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EDITORS' NOTE

by Pheny Sekati



I am delighted to present to you, the reader, the fifteenth edition of *the Pretoria Student Law Review's (PSLR) Annual Edition* with its Special Section on and Social Justice and COVID-19. This year's Annual Edition, together with the developments made during the year, is a testament to the growth, resilience, and adaptability of this student-driven initiative especially during these turbulent times. This year has also been one of reflection and remembrance as we publish this edition in tribute to the late Professor Christof Heyns whose instrumentality in the establishment of the Pretoria University Law Press (PULP) has brought us to where we are today. Fourteen years since its inception and the journal still continues to grow and evolve whilst remaining true to its thriving legacy in fostering excellence and innovation through legal writing. This publication's uniqueness is also presented through its diverse contributions all addressing contemporary societal and legal issues under a broad range of legal disciplines.

In an era of many continued 'firsts', the *PSLR* has strived to build on the legacy of its predecessors by expanding on the journal's visibility and accessibility. The *PSLR's* digital presence has now grown substantially leading to an increase in quality submissions from institutions across the country. This year, the *PSLR* launched its first independent website and developed an official logo for the journal and its online platforms. Authors are now able to submit their papers through the Open Journals System platform, track their workflow, manage their submissions, and submit at any time outside of the *PSLR's* official Call for Submissions. We can firmly submit that we have, in pursuance of being a DHET accredited journal, fulfilled the standards set out by the Department of Higher Education and

Training. Many thanks are extended to Makone Maja for developing the website. Your patience, guidance, and geniality are truly appreciated. Thank you also to Jakolien Strydom and ClickCreate for your charitable assistance in developing and designing the logo.

To the authors, this year has, in many respects, been challenging with many of those challenges affecting students directly. We appreciate the dedicated efforts put into your submissions and your wholehearted cooperation throughout the entire process. Much appreciation is also extended to the reviewers who have selflessly committed to assisting the *PSLR* during the peer-review process. To all of the reviewers, your input, guidance, and recommendations are greatly appreciated.

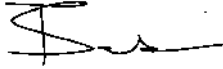
To our Guardian, Ilana le Roux, your unwavering support towards the journal and Editorial Board has been both motivating and heart-warming. Thank you for your always putting the well-being of the Board first and for guiding us through all of our endeavours. To Adelaide Chagopa, I could not have asked for a better Senior Editor. You have approached every task (and hurdle) with an inspiring sense of determination. Your genuity and humorous anecdotes have kept the team connected and your efforts are appreciated immensely. I would also like to extend my heartfelt thanks and appreciation to the Editorial Board. To Dr Ntandokayise Ndlovu, Ntando Sindane, Marno Swart, Odirile Matladi, Khalipha Shange, Cebolenkosi Ramaube, and MP Fourie, I am eternally grateful for your dedicated efforts and immense contribution towards publishing the journal. Your commitment, diligence, and drive have not gone unrecognised.

Many thanks are extended to the Law Faculty of the University of Pretoria, the Dean, Professor Elsabe Schoeman, and Deputy Dean, Professor Charles Maimela. Special gratitude is also extended to Lizette Hermann, Elzet Hurter, and Mornay Hassen. Your constant support and assistance has kept the journal afloat. Thank you insight and guidance throughout the *PSLR's* journey. To my predecessors, Simon Mateus and Primrose ER Kurasha, thank you for your insight and encouragement.

To my family, without your sacrifices, inspiration, and drive, I would not be where I am today, and I never take for granted how blessed I am for your presence and loving guidance. Thank you for your encouragement and silent prayers.

To quote Chinua Achebe, 'a good writer does not need be told anything except to keep at it'. As future leaders and trailblazers in the legal profession, your insight and perspectives are invaluable. I therefore implore all aspiring authors to carve out every opportunity to write. Please visit our website for more information on the *PSLR* and on how to make a submission.

I trust you, the reader, will enjoy and benefit from reading the publication

A handwritten signature in black ink, appearing to be 'Pheno Nomasono Morwesi Sekati', written in a cursive style.

Pheno Nomasono Morwesi Sekati
Editor-in-Chief
Pretoria Student Law Review
2021

NOTE ON CONTRIBUTIONS

We invite all students to submit material for the sixteenth 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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SOCIAL JUSTICE AND COVID-19 IN THE ‘NEW’ SOUTH AFRICA: INVOKING RAMOSEAN MEDITATIONS IN PANDEMIC TIMES

by Ilana le Roux*



Abstract

In this contributory essay to the 2021 Special Section of the PSLR spotlighting ‘Social Justice and COVID-19’, I attempt to challenge portrayals of the novel coronavirus (COVID-19) as an ‘indiscriminate’ and ‘equal opportunity’ assailant. In doing so, I endeavour to bring to the fore a reading of social injustices experienced during the ongoing COVID-19 pandemic that implicates not only systemic disadvantages inherited from apartheid but also the legacies of unjust colonial conquest. By underscoring memory as the possibility condition for restorative social justice within a progressively unjust South Africa, I draw on philosopher Mogobe Ramose’s counter-discourse meditations problematising the pervasiveness of colonial-apartheid conquest in a post-1994 liberal democratic polity. Accordingly, I align myself with perspectives that consider substantive social justice in a stratified ‘new’ South Africa to be a decolonial justice carved out by an African experience and memory, with the restoration of unjustly dispossessed land as a possibility condition for social cohesion.

* BSc (Human Genetics), LLB, LLM, University of Pretoria. Doctoral Candidate (Department of Public Law), University of Pretoria. ORCID iD: 0000-0002-4619-5320. I wish to thank the following people for generously taking the time to critique earlier versions of this contribution: Tumelo Modiselle, Ntando Sindane, Elme Ravenscroft, and Gustav Muller. Special thanks to Tumelo, for many insightful and challenging comments and conversations. All errors and omissions are exclusively my own. I further wish to express my gratitude towards both Adelaide Chagopa and Pheny Sekati for editing this contribution with the utmost grace and patience.

1 Introduction

The more than three centuries long history of subjugation, exploitation and oppression in the exercise of the questionable 'right of conquest' cannot be erased from the memory of the conquered peoples merely by the prospect of a new constitutional dispensation intent upon the obliteration of such a memory. The memory cannot be buried because the conquered peoples philosophy of law upholds the principle that *molato ga o bole*. This means that the passage of time does not cancel an injustice nor does it change it into justice. An injustice may not be buried.¹

It would seem as if President Cyril Ramaphosa's repeated appeals to the nation to foster a human solidarity that transcends all societal differences in the face of unprecedented, ambivalent and uncertain times of unsurmountable loss and precarity brought on by the global coronavirus (COVID-19) pandemic were only directed to those who find themselves in the *zone of being*, seeing as such petitions for unification and cohesion subjected those who already found themselves condemned and confined to the *zone of non-being* to even greater encounters with violence and vulnerability.²

This contribution then aligns itself with an emerging body of real-time scholarship that paints the pandemic as a catalyst for the aggravation of persisting historical social inequalities and injustices founded on *white supremacist capitalist patriarchal* domination and ontological devaluation.³ In doing so, I borrow from thinkers who consider substantive justice a precursor to social cohesion, and are

- 1 MB Ramose 'Reconciliation and reconfiliation in South Africa' (2012) 5 *Journal on African Philosophy* at 23.
- 2 F Fanon *Black Skin, White Masks* trans CL Markham (1952) at 2. See also B de Sousa Santos 'Beyond abyssal thinking: From global lines to ecologies of knowledges' (2007) 30 *Review*; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critique the anti-black economy of recognition, incorporation and distribution' (2017) 1 *Stellenbosch Law Review* at 124; I Yousuf 'Burdened by a Beast: A brief consideration of social death in South African universities' (2019) 1 *Journal of Decolonising Disciplines*. Madlingozi explains that 'the historically colonised worlds' could be divided 'into a "zone of beings" and a "zone of non-beings" with dwellers of the latter zone being regarded as not-yet beings'. The conquerors and beneficiaries of conquest in the zone of beings *doubt* the humanity of the conquered peoples in the zone of non-being. See N Dladla *Here is a table: a philosophical essay on the history of race in South Africa* (2020) at 104; and MB Ramose *African philosophy through ubuntu* (1999) at 29.
- 3 See b hooks *Black Looks: Race and representation* (1992) at 22. I would be remiss if I did not, at this point, briefly include a necessary caveat: the particularity of the oppressive existential and experiential situation of the gendered person or male antithesis subjugated through conquest cannot be overstated. As Oyèrónké Oyèwùmí points out: 'Colonization, besides being a racist process, was also a process by which male hegemony was instituted and legitimized in African societies. Its ultimate manifestation was the patriarchal state', thereby producing what bell hooks describes as a 'social hierarchy based on race and sex that ranked white men first, white women second, though sometimes equal to black men, who are ranked third, and black women last'. Although a thorough interrogation of the gender-based injuries inflicted by the patriarchal powers

therefore unsympathetic to pleas from the powerful elite that put the horse before the cart by encouraging the inverse. Accordingly, the axiological foundations for the claims put forward here affirm the principle articulated by philosopher Mogobe B. Ramose in the epigraph above: ‘... the passage of time does not cancel an injustice, nor does it change it into justice. An injustice may not be buried’.⁴

By investigating and ascribing to the philosophical insights and arguments conceptualised and developed by Ramose and his intellectual associates and supporters, the contribution foregrounds the African experience rooted in Azanian thought.⁵ These thinkers question the ethics advanced by the protagonists of ‘multiracialism’ for their ironical reification and legitimisation of different ‘races’ within a supposedly *de*-racialised context,⁶ as opposed to the Azanian school’s devotion to the oneness of a single, but *pluriversal*,⁷ human race. The current contribution is an attempt to make sense of what ‘social justice’ in the times of COVID-19 entails – or *should* entail – within a specific geographical context, being that of Africa; *home* to an African majority, with axiological and ontological relationships, foundations, and values that contest the proclaimed dogmatic universality and imposition of Western experiences and belief. On this view, it then naturally follows that COVID-19 related injustices within

demands special attention, regrettably, such an examination is beyond the scope of this contribution. It must further be noted that despite Ramose and his affiliates’ attentiveness and sensitivity to the gender-dimensions of conquest and the special plight of the conquered women/gendered Other, I acknowledge the uncomfortable overrepresentation of the male perspective in this contribution, inspiring the need, and thereby, inviting cause, for future critical consideration. See O Oyèwùmi *The invention of women: Making an African sense of Western gender discourses* (1997) at 156; and hooks *Ain’t I a woman: Black women and feminism* (1981) at 78.

