of law in administrative law propagates the idea, *inter alia*, that public power should only be exercised within the confines of the law or in a lawful manner.[10] This rule is encapsulated as a constitutional founding provision according to section 1(c) of the Constitution, that, '[t]he Republic of South Africa is one, sovereign, democratic state founded on … [the] supremacy of the constitution and the rule of law'.[11] In it, the principle of legality finds expression, that 'the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond what is conferred upon them by law'.[12]

Before the commencement of the 1996 Constitution, the exercise of public power and the performance of public functions were mainly regulated by common law constitutional principles, subject to parliamentary sovereignty.[13] In the current South African constitutional dispensation, there exists only one system of law that primarily flows from the legal supremacy of the Constitution.[14] For the sphere of administrative law, this means that the regulation of public power has been infused with the relevant principles of administrative justice that are enshrined in the Constitution, without negating the existing common law principles of administrative law.[15] In particular, section 33(1) of the Constitution guarantees the right to just administrative action that is lawful, reasonable and procedurally fair.[16] The status of the common law in this regard is that it informs certain provisions of PAJA and the Constitution,[17] but derives its power from and supplements the written Constitution.[18]

8 Act 3 of 2000.
9 Quinot (n 1 above) 2.
10 Quinot (n 1 above) 6.
11 Sec 1(c) of the Constitution of the Republic of South Africa (hereafter, 'the Constitution').
12 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) para 58.
13 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) para 37 (hereafter, '*Pharmaceutical*').
14 *Pharmaceutical* (n 13 above) para 44.
15 *Pharmaceutical* (n 13 above) para 45.
16 Sec 33(1) of the Constitution. That is, *just* administrative action.
17 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC) para 22 (hereafter, '*Bato Star*').
18 *Pharmaceutical* (n 13 above) para 49. The common law also applies in incidences where existing legislation does not give effect to the right to just administrative action or to the extent that the relevant legislation is silent on the matter (see sec 8(3)(a) of the Constitution). Although section 33(1) of the Constitution guarantees the right to just administrative action, PAJA was enacted to directly give effect to the right envisaged in section 33(1). Accordingly, 'the cause of action for judicial review of administrative action now ordinarily arises from

2.2 The *modus* of administrative law review

The principle of constitutional subsidiarity requires litigants to first rely on PAJA to enforce their constitutional right to just administrative action before relying on section 33(1) of the Constitution.[19] The Constitutional Court emphasised this principle in *Mazibuko v MEC for Traditional and Local Government Affairs*,[20] where O'Regan J elucidated that:

> The answer to this raises the difficult question of the principle of constitutional subsidiarity. This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively, challenge the legislation as being inconsistent with the Constitution.[21]

PAJA does not apply to conduct by administrators that escapes the definition of 'administrative action' stipulated in section 1 of PAJA. The courts have in such instances adopted an approach that places reliance on the common law principle of legality to regulate the exercise of any public power that falls outside of the ambit of PAJA.[22]

On the one hand and unlike the aforementioned sources of administrative law review, the constitutional principle of legality is less exacting in applications for review, as it is merely a general constitutional principle that makes it possible for the courts to defer

PAJA, not from the common law as in the past' (our emphasis) (see *Bato Star* (n 17 above) para 25), especially taking into account the prevailing or superseding effect of statutes against the common law (see C Hoexter *Administrative Law in South Africa* (2012) 118). Furthermore, PAJA is not regarded as ordinary legislation but as 'triumphal' or 'constitutional' legislation that governs the exercise of administrative action in general (see *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (W) para 7; *Platinum Asset Management (Pty) Ltd v Financial Services Board and Others*; *Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others* 2006 4 SA 73 (W) para 142; *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) para 101.

19 C Hoexter *Administrative Law in South Africa* (2012) 119. It happens at times that empowering provisions themselves contain specific provisions that grant the right to review administrative action incidental to matters dealt therewith. Where this is the case, the rule of implied exception might in some instances be bypassed in favour of the provisions of PAJA where such provisions from the PAJA provide a more generous protection of rights than the relevant empowering provision, given PAJA's status as a 'universal' legislation (see *Sasol* (n 19 above) para 7). The rule of implied exception stipulates that '*generalia specialibus non derogant*' (i.e. provisions of a general statute must yield to those of a special (or specific) one).

20 *Mazibuko v MEC for Traditional and Local Government Affairs* 2010 4 SA 1 (CC).

21 *Mazibuko* (n 20 above) para 73. The exception to the constitutional subsidiarity principle applies where legislation is challenged on grounds of constitutionality (see Hoexter (n 19 above) 119). The courts will attempt to read the impugned provisions in a manner that is consistent with the Constitution, failing which the provisions will be declared unconstitutional (see *Zondi* (n 18 above) para 102), and as a consequence, become unenforceable.

22 M Carnelley & S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 63-64. This reliance on legality is residual and should only act as a safety net in instances where PAJA is not applicable (see Hoexter (n 19 above) 121-124).

to the government without abandoning its supervisory role over the exercise of public power.[23] On the other hand, the principle of legality offers some convenience in that it is far reaching and inclusive.[24] All of these legal regimes will apply based on the source of administrative law that is applicable in a given case.[25]

3 Factual summary of the *Absa* case

In 2010, a complaint was lodged by Advocate Paul Hoffman SC of the Institute for Accountability in Southern Africa (IFAISA), about the alleged failure of the South African government to implement the findings of a CIEX Report and to recover the money allegedly owed to the South African Reserve Bank (SARB) by Absa Bank Ltd. (Absa) and other entities.[26] The alleged debt arose from what has become known as 'lifeboat transactions' concluded between the SARB and several small banking institutions during the mid-1980s, including Bankorp Ltd (Bankorp), which was in financial distress at the time.[27] The acquisition of Bankorp by Absa was conditional upon the existing financial assistance arrangements between the SARB and Bankorp being extended to Absa.[28] In the final report, CIEX concluded that there was corruption, fraud and maladministration committed in relation to the financial assistance the SARB rendered to Bankorp/Absa.[29]

Consequently, the Public Protector invoked her powers in terms of section 6(9) of the Public Protector Act[30] (the PPA) to investigate the lifeboat transactions that the SARB concluded with Bankorp/Absa and other entities.[31] Thereafter, the Public Protector issued a report

23 Hoexter (n 19 above) 124.
24 Hoexter (n 19 above) 124-125.
25 Hoexter (n 19 above) 122. There is an important point of differentiation between the grounds of review under PAJA and those under legality, although each route falls under the same single constitutional system of law. The grounds of reviewing conduct by an administrator under PAJA are unlawfulness, unreasonableness, or procedural unfairness, and the failure by an administrator to provide written reasons for their decisions in some instances, all of which are based on requirements established in terms of section 33 of the Constitution (See sec 33(1) & (2) of the Constitution and sec 6 of PAJA). The grounds of review in respect of specific legislation would generally be provided for in the particular legislation and will be read along with PAJA where applicable (See *Zondi* (n 18 above) para 101). In the alternative and where applicable, the grounds of reviewing conduct by an administrator under the constitutional principle of legality are based on the duty imposed on administrators at common law to act within the powers that have been conferred by law and not to misconstrue such powers; the duty to act in good faith and not arbitrarily, and the duty to act rationally and fairly unless acting unfairly would be rational (see Hoexter (n 19 above) 121-123).
26 *Absa* (n 5 above) paras 24-26.
27 *Absa* (n 5 above) para 25.
28 As above.
29 *Absa* (n 5 above) para 27.
30 Act 23 of 1994.
31 *Absa* (n 5 above) para 30.

in which she made findings that the South African government failed to recover allegedly stolen public funds that resulted from financial assistance extended by the SARB to Bankorp in the form of a simulated loan transaction,[32] the latter of which was later acquired by Absa.[33] The loan agreement between SARB and Absa was terminated without any repayment to SARB.[34] This led to the Public Protector's remedial action that the Absa-SARB matter be reinvestigated and that Absa should repay the said loan to SARB.[35] Prior to finalising her report, the Public Protector had undisclosed meetings with various state officials from the South African Presidency and political organisations.[36] In the final report, the Public Protector's remedial action was different from that proposed in her preliminary report.[37]

Absa, SARB, and the Minister of Finance made an application for review against the Public Protector's remedial action and the Court had to determine whether: (i) the Public Protector's remedial action in paragraph 7 of the Report constitutes administrative action according to PAJA; if so, (ii) whether the Public Protector adhered to the dictates of procedural fairness and reasonableness; and (iii) whether the Public Protector's remedial action was lawful;[38] alternatively (iv) whether the Public Protector's conduct could be reviewed according to the principle of legality.[39]

The Court held that the Public Protector's conduct amounted to 'administrative action' in terms of PAJA.[40] According to the Court, the Public Protector's remedial action concerning a reinvestigation adversely impacts the rights of Absa and the SARB because of its invasive nature.[41] Furthermore, the Public Protector's findings against Absa were predetermined, which raised potential prejudice.[42]

The Court further held that: (i) when applying the principles and the findings in respect of administrative action in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* (*Bapedi* case),[43] as well as section 182(c) of the Constitution, it is clear that the decision and remedial action set out in the Public Protector's report falls squarely in the definition of

32 *Absa* (n 5 above) para 1.
33 *Absa* (n 5 above) para 25.
34 *Absa* (n 5 above) para 30.
35 *Absa* (n 5 above) para 31.
36 *Absa* (n 5 above) para 32.
37 As above.
38 *Absa* (n 5 above) para 34.
39 *Absa* (n 5 above) para 5.
40 *Absa* (n 5 above) para 41.
41 As above.
42 *Absa* (n 5 above) para 43. This, of course, is in line with the *dictum* in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 6 SA 313 (SCA), which determined that a person's 'rights' according to PAJA includes an impact on potential future rights.
43 *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* 2015 3 BCLR 268 (CC).