4 Ramose (n 1) 23. See also JM Modiri ‘Conquest and constitutionalism: first thoughts on an alternative jurisprudence’ (2018) *South African Journal on Human Rights* at 15; Madlingozi (n 2) 142.

5 See M Ramose ‘To whom does the land belong?: Mogobe Bernard Ramose talks to Derek Hook’ (2016) 50 *Psychology in Society*; Dladla (n 2) 117-140; T Delpont ‘*Asazi ukuthi iyozala nkomoni*: Robert Mangaliso Sobukwe’s historical imagination of the future’ (2016) 50 *Psychology in Society*; and Madlingozi (n 2). ‘Azania’ is the preferred name for the yet-to-be decolonised territory currently known as South Africa, as endorsed by the Pan-Africanist tradition and Black Consciousness Movement; as pioneered by influential emancipatory thinkers such as Anton Muziwakhe Lembede, Robert Mangaliso Sobukwe, and Steve Bantu Biko, amongst many others. Here, we further note the denomination ‘Africa’ to be worthy of contestation, which Ramose problematises for being a name bestowed upon the territory unethically and unjustly seized from the indigenous conquered peoples, with such an appellation amounting to a baptismal name given to the territories by its imperial and colonial rulers. See also MB Ramose ‘I doubt, therefore African philosophy exists’ (2003) 22 *South African Journal of Philosophy*; Ramose (n 2) 4; AA Mazrui ‘Where is Africa? The Universe According to Europe’ 1986 https://www.artsrn.ualberta.ca/amcdouga/Hist247/winter_2014/readings/where_is_africa.html (accessed 18 March 2021).

6 See Dladla (n 2) 117-140.

7 Ramose (n 2) 4; SJ Ndlovu-Gatsheni ‘Geopolitics of power and knowledges in the COVID-19 pandemic: Decolonial reflections on a global crisis’ (2020) 36 *SAGE Publications* at 378 & 383.

the South African context cannot be remedied without a thorough espousal of 'black radical and Africanist imaginaries and vocabularies'.⁸

This essay is divided into three temporal parts: the present, the past, and the future. The logic behind this division is premised on the belief that injustices of the present can be explained by examining our past, which then, in turn, enables us to work towards an improved and just future. Or to borrow Ramose's more eloquent expression – as I shall do frequently throughout this contribution – 'My starting point is that the present is the child of the past and the present in turn is the parent of the future'.⁹ In the first part, I challenge the fallacious neo-liberal depiction of COVID-19 as the 'great equaliser' for its supposedly indiscriminate disregard of all conceivable societal binaries and categories for how it has affected and halted the lives of humanity at large. In this part, I attempt to illustrate that the pandemic and the attendant lockdown regulations produced inegalitarian realities in South Africans depending on which side of the 'colour bar'¹⁰ and its appendaged class structure they found themselves within a white supremacist settler-colonial social locale ruled by economic fundamentalist values.¹¹ To this end, I consider some findings reported by the latest unemployment statistics;¹² contextualising precarity in times of crisis as continuities of pre-1994 systemic disadvantages that persist almost three decades after the 'dawn of democracy'.¹³ Having considered our reality at present, the next part argues that the injustices exposed and (re)produced by the state's handling of the COVID-19 pandemic can only be remedied, and justice can only be restored to the marginalised majority by ascribing to what philosopher Enrique Dussel formulates as a *philosophy and ethics of liberation*, as informed by the non-philosophical lived realities and experiential truths of the oppressed.¹⁴ By interrogating

8 Modiri (n 4) 6.

9 MB Ramose 'On the contested meaning of "philosophy"' (2015) 34 *South African Journal of Philosophy* at 551.

10 See S Terreblanche *A history of inequality in South Africa 1652-2002* (2002) at 47; J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2005) at 3.

11 See MB Ramose 'Globalization and ubuntu' in PH Coetzee & APJ Roux (eds) *Philosophy from Africa: a text with readings* (2002) at 733. To roughly summarise, an economic fundamentalist society is one in which 'the sovereignty of money has replaced the human being as the primary value'. A capitalist economic structure that exploits people and undersells labour for profits, therefore, ascribes to the dogma of economic fundamentalism.

12 StatsSA 'Quarterly Labour Force Survey Quarter 1: 2021' 01 June 2021 <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2021.pdf> (accessed 2 June 2021) (QLFS).

13 Seekings & Nattrass (n 10) 166.

14 E Dussel *Ethics of Liberation* (1985) at 3; E Dussel *Ethics of Liberation in the age of globalization and exclusion* (2013). See also Ramose (n 1) 36; and MB Ramose 'Philosophy: A particularist interpretation with universal appeal' in

the material conditions of the historically vanquished in the present – ‘in light of the past’¹⁵ – a philosophy of liberation demands the eradication of the unethical prevailing order that denies the indigenous conquered people a ‘humanity second in quality to none’.¹⁶ This demand adheres to (de)colonisation theorist, Frantz Fanon’s call for a decolonial change in the presiding order of the world.¹⁷ In doing so, existing inequalities are framed as persisting colonial-apartheid injustices introduced through unjust and unethical conquest.¹⁸ Although the dehumanising and unethical socio-economic conditions forced onto the materially oppressed and socially excluded in our post-1994 constitutional dispensation are legacies juridically

14 JO Oguejiofor & GI Onah (eds) *African Philosophy and the Hermeneutics of Culture* (2005) at 151-152. In the latter text, Ramose emphasises that it is ‘the existential out of which philosophy grows’ by drawing on the work of both Dussel and Theophilus Okere.

15 MB Ramose ‘A philosophy without memory cannot abolish slavery: On epistemic justice in South Africa’ in G Hull (ed) *Debating African Philosophy: Perspectives on identity, decolonial ethics and comparative philosophy* (2019) at 64.

See Dladla (n 2) 6; Ramose (n 2) 4. I refer to ‘indigenous conquered people and ‘conquered peoples’ in line with the Ramosean formulation of conquest and the resulting dispossessed title of territorial sovereignty in South Africa. Ramose distinguishes between the ‘indigenous conquered peoples of South Africa’ and the ‘conquered peoples of South Africa’ on historical grounds, the latter to include the Indian and Coloured communities who also succumbed to the white supremacist subjugation and abuse of colonial-apartheid forces introduced through unjust conquest to South Africa, albeit to varying degrees, and it is by reason of the shared title of ‘human being’ that they share an interest in ‘natural historical justice’. I mirror Ramose’s use throughout this contribution. For a brief elaboration on the logic that informs this distinction, see MB Ramose ‘In memoriam: sovereignty and the “New” South Africa’ (2007) 16 *Griffith Law Review* at 320-321.

17 F Fanon *The wretched of the earth* trans R Philcox (1961) at 2. See also E Tuck & KW Yang ‘Decolonisation is not a metaphor’ (2012) 1 *Decolonization: Indigeneity, Education & Society* at 31. I also here note the apprehension among some Azanian thinkers, like Ndumiso Dladla, to readily adopt the term ‘decolonial(ity)’ as it is used by some Latin American counter-discourse thinkers. ‘Decolonisation’, as it is used in the present contribution, then understands colonialism to be an enduring injustice experienced by the indigenous conquered people; a social arrangement, and material reality that persists. Although I do rely on the work of theorists (such as Tuck & Yang, and Wolfe) to add to our understanding on the particularities of the settler-situation, the aim remains the foregrounding of the African(ist) experience when determining the *content* of ‘decolonisation’. See N Dladla ‘The Azanian philosophical tradition today’ (2021) 68 *Theoria* at 9-10 for a brief explanation on this stated apprehension to ‘decoloniality’. (Furthermore, may it suffice to mention here in brief, that the current contribution was authored prior to the publication of the aforementioned *Special Issue of Theoria* exploring Azanian Political Thought, guest-edited by Ndumiso Dladla. The present author considers the *Special Issue* an invaluable and invigorating collection of works with rich and powerful insights that will undoubtedly enhance the reader’s understanding of the Azanian Philosophical Tradition at the heart of the current contribution.)

18 I borrow the term ‘colonial-apartheid’ from Modiri (n 4); Madlingozi (n 2); Dladla (n 2); and S Sibanda ‘When do you call time on a compromise? South Africa’s discourse on transformation and the future of transformative constitutionalism’ (2020) 24 *Law, Democracy & Development*. These authors, relying on Ramosean ideations, deploy this formulation to illustrate the connection and relationship between these two situations or power structures, framing them as one ongoing operation even in the afterlife their formal demise. Ultimately, the use of

institutionalised by the pre-1994 state,¹⁹ it remains pertinent to substantive justice that 'the original injustices of conquest in the unjust wars of colonisation',²⁰ as well as the subsequent naturalisation of 'settler-colonial usurpation',²¹ and the entrenched economic system of racialised liberal capitalism be appropriately implicated if justice is to be achieved during pandemic times. In the final part of this contribution, I return to the unavoidable and bedevilled 'land question' with territory as a site for ethical justice in the 'new' South Africa – the importance of which became more pronounced during the ongoing COVID-19 pandemic in which being safe means to stay *home*. The Ramosean demand for 'the unambiguous restoration of title to territory to the indigenous peoples conquered in the unjust wars of colonisation' is then espoused as the chief mechanism through which people living under conditions of avoidable poverty will be able to disinvest from – and in so doing, destabilise and dismantle – the very systems that ensure their perpetual subordination²² and subservience.

2 The present: Confronting calamity

And if these things are true, as no one can deny, will it be said, in order to minimize them, that these corpses don't prove anything?²³

Laster Pirtle and Wright put it crisply: '[t]he pandemic reveals'.²⁴ What has been visibilised by the enduring COVID-19 pandemic is not only determined by *where* we look, but *how* we look at that which has been revealed to us in this time of crisis. The perspective presented here then challenges the neo-liberal depiction of COVID-19 as an 'equal opportunist viral enemy' and 'great morbid equalizer'.²⁵ Appeals to the public encouraging social cohesion and uniform compliance with lockdown policies and restrictions aimed at mitigating the calamitic effects of COVID-19 repeatedly emphasise that the virus does not pardon anyone from its physiological and

'colonial-apartheid' serves to capture the systemic and structural nature of white domination that informed and outlived both formal colonial rule and legislated apartheid. It is the values of white supremacy that links and perpetuates these two historical situations, rendering the separation of these systems of domination superfluous.

19 See Terreblanche (n 10); Seekings & Nattrass (n 10).

20 See Ramose (n 16) 310.

21 Modiri (n 4) 4.

22 Ramose (n 16) 327.

23 A Césaire *Discourse on Colonialism* (1972) at 41.

24 WN Laster Pirtle & T Wright 'Structural gendered racism revealed in pandemic times: Inter-sectional approaches to understanding race and gender health inequalities in COVID-19' (2021) 35 *Gender & Society* at 169.

25 CC Hodge 'Density and danger: Social distancing as racialised population management' (2021) 8 *Medicine Anthropology Theory* at 3; K Silva 'COVID-19 and the mundane practice of privilege' (2021) 35 *Cultural Studies* at 241. See also S Maistry 'South Africa's comorbidity: A chronic affliction of intersecting education, economic and health inequalities' (2021) 25 *Education as Change* at 3.

mortal consequences. Of course, the message conveyed through such appeals reverberates the post-1994 liberal portrayal of South Africa as ‘non-racial’:²⁶ *the virus does not care if you are black or white – it is blind to ‘race’ – it kills indiscriminately.*²⁷

It may be true, in part, that the virus fails to respect socially constructed spheres of identification once it is contracted,²⁸ but such representations paint a dubious, distorted, and incomplete picture.²⁹ Much work has been done on the ‘social production of disease’ prior to COVID-19 to discredit such claims; examining how the hierarchal *white male power structure*³⁰ devoted to capitalist accumulation produces unequal material conditions and life experiences.³¹ Systemic socio-political factors influence and determine not only *who* is at risk of exposure, infection, and transmission of diseases, but also assigns a lower recovery and higher mortality rate to persons who find themselves at the bottom of the racialised ontological pyramid based on how systems of socio-economic exclusion and repression produce disease – and comorbidities – ‘under conditions of capitalism and racial oppression’.³² Apart from socio-economic and material vulnerability influencing *who gets sick* and *how sick* they get, disease – or the threat thereof – also has the acute tendency to intensify pre-existing socio-political vulnerabilities, rendering disease yet *another* obstacle to be endured by people living in precarity. It is this intensification of oppression brought on by COVID-19 in South Africa

26 See Modiri (n 4); Dladla (n 2).

27 See K Crenshaw ‘Mapping the margins: intersectionality, identity politics, and violence against women of color’ (1991) 43 *Stanford Law Review* at 1244, fn 6; Modiri (n 4) 5, fn 26. The use of ‘Black’, ‘black’, and ‘white’ in this contribution is synonymous with that of these scholars. Following Modiri’s example and logic, I will capitalise ‘Black’ when referring to a particular cultural and political group, and the uncapitalised ‘black’ is used as a ‘descriptive category’. Modiri further qualifies his use of Black/white within a settler-colonial South African context; stating that ‘the term “Black” [is] to include groups traditionally labelled as Africans, Indians and Coloureds’. He goes on to explain that the use of the capitalised ‘Black’ further serves as a contestation to the historical ontological inferiorisation of Black people within the white supremacist racial hierarchy. The use of ‘white’ in the lowercase acknowledges that this group is not a cultural group, nor is whiteness inferiorised. I am grateful to Zenia Pero for directing me towards substantiating and explanatory sources elaborating on the dichotomous use of ‘Black/white’.

28 See C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) at 25.

29 See Harvey ‘Anti-capitalist politics in the time of COVID-19’ 2020 <https://jacobinmag.com/2020/03/david-harvey-coronavirus-political-economy-disruptions> (accessed 15 May 2021).

30 See hooks (n 3) 131 & 211.

31 See N Krieger & M Bassett ‘The health of black folk: disease, class, and ideology in science’ (1986) 38 *Monthly Review* at 161. See, generally, CA Rentmeester ‘Postcolonial bioethics: A lens for considering the historical roots of racial and ethnic inequalities in mental health’ (2012) 21 *Cambridge Quarterly of Health Ethics*; ET Richardson ‘On the coloniality of global public health’ (2019) 6 *Medicine Anthropology Theory*; D Roberts *Fatal invention: How science, politics, and big business recreate race in the twenty-first century* (2011).

32 Krieger & Bassett (n 31) 161.

that this section seeks to interrogate. To advance the argument that an *ethical* social justice in South Africa is an Africanist *decolonial* social justice informed by an ethics of liberation, I will first evidence some disparities in lived realities during the COVID-19 pandemic.

Some of the lockdown regulations and restrictions enforced by the South African government to mitigate or prevent the spread of COVID-19 have been lauded for effectively alleviating the burden of an already overstrained health sector.³³ Other restrictions – and the enforcement thereof – have been met with outright scorn for reproducing, maintaining, and deepening inequalities and oppressions marked by the *white supremacist capitalist patriarchal* devaluation of human essence. This much is evinced by the wave of protests observed during the pandemic demanding socio-economic justice and relief, certifying pandemic injustice as political injustice.

True to neo-liberal/neo-colonial form,³⁴ the relaxation of restrictions that encumbered profit production and halted individual liberties of those in positions of privilege in the zone of being were prioritised over the humanity of those left at the mercy of colonial-apartheid power configurations in the zone of non-being. One need only grapple with a few 'who(m) questions' incited by the pandemic and lockdown to stress the pervasiveness of white domination and racial capitalism in a supposedly deracialised South Africa: to *whom* did the regulations that allowed for the on-site consumption of liquor on weekends in licensed premises, whilst criminalising the off-site consumption of those who cannot afford such on-site expenditures, cater to?³⁵ *who* did the police assault with water cannons as they cued outside the Bellville SASSA offices to receive social grants – without

33 MJ Manyoni & MI Abader 'The effects of the COVID-19 lockdown and alcohol restrictions on trauma-related emergency department cases in a South African regional hospital' (2021) 11 *African Journal of Emergency Medicine* at 227-230

34 To briefly explain, within the present context, 'neo-liberalism' refers to the hegemonic 'ideology of liberal capitalism' as the globalised free-market economic policy conceived and disseminated by Western imperialist forces. According to Sampie Terreblanche, the neo-liberal ideology was the adopted economic strategy of the 'new' South Africa. See Terreblanche (n 10). 'Neo-colonialism', according to Kwame Nkrumah, describes the situation in which imperial forces 'switched tactics' after granting the ex-colonies their formal independence, whereby the 'the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its [neo-liberal] economic system and thus its political policy is directed from outside'. It is then understood that the neo-liberal economic fundamentalist approach is the mechanism through which neo-colonialists perpetuate their subjugation of historically conquered peoples by 'recolonising' ex-colonies by way of economic bondage to the former colonial ruler'. See K Nkrumah *Neocolonialism: The Last Stage of Imperialism* (1974) at ix; and Ramose (n 11) 742.

35 Department of Health 'Summary of Level 3 Regulations (as of 01st February 2021)' <https://sacoronavirus.co.za/2021/02/02/summary-of-level-3-regulations-as-of-01st-february-+2021/> (accessed 02 May 2021). On this point, I wish to respond to the rebuttal that easing the restrictions on sales and on-site consumption on weekends in licensed establishments was to protect the livelihoods of those working in the industry with another question: *why* were the

which many households would be forced into starvation?³⁶ *who* was murdered by the police and troops deployed to militarise the compliance of lockdown regulations in peripheral townships?³⁷ *who* was evicted from spaces of safety and refuge during a global pandemic in which people were ordered to stay home, and when failing to do so, met with sanctioned violence?³⁸ *who* was branded ‘uneducated’ for their willingness to receive a vaccine, when vaccines will expedite their return to employment in an economy that reduces unskilled and menial labourers to mere fungibles?³⁹ *who* were the billions worth in state-funded food parcels and Personal Protective Equipment (PPE) meant to sustain and protect were it not for corrupt governmental officials looting state coffins?⁴⁰ *who* are the restrictions and regulations meant to police when non-compliance is met with monetary fines and/or convictions, rendering non-compliance an expensive inconvenience for some, but totally debilitating for others?

With these questions I attempt to probe the manner in which the liberties and humanity of certain bodies were considered and taken into account during the formulation of the national lockdown regulations and restrictions, whilst others were left unimagined and discounted; how the tethered and mutually reinforcing forces of white supremacy and capitalism in South Africa control certain bodies with overt and unforgiving violence – as the elite in the zone of being lament the postponement of *habitus*.⁴¹ To borrow from Aimé Césaire, as his words arguably hold even more water today: with these

- livelihoods of those who sell liquor for on-site consumption in townships and peripheral urban settlements not also deemed worthy of the same protection?
- 36 J Evans ‘Sassa scramble: Human Rights Commission demands answers after Bellville queue chaos’ *News24* 19 January 2021 <https://www.news24.com/news24/southafrica/news/sassa-scramble-human-rights-commission-demands-answers-after-bellville-queue-chaos-20210119> (accessed 02 May 2021).
 - 37 K Trippe ‘Pandemic policing: South Africa’s most vulnerable face a sharp increase in police-related brutality’ 24 June 2020 <https://www.atlanticcouncil.org/blogs/africasource/pandemic-policing-south-africas-most-vulnerable-face-a-sharp-increase-in-police-related-brutality/> (accessed 02 May 2021).
 - 38 T Fish Hogson ‘he lawlessness of unlawful evictions: South Africa’s home invasion problem’ *Maverick Citizen* 06 August 2020 <https://www.dailymaverick.co.za/article/2020-08-06-the-lawlessness-of-unlawful-evictions-south-africas-home-invasion-problem/> (accessed 02 May 2021). This dehumanising and immoral state of affairs is further evidenced by the number of illegal evictions pursued during the lockdown period by public interest institutions/organisations such as the *Centre for Applied Legal Studies*, the *Legal Resource Centre*, as well as the *Socio-Economic Rights Institute of South Africa*, to name but a few. The onslaught on the residents of informal settlements and vulnerable households in and around Cape Town, Durban, and Johannesburg is well-documented by these institutions and organisations.
 - 39 N Shange ‘“Black Africans more likely to be willing to accept a vaccine than white people”, new survey reveals’ <https://www.timeslive.co.za/news/south-africa/2021-02-17-study-reveals-black-and-less-educated-people-more-willing-to-take-covid-19-vaccine/> (accessed 02 May 2021).
 - 40 T Moche ‘TIMELINE: COVID-19 food parcels, PPE corruption timeline’ 31 August 2020 <https://www.sabcnews.com/sabcnews/timeline-COVID-19-food-parcels-ppe-corruption-timeline/> (accessed 02 May 2021).
 - 41 See Silva (n 25) 239 & 245; Yousuf (n 2) 84

questions I endeavour to make 'it possible to see things on a large scale and to grasp the fact that capitalist society, at its present stage, is incapable of establishing a concept of the rights of all men ...'.⁴²