'administrative action' prescribed by PAJA. It amounts to administrative action in terms of both PAJA and the principle of legality;[44] (ii) the remedial action imposed on the President and the Special Investigating Unit by the Public Protector is unlawful; and (iii) the Public Protector's remedial action was a product of a procedurally unfair process.[45] According to the Court, the Public Protector's remedial action was reviewable under section 6(2) of PAJA. The Court then set the report aside and reasoned that should it be mistaken regarding the applicability of PAJA, the principle of legality applies in light of the Public Protector's duty to comply with the rule of law in decision making.[46]

4 Procedural fairness: The cornerstone of good governance

4.1 The object of procedural fairness

Procedural fairness serves several important purposes. Mokgoro J eloquently expressed these as follows:

> When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his own matter and that the other side should be heard aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law.[47]

The *dictum* above places emphasis on the instrumental rationale for the existence of a right to procedural fairness.[48] At common law, the requirements of natural justice had to be complied with.[49] This entailed compliance with two natural law rules that formed two separate requirements: (i) *audi alteram partem* ('hear the other side'); and (ii) *nemo iudex in sua causa* ('no one should be a judge in their own cause/interest').[50] These rules ensured that individuals who were adversely affected by decisions would know about such

44 *Absa* (n 5 above) para 52.
45 *Absa* (n 5 above) paras 50-103.
46 *Absa* (n 5 above) para 52.
47 *De Lange v Smuts NO and Others* 1998 3 SA 785 (CC) para 131.
48 JR De Ville *Judicial Review of Administrative Action in South Africa* (2003) 217. The requirements of fairness as demanded by the rules of natural justice remain in place post-apartheid as they are protected by section 33 of the Constitution, PAJA and legality. Section 33(1) of the Constitution grants everyone a right to administrative action that is 'procedurally fair' (see Quinot (n 1 above) 146-147).
49 De Ville (n 48 above) 218.
50 As above.

decisions and be able to participate in the decision-making process.[51] In *Zondi v MEC for Traditional and Local Government Affairs and Others*,[52] Ngcobo J reiterated the importance of this position and explained that:

> The overriding consideration will always be what fairness demands in the circumstances of each case. The decision-makers that are vested the authority to make administrative decisions are… required to do so in a manner consistent with PAJA.[53]

Accordingly, section 3(2)(a) of PAJA stipulates that procedural fairness depends on the 'context of the decision' and that it has a 'highly variable content'.[54]

4.2 A reasonable opportunity to make representations

Section 3(2)(b)(ii) of PAJA provides that any person referred to in subsection (1) must be given a reasonable opportunity to make representations. This requirement gives effect to the *audi alteram partem* rule.[55] The right to be heard is integral to the South African constitutional scheme and over the past two to three decades there has been much development of the *audi alteram partem* rule in the South African administrative law.[56] Our courts have unwaveringly shifted from the old narrow and formalistic approach towards the tenets of natural justice, flexible and broad duty to act fairly in all cases.[57]

Section 7(9)(a) of the PPA provides that, where it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, the Public

51 Quinot (n 1 above) 147. The common-law rules of natural justice entailed prior notice of the decisions and an opportunity for those affected to state their case and influence the outcome of the decisions to an unbiased decision-maker. Section 3(1) of PAJA states that the procedural fairness requirement applies when the administrative action at issue: (i) 'affects any person'; (ii) has a material and adverse effect'; and (iii) affects 'rights or legitimate expectations'. See Quinot (n 1 above) 149.

52 *Zondi* (n 18 above).

53 *Zondi* (n 18 above) para 114.

54 Y Burns & M Beukes *Administrative Law under the 1996 Constitution* (2006) 224; see also *Turner v Jockey Cub of South Africa* 1974 3 SA 633 (A) para 652-653. Section 3(2)(b) of PAJA contains the minimum requirements to give effect to the right to procedurally fair administrative action to the person referred to in subsection (1): (i) adequate notice of the nature and purpose of the proposed administrative action;(ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal (where applicable); and (v) adequate notice of the right to request reasons in terms of section 5 of PAJA. Section 3(3) of PAJA provides that in some situations, more onerous procedures may be required in respect of administrative action that affects a person, such as an opportunity for the affected person to present and dispute information and arguments, including in person.

55 Burns & Beukes (n 54 above) 227.

56 Hoexter (n 19 above) 363.

Protector shall afford such person an opportunity to respond in connection therewith.[58] In making a decision without affording the applicants an effective opportunity to make representations before the decision was made, as elucidated by the facts in *Absa*, the Public Protector acted unfairly. Therefore, the remedial action in paragraphs 7.1 and 8.1 of the report was set aside as they were a product of a procedurally unfair process and were unlawful.[59] The importance of a reasonable opportunity to make representations was explained in *Zondi* as follows:

> The reasonable opportunity to make representations can generally be given by ensuring that reasonable steps are taken to bring the fact of the decision-making to the attention of the person to be affected by the decision.[60]

This *dictum* demonstrates that the Public Protector did not uphold and defend the objectives of section 3(2)(b)(ii) of PAJA and section 7(9) of the PPA. She also forsook the duty to promote an efficient administration imposed on administrators by section 33(c) of the Constitution as she did not afford and make it clear to the applicants that they had an opportunity to make representations. The Court in *Absa* referred to *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (*New Clicks* case)[61] and emphasised that affected parties cannot make meaningful representations when they do not know what factors will weigh against them in a decision to be taken.[62] In this instance, the affected parties were not informed at all before the final report was published.[63]

4.3 The prohibition against bias

Another common law principle associated with procedural fairness is the *nemo iudex in sua causa* rule. The maxim is often described as the

57 The Court in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 72 held that the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which a decision is based. The Court favoured the minority approach in *Masethla v President of the Republic of South Africa* 2008 (1) SA 566 (CC), wherein Ngcobo J held in his dissenting judgment that those who exercise public power are under a duty to act fairly by virtue of the rule of law and its existing requirement of rationality as part of the objective normative value system (see also Murcott 'Procedural fairness as a component of legality: is a reconciliation between Albutt and Masetlha possible?' (2013) 130 *South African Law Journal* 264).

58 Sec 7(9)(a) of the PPA.

59 As above.

60 *Zondi* (n 18 above) para 113. Compare with *De Beer NO v North-Central Local Council and South Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) paras 1-32.

61 *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 2 SA 311 (CC).

62 *Absa* (n 5 above) para 102.

63 As above.

rule against bias and expresses the idea that decisions ought to be impartial.[64] This principle is expressed in section 6(2)(a)(iii) of PAJA, which grants the court power to review administrative action where the administrator 'was biased or reasonably suspected of bias'.[65] Decisions-makers must be prevented from making decisions that are based on illegitimate (often personal) motives and considerations.[66] The Constitution in this regard provides that the Public Protector is 'independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'.[67]

In *President of the Republic of South Africa and Others v South African Rugby Football Union*,[68] the Court formulated the test for bias as follows:

> The test is an objective one which enquires whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case.[69]

Similarly, the Court in *Absa* correctly stated that this test was applicable to the present matter.[70] It appears that to show that a judge or other official was actually biased, one must inspect their conduct during the proceedings.[71] Actual bias will be present if the presiding officer or other official manifested signs of partiality during the course of the proceedings (with reference to remarks or conduct).[72]

On 19 June 2017, the Public Protector finalised her report. As appears from her report, prior to finalising it, the Public Protector held meetings with an official from the State Security Agency (SSA), officials from the Presidency and representatives from an organisation known as Black First Land First (BLF).[73] However, the Public Protector did not disclose that she had met the officials from the Presidency and BLF.[74] The shortfall of this conduct was that the Public Protector did not afford the reviewing parties a similar

64 Hoexter (n 19 above) 451.
65 As above. It is based on two common law principles of good administration: (i) that decisions are more likely to be sound when the decision-maker is unbiased; and (ii) that the public will have more faith in the administrative process when justice is not only done but seen to be done.
66 As above.
67 Sec 181(2) of the Constitutional of the Republic of South Africa, 1996.
68 *South Africa and Others v South African Rugby Football Union* 1999 4 SA 147 (CC).
69 *South African Rugby Football Union* (n 68 above) para 48.
70 *Absa* (n 5 above) para 97.
71 De Ville (n 48 above) 271.
72 As above. In *Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg* 1932 WLD para 100, the Court reiterated that the test for bias is two-fold: it requires (i) a 'reasonable suspicion for bias; and (ii) the 'real likelihood' of bias.
73 *Absa* (n 5 above) para 32.
74 As above.

opportunity, thereby failing to allow the implicated parties the opportunity to state their case and contribute to the outcome of the decision that was supposed to have been made by an unbiased decision-maker. She should have informed all parties of these meetings before releasing the report.

The Court found that such conduct cannot be an administrative oversight as she was clearly aware of the provisions of section 7(9) of the PPA when she decided to have an interview with the Presidency and other relevant parties.[75] The Court further found that, if it was an oversight, one would have expected the Public Protector to have stated this in her answering affidavit.[76] One can conclude that a reasonable, informed and objective person would reasonably have an apprehension that the Public Protector, as a result of her conduct, did not bring an impartial mind to bear on the issues before her.[77]

5 Transformative constitutionalist approach to adjudication in administrative law

5.1 A transformative imperative to post-1994 adjudication

Until 1994, the South African legal culture had been homogenous, conservative and predictable.[78] The period in South African history which predated the new constitutional era was characterised, in the words of Etienne Mureinik, by a culture of (repressive) authority.[79] In 1986, Dean described the administrative law as 'a somewhat depressing area of South African law' partially on account of Parliament's then unlimited legislative freedom and the courts' often passive response to it:

> [Administrative law] has developed within a system of government which concentrates enormous powers in the hands of the executive and the state administration and in which the law has been used not to check or structure these powers, but rather to facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best. In this process, the South African courts have at times appeared to be all too willing partners displaying what

75 *Absa* (n 5 above) para 100.
76 As above.
77 This is in accordance with the findings in *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 3 SA 673 (A), where the Court found that there was no evidence of bias but there were reasonable grounds for a suspicion of bias. See also *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 2 SA 570 (T) para 25.
78 D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 316.
79 E Mureinik 'A bridge to where: Introducing the interim Bill of Rights' (1994) 31 *South African Journal on Human Rights* 32. That is, understood by the authors as authoritarianism.