The speciousness of the dominant elite's unethical efforts to obscure and trivialise the precarity and deprivation to which the majority of Black people in South Africa have succumbed during the ongoing pandemic was laid bare by the *Quarterly Labour Force Survey* (QLFS) for the first quarter of 2021.⁴³ To further demystify and defend the argument put forward in the sections to follow that social justice is necessarily *historical* justice in post-1994 South Africa – be it in times of crisis, in which death is visibilised for its ability to affect the dominant elite, or otherwise – when the social death that engenders 'the facts of being black'⁴⁴ in a post-1994 South Africa is naturalised – I briefly condense some of these findings on the South African (un)employment rates published on 01 June 2021.⁴⁵ The report, using data from interviews conducted telephonically to curtail the spread of COVID-19,⁴⁶ revealed the extent to which the structures institutionalised by the architects of pre-1994 South Africa remain unfettered; forcing those refuting the prevalence of colonial-apartheid powers in a juridically deracialised South Africa to confront the barrenness of their contentions.

According to the household-based survey, South Africa's official unemployment rate reached an all-time high since the start of the

42 Césaire (n 23) 37.

43 QLFS (n 12).

44 Krieger & Basset (n 31) 161. Krieger and Basset draw on Fanon's formulation of Blackness, as posited in *Black Skin, White Masks*, in which he addresses the 'facts of Blackness'. See Fanon (n 2) 82-107.

45 Yousuf (n 2) 83-85. Drawing in the work of Fanon, Kalish, Patterson, and Turner, Yousuf succinctly explains *what* by reconceptualising 'death' to include not only the end of one's somatic or biological career, but also the 'death of the psychological, sociological and social' is to acknowledge the 'systematicity' of 'death'. By locating the origins of the 'social death' – a state of being reserved for racialised colonial subjects – in slavery, Yousuf argues that the physical death of racialised colonial subjects 'was only suspended insofar as slaves submitted to their powerlessness'. Ramose makes a similar point when he asserts that the indigenous conquered peoples were given only one right, being that they submit to the will of their conquerors or (physically) die. Accordingly, to say that those marked by race within the colonial situation are condemned to a 'social death' is to understand that white supremacy systemically and systemically denies the racialised Other their full humanity to the point where 'a person believes that they are as good as dead'. Thus, race determines not only who lives and dies physically, but also psychologically and socially. See Ramose (n 2) 17-18. Special thanks to Ntando Sindane for the introduction to the work of Iram Yousuf.

46 QLFS (n 12) 1. The survey warns that due to the change in the survey's mode of collection and the fact that Q1: 2021 estimates are not based on a full sample, comparisons with previous quarters should be made with caution. On my reading of this change in methodology, there is cause to suspect that the concluding results are actually more dire than they appear, since it is plausible that participants from the previous quarter who were not contactable for the Q1/2021 survey were non-contactable *because* their material conditions may have deteriorated to the extent that they no longer had access to resources through which they were previously contactable.

survey in 2008, standing at 32,6% in the first quarter of 2021, a 0,1% increase from the preceding period.⁴⁷ The expanded definition of unemployment – which is arguably more illustrative of the grim reality faced by South Africans since this expanded definition widens its scope to include people discouraged from seeking work due to its unavailability and/or hopelessness – rose by 0,6% to 43,2%.⁴⁸ Although some industries observed an increase in employment, such increases were limited to the formal sector with the greatest increase of 215 000 jobs in Finance, with decreases in employment concentrated to the informal sector: 87 000 losses in Construction; 84 000 losses in Trade; 70 000 losses by those working in Private households; 40 000 losses in Transport services; and 18 000 losses in Agriculture.⁴⁹ The data further demonstrates the significance of social capital in retaining employment and receiving pay/salaries during the lockdown period: people employed in the informal sector were far less likely to work from home due to the lockdown, thereby rendering them more exposed to the virus;⁵⁰ those with higher levels of education being more likely to receive their full pay/salaries during this period than their counterparts with lower levels of education;⁵¹ noting that 90.1% of the 7,2 million officially unemployed persons in the 2021 survey did not have educational training that surpassed matric.⁵²

Few would debate the axiom that in post-1994 South Africa the profiles of the people that occupy positions in the informal sector – thereby bearing the brunt of the job losses, increases in unemployment, and reduced salaries – are still patently racialised, with such ‘modern forms of servitude’ by and large performed by

47 QLFS (n 12) 2.

48 QLFS (n 12) 13.

49 QLFS (n 12) 3. The fact that increases were concentrated in the Finance sector further substantiates the claim that the pandemic produced inequalitarian outcomes within the prevailing paradigm of liberal capitalism by favouring those willing and able to assimilate into the capitalist order, and disfavoured those excluded from the system by way of design.

50 QLFS (n 12) 9. See also, S Adam et al ‘Bioethics and self-isolation: What about low-resource settings?’ (2020) 110 *South African Medical Journal*, touching on the impact of such realities on food security. The study showed that ‘[l]ow-income jobs can often not be performed remotely, and the majority of low-income jobs do not offer paid sick days. Persons performing low-income jobs are disproportionately more likely to be unable to afford medical care, or even to stock up the pantry. These individuals are at increased risk of contracting, and spreading, the COVID-19 virus. ... The COVID-19 outbreak hasn’t caused these underlying problems, but it has highlighted the deficits in our fragile, imbalanced society’.

51 QLFS (n 12) 10. See also, Arndt et al ‘COVID-19 lockdowns, income distribution, and food security: An analysis for South Africa’ (2020) 26 *Global Food Security*, examining the consequences of such realities on food security.

52 QLFS (n 12) 13. The survey showed that 37,7% of the 7.2 million unemployed people in the first quarter had matric as their highest level of formal education, and 52,4% of the unemployed had education levels below matric.

historically subordinated Black citizens.⁵³ The survey confirms as much with figures indicating that the unemployment rate, according to the expanded definition, *decreased* for whites during the first three months of 2021, whilst the unemployment rate for every other population group saw an increase.⁵⁴ Whites were also the only population group to experience an *increase* in employment from the previous quarter, with all other populations suffering decreases.⁵⁵

Although the report does not address inequality directly, an increase in job losses – predominantly felt in the visibly racialised informal sector – produces more have-nots, therefore aggravating inequality between them and the haves – who also saw a racialised increase in numbers in favour of the white minority. Other studies that do address inequality in post-apartheid South Africa,⁵⁶ show that post-1994 inequalities remain categorically, although less overtly, racialised. These studies implicate pre-1994 social/state structures that favour 'existing advantage', whilst disfavoured 'the already disadvantaged'.⁵⁷ What I hope to have emphasised here, thereby contextualising the discussion to follow, is the composition of the population that comprise the have-nots and *continue* to live under conditions of socio-political injustice almost 30 years after the dawn

53 JM Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* at 232-233.

54 QLFS (n 12) 46-47. The population groups examined in the survey are denoted as 'Black/African', 'Coloured', 'Indian/Asian', and 'White'.

55 As above. Here I wish to suggest that the fact that increases in employment were (1) mainly reserved for whites, and (2) concentrated to the Finance sector should not be overlooked, nor trivialised. The correlation between these two findings illustrates that the supposedly *de*-racialised post-1994 economic system of liberal capitalism remains overtly racialised.

56 See Terreblanche (n 10); Seekings & Natrass (n 10); World Bank 'Overcoming poverty and inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' 2018 <https://documents1.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf> (accessed 02 June 2021); S Plagerson & S Mthembu 'Poverty, inequality and social exclusion in South Africa: A systemic assessment of key policies, strategies and flagship programmes' (2019) *Centre for Social Development in Africa*. The (impressive) study by Seekings & Natrass investigates the pervasiveness of inequality in South Africa by looking at the distributional regimes from before, during, and after apartheid. The study shows that although deracialisation has meant a decrease in *interracial* inequality (i.e., more Africans have had 'upward social mobility), structural distributional patterns inherited from a late apartheid government has outlasted the demise of formal apartheid rule, thereby producing a rise in *intra*racial inequality post-apartheid, attributable to 'the basis of disadvantage [having] shifted from race to class'. The study shows that the gap between the rich and the poor is increasing, even if the 'rich' are now more multiracial, and that such increase in inequality remains greatly determined by apartheid legacies of racial discrimination. The cited 2018 Report illustrated that those who constitute the upper, middle, and lower classes are still greatly defined by race in post-racial South Africa, finding that 'while black South Africans make up about 80 percent of the total population, in 2014/15 they made up just above 50 percent of the middle class. On the other hand, while whites constitute a mere 10 percent of the South African population, almost one in three members of the middle class and two in three members of the elite are white' (p 38).

57 Seekings & Natrass (n 10) 340-341.

of the post-racial ‘rainbow’ polity. These observations therefore act in defence of claims submitted by critical legal theorist, Joel Modiri, who stresses that:⁵⁸

... exploitation still remains despite the creation of a small class of enormously wealthy black elites and a slowly growing Black middle class and also despite the presence of poor whites (and here we should note that class differentials between blacks and poverty in white communities existed prior to 1994). What is important is not who constitutes the capitalist class, but *who constitutes the large majority of the poor, unemployed and working class* (viz Blacks).

Important to understand here is that poverty is not the same as inequality. According to the 2019 *Poverty, inequality and social exclusion in South Africa* report, poverty ‘describes a state in which individuals or households show significant deficits in wellbeing ... [with their] standards of living fall[ing] below a threshold’, whereas inequality relates to ‘variations in living standards across a whole population’.⁵⁹ The mentioned studies prove that *poverty* remains a state of deprivation mainly reserved for racialised colonial-apartheid subjects within settler-colonial South Africa.⁶⁰

Following from the above contextualisation of what Ramose calls the ‘living face plunged into preventable suffering’ during pandemic times,⁶¹ we may now consider what social justice in a socially unjust and bifurcated landscape *should* encompass. If the contention is, as it is here, that the injustices induced and revealed by COVID-19 are structural legacies of historical injustice, and therefore (re)productions and exacerbations of traditions of repression constructed by historically oppressive forces and its beneficiaries, then logically, social justice during the ongoing crisis will have to consult history to locate the root of the cause, for an *injustice not to be buried*, and for justice to be achieved. It is the necessity for a liberatory philosophy rooted in and fuelled by memory in the struggle for social justice in South Africa that I explore next.

3 The past: Implicating conquest

... White supremacy has a broader reach, history and scope than Apartheid. ... A more pertinent example of the prophetic nature of this critique is present day South Africa which while it is “post-Apartheid”, is far from “post-racial”, post-White Supremacist or post-conquest.⁶²

58 Modiri (n 53) 232 (own emphasis). See also Ramose (n 15) 70; Terreblanche (n 10) 460; Madlingozi (n 2) 135.

59 Plagerson & Mthembu (n 56) 7.

60 Plagerson & Mthembu (n 56) 10.

61 See Ramose (n 1) 35.

62 Dladla (n 2) 136-137.

Following from the above, we are able to now grasp *who* those in need of social justice during the ongoing COVID-19 pandemic are. Restorative justice as a precursor to social cohesion then demands the eradication of the institutions that engender exclusion and deprivation of the majoritarian population.⁶³ Following philosopher Ndumiso Dladla's logic, A South African society will then be a just society when the historically oppressed are *freed from* the unethical prevailing order that diminishes their human essence and they are able to (re)claim the associated *freedom to* enjoy an untainted humanity.⁶⁴ For as Dladla presents it to us: '[s]urely a human-being who comes of consciousness in a world in which her bondage is taken for granted *must of necessity reflect upon the condition of this bondage, its causes and devise ways in which to gain freedom*'.⁶⁵

Social justice should then be understood as something to be achieved, thus, a state of affairs realised through *action*, the content of which is to be determined by a philosophy and ethics that serve as an *action-guide*, or philo-praxis, for the construction of a just society. In an oppressive settler-colonial/neo-apartheid context, the actions that will antagonise social and economic unfreedom then ascribe to what philosopher Enrique Dussel formulates as a philosophy and ethics of liberation.⁶⁶ In his critique of the (unethical) post-1994 constitutional milieu, Terblanche Delpont draws on Dussel's formulation of liberationist ethics to assert that once we realise that 'the position of the victim is not a natural fact' but rather 'a creation of those in power and with privilege to keep their positions by exploiting those less powerful',⁶⁷ then what is considered to be *ethical* practice when humans interact relationally will be the action that confronts and disturbs the systems of domination that prevent and subvert the 'production, reproduction, and development of the *human life in the concrete*'.⁶⁸ Stated differently, what we *ought* to do when constructing a just society in a given context is to be determined from the perspective of the victim, being those who are

63 SB Biko *I write what I like* (1978) at 64. Lest we forget Biko's desideratum that '[o]ne has to overhaul the whole system in South Africa *before hoping to get black and white walking hand in hand to oppose a common enemy*' (own emphasis).

64 Dladla (n 2) 44.

65 Dladla (n 2) 2 (own emphasis). See also Ngwena (n 28) 28; and P Freire *Pedagogy of the oppressed* (2000) at 85. Both these authors make similar points: Ngwena asserts that '[h]istories give us memory. When they reveal palpable injustices, they give us a foundation for a mission and a sense of remedial orientation.' Or as Freire puts it to us: 'But since people do not exist apart from the world, apart from reality, the movement must begin with the human-world relationship. Accordingly, the point of departure must always be with men and women in the "here and now," which constitutes the situation within which they are submerged, from which they emerge, and in which they intervene'.

66 Dussel (n 14). See also T Delpont 'An ethical (anti-)constitutionalism? Transformation for a transfigured public' (2014) 46 *Acta Academia*.

67 Delpont (n 66) 110-111.

68 Delpont (n 66) 107; quoting 2013 Dussel (n 15) 56.

‘materially unable to produce, reproduce, and develop her human life and formally excluded from the discursive apparatus of a specific community’.⁶⁹

It is then a philosophy of liberation that grounds the earlier contention that social injustices today can be explained, and its origins and causes can be located and disrupted directly, by way of critical historical reflection and remembrance.⁷⁰ From this standpoint, social justice in settler-colonial post-1994 South Africa requires one to properly implicate the ‘root’ of the injustice if justice proper is to be achieved.⁷¹ In doing so, memory serves as a site of resistance.⁷² For Ramose, the liberationist philosophy that guides us to *ethical* actions aimed at the humanisation of the historically marginalised majority in the ‘new’ South Africa is certainly a philosophy of memory, and it is through a philosophy of memory that emancipation and social justice is to be achieved.⁷³ The question then, of course, is *which* memory, or *which historical injustice*, are we to charge as the *original* injustice from which injustices lived in the present emanate? Ramose argues that the original injustice that survived democratisation is one of unethical conquest and dispossession of the ‘indigenous peoples conquered in the unjust wars of colonisation’, and the consequential settlement of colonialists and their successors in title.⁷⁴

Influenced by Ramose’s philosophical insights and borrowing from Magobo More, Dladla argues that the emphasis on *apartheid* as the root or source of injustices experienced by Black people in a post-1994 South Africa is misplaced. He argues that apartheid was one particular manifestation or formal concretisation of the long-standing and uninterrupted tradition of white supremacist domination launched in 1652.⁷⁵ According to Dladla, by *fixedly* framing *apartheid* as an extraordinary event or ‘a misstep’ in need of correction:⁷⁶

[a]partheid as such then has limited historical significance and is often used in an obfuscatory manner to distort the length of time over which liberation has been outstanding and to deflect attention from the conquest of indigenous people in the unjust wars of colonisation.

Also in line with Ramosean meditations, and resonating with Dladla’s perspective, Modiri endorses this indictment of non-racial liberal constitutionalism in post-1994 South Africa for facilitating and naturalising a less obvious but equally – if not more – devastating

69 Delpont (n 66) 110.

70 Ramose (n 15).

71 Modiri (n 4) 18.

72 hooks (n 3) 174.

73 Ramose (1); Ramose (n 15); Ramose (n 16).

74 Ramose (n 16) 310.

75 Dladla (n 2) 20.

76 As above. See also Modiri (n 4) 14.

continuation of colonial-apartheid contradictions and power configurations. Emphasising the importance of correctly implicating conquest as the original injustice in need of rectification, Modiri asserts that '[w]hereas freedom from apartheid involves the egalitarian liberal inclusion of the oppressed black majority into the conqueror's world, liberation from conquest involves dismantling the conqueror's world altogether followed by the collective construction of a new social order'.⁷⁷

If social justice for the historically oppressed mandates an interrogation of 'the present in light of the past',⁷⁸ then social justice for subjects entrapped by the conqueror's colonial-apartheid apparatus that survived the transition to formal deracialisation, is inherently decolonial – or rather, post-conquest⁷⁹ – in essence and mission. Decolonisation can then be understood as *rupture* or a radical/revolutionary/unclean *break* from an oppressive order,⁸⁰ thereby rendering any compromise or smooth comfortable 'transition' ethically unsound.⁸¹ A comfortable transition devoid of rupture cannot then be considered social justice proper from the perspective of the historically oppressed,⁸² since such a compromise or negotiation on the content of social justice leaves the system that engenders their deprivation and exclusion intact and functional, albeit more palatable and less affronting to those in positions of privilege who wish to retain their beneficiary status without disruption or condemnation.⁸³ Stated differently, an unbending rupture from settler-colonial rule and subjugation rejects any compromise for preserving and obscuring the integrity of the settler polity that ensures what Patrick Wolfe describes as the continuous 'elimination of the native'.⁸⁴ In the context of the 'new' South Africa, this elimination is expedited through (1) the black elite's co-optation and integration into the zone of being as beneficiaries of a capitalist system that continues to thrive on the subservience of those in the zone of non-being,⁸⁵ and (2) by producing and intensifying conditions for both social and material death for the constituents of the zone of non-being, a systemic elimination, the concrete manifestations of which has become more visible during the ongoing pandemic. As such, settlerdom then creates a situation of uninterrupted negation, resulting in the indigenous conquered people's elimination when they

77 Modiri (n 4) 16. See also Ramose (n 21) 320.

78 Ramose (n 15) 64.

79 See Dladla (n 2) 123.

80 See Tuck & Yang (n 17) 20 & 31; and Santos (n 2) 26. See also N Wa Thiong'o *Decolonizing the Mind: the politics of language in African literature* (1986) at xii.

81 Terreblanche (n 10).

82 Madlingozi (n 2); Sibanda (n 18).

83 Modiri (n 4) 22 & 25.

84 P Wolfe 'Settler colonialism and the elimination of the native' (2006) 8 *Journal of Genocide Research*.

85 Madlingozi (n 2) 124-125 & 135.

are assimilated into the structures and spheres of the conquerors/settlers, as well as when these structures produce conditions that result in their material destruction and erasure.⁸⁶

Modiri argues that if the denigration to which the black majority are subjected is systemic and not just exceptional interpersonal encounters,⁸⁷ then the system that favours white supremacist capitalist patriarchy to safeguard white male interests in settler-colonial South Africa is what we are to destabilise and dismantle if a socially just post-conquest future is to be attained.⁸⁸ Rupture then gives credence to Audre Lorde's proclamation that 'the master's tools [of compromise by way of gradual and slow non-racialist 'transformation'] will never dismantle the master's house',⁸⁹ and it is only by way of 'undoing the settler-created house' that the socially and materially oppressed can be humanised,⁹⁰ since it is the construction of the master's house in unethically conquered territories that is to blame for the social death to which the black majority has been condemned since the settler's arrival to present.