> virtually amounts to a phobia of any judicial intervention in the exercise of public powers.[80]

During this period, parliamentary sovereignty dictated that Parliament was supreme and the *audi alteram partem* rule would be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals were affected.[81] Klare described this legal culture as formalistic, particularly in the sense that it is characterised by cautious traditions of analysis and rather literal, rule-bound interpretation of legal texts.[82] Adopting a transformative constitutionalist jurisprudence, Kibet and Fombad argue that the judicial mindset founded on a positivistic legal culture must be 'examined and revised so as to reflect the transformative conception of adjudicative process and method demanded by the doctrine of transformative constitutionalism'.[83]

The imperative goal in post-1994 South Africa lies in redressing the damages of the past and progressively constructing a society based on substantive equality, human dignity, and freedom.[84] This is the transformative goal that is said to underlie the Constitution which informs mainstream post-1994 jurisprudence in the current constitutional dispensation.[85] As the day-to-day interpreters of the law, judges play a vital role in the actualisation of this goal.[86] This is done by adopting a transformative approach to adjudication, which is a value-orientated approach to judicial interpretation that allows judges to move beyond the confines of a restricted, formalistic jurisprudence.[87]

The present constitutional dispensation has brought with it a broader philosophical foundation for administrative law — a rights-based philosophy.[88] One of the main characteristics of constitutional transformation in South Africa is a shift towards a culture of justification where every exercise of public power must be justified.[89] Within such a culture, an array of constitutional rights 'are standards of justification — standards against which to measure the justification of the decisions challenged under them'.[90] Langa was

80 WHB Dean 'Our Administrative Law — A Dismal Science?' (1986) 2 *South African Journal on Human Rights* 164.
81 VL Peach 'The application of the *audi alteram partem* rule to the proceedings of commissions of Inquiry' unpublished LLM thesis, North West University, 2003 6.
82 C Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *South African Journal on Human Rights* 285.
83 E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 358.
84 P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 352.
85 Langa (n 84 above) 351.
86 Klare (n 4 above) 147.
87 Moseneke (n 78 above) 317-318.
88 Burns & Beukes (n 54 above) 61.
89 Mureinik (n 79 above) 31-32.
90 Mureinik (n 79 above) 33.

of the view that under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority but by reference to entrenched values.[91] Transformative adjudication requires an evolved, updated and politically aware account of the rule of law as opposed to the rigidity of formalism.[92]

5.2 The court's approach towards procedural fairness

It is important to bear in mind that the mere setting aside of the Public Protector's remedial action does not mean that the Court absolved *Absa* from paying back the maladministered state funds received by them. In fact, the Court's decision shows us that the maladministered state funds can be recovered. However, the prescribed procedure(s) must be followed. The Court's determination of the applicability of the rules of procedural fairness in *Absa* reveals admirable substantive reasoning in administrative law review.[93]

In *Absa*, the Public Protector had no adequate or justifiable reasons neither to follow the formally prescribed procedures, nor to deny the reviewing parties an opportunity to make representation(s), which is essential for good governance.[94] In *New Clicks*, the Court endorsed participatory democracy as it held that the right to speak and be listened to is part of the constitutional democracy dialogue as all interested parties, not only those implicated, are entitled to know what government institutions are doing and to have a say.[95]

The Court in *Absa* demonstrated procedural fairness well as it held the Public Protector accountable on the ground that her remedial action was a product of an unfair procedure, thus compromising the principle of good administration. Transformative adjudication necessitates that judges must demand, in every constitutional matter, that state institutions present adequate justification for all their actions that impact on constitutional rights.

5.3 The court's handling of the interplay between legality, section 33 of the Constitution, and PAJA in the *Absa* case

The courts have warned against conflating the principles of legality with that of PAJA when it relates to reviewing the exercise of public

91 Langa (n 84 above) 358.
92 Klare (n 4 above) 166-188.
93 G Quinot 'Substantive Reasoning in Administrative-Law Adjudication' (2010) 3 *Constitutional Court Review* 121.
94 As demanded by sec 181(2) of the Constitution and sec 7(9) of the PPA.
95 *New Clicks* (n 61 above) para 111.

power, so as to avoid a parallel system of law.[96] Murcott argues that legality should be seen as a safeguard or safety net after determining that public conduct does not fall within the ambit of PAJA.[97] She opines that although the inquisition into whether the definition of administrative action in terms of PAJA applies is cumbersome,[98] it remains the duty of the courts to consider the definition where it is applicable so that the objectives to give effect to the right to just administrative action as envisaged by section 33 of the Constitution are not undermined.[99]

It is arguable that the Court in *Absa* did not follow the correct approach by not embarking on the appropriate inquisition into the definition of administrative action according to PAJA. Instead, the Court held that the Public Protector's conduct amounted to administrative action based on an unfamiliar and confusing 'two-stage process' which (only) considers an adverse impact of rights that is based on a peremptory decision in the first stage, or an adverse impact of rights in the second stage which is based on a non-peremptory decision (i.e. a recommendation) that places reliance for its legal effect on another peremptory decision which was yet to be made.[100]

The issue with this approach is that PAJA is a constitutionally mandated legislation that was enacted to give effect to section 33 of the Constitution.[101] Once such legislation (PAJA) is side-stepped, section 33 of the Constitution is undermined, and ultimately, the same is true for the value of justification that underlies it.[102]

96 *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 4 SA 298 (SCA) para 19; *New Clicks* (n 61 above) para 436; *Pharmaceutical* (n 13 above) para 44; *Bato Star* (n 17 above) para 22. That is, appropriately recognising the conceptual difference between PAJA, legality, and sec 33 of the Constitution, understanding how they overlap and inform each other, and understanding that they all fall under the one-system of law created by the Constitution, without inappropriately conflating them by confusing one for the other.

97 Murcott 'Procedural fairness as a component of legality: is a reconciliation between Albutt and Masetlha possible?' (2013) 130 *South African Law Journal* 270.

98 Murcott (n 97 above) 269.

99 Murcott (n 97 above) 270. This is especially relevant since PAJA was enacted to give effect to sec 33 the Constitution. See *New Clicks* (n 62 above) para 95, and the preamble to PAJA.

100 *Absa* (n 5 above) paras 41-43.

101 See n 18 above.

102 Of course, where PAJA is *contra* sec 33 itself, it will have to be amended to be in consonance with sec 33 of the Constitution. There is also a tendency by courts to side-step PAJA in preference of legality. Placing preference over legality at the cost of applying PAJA where PAJA is indeed applicable makes it harder to hold administrators accountable for their decisions, in that PAJA imposes more stringent requirements on administrators regarding just administrative action than what legality imposes. This preference further creates legal uncertainty as

In *Minister of Defence and Military Veterans v Motau and Others* (*Motau* case),[103] the Constitutional Court laid down the appropriate construction for determining whether conduct by administrators falls within the definition of 'administrative action' according to PAJA. In its formulation, the Court asserted that:

> The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.[104]

It is highly likely that the Court in *Absa* would have reached a different decision had it applied the appropriate construction for determining the applicability of PAJA as established by the Court in *Motau* above. The Supreme Court of Appeal in *Minister of Home Affairs v Public Protector*[105] illustrated the importance of a proper inquisition into the definition of administrative action in terms of PAJA. The Court in that case held that decisions by the Public Protector to order remedial action are not administrative in nature and fall outside the ambit of PAJA.[106] The Court reached this decision after appropriately embarking on an inquisition into the definition of administrative action in terms of PAJA. In contrast, the Court in *Absa* did not even consult section 1 of PAJA to ensure whether PAJA was applicable

In addition, the Court in Absa relied on section 182(1)(c) of the Constitution and the legal principles applied by the Constitutional Court in *Bapedi* to classify the Public Protector's conduct as 'administrative action' according to PAJA.[107] The Court was unclear as to exactly which principle from *Bapedi* it relied on, for which particular reasons, and on what basis it relied on such principle(s). The Court vaguely stated that it relied on 'the principles and the findings in respect of administrative action by the Constitutional Court …' to establish the applicability of PAJA.[108] The only explicit reference by the Court in *Absa* to a principle applied in *Bapedi* was

to the applicability of PAJA to certain precarious administrative conduct, as the principles in PAJA are seldom utilised to test such conduct. See also Carnelley & Hoctor (n 22 above) 65, where Hoexter submits that, '[h]owever, the very attractions of the principle of legality have negative implications for South African administrative law as it is currently constructed. The main difficulty is that over-reliance on the principle is subversive of the scheme laid down in s 33 of the Constitution'.

103 *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC).
104 *Motau* (n 103 above) para 33.
105 *Minister of Home Affairs v Public Protector* 2018 3 SA 380 (SCA).
106 *Minister of Home Affairs* (n 105 above) para 37.
107 *Absa* (n 5 above) para 50.
108 As above.

the principle of deferring to constitutionally established state institutions,[109] that:

> A level of deference is necessary — and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should, as this Court counselled in *Bato Star*, treat the decisions of administrative bodies with "appropriate respect" and "give due weight to findings of fact… made by those with special expertise and experience".[110]

However, the Court in *Bapedi* considered the principle of deference in relation to the standard of reviewing conduct by administrators, and not in determining whether such conduct should be classified as 'administrative action' according to PAJA, the latter of which was relevant to the matter that was before the Court in *Absa*.[111] Furthermore, section 182(1)(c) of the Constitution briefly deals with the power of the Public Protector to order remedial actions. It is unclear why the Court in *Absa* relied on this provision to establish the applicability of PAJA when PAJA itself provides requirements that are to be considered by courts when determining the applicability of PAJA.[112]

The Court further considered the grounds for reviewing the Public Protector's remedial action. It stated that in the alternative review application under legality, section 33 of the Constitution applies, and the Public Protector's decision must have been lawful, reasonable, and procedurally fair in order to survive scrutiny.[113]

It is submitted that the Court conflated the grounds of review under PAJA with those under legality. Although there are considerable overlaps between PAJA and legality, the grounds of review under

109 *Absa* (n 5 above) para 16.