The reflections on contrasting lockdown realities, proffered above in part one, proves that the inauguration of the deracialised post-apartheid paradigm might have formally 'freed' the 'formerly' conquered peoples from discriminatory legislated servitude and subordination, but that the system that engineered their unfreedom under pre-1994 rule since 1652 remained unscathed by this transition.⁹¹ Ramose explicates that with this transition to post-1994 democratisation and globalisation, 'only limping or defective sovereignty was restored to the indigenous conquered people', and that '[t]heir sovereignty remains defective because their newly acquired sovereignty was already burdened with economic bondage to the former colonial ruler'.⁹² It is the defectiveness of the sovereignty and persisting unfreedom safeguarded through outward deracialisation that informs critical psychologist Kopano Ratele's description of post-1994 South Africa as a 'historically colonised, multiracial, multicultural country with significant socio-economic inequalities wherein blacks run the government and whites run the economy'.⁹³ Modiri endorses this view with reference to Ali Mazrui's effective crown-and-jewel analogy when he writes:⁹⁴

86 See Fanon (n 2).

87 Modiri (n 4) 17.

88 Modiri (n 4) 16-17.

89 A Lorde *The master's tools will never dismantle the master's house* (1979) at 19.

90 Madlingozi (n 2) 141.

91 Terreblanche (n 10).

92 Ramose (n 11) 742.

93 K Ratele 'The singularity of the post-apartheid black condition' (2015) 49 *Psychology in Society* at 47.

94 Modiri (n 4) 17.

[T]he South African case has been said to be a paradigmatic case of white people relinquishing the crown (state power) but keeping the jewels (socio-economic power). The formal abolition of legally sanctioned racial discrimination should therefore not be conflated with the elimination of the structures, practices and relations of coloniality and white supremacy.

In the white male settler-colonial structure, the devotion to dogmatic economic fundamentalist values continuously reifies and agitates a particular unfreedom marked by race.⁹⁵ Racialised subjects that depend on the deracialised state to enable the (re)production and development of their human lives are rendered disposable. If what we *ought* to do is dislodge the line that partitions humanity into zones of (non-)being to achieve social justice for the historically periheralised majority,⁹⁶ and not just include a selected elite into a system of domination that reproduces oppression,⁹⁷ then a collective commitment to a historical, substantive justice that chiefs the interests of the most vulnerable in South Africa submits to the Fanonian exigency for decolonisation, being that 'the last shall be the first'.⁹⁸

Accordingly, social justice efforts in a stratified settler-colonial context must be *decolonial* in essence and mission when colonial conquest is correctly implicated for injustices in the 'now'. Emancipation through decolonisation, then, calls into question the legitimacy of empty gestures by those in positions of power limned as justice that circumvent and frustrate the overhauling of the system.⁹⁹ It then follows that the final part of this contribution considers and defends one such pathway towards a socially just, decolonial future particular to the pandemic.

3 The future: A question of return

Whatever settlers may say – and they generally have a lot to say – the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism's specific, irreducible element.¹⁰⁰

Congruent with Ramosean formulations of justice in the 'new' South Africa, Tuck & Yang argue in their widely cited critique of the incommensurability of decolonisation with rights-based social justice

95 Modiri (n 4) 21; Dladla (n 2).

96 Terreblanche (n 10); Madlingozi (n 2) 142.

97 Madlingozi (n 2) 135.

98 Fanon (n 17) 2.

99 Biko (n 63) 64. See also Madlingozi (n 2) 132 with reference to Robert Mangaliso Sobukwe's similar demand for the complete overhaul of the prevailing societal order. Further see Dladla (n 2) for a comprehensive but concise discussion on both Sobukwe and Biko's Black Radical abolitionist thought.

100 Wolfe (n 84) 388.

initiatives and frameworks, that the settler-colonial situation could only be rectified, and indigenous conquered people will only be able to claim social justice *through* decolonisation. In other words, decolonisation as a tool to achieve social justice in the settler-colonial situation, as well as an *alternative way of being* and co-existing in a shared and equal humanity is only possible if the settler-colonial situation is disrupted and destabilised where it matters most: the land.¹⁰¹ On their broad reading of when the ‘settler colonizers comes to stay’,¹⁰² the return of unjustly seized land is an indispensable element and possibility condition for decolonisation proper, without which any claim to having decolonised a settler-colonial state is premature and ethically barren. Decolonisation, when taken seriously, is then alive to the inextricable link between freedom and land, as Ramose and his intellectual predecessors and successors steadfastly emphasise. Fanon tells us as much in his pioneering work, *The Wretched of the Earth*, stating that ‘[f]or a colonized people, the most essential value, because it is the most meaningful, is first and foremost the land: the land, which must provide bread and, naturally, dignity’.¹⁰³

Settler-colonialism is then understood not as an event, but as a *structure*;¹⁰⁴ a violent, institutionalised interference with indigenous people’s relationships to land for as long as settlerdom persists at the expense of the indigenous conquered people’s humanity.¹⁰⁵ Tuck and Yang in their dissection of the particularity of the settler-colonial

101 Tuck & Yang (n 17) 21.

102 Wolfe (n 84) 388; Tuck & Yang (n 17) 5. It is worth noting that even though Wolfe, as well as Tuck and Yang’s critiques are theoretical interrogations of the universal enterprise and structure of settler-colonialism where settler occupation of territories at the expense of indigenous people persist, they draw special attention to the settler-colonial situation in Australia and the United States, respectively. One must however appreciate – as it was by the authors in question – that, on a practical and conceptual level, settler-colonial societies look and function differently depending on the given geographical, cultural, socio-historical, and politico-economic context. Different geographies with different histories and constituent relationships produce experiences that are not universalisable. To briefly explain in oversimplistic terms, settler colonialism in the US, for example, looks different to settler-colonialism in South Africa for a variety of reasons. One such reason is for example that settlers in the US far outnumber the indigenous population, whereas in South Africa this is clearly not the case – thereby constructing a situation in the US where whites run the government, as opposed to South Africa’s Black governed settler-colonial state; adding another or different layer of complexity to the settler situation in South Africa. Another example would be that the constituents of the indigenous population in the US are ethnographically different to that in South Africa, therefore creating a particular experience and claims to restoration put forward by Black people on the African continent where a white minority has settled, and African people in the diaspora where they have been forced into settlement as people forced into enslavement. These differences factor into what decolonisation entails in a particular settler-colonial situation and the mechanisms to be employed to decolonise a particular settler-colonial state.

103 Fanon (n 17) 9.

104 Wolfe (n 84) 388.

105 See Tuck & Yang (n 17) 5.

situation, explain how settler usurpation relies on the remaking of land into property with the effect that 'human relationships to land are restricted to the relationship of the owner to his property'.¹⁰⁶ In this way, indigenous people's '[e]pistemological, ontological, and cosmological relationships to land are interred, indeed made pre-modern and backward. Made savage'.¹⁰⁷

From this viewpoint, decolonisation *should* include the abolition of the colonial system that constructs land as private property, arguing that this system legitimises and secures settler occupation, dominance, and social exclusion of the indigenous conquered peoples through private ownership.¹⁰⁸ It is only once the colonial system severing the indigenous conquered people's ties and relationships with the land has been dismantled, and their sovereignty has been restored that a settler-state can be claimed to be decolonised. Without addressing the 'land question', substantive social justice for the historically conquered and colonised population remains, and will continue to remain, elusive. Following on the above, the rest of the discussion considers a reading of Ramosean meditations in which *an ethical decolonial social justice* for the historically marginalised black majority in South Africa during the ongoing pandemic, and thereafter, demands an answer to this contentious 'question'.

To then return to the postulation of decolonisation as an uncompromising rupture of the oppressive prevailing order within a South African context: for Ramose, the 'limping defective sovereignty' conceded to the indigenous conquered peoples with the transition to the 'new' South Africa was one that fortified the annulment of the conquered peoples' rightful claim to the restoration of sovereign territory.¹⁰⁹ Contextualising the aftermath of what he describes as 'the ethically unsustainable and politically contestable 'right of conquest',¹¹⁰ he writes:

Van Riebeeck vowed that the land would be "retained" and his successors in title have ensured its survival to date. The retention means in practice that the unjustly acquired wealth of the conqueror continues to be their possessions, protected by the constitution of South Africa, Act 108 of 1996. From the point of view of the conquered, this injustice ought to be remedied. Furthermore, the retention of the land means that sovereign title to territory is yet to revert to the conquered peoples of South Africa, the "rightful" owners of the land "since the beginning of time". By opting for government succession, the "new" South Africa failed to respond to this ethical exigency of historic title. It is lunatic absurdity to justify this failure by the frivolous argument that the restoration of sovereign title to territory to the rightful owners is

106 As above.

107 Tuck & Yang (n 17) 5.

108 Tuck & Yang (n 17) 26.

109 Ramose (n 16) 319-320.

110 Ramose (n 9) 553.

impossible since not every one of them can be allocated a piece of land.¹¹¹

Elaborating on this point, critical scholar and social justice activist, Tshepo Madlingozi explicates that '[i]t is Ramose's contention that the Constitution, therefore, shows a bias towards Eurocentric legal doctrine, and the putative right of conquest, because it aligns itself with the doctrine of extinctive prescription in terms of which after a passage of some time illegally obtained property becomes lawful'; enabling a dominant minority in a supposedly post-racial democratic South Africa to concretise their beneficiary status through the resultant '*de facto* and *de jure* doctrine of non-reversibility with respect to loss of territory'.¹¹² Echoing this dissent of the decreed irreversibility of title to territory under post-1994 constitutionalism, Dladla denounces this refusal to reverse the settler's claim to territory as white supremacy at work because it allows white powers to retain benefits accrued by way of racist practices of ontological exclusion and capitalist exploitation that diminished, and continues to diminish, the humanity of the oppressed majority.¹¹³ In a similar vein, Modiri adds that the conversion of unethically obtained settler/white interests into constitutionally enshrined and protected rights contradicts the post-1994 portrayal of the constitution as a 'non-racial' instrument; arguing that the liberal depiction of post-1994 South Africa as non-racial operates to mystify and shield unethically obtained white interests.¹¹⁴ By implicating unremedied conquest as the source of injustices experienced in the present, and by further implicating liberal non-racialism under a constitutional dispensation for the preservation of white interests acquired by way of colonial-apartheid subordination, apartheid can then be understood, to quote Dladla, as 'the ugly political sister of liberalism born of the same womb of [the colonial conqueror's] White Supremacy'.¹¹⁵

To recapitulate: social justice in present-day South Africa is inherently and unavoidably *decolonial* in essence and mission if we accept that (1) it is the experience of the victims of conquest in post-1994 South Africa that is to inform what we deem ethical remedial action when confronted with injustice; and (2) we acknowledge that in the South African context the victims are constructed through white supremacist capitalist patriarchal colonial conquest. And if a decolonial social justice boils down to addressing the 'land question', then the logical and natural conclusion to draw, to borrow at length from Ramose one final time, must be that the:¹¹⁶

111 Ramose (n 15) 65.

112 Madlingozi (n 2) 142.

113 Dladla (n 2) 122.

114 Modiri (n 4) 18. See also Dladla (n 2).

115 Dladla (n 2) 123.

116 Ramose (n 16) 310-311.

recovery and restoration of full, integral and comprehensive sovereignty to the indigenous peoples conquered in the unjust wars of colonisation is a moral and political imperative that may not be consigned to oblivion. The memory of the original injustice of conquest in the unjust wars of colonization shall not be erased until substantive justice in the form of recovery and restoration of lost sovereignty remedies the situation. *An integral part of our thesis is that recovery and restoration as the twin exigencies of justice are the necessary means to the construction of peace in South Africa. They are thus the means to challenge and overcome bounded reasoning which obscures the biological oneness of humanity ...*

Therefore, it is suggested that without an *ethical* answer from the perspective of the historically conquered to the land question, programmes of 'social justice' offered by those in positions of power during pandemic times are palliative at best. It is this connection between the land question and achievement of social justice in the ongoing COVID-19 pandemic that I now consider in brief.

Throughout the pandemic, the 'home' has featured prominently in disease-mitigating strategies. Not only were South Africans instructed to 'stay at home' with enforced restrictions on movements in the form of curfews, traveling prohibitions, and limited contact-based economic activity to varying degrees at different lockdown levels to ensure social distancing to curtail the spread of the virus, but people were confined to their homes for isolation and quarantine if they were exposed to the virus, or contracted it. The failure to abide by such 'stay at home' orders was deemed a punishable offence to ensure compliance during the National State of Disaster, as declared by President Ramaphosa on 15 March 2020.

For the conquered peoples condemned to the zone of non-being, staying at home was next to impossible when their lack of social capital and exclusion from the white-dominated liberal capitalist economic structure meant that they were to forfeit an income and sustenance. For the historically marginalised majority, instructions to 'stay at home' to avoid the virus implied that they were to accept a different demise in the form of intensified structural poverty and dehumanising material deprivation. Those deemed 'essential' enough to continue working during the pandemic in low-income 'modern forms of servitude'¹¹⁷ have evaded a similar fate in exchange for an increased risk of contracting and transmitting the virus. Ultimately, the pandemic both amplified and magnified the effectiveness and force with which settler-colonialism and racial capitalism operates in a non-racial post-1994 South Africa. Clearly, the order to 'stay at home' never *truly* applied to those in the zone of non-being; serving to preserve the lives of those in the zone of being.

117 Modiri (n 53) 232-233.

The white supremacist structures of settler-colonialism and racial capitalism collude to engender the social and material oppression of the indigenous conquered peoples during this pandemic. The former having robbed them – and continue to do so – of a home to which they could retreat to seek refuge and protection through the retention of unjustly and unethically seized land; the latter ensuring the fixation of the indigenous conquered peoples in the zone of non-being by intensifying their material deprivation and impoverishment if they *do* ‘stay at home’ without a source of income. As illustrated above, this state of affairs is a conundrum primarily reserved for racialised colonial-apartheid subjects in a white economic structure, which in turn ensures that these subjects *remain* disempowered and dispossessed of their sovereign title to territory.

Decolonial justice understood as the dismantling of these systems of subordination by way of returning the stolen sovereign title to territory to the indigenous conquered peoples during pandemic times will then allow the indigenous conquered peoples to disinvest from and abolish both settler-colonial occupation and the racial capitalist dehumanisation that engender their oppression: the former by way of reclaiming their territory, thereby returning a home during a time in which having one saves lives, the latter making it *possible* for them to ‘stay at home’ without the looming threat of dehumanising poverty and social and material death hanging like a sword over their heads. By eradicating white supremacy and by unsettling both settler-colonial usurpation and racial capitalism as tools of domination through restoration of title to land, the indigenous conquered peoples will be able to produce, reproduce, and develop human life in the concrete; something they are prevented from doing for as long as the original injustice of conquest and dispossessed title remains unremedied. Such an anti-capitalist approach to the humanisation of the indigenous conquered peoples would amount to *ethical* social justice from the perspective of the victims of conquest, if we consider that one of the fundamental principles of African liberationist philosophy demands that when confronted by the choice between the possession of wealth on the one hand, and the preservation of human life on the other, that the latter should always take priority.¹¹⁸

To summarise and conclude: based on the above reading of Ramosean meditations, it logically follows that the restoration of title constitutes *ethical* social justice during pandemic times from the perspective of the historically conquered majority in South Africa, whereas the retention of title by the conqueror’s successors in title is *unethical* from the viewpoint of the victims of social injustices stemming from conquest for its inability to (re)produce and develop

118 Ramose (n 2) 7. This imperative, according to Ramose, is expressed in the principle of ‘*feta kgomo o tshware motho*’.

their human lives in the concrete. Social justice in South Africa during the ongoing COVID-19 pandemic is then necessarily *decolonial* justice. By correctly identifying white supremacist capitalist patriarchal conquest as the root of injustices experienced during the pandemic, one is faced with the truism that persisting injustices could only be remedied properly through the restoration of unjustly dispossessed land, since such restoration will: (1) provide the historically marginalised black majority with a safe home during pandemic times and thereafter; (2) enable their disinvestment and eventual freedom from their '[e]conomic bondage to the successors in title to conquest'.¹¹⁹ Failing to restore title to land cannot then be limned as 'non-racial', nor 'just' when such an omission serves to protect white (supremacist) interests at the expense of the indigenous conquered people's humanity.¹²⁰

This Ramosean reflection provides insights to guide us towards a socially just future from the perspective of the victims of persisting colonial-apartheid injustices in present-day South Africa. It is then submitted that substantive justice demands of us an answer to the 'land question', which cannot be postponed until 'after' the pandemic, nor 'consigned to oblivion',¹²¹ when its postponement is the cause of injustices in the present, and its *ethical* answer from the perspective of the historically oppressed peoples of South Africa is precisely how they get to finally enjoy an untainted humanity, second to none.

119 Dladla (n 2) 35.

120 Dladla (n 2) 122; Modiri (n 4) 18.

121 Ramose (n 16) 310-311.

RACIAL EPISTEMOLOGY AT A TIME OF A PANDEMIC: A SYNOPSIS OF SOUTH AFRICA'S PERSISTING INEQUALITIES THROUGH THE LENS OF '#FEESMUSTFALL' AND '#FREEDECLONISEDEDUCATION'

by Gudani Tshikota*



Abstract

The creation of South Africa was accompanied by the creation of an education system that would reflect Eurocentric ideologies, concepts, and livelihoods. When South Africa attained 'democracy', this creation was not abolished. A direct consequence of this was that the racial epistemology of conquest continues. The #feesmustfall and #FreeDeclonisedEducation protests were a response to the persistence of this creation. However, these calls were also not realised. Which means that the racial epistemology of conquest persists. In this article I attempt to show how the realisation of these calls could have dealt with the challenges that the education system and sector faces as a result of the coronavirus pandemic. I do this by problematising the exclusionary nature of the type of education and learning that is prevalent in South Africa. I opine that in order for the racial ontology of conquest to be abolished, there should be free and decolonised education.

* LLB, University of Pretoria. ORCID iD: 000-0001-5967- 3101. To Masixole Mlandu, Busisiwe Seabe, Amla Monageng and the many named and unnamed student activists, history will absolve you. Although completely different, the opening lines of this article were inspired by one of my favourite openings to ever grace literature. I dedicate all my writings to Suzan Tshikota and Karabo Tshikota. To Mr Steven Ball and his family, Mr Muanalo Dzhivhuho and Mr Phumudzo Tshikota, thank you for your continuous support. Aluta!

1 Introduction

Mcebo Dlamini spent about two years in prison after being denied bail, whereafter he was trialled and found guilty of public violence for his participation in the call for free and decolonised education.¹ Similarly, Kanya Cekeshe was also found guilty and sentenced to five years imprisonment for his participation in this call.² Many student activists and protesters know the smell of rubber bullets, but Shaeera Kalla's body was subjected to rubber bullets not only once, but almost ten times.³ Naledi Chirwa, and many other student activists, were also victimised by higher education institutions, some suspended, and others expelled for their participation in this call.⁴ Now it is our time to engage in the plight for free and decolonised education. During the COVID-19 pandemic, most universities introduced online learning.⁵ The pandemic brought with it so much pain; economies found themselves in the grips of depreciation, and humanity was found shaking as about 56 356 people around South Africa had lost their lives to this monstrous pandemic by middle April 2021, whilst poverty and unemployment continued to worsen.⁶ Despite the entire country coming to a standstill, universities across South Africa decided to continue their activities on online platforms.⁷

The implementation of online learning was problematic in many respects, but for the purpose of this article, focus will fall on how online teaching and learning excluded certain groups of students from the services of these South African universities.⁸ This article will

- 1 C Manyathela 'Fees must fall activists Mcebo Dlamini found guilty of public violence' *Eye Witness News* (Johannesburg) 09 March 2020 <https://ewn.co.za/2020/03/09/fees-must-fall-activist-mcebo-dlamini-found-guilty-of-public-violence> (accessed 27 January 2021).
- 2 Z Pikoli 'Growing calls from civil society to "Free Kanya Cekeshe"' *Daily Maverick* 22 November 2019 <https://www.dailymaverick.co.za/article/2019-11-22-growing-calls-from-civil-society-to-free-kanya-cekeshe-now/>. accessed 27 January 2021).
- 3 C Manyathela 'Police investigates after Wits student leader hit by 10 rubber bullets' *Eye Witness News* (Johannesburg) 20 October 2016 <https://www.google.com/amp/s/ewn.co.za/2016/10/20/Police-investigate-after-Wits-student-leader-struck-by-10-rubber-bullets/amp> (accessed 28 January 2021).
- 4 Y Sobuwa 'What happened to the "fees must fall" movement leaders' *Sowetan Live* <https://www.sowetanlive.co.za/news/south-africa/2018-02-28-what-happened-to-the-fees-must-fall-movement-leaders/> (accessed 28 January 2021).
- 5 South African Government 'Minister Blade Nzimande: Government's intervention measures on Coronavirus COVID-19' 24 March 2020 <https://www.gov.za/speeches/response-covid-19-24-mar-2020-0000> (accessed 22 January 2021).
- 6 Congressional research services 'Global effects of COVID-19' 07 March 2020 <https://fas.org/sgp/crs/row/R46270.pdf>. (accessed 29 January 2021).
- 7 South African Government (n 5).
- 8 See Z Pikoli 'South Africa: Academics Reject Claims That 2020 Has Been a Success for Universities' 14 December 2020 <https://allafrica.com/stories/202012150228.html> (accessed 23 January 2020) where about 300 academics all over South African universities revealed that some of the problems that online learning created were; increasing dropout rates, the adverse effects concerning the critical thinking development of students, and many other issues as highlighted in greater detail in the latter paragraphs.