110 *Bapedi* (n 43 above) para 79.

111 There are different phases in review applications in terms of PAJA. The first phase is where the applicability of PAJA is determined. The second phase determines the grounds of reviewing conduct by administrators, which depends on the applicability of PAJA as dealt with in the first phase. The last phase determines the appropriate remedy that is applicable in the given circumstances (see secs 1-8 of PAJA).

112 Moreover, as much as courts have the responsibility to defer to legitimate state institutions that have the necessary expertise to make appropriate decisions before reviewing such decisions (see *Bato Star* (n 17 above) paras 46-48), this principle very clearly applies to decisions made by the Public Protector as well as a constitutionally mandated state institution. The Court in Absa did not defer to the Public Protector's expertise when reviewing her decisions, even though the Court held her office to a higher standard than ordinary administrators when it comes to the exercise of public power (See *Absa* (n 5 above) para 98). The provisions and powers given to the office of the Public Protector in terms of the PPA illustrate this well. It is clear from sec 1A(3) of the PPA that anyone that seeks to be considered for the position of Public Protector has to meet demanding requirements that require expertise. It is also clear from sec 11 of the same Act that non-compliance by anyone with the Public Protector results in a criminal offense, which heightens the prestige and gravity of this office and further confirms the due respect owed to whoever heads it.

113 *Absa* (n 5 above) paras 51-52.

legality do not specifically include requirements of procedural fairness and reasonableness that operate under PAJA.[114] Since the courts have confirmed that South Africa operates under one system of law that is informed by the Constitution, this conflation runs the risk of suggesting the existence of a parallel system of law that may possibly conflict with established constitutional jurisprudence.[115]

As stated above, according to the subsidiarity principle, direct reliance on section 33 of the Constitution will only be relevant where the provisions of PAJA are challenged on the basis of inconsistency with the Constitution, after an unsuccessful attempt to reconcile such provisions with section 33 of the Constitution.[116] The Court in *Absa* neither invoked provisions of PAJA in order to reconcile them with section 33 of the Constitution nor did it invalidate any provision in terms of PAJA on constitutional grounds.[117] This, again, possibly undermines the purpose of PAJA as the instrument that has been specifically enacted to give effect to section 33 of the Constitution. Consequently, the Court may have missed an opportunity to invoke

114 Secs 3-6 of PAJA. Notwithstanding this, Murcott argues that there might be certain incidences whereby the standards of procedural fairness may be applied to the exercise of public power under legality where it would be irrational not to do so (see Murcott (n 97 above) 260). This would ideally be in consonance with a transformative and purposive approach to adjudication, in that it involves a wider approach to protecting persons against the unjust exercise of public power that falls under legality, which would be one step closer to upholding the rule of law and entrenching a stronger culture of justification.

115 See *Freedom Under Law* (n 96 above) para 19. The Court in *Absa* stated at paragraph 52 that, 'Even though the court has found that PAJA does apply, it is clear that, in the alternative, the principle of legality will apply as the Public Protector had made a decision … we are of the view that the decision on remedial action does constitute administrative action, both according to the provisions of PAJA and the principle of legality'. This is, again, a conflation made by the Court with respect to the applicability of 'administrative action' under both PAJA and legality, which is inconsistent with set precedence and PAJA (see *Freedom Under Law* (n 96 above) para 28, *Motau* (n 103 above) paras 27-34, and sec 1 of PAJA. We are of the view that in a single system of law, there cannot be review in terms of both PAJA and legality simultaneously. As discussed above, PAJA should be consulted first before review on the basis of legality is considered.

116 *Zondi* (n 18 above) paras 101-103.

117 The Court only dealt with the fact that it was unnecessary to try to determine whether the Public Protector's decision adversely impacted rights when it came to the applicability of legality through sec 33 of the Constitution (see *Absa* (n 5 above) para 51). In so doing, the Court basically suggested that sec 33 of the Constitution regulates legality. It is rather contended that legality, as found in the rule of law, is regulated by s1(c) of the Constitution, not sec 33, although sec 33 most probably flows from the same principles underlying legality which highlight the need to regulate public power in the first place. Sec 33 is much more specific than legality and is effected through PAJA, not through legality at common law. To say that sec 33 applies because PAJA doesn't apply is to imply that certain provisions of PAJA are unconstitutional and/or inadequate since sec 33 should be relied on to challenge PAJA in accordance with the subsidiarity principle. *Otherwise*, where PAJA is not applicable, then sec 33 will not be applicable. See also Carnelley & Hoctor (n 22 above) 65.

the values underlying PAJA to optimally give effect to the right to just administrative action.[118]

6 Conclusion

In this paper, the authors offered an analysis of the Court's decision in *Absa* that although the conduct of the Public Protector is administrative action to which PAJA applies, it is also susceptible to review in terms of legality and section 33 of the Constitution, all on the same grounds as PAJA. The authors critiqued the Court's conflation of the principles of PAJA, legality, and section 33 of the Constitution due to its propensity to promote a parallel system of law. The authors also examined and endorsed the Court's approach in handling of the procedural unfairness of the Public Protector's conduct. The authors further demonstrated how the Public Protector acted *ultra vires*, unlawfully and breached several provisions of PAJA and the principle of legality.

It appears the Court in *Absa* adopted a split or mixed approach to transformative adjudication. On the one hand, the Court evinced an approach that promoted transformative adjudication, while on the other hand the Court did the exact opposite — all in the same case. This is made clear by how the Court applied a transformative approach to adjudication when considering the conduct of the Public Protector, and not so when it came to its own decision-making, which is (correctly) applying the law, as the latter relates to a culture of justification with respect to judicial interpretations.[119]

The authors are of the view that a transformative approach to adjudication is one that is thoroughly interwoven throughout and it does not necessarily negate the proper application of the substantive law and set procedure. Rather, it both informs and tests law and procedure against the Constitution. This is intricately connected to a transformative approach to adjudication, especially to the goal of creating a culture of justification, which is arguably strengthened by legal certainty. Therefore, it is imperative for courts to first acknowledge the constitutional values that already underlie existing legal norms. In so doing, the courts will always be placed in a better

118 That is, a transformative approach to adjudication rightly invokes the values underlying the Constitution in order to effect the necessary transformative task given by the Constitution. By side-stepping PAJA (as the Act enacted to give effect to sec 33 of the Constitution, the section of which is part of the grand scheme of the Constitution to transform society), courts run the risk of not fulfilling the intended task by the Constitution in correctly and effectively holding office bearers accountable for their decisions (especially considering the fact that PAJA places a heavier obligation on administrators through procedural fairness and reasonableness, which makes it harder for administrators to escape judicial review).

119 Klare (n 4 above) 147, 172-188.

position to adopt a value-orientated approach to adjudication and will inevitably make significant contributions to the transformative scheme underlying the Constitution.

THE *PAS DE DEUX* BETWEEN EDUCATION AND RECREATION: FACILITATING THE REALISATION OF ARTICLES 11 AND 12 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD IN SCHOOLS

by Thandeka N. Khoza & Cebolenkosi Zuma***

1 Introduction

The African Charter on the Rights and Welfare of the Child (African Children's Charter) is the regional instrument which protects children's rights in Africa.[1] Having been adopted in 1990,[2] this year is

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1 D Olowu 'Protecting Children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127.

2 Olowu (n 1 above) 127 & 134.

momentous as the Charter celebrates 30 years since entry into force.[3] This anniversary brings with it a unique and important opportunity to reflect on what has been achieved since the adoption of the Charter in 1990, as well as assess what may still need to be achieved going forward. This anniversary is also especially opportune in that it coincides with the five-year anniversary of the United Nations' Sustainable Development Goals.[4] Therefore, in light of future development, this anniversary allows us to investigate how the African Children's Charter can still assist State Parties in achieving the realisation of children's rights in an everchanging and constantly developing world.

- The African Children's Charter is a landmark treaty in the arena of children's rights. This is because the then Organisation for African Unity, now African Union, was the first regional body to promulgate a regional instrument focusing on the rights and protection of children.[5] The African Children's Charter has also been lauded as being more sophisticated in its protection of children's rights,[6] especially within the African continent.[7] One of the most common reasons for this praise is the fact that the Charter contemplates child rights issues which are not reflected in the United Nations Convention on the Rights of the Child (CRC), but are specific to African children.[8] The African Children's Charter was drafted, in part, because the CRC 'does not contemplate the socio-cultural realities of the African experience'.[9] Because of the Convention's blindness to the cultural context and realities of African children, then, the African Children's Charter was developed to complement and supplement the Convention where it was blind.[10] The drafting of the African Children's Charter, thus, was necessitated by the deficiencies of th[11]e CRC.
- Of relevance to this article is a consideration of the manner in which the African Children's Charter contemplates and advances the rights

3 The African Charter on the Rights and Welfare of the Child (African Children's Charter) was adopted at the twenty-sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU in Addis Ababa (11 July 1990); A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2(1) *African Human Rights Law Journal* 11.

4 United Nations General Assembly *Transforming our world: the 2030 Agenda for Sustainable Development* (21 October 2015) A/RES/70/1.

5 Lloyd (n 3 above) 13.

6 Lloyd (n 3 above) 14 – 15; D Olowu (n 1 above) 130.

7 Olowu (n 1 above) 128.

8 F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (1998) 31 *Comparative and International Law Journal of Southern Africa* 205.

9 Olowu (n 1 above) 128.

10 LM Kohm 'A brief assessment of the 25-year effect of the Convention on the Rights of the Child' (2015) 23(323) *Cardozo Journal of International Comparative Law* 324.

11 M Nyarko & H Ekefre 'Recent Advances in Children's Rights in the African Human Rights System' (2016) 15 *The Law and Practice of International Courts and Tribunals*.

to education and recreational activity.[12] Especially recalling the added value of the African Children's Charter in terms of the protection of African children's rights,[13] this paper focuses on two particular rights protected by the African Children's Charter: the right to education and the right to recreational activity. The argument which will be advanced in this article is that African children would benefit from accessing schools which offer them an education infused with recreational activity, through the creation of space and time for recreational activity within the school day. To this end, it will be suggested that crafting curricula which include recreational activity, specifically in the form of dance, will assist to improve the quality of education available to African children. It is argued that this proposed curriculum is a move towards the provision of the quality education demanded by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in its Agenda 2040 for Children's Rights in Africa (Agenda 2040).[14] In order to do this, this article will first explore the content of article 11, which relates to the right to education. Thereafter, it will move to unpack the meaning of article 12, which deals with the right to recreational activity, as well as its implications. This article will then give a short account of the links between these provisions, within the context of the best interests of the child. Finally, the paper will conclude with a summary of its formulation, particularly within the context of Agenda 2040.

2 Article 11 of the African Charter on the Rights and Welfare of the Child: The Right to Education

As a point of departure, the direction of this article, and the arguments made herein, necessitate a contextualisation of the protection of the right to education. The right to education has been recognised since 1948;[15] however, it was later contemplated specifically as it relates to children in 1989.[16] The United Nations Committee on the Rights of the Child (UNCRC) has also outlined the aims of education and what they mean in terms of state party obligations.[17] The UNCRC has written that all the elements relating to the aims of education are geared towards children's rights, including their rights to the holistic development of their full potential, an

12 Olowu (n 1 above) 130.
13 Olowu (n 1 above); Lloyd (n 3 above) 13.
14 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *Africa's Agenda for Children 2040: Fostering an Africa Fit for Children* (Agenda 2040) (November 2016) Aspiration Six.
15 The first instrument to codify the right to education was the Universal of Human Rights at art 26.
16 The first instrument to protect the child's right to education was the Convention on the rights of the Child at arts 28 – 29.
17 United Nations Committee on the Rights of the Child (UNCRC) General Comment No 1 (2001) Article 29(1): The Aims of Education CRC/C/GC/2001/1.

enhanced sense of identity and affiliation as well as socialisation and interaction with others.[18] These themes are contemplated in the arguments made later in the paper which are in favour of recreational activity in schools.

Although the content of the right to basic education has not received as much attention as access to education, the UNCRC has categorically declared that the right to education includes both elements of access as well as content.[19] The Committee has also stated that the provisions of article 29 of the Convention offer a 'qualitative dimension' to the right to education through insisting that children's education should be child-centred, child-friendly and empowering.[20] Furthermore, all children are entitled to an education which will develop their relevant skills, abilities, learning and other capacities, their dignity, self-confidence and talents.[21]

By virtue of the amount of time for which the right has been recognised by international law, then, major developments over the years were also bound to have taken place. Of particular importance was the development of the 'Four-A-Scheme', a fairly recent development,[22] which was adopted by the United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR).[23] In terms of the Four-A-Scheme, there are four elements to the right to education, namely availability;[24] accessibility;[25] acceptability;[26] and adaptability.[27] These four features, which education in all states, regardless of economic or other standing, must exhibit, are a useful foundation from which we can begin to interpret and ascribe substance to the right to education.[28]

Within the context of this particular article, it is important to unpack the right to education as it is contemplated in the African Children's Charter. It is worth noting that, for the most part, the African Children's Charter offers a protection of the right to education which is similar to the type of protection found or offered within the CRC.[29] However, it is just as important to mention that, in

18 UNCRC General Comment No 1 para 1.
19 UNCRC General Comment No 1 para 3.
20 UNCRC General Comment No 1 para 2.
21 As above.
22 The 'Four A Scheme' was developed in 2006 by the late Katarina Tomasevski, who was the first United Nations Special Rapporteur on the Right to Education. See K Tomasevski *Human Rights Obligations in Education: The 4-A Scheme* (2006).
23 United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR) General Comment No 13: The Right to Education (Art 13) (1999) E/C.12/1999/10 (General Comment No 13) para 6(a – d).
24 Committee on ESCR General Comment No 13 para 6(a).
25 Committee on ESCR General Comment No 13 para 6(b).
26 Committee on ESCR General Comment No 13 para 6(c).
27 Committee on ESCR General Comment No 13 para 6(d).
28 F Veriava *Realising the Right to Basic Education: The Role of the Courts and civil Society* (2019) 8 – 9.
29 M Gose*The African Charter on the Rights and Welfare of the Child* (2002) 112.

some areas, the African Children's Charter contemplates issues which are not found within or protected by the CRC.[30] For example, the African Children's Charter contains within one article the contents of the right to education as well as the aims and purposes of education,[31] whereas the CRC divides the two themes between two separate articles.[32] Another difference between the African Children's Charter and the CRC is that the African Children's Charter introduces a provision which obligates State Parties to implement affirmative action measures in favour of disadvantaged, female and gifted children in their provision of access education.[33] The African Children's Charter also contemplates the themes of preservation of national independence,[34] territorial integrity,[35] and African unity and solidarity within education.[36] Added values notwithstanding, however, the provisions of the African Children's Charter which are of particular importance for this section of the paper are reflected within sub-articles (1) as well as (3)(a), (b) and (d). Article 11(2)(a) will be discussed at the end of this section of the article because it links to the discussion of article 12, which will follow in the next section.

The African Children's Charter guarantees the right to an education for every African child.[37] Simply stated, this means that every State Party has an obligation to ensure that every child within its territory has access to education. On the subject of State Parties, it is worth noting that the African Children's Charter enjoys near-universal ratification on the continent, with only one reservation to the education provisions.[38] Therefore, positively, this paper has a large portion of the continent as its audience. Having noted this, of course, it is important to highlight that the African Children's Charter goes into further detail by way of compartmentalising the right and assigning different outcomes as well as levels and types of obligations in relation to the right.

30 Kohm (n 10 above) 324; Nyarko & Ekefre (n 11 above).
31 Both the content and aims of (the right to) education are encapsulated in article 11 of the African Children's Charter.
32 The contents of the right to education within the Convention on the Rights of the Child are found in article 28 and the aims of education are found in article 29.
33 African Children's Charter art 11(3)(e).
34 African Children's Charter art 11(2)(e).
35 African Children's Charter art 11(2)(f).
36 African Children's Charter art 11(2)(h).
37 African Children's Charter art 11(1).
38 The African Children's Charter enjoys the ratification of 49 of the 55 African States. The states which have not ratified the Charter yet are the Democratic Republic of Congo, Morocco, Sahrawi Arab Democratic Republic, Somalia, South Sudan and Tunisia. Of the ratifying States, Botswana, Egypt, Mauritania and Sudan have reservations to varying provisions, with Sudan having a reservation to article 11(6). This information is available at https://www.acerwc.africa/ratifications-table/ (accessed 22 April 2020).

It is in sub-article three that the African Children's Charter maps out the different types of obligations which State Parties have in relation to the different levels of schooling. The Charter provides that:[39]

> State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of [the right to education] and shall in particular:
>
> (a) provide free and compulsory basic education;
> (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
> (c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;
> (d) take measures to encourage regular attendance as schools and the reduction of dropout rates;
> (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Most relevant to the discussion in this article are items (a), (b) and (d).[40] With specific regard to basic education,[41] in terms of the Charter, State Parties are obligated to make basic education both free as well as compulsory.[42] A simple reading of this provision reveals that its aim is to equip children with the basic tools of literacy, numeracy and other learning areas, so that they may be able to progress both in education and in life.[43] It is worth noting here, with reference to the World Declaration on Education for All,[44] that 'basic education' actually refers to the content of education — which also includes skills relating to oral expression and problem-solving.[45] In addition to the content of the right, the fact that the basic level of education must be free and compulsory also speaks to the fact that State Parties have a duty to ensure universal access to education for all children within their states.[46] It is also argued that, while secondary education should be 'progressively' made free and accessible to all children,[47] this provision is not a means to evade any obligation to provide for this

39 African Children's Charter art 11(3)(a – e).
40 African Children's Charter art 11(3)(a),(b) & (d).
41 It is interesting to note that, unlike the United Nations instruments, including the CRC and the ICESCR, the African Children's Charter speaks of free and compulsory 'basic' education, not 'primary' education. However, despite this semantic difference, the provisions seem to offer the same protection.
42 African Children's Charter art 11(3)(a).
43 TN Khoza 'The End Justifies the Means: Realising the Right to Education for the Girl Child as a Means to Achieving Economic Growth and Empowerment in Africa' in MN Amutabi *Africa's New Deal* (2019) 235.
44 United Nations Educational, Scientific and Cultural Organisation (UNESCO) *World Declaration on Education for All* (1990).
45 LN Murungi 'Inclusive basic education in South Africa: Issues in its conceptualization and implementation' (2015) 18(1) *Potchefstroom Electronic Law Journal* 3161.
46 Lloyd (n 3 above) 13.
47 African Children's Charter art 11(3)(b).

level of education. Rather, as the Committee on ESCR has noted,[48] the 'progressive realisation' of socioeconomic rights does not allow for the non-realisation or a deliberate delay in the realisation of socioeconomic rights.[49] Instead, this term should be read so as to mean that State Parties should do all they can to ensure that the minimum core of any socioeconomic right is ensured, with the vision of always improving access to and the quality of the right.[50] Therefore, if we take basic education to be synonymous with primary education, which is often the case,[51] it is argued here that the protection of the right to basic education goes hand in hand with the protection of the right to secondary education. State Parties cannot ensure basic education without also making plans to ensure that children who have passed the basic levels of education are able to progress to the secondary level of schooling. Basic education is, and should be seen as, a means to an end; not just an end in and of itself. Education is both an ends and a means because it is a basic human right and developmental goal in its own right as well as a gateway right the realisation of which assists in the further realisation of other rights, such as improved health, personal growth and development.[52]

The final education-related provision of the African Children's Charter which is of great relevance in this article is the obligation which State Parties have to make every effort to retain children in school and decrease dropout rates.[53] This provision was a well thought inclusion on the part of the drafters, especially because it is directly linked to and reiterates the notion of access to education and the interconnectedness of all the levels of schooling. Moreover, although it was drafted over three decades ago, it is still relevant because there is still no universal access to education, and countries are not on track to achieving universal access within the next decade either.[54] Access to education alone is not enough; children should be able to retain the information which they are taught,[55] and schools should in turn be able to retain children, through their progression through the different grades and levels of their schooling career.[56]

Noting the obligation placed upon State Parties to retain children within schools, it is argued in this article that the inclusion of

48 Committee on Economic, Social and Cultural Rights (Committee on ESCR) 'General Comment No 3: The Nature of State Parties' Obligations (Art.2, Para.1, of the Convention)' E/1991/23 (11 July 1990).
49 Committee on ESCR General Comment No 3 paras 9 – 10.
50 Committee on ESCR General Comment No 3 para 10.
51 Murungi (n 45 above) 3161.
52 A Szirmai 'Education and Development' in A Szirmai *Socio-Economic Development* 2nd Edition (2015) 237.
53 African Children's Charter art 11(3)(d).
54 UNESCO 'Global Education Meeting 2018: Brussels Declaration' (2018) para 1.
55 Whitehead (n 43 above) 197; Lloyd (n 3 above) 19.
56 UNESCO 'Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal 4' (2016) ED-2016/WS/28, 31 para 18.

recreational activity in the school curriculum has the potential to assist in retaining children in school. By adding a fun and active subject to the curriculum, this gives children another reason to look forward to and remain in school. Not only that, recreational activities can also be used to assist children to understand school content better, as children have different learning capabilities and styles. Because the education accessed by children must be of good quality,[57] this means that the curricula which are set by ministries of education should also pay heed to children and their different abilities to process the work they are taught. Remaining cognisant of this will also allow ministries of education and teachers to investigate and implement possible aids for better performance. This also means that state curricula should be as diverse as practically possible, thereby offering children with a wider range of opportunities after school.

The benefits of recreational activity for children at school will be detailed below. However, what is important to note at this juncture is the argument that making recreational activity part of the school curricula will assist State Parties to fulfil two obligations simultaneously. Through offering recreational activity at schools, the State Parties will be fulfilling their obligations in terms of article 11 and article 12 of the Charter. Therefore, this school-setting *pas de deux* approach to the realisation of these two rights is both favourable and beneficial.

On the subject of the *pas de deux* between these two provisions, which protect the right to education and the right to recreation, it is important to now refer to sub-article two of the Charter's education provision, which states that:[58]

> The education of the child shall be directed to […] the promotion of the child's personality, talents and *mental and physical abilities to their full potential* (own emphasis added).

Building on the requirement for universal access to education for African children,[59] it is argued that the African Children's Charter then places a premium on recreational activity within the syllabus by requiring the education provided to children to also be aimed at improving their mental and physical development.[60] Because of the wording of sub-article (2)(a), it is argued that the African Children's Charter does indeed support, perhaps it even requires, the implementation of a curriculum which includes recreational activity.

57 ACERWC Agenda 2040 Aspiration 6.
58 African Children's Charter art (11)(2)(a).
59 African Children's Charter art 11(1).
60 African Children's Charter art 11(2)(a).

It admits of no debate that recreational activity contributes positively to both mental as well as physical development.[61]

Oftentimes, when recreational activity forms part of a curriculum, it does so as part of the subject 'physical education'. Regrettably, recreational activities syllabi, such as physical education, are often undervalued and viewed as being less important than other subjects in a number of schools globally.[62] When compared to other subjects, physical education is often viewed as a waste of time and its academic value is largely overlooked; as a result of this, it is often marginalised to make way for what are viewed as 'more valuable' subjects[63]. This is not a surprising state of events which also supports this claim, of physical education being marginalised, because a number of schools do not include physical education syllabi within their school curricula.

While there are a number of different recreational and physical activities which can form part of a curriculum, in the form of physical education, as stated at the beginning of the paper, this article focuses specifically on the activity of dance. It should be borne in the mind that physical activities, such as childhood games, which often have an element of dance, for example, can aid a child's holistic development.[64] Dance can be considered another form of physical education, as it shares the same abilities of fostering the physical, moral, social, emotional, cultural, and intellectual development of children.[65] Dance does differ from conventional forms of physical education in its ability to nurture artistic and cultural expression which have long been a part of the cultural fabric of Africa. 'Historically, cultural [heritage] music and dances have been key to the day-to-day life of African people ... in different communities dances embody and exude complex meanings relating to the experiences of the people.'[66]

In essence, dance education contributes to the child's cognitive development; physical development; socio-emotional development as well as cultural development. This article will address each of these

61 UNCRC General Comment No 17 (2013) on the right of the child to rest; leisure; play; recreational activities; cultural life and the arts (Art 31) CRC/C/GC/17 paras 8 – 9; A Watt *et al* 'Physical Education' in T McKenna (Ed) *Engaging the Disengaged: Inclusive Approaches to Teaching the Least Advantaged* (2013) 110.

62 CS Zuma 'Utilizing Indigenous Pedagogy of South African childhood games, and song in the dance classroom with secondary students' PGCE dissertation, UCT, 2019 at 6 (unpublished).

63 A Sprake & C Palmer 'The Conversation' 2018 https://theconversation.com/physical-education-is-just-as-important-as-any-other-school-subject-103187 (accessed 25 April 2020).

64 CS Zuma (n 62 above) at 8.

65 Sprake & Palmer (n 63 above).

66 AMB Mabingo 'Deconstructing pedagogies of African cultural heritage dances: Reflections, rationalities, and practices of dance teachers in central Uganda' unpublished PhD thesis, University of Auckland, 2018 at 22.

themes individually and in more detail following the discussion on Article 12 on the African Children's Charter

3 Article 12 of the African Charter on the Rights and Welfare of the Child: The Right to Leisure; Recreation and Cultural Activities

Having mapped out the right to education and its importance, this paper now turns its focus to the second part, which unpacks the right to recreational activity. In terms of the African Children's Charter, State Parties are obligated to recognise that every child has a right to 'rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and arts.'[67] This provision is heavy laden with different aspects of activity, each one carrying unique and different yet interconnected obligations. However, the focus for this paper will be on the aspect of recreational activity.

The argument advanced in this article is that the right to education and the right recreational activity, while they exist as independent rights, are also rights the realisation of which are a precondition for the realisation of a child's right to development to his or her full potential.[68] This argument is also in line with the general belief that human rights are interconnected and interdependent.[69]

In support of the proposed *pas de deux* curricula approach, it has been argued that the right to education is not only about the attainment of literacy, but also about artistic skills; understanding one's social environment and the development of personal skills.[70] Scholastic recreational activities, as a part of or in the form of physical education, offer an opportunity for learners to receive critical information which in turn facilitates the learners' understanding of lifestyle choices and ongoing positive development of their physical and psychological wellbeing.[71] Physical education must also be multifaceted and include elements of creative movement, fitness, activities and the learners' physical and psychological health; social interactions as well as cognitive performance.[72] Dance is one such a physical and recreational

67 African Children's Charter art 12(1).
68 Committee on ESCR General Comment No 13 para 1.
69 Global Citizenship Commission 'The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World' (2016) 18.
70 A Szirmai 'Education and Development' in A Szirmai (n 52 above) 265.
71 A Watt *et al* 'Physical Education' in Marcelle Cacciattolo *et al Engaging the Disengaged: Inclusive Approaches to Teaching the Least Advantaged* (2013) 110.
72 Watt *et al* (n 71 above) 116.

activity.[73] Dance is also an especially beneficial form of recreational activity because it is both recreational as well as artistic. Therefore, offering learners a space and time in which they can dance is the creation of opportunities to be active, boost their confidence and make them more engaged; empathic and aware students.[74]

The World Health Organisation (WHO) has also enumerated a number of benefits of physical activity. WHO defined physical activity to include play, games, sport, recreation, physical education and planned exercise; furthermore, it recommended at least 60 minutes a day of age-appropriate physical activity for children.[75] It is worth mentioning at this juncture that, because of the amount of time children spend at school, working recreational activities into their school life will be an effective way to ensure that they have the time and space to perform and learn from recreation. WHO has listed physical health benefits, such as the development of healthy and well-functioning bodies, psychological benefits, such as the improvement of control in situations of anxiety and the benefits of social development, through opportunities of self-expression, social interaction and building confidence.[76]

The UNCRC has also stated that one of the aims of education is to build the self-esteem, capabilities and confidence[77] — all of which can be achieved through dance education. The right to education is also linked to the rights to freedom of expression and development,[78] which are also facilitated through dance education. Access to and content of education for children must also be child centred, so that it focuses on the development of the child's creative talents, interests and other tools which the child may use immediately and later in life.[79] As will be shown below, this is also an achievable goal of dance education.

The UNCRC has also noted, with concern, the poor investment into and implementation of the child's right to recreational activity, and other connected and similar rights.[80] The realisation of the right to recreational activity is important because, in addition to enriching a child's life, it is fundamental to the child's optimum development, creatively and physically.[81] It was also emphasised by the UNCRC that

73 Watt *et al* (n 73 above) 118.
74 T McKenna *et al* 'Arts Education: Do the arts really matter?' in T McKenna *et al* *Engaging the Disengaged: Inclusive Approaches to Teaching the Least Advantaged* (2013) 74 – 80.
75 World Health Organisation 'Global Recommendations on Physical Activity for Health 5 – 17 years old (2011) https://www.who.int/dietphysicalactivity/publications/physical-activity-recommendations-5-17years.pdf?ua=1.
76 World Health Organisation (n 75 above).
77 UNCRC General Comment No 1 para 2.
78 UNCRC General Comment No 1 para 6.
79 UNCRC General Comment No 1 para 9.
80 UNCRC General Comment No 17 para 2.
81 UNCRC General Comment No 17 para 8.

recreational activity is also essential to the health and wellbeing of the child as well as promotes the development of creativity, imagination and physical, cognitive and strength skills.[82] Therefore, the positive value of recreational activity to the child's development needs to be recognised.[83]

An Africa fit for children, as envisaged in Agenda 2040,[84] can only be an Africa in which every child is exposed to as many opportunities as possible. Some key opportunities to which all children are entitled include opportunities to be healthy,[85] to grow,[86] to develop mentally,[87] to develop physically,[88] to progress in education,[89] and to also contribute to and benefit from the development of their nations.[90] The *pas de deux* curricula approach allows for education to be directed towards the full development of the child's abilities to their full potential. The implementation of recreational activity at schools, then, is essential for the achieving compliance with the right to education provisions, both in the African Children's Charter as well as Agenda 2040.[91]

It is also argued in this article that adding recreational activity to school curricula, specifically dance, as will be argued for in the following section, will not place a strenuous burden on State Parties in terms of the provisioning which must take place in order to actualise the right in schools. For example, by drawing on the rich cultures of their peoples, State Parties can include dances which are already part of the different communities in the curricula. Essentially, then, in terms of practical steps which must be taken in order to realise this right in schools, beyond drafting and passing legislation and policies, State Parties will have to mandate schools to ensure that the school day includes a dedicated time slot for recreational activity.

4 Unpacking the benefits quadrigeminal of recreational activity for children through the lens of dance education

Having established that there is a protection of the right to physical education within the African Children's Charter, this article will now

82 UNCRC General Comment No 17 paras 9 & 25.
83 UNCRC General Comment No 17 para 18.
84 ACERWC Agenda 2040 (November 2016).
85 ACERWC Agenda 2040 Aspiration 4.
86 ACERWC Agenda 2040 Aspiration 5.
87 ACERWC Agenda 2040 Aspiration 4.
88 As above.
89 ACERWC Agenda 2040 Aspiration 6.
90 ACERWC Agenda 2040 Background 1.
91 UNCRC General Comment No 17 para 27.

take a look at the approach of South Africa's Curriculum and Assessment Policy Statement (CAPS) for Dance Studies for Grades 10 to 12, as amended by the Department of Basic Education.[92] Of particular interest here is how the document uses the daily dance practice and dance theory aims in order to promote 'fitness and a healthy lifestyle and [equip] learners with crucial life skills, such as self-discipline, creativity, critical thinking, leadership and teamwork, all of which will benefit them in any field of interest'.[93] As a State Party to the African Children's Charter and as a state which has a dance syllabus as part of the school curriculum, it is helpful to look at the provisions within South African policy so as to convey the possibility of States implementing recreational activity in schools across Africa. The developmental focal benefits of dance education are fourfold and are enumerated and discussed individually below.

4.1 Physical development

The first development to be discussed here is the physical attribute of dance education, as it is one of the most visible benefits. Learners can acquire a great range of motion, coordination, muscular strength and stamina through dancing. Dance training creates movement sequences to build kinaesthetic memory on how to use the body to execute movements. These movements, which are made up of sequences, also help the child with his or her coordination skills.[94] CAPS for Dance Studies goes on to add physical attributes such as core stability, flexibility, and neuromuscular skills to the list of physical developmental advantages of dance education.[95] All these attributes collectively contribute to the physical wellbeing of the child, subsequently building the child's dance lexicon as the dance technique becomes more complex, enhancing his or her performance and creative skills. Creating time and space for dance activities at schools, then, allows children an opportunity to work on their health as well as physical aspect of their development.

4.2 Cognitive development

It is incontrovertible that skills such as creativity and critical thinking are a pertinent and central element of cognitive development. One of the aims of dance education is to promote the awareness of safe

92 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011).
93 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 8.
94 B White 'How Dance Classes Benefit Early Development' (2012) https://www.dancetoevolve.com/blog/bid/207943/How-Dance-Classes-Benefit-Early-Development (accessed 27 April 2020).
95 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 12.

dance practices. Safe dance practices entail learning the purpose and importance of warming up the body before a dance class and doing a 'cool down' exercise after a dance class, or any physical activity. Warming up is a fundamental aspect of safe dance practice, which improves performance and reduces chances of injuries.[96] It also fosters the basic knowledge of the body's anatomy, taking cognisance of how our bodies operate when dancing.[97] These principles can be closely linked to the western dance teaching pedagogies which, while essential, are only a fraction of what dance education brings to the table of awareness, for they neglect the cosmology of African dances.

African dance pedagogies that are closely linked to cultural heritage dances and contain such complexities and uniqueness in their teaching methods that they cannot be thrust into a singular pedagogy.[98] African dances should be considered as 'domains of epistemological, historical, contextual and ontological knowledge that reflects on the place, the people, location, and the experience'.[99] Therefore, dance education of children in Africa may have the added value of teaching about cultural history and heritage.

When learning about African dance cosmology in the dance classroom, learners will begin to unpack the significance of the dances, and the references made to nature,[100] which could assist in critically analysing humankind's relationship to and with nature; as well as trigger thoughts about the intersectionality within the African context as the African child starts to take part in dances which were made for specific purposes. Learners could start to delve into the complexities of the politics of intersectionality within Africa, and as awareness is brought upon this, the child stands a chance to be moulded into a more diverse human being. This is not to say that this cannot be achieved in other schooling subjects. However, perhaps because of the nature of dance education, it will allow the learners more freedom to express their thoughts,[101] and dance education could concurrently work with other subjects to expand on these thoughts to form an Intergraded Curriculum.[102]

96 See generally: E Quin *et al Safe Dance Practice* (2015).
97 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 17.
98 Mabingo (n 66 above) at 13
99 Mabingo (n 66 above) at 225
100 For example, the 'Acogny technique', which was founded by Mama Germaine Acogny, was built based on her knowledge of most West African traditional dances, with an influence on dance forms. Most movements are inspired by nature, plants or animals and everyday African life. See http://ecoledessables.org/en/germaine-acogny/technique/
101 UNCRC General Comment No 17 para 20.
102 T Barton 'Changing The Future For Teaching' 10 December 2019 https://servelearn.co/blog/integrated-curriculum-changing-the-future-of-teaching/ (accessed 1 June 2020).

There is a possible opportunity for dance to provide a better image for young girls whose bodies are more subjected to exploitation, thus, focusing on issues of the girl child, as suggested by the UNCRC.[103] Dance education will assist the African child, both male and female, to see their bodies past the European standard of what they should be, but as tools of information and carriers of history. With this understanding, a better community of human beings can arise.

Lastly, dance studies assist the learners to be aware of the space in which they dance so as to ensure that it is conducive for the learners to dance in, and what it is they would have to wear or do in order to make the space dance appropriate (the consideration of hygienic and unhygienic spaces comes to mind); the understanding of good nutrition to better the learner's health. Again, all of these steps are taken in order to ensure that the learner is safe and dances in a safe and conducive environment. However, the skills learnt in the dance class, of awareness of surroundings, tasks at hand, planning, cleanliness, and so forth, are applicable in other subjects and to life in general.

In the context of mental development, it is important to note that the dance classroom also affords learners the chance to be creative. This opportunity to be creative comes with a chance to further develop problem-solving, decision-making, analysis, synthesis, and application of skills and knowledge obtained in and outside the classroom — both formally and informally.[104] Within the dance classroom, these skills are used when learners need to figure out how to connect movements together to create a sequence. However, they too can be transposed to other subjects and areas of life. Essentially, dance education presents children with an opportunity to learn about piecing together information in order to formulate an end result. Improvisation is another tool which is used in dance to allow the pupils to navigate for themselves, and carry out tasks differently from what the textbook would require them to. With only guidelines or facilitation, children are able to explore possibilities with their mind's creation and possibly formulate different and unique ways of achieving the goal at hand. Therefore, dance education also equips children with the important skills of independent thinking, formulating projects for presentation and processing thoughts and information. In addition to building confidence, this also supports the argument that education, as contemplated in the African Children's Charter, should always make room for the child to learn some lessons independently.[105]

103 UNCRC General Comment No 17 para 16.
104 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 31.
105 Gose (n 29 above) 113.

Given that dance is an art form which is about moving the body and expressing oneself, it can also serve as a form of therapy. Through ambidextrous ability of dealing with both the body and the mind, it has the capacity of building a child's confidence and making him or her feel 'whole' again.[106] Dance possesses the qualities to function as a stress reliever and reduce depression, because dance is fun. The mind and body experience also increases the blood supply to the brain, also increasing the temporal and prefrontal brain activity responsible for improving memory, multitasking, and attention[107]. With these qualities it could assist a child's mind to be calm, broaden and be free to take on other subjects that they have to conquer at school. A consideration of these positive gains of dance further reiterate and support the argument of why a *pas de deux* curriculum, which includes education and recreational activity, is beneficial for the child.

4.3 Socio-emotional development

The term 'socio-emotional development' has been defined as to include the child's 'experience, expression, and management of emotions and the ability to establish positive and rewarding relationships with others'.[108] Good socio-emotional development has been listed as one of the '21st century skills' which every learner should be equipped with and should have.[109]

This skill is listed as one of the 21st century skills because being able to interact with your peers and colleagues is important, indispensable, in fact, in the 21st century world people skills are essential for meaningful interactions and honing the ability to present yourself with confidence. Additionally, they are also necessary for leadership as they equip you with the tools to effectively lead while the right of others to be heard. To be able to attain this skill, a learner should be given the opportunity to tap into his or her interpersonal intelligence, which is the ability to understand and relate to others, as well as his or her intrapersonal Intelligence, which allows for introspection and the awareness of self. Recalling the need for education to have utility which lasts longer than a child's formal

106 P Alpert 'The Health Benefits of Dance' (2011) 23 *Home Health Care Management & Practice* 155.

107 Alpert (n 106 above) 155 – 156.

108 J Cohen *et al* 'Helping Young Children Succeed: Strategies to Promote Early Childhood Social and Emotional Development' 12 February 2005 https://www.zerotothree.org/resources/136-helping-young-children-succeed-strategies-to-promote-early-childhood-social-and-emotional-development (accessed 26 April 2020).

109 For a full discussion of the skills necessary for the 21st century education, see generally: Centre for Curriculum Design *Skills for the 21st Century: What Should Students Learn* 2015 https://curriculumredesign.org/wp-content/uploads/CCR-Skills_FINAL_June2015.pdf.

education career, placing a premium on the development of such areas for every child is no doubt in their best interests. Not only this, it is the obligation of every State Party to ensure that this development is allowed to occur within the setting of achieving the right to education.

In addition to its other benefits, it is also important to note that dance education can be used as a means to enhance the child's interpersonal skills and intrapersonal Intelligence.[110] In the specific case of South Africa, Dance Studies, as contemplated in the CAPS curriculum, positively endorse educators to teach children people management skills and how to collaborate and work with one another.[111] This curriculum places a premium on social interaction and holds that it is essential to learning, because we often learn best when working with others. When in partners or doing group work in the dance classroom, children can learn exercises by examining one another and by way of demonstrating to each other as well. While taking notes, and through feedback sessions facilitated by the teacher, the children can draw knowledge from each other. This will teach the child to be able to give constructive criticism and to receive constructive criticism. It will also teach the child self-discipline, knowing when it is their turn to speak and when they are required to listen and give chance to their peers.

One of the functions of dance in society is that it teaches leaners to be able to freely express themselves. One of the aims of South Africa's CAPS for dance studies is to develop the body as an instrument of expression.[112] Through improvisation and choreography, children will be given a chance to share their political ideas and feelings towards certain issues; thus, also realising their right of freedom of expression.[113] With the use of their body they will learn to interpret the emotions and intension behind what they are trying to communicate, which is another function of dance in society — this will be elaborated in the next topic area of cultural development.

4.4 Cultural development

Through dance, children will learn to engage with social, cultural, environmental, and community issues.[114] In the dance classroom,

110 AG Gilbert 'Toward best practices in dance education through the theory of multiple intelligences' (2003) 3 *Journal of Dance Education* 32.
111 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 31.
112 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 8.
113 Gose (n 29 above) 136.
114 Department of Basic Education of the Republic of South Africa 'Curriculum Assessment Policy Statement' (2011) 8.

they will be exposed to different dance styles, whether it be traditional dance or contemporary, or modern dance forms. The learners will learn about the basic developments of dances in the past and the present, unpacking the purpose they served then and now. For example, in South Africa's CAPS for dance studies curriculum, learners in the tenth and eleventh grade are required to learn an indigenous dance form. If the learners learn the *Indlamu*,[115] they will learn about the culture of Zulu people, where Zulu people come from and where they are predominantly found on the map, the purposes of the dance then and now, and how it has shifted to accommodate the now. In turn, cultural traditions and heritage are being passed down from generation to generation, even within the classroom. Therefore, reinforcing and preserving the cultural identity and customs of the Zulu nation.

Zuma has documented an analysis of the importance of play, and song, by use of indigenous childhood games in the dance classroom. The function of indigenous childhood games was not only for physical and social-emotional development alone, but also a means to transmit information or life lessons.[116] Because indigenous childhood games are community based, they would generally contain information of events that took place around the community. This again is another opportunity for cultural development in a classroom with pupils who come from different community and social backgrounds to exchange knowledge and teachings through play and song.

Considering all of these developmental benefits of dance education, then, it is argued that the *pas de deux* approach of observing both the right to education and the right to recreational activity at schools is both important as well as beneficial for the child, on numerous levels. Dance is not only a tool of entertainment, but it is also an interaction between the body and the mind.[117] Through dance, or dance education, the African child has the opportunity to grow to be a physically strong human being, while actively practicing to lead a healthy lifestyle, which also includes a boosted psychological wellbeing of the African child. Not only will the physical contribute to the psychological wellbeing of the learner, but also the ability to have a space where they can obtain the knowledge on how to express themselves, which could be a therapeutic endeavour. Through the teachings and understanding of African dance cosmology, the African child could find solace in the understanding of their being, and their being in relation to the world; endorsement of their own culture and how other cultures may possibly intertwine and this could

115 *Indlamu* is a traditional dance performed by the Zulu people of South Africa.
116 See generally: Zuma (n 62 above).
117 AV Balgaonkar 'Effect of dance/motor therapy on the cognitive development of children' (2010) 3 *International Journal of Art and Sciences* 55.

assist the African child to be more diverse in their thinking. The sharing of this knowledge with other peers in a proactive manner will be able to assist the African child with being able to communicate these thoughts through dance, and also be able to communicate and share ideas with others within the learning environment, and could assist with communicating with the community at large.

In essence, dance has holistic development, where the African child may not only obtain 50% of what they hear and see, or 70% of what they say and write, but 90% of what they learn and physically actualise.[118] With these provisions made by the State Party, they would be doing a service to the African child in ensuring that they obtain a holistic development for the African child's betterment.

5 The best interests of the child

The best interests of the child must be considered whenever dealing with the child, no matter the context, consideration or action. This section thus tangentially discusses the principle, in order to show its importance and relevance to the main discussion. The best interests principle dictates that, whenever dealing with a child, one has to consider the child's best interest. Semantically, this discussion also brings attention to another difference between the African Children's Charter and the Convention on the Rights of the Child.[119] The African Children's Charter states that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'[120] It has been argued that, in relation to the protection of the best interests of the child, the African Children's Charter offers a stronger protection than its counterpart, the CRC.[121] This is because the Charter makes the consideration of the best interests of the child *the* primary consideration,[122] while the CRC makes it *a* primary consideration.[123]

The best interests of the child principle was first introduced in 1959.[124] It was then later transposed into the CRC, which was designed for the purpose of protecting the best interests of the child.[125] Similarly, by making the best interests of the child the primary consideration in all matters concerning the child, the African

118 Balgaonkar (n 117 above) 61.
119 Gose (n 29 above) 25 – 26.
120 African Children's Charter art 4(1).
121 Gose (n 29 above) 26; Lloyd (n 3 above) 13 – 14.
122 African Children's Charter art 4(1).
123 Convention on the Rights of the Child art 3(1).
124 Declaration of the Rights of the Child, Principle 2.
125 Kohm (n 10 above) 323.

Children's Charter serves the same purpose.[126] In fact, the African Committee of Experts, the guardians of children's rights in Africa, have confirmed in case law too that the best interests of the child must be observed in all matters pertaining to children.[127]

The best interests of the child principle can be broken down into three elements. Firstly, it is a 'rule of procedure', in terms of which all decision-making processes and decisions made in relation to children must consider the principle.[128] Secondly, it is a 'function of a substantive right', in that it is a guarantee that the principle will be applied in all matters dealing with the child.[129] Finally, it is a fundamental and interpretive 'legal principle', which, by design, implores adults to act in the best interests of the child.[130]

When applying these elements to the rights in focus, the test shows that the propositions made here, are in the best interests of the child. The UNCRC has stated that the right to education, naturally, is linked to the best interests of the child,[131] as all decisions regarding the child's right to education must take account of the best interests principle.[132] Furthermore, one of the aims of education is to provide the child with an education which is of good quality and mindful of the best interests principle.[133] With regard to the right to recreational activity, the Committee has also stated categorically that the realisation of the rights under article 31 of the CRC, of which recreational activity is one, is 'by definition in the best interest of the child'.[134] Therefore, in the *pas de deux* education curriculum, the best interests of the child are observed as an independent principle as well as a central pillar in the realisation of other rights, particularly the rights of the child to education and recreational activity.

Essentially, noting the centrality and importance of the best interests of the child principle in the African Children's Charter, it is argued here that the propositions made above are in the best interest of the child. Both access to education as well as recreational activity

126 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v The Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (22 March 2011) para 29; Nyarko & Ekefre (n 11 above) 388.

127 *Michelo Hansungule and Others (on behalf of Children in Northern Uganda) v The Government of Uganda*, Communication No 1/2015 at the 21st Ordinary Session, African Committee of Experts on the Rights and Welfare of the Child (15 – 19 April 2015) para 37.

128 J Zermatten 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* 485.

129 As above.

130 As above.

131 UNCRC General Comment No 1 para 6.

132 UNCRC General Comment No 7 (2007) Implementing child rights in early childhood CRC/C/GC/7/Rev.1 para 13.

133 UNCRC General Comment No 1 para 9.

134 UNCRC General Comment No 17 para 17.

are in the best interest of the child, and they observe the best interests principle — meaning that all elements of the principle are realised. The developmental benefits attached to the realisation of both rights have an undeniably and positively high utility. Therefore, it is submitted that the education and recreational activity *pas de deux* should be implemented within curricula because of the fact that, over and above all the benefits listed above, it would be in the best interest of the child to do so.

6 Conclusion

The discussion in this article was centred around four arguments. Firstly, it was established that the African Children's Charter recognises and protects the right of the African child to receive an education as well as take part in recreational activity. Secondly, it was argued that State Parties would do well to include dance, as a form of recreational activity, in their school curricular because of its benefits for their development and wellbeing. When these two themes are considered together, it is made evident that the school setting is an opportune place to ensure the realisation of both of these rights for children across the continent. Additionally, tangentially but importantly, it was argued that the proposals made herein would be in the best interests of the child, if realised. Finally, and also importantly, where State Parties implement curricular which feature recreational activity syllabi, they will be realising two of their obligations in terms of the African Children's Charter simultaneously.