argue that in 2021 there is neither free nor decolonised education in South Africa, and as a result, the inequalities in the education system persist. This argument will be made by indicating that South Africa was, among other things, built on racial epistemology and that this racial epistemology was not abolished when South Africa attained its so-called 'freedom' in 1994.⁹ This article will also reveal how the COVID-19 pandemic has once again highlighted the importance of the call for free and decolonised education in South Africa. And lastly, this article will indicate that the #feesmustfall and #FreeDecolonisedEducation calls could have addressed these issues if they were realised, and as a result, such calls are further enunciated; Mayihlome!¹⁰

2 Racial epistemology

2.1 An introduction to racial epistemology in South Africa

The emergence of what we know as South Africa today started in 1652 and developed until 1910.¹¹ In 1910 the racial order was legalised and formalised, which persisted through the 1913 Land Act¹², the 1948 declaration of apartheid, the 1961 Constitution¹³, and the 1983 Constitution.¹⁴ The year 1652 set in motion the colonial encounter, when Jan van Riebeeck arrived in the Cape of Good Hope and began to reshape the area which would later be known as 'South Africa' in the image of the conqueror.¹⁵ This resulted in what historical literature has coined as 'conquest', which results from political economy, ontology, and epistemology.¹⁶ This is how South Africa was constituted.¹⁷ Racial capitalism entailed the creation of an economy that favours white people over black people, that is, white people being beneficiaries and black people being labourers.¹⁸ Racial

9 H Savo 'Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa' (2016) 1 *Transformation in Higher* at 2.

10 The term 'Mayihlome Ihlasele' is an isiZulu phrase which was used during anti-colonial-apartheid protests signifying non-resistance and not backing down. Directly translated the term means 'Let us arm ourselves and attack'.

11 South African History Online 'History of slavery and early colonisation in South Africa' <https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa> (accessed 15 April 2019).

12 Natives Land Act 27 of 1913.

13 The Republic of South Africa Act, 1961.

14 The Republic of South Africa Constitution Act 110 of 1983.

15 JM Modiri 'The jurisprudence of Steve Biko: A study in race, law and power in the aftermath of colonial-apartheid' PhD thesis, University of Pretoria 2017 at 182.

16 B Magubane 'The problem and its matrix: Theoretical and methodological issues' in *The political economy of race and class in South Africa* (1979) https://knowledge4empowerment.files.wordpress.com/2011/08/magubane-1979-1990-ch1_poliecon-raceclass.pdf (accessed 22 May 2020) at 3; T Serequeberhan 'African Philosophy as the Practice of Resistance' (2005) 4 *Journal of Philosophy: A Cross-Disciplinary Inquiry* at 50; Savo (n 9) 2.

17 As above.

18 Magubane (n 16) 3.

ontology entailed the creation of a reality that presented black people as non-humans, thus justifying their enslavement and their reduction to the lowest human class.¹⁹ Racial epistemology entailed the imposition of Western education, cultures, traditions, and norms, accompanied by the demonisation and destruction of indigenous African knowledge.²⁰ According to Modiri, conquest should be understood as the taking over of foreign territory through physical, structural, and symbolic violence.²¹ Accordingly, in South Africa, black people are the conquered and white people are the conquerors.²²

When white people came to Africa, they made several claims: Among these were claims of an empty and unoccupied land, and the claim that African people were not civilised.²³ This seems to be a contradiction in and of itself, because if Africa were indeed empty, who would the missionaries have to civilise? Accordingly, the belief was that Africans ‘needed’ the Europeans to make them human-like through the imposition of religion and education.²⁴ Pivotal to white settler[ism] was the imposition of a form of education that would ensure that Eurocentricity was maintained and preserved for centuries to come.²⁵

In the middle 1900s, the children of the indigenous people were introduced to an education that did not reflect their backgrounds, histories, traditions, or norms.²⁶ They received an education of a lower standard than that provided to white pupils.²⁷ In addition to this, black students were directly and indirectly excluded from institutions of learning through fee hikes and racial segregation.²⁸ The exclusionary nature of these institutions was predetermined, as the system undertook to enslave the natives and strip them of any economic viability.²⁹ Through the establishment of the Bantu Education Act,³⁰ black people were subjected to an education that would relegate them to being slave labourers.³¹ Through the establishment of universities exclusively for black students, which

19 Serequeberhan (n 16) 50.

20 Savo (n 9) 2.

21 JM Modiri ‘Conquest and constitutionalism: first thoughts on an alternative jurisprudence’ (2018) 34 *South African Journal on Human Rights* at 320.

22 As above.

23 NS Cezula & L Modise ‘The “Empty Land” Myth: A Biblical and socio-historical Exploration’ (2020) 46 *Studia Historiae Ecclesiasticae* at 3.

24 Savo (n 9) 2.

25 As above.

26 As above.

27 Savo (n 9) 3.

28 CH Mackenzie ‘Black Students in “White” Universities: The character and provision of liberal higher education in post-apartheid South Africa’ (1994) 24 *A Journal of Comparative and International Education* at 67.

29 As above.

30 Bantu Education Act 47 of 1983.

31 P Bauer ‘Bantu Education Act’ *Encyclopedia Britannica*, 22 July 2020 <https://www.britannica.com/event/Bantu-Education-Act>. (accessed 06 June 2021).

were either of poor infrastructure or lacked resources, black people continued to receive an education that was of a lower standard compared to that received by white people in universities reserved exclusively for white students.³²

2.2 The persistence of racial epistemology in South Africa

Madlingozi opines that racial epistemology persists in South Africa because 1994 did not facilitate a breakaway from [colonial]-apartheid South Africa to freedom.³³ Many scholars ascribe this to the 1996 Constitution's³⁴ failure to address the injustices and tragedies of conquest.³⁵ The main contention here is that the 1996 Constitution undertook the task of moving South Africa forward without accounting for the segregated foundations upon which South Africa was built.³⁶ These foundations being, as discussed above, the racial ontology, racial capitalism, and racial epistemology of conquest.³⁷ To my mind, this is the reason why racial epistemology remains entrenched in South Africa's fabric, despite the claims of freedom.

Constitutional abolitionists also argue strongly against the notion of the year 1994 signifying a new South Africa.³⁸ They contend that the 1996 Constitution did not address the long history of segregation, inequality, and injustices in colonial-apartheid South Africa.³⁹ Accordingly, racial epistemology, as one of the foundations upon which colonial-apartheid South Africa was nurtured, has not been dismantled.⁴⁰ As a result, South Africa's education and forms of learning remain very much Eurocentric.⁴¹ Institutions of learning continue to speak from a Eurocentric mouth while enclosed in African names, and the education system does not reflect the needs, lived realities, histories, and norms of the indigenous people of 'South Africa'.⁴²

32 As above.

33 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 1 *Stellenbosch Law Review* at 127.

34 Constitution of the Republic of South Africa, 1996.

35 N Dladla 'Towards an African critical philosophy of race: Ubuntu as a philpraxis of liberation' (2017) 6 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* at 39.

36 As above.

37 Magubane (n 16) 3; Savo (n 9) 2; Serequeberhan (n 16) 50.

38 Dladla (n 36) 39.

39 As above.

40 Savo (n 9) 3.

41 As above.

42 As above.

3 Free decolonised education

3.1 Education during the COVID-19 pandemic

On 24 March 2020, it was reported that the Minister of Higher Education made an announcement that higher education institutions would have to switch to online learning.⁴³ Furthermore, the Minister of Basic Education took a decision to suspend contact classes to plan for a gradual resumption of face-to-face classes, whilst the management strategies for the COVID-19 pandemic were implemented.⁴⁴ Only nine universities were able to complete the 2020 academic year within the year 2020, and it comes as no surprise that all of them are former ‘whites only’ institutions, and were therefore at the receiving end of colonial and apartheid benefits.⁴⁵ The poor and former black institutions which house most of the vulnerable students of this country are said to have finished the 2020 academic year in 2021.⁴⁶ The COVID-19 pandemic has exposed once again the persisting inequalities that student activists were fighting against during the #feesmustfall and #FreeDecolonisedEducation protests.

The universities that were previously exclusively reserved for white students managed to finish the 2020 academic year in 2020 because these institutions are well resourced.⁴⁷ The majority of students in these universities are from households with study rooms, unlimited internet connection, environments that are conducive to learning, private tutors, and sufficient nutrition.⁴⁸ However, for many black students, online learning meant going back to townships where a person may share a room with five other people, and studying is an inconvenience to those around you.⁴⁹ It meant going back to an isolated village where network coverage is scarce, and electricity is unreliable or even unavailable for many.⁵⁰ In some cases, it meant

43 South African Government ‘Minister Blade Nzimande: Government’s intervention measures on Coronavirus COVID-19’ 24 March 2020. <https://www.gov.za/speeches/response-covid-19-24-mar-2020-0000#> (accessed 22 January 2021).

44 Congressional research services (n 6).

45 See Cezula & Modise (n 28); Staff Writer ‘2020 academic year remains on course’ *eNCA* (Johannesburg) 09 July 2020 <https://www.enca.com/news/2020-academic-year-remains-course-nzimande> (accessed 01 February 2021). The institutions which are said to have been able to complete the 2020 academic year are amongst others, the University of Pretoria, the University of Witwatersrand, the University of Stellenbosch, the University of Cape Town, the University of Johannesburg, the University of Free State, and Rhodes University.

46 As above.

47 As above.

48 L Bashman ‘Online learning punishes the poor’ *IOL* 12 April 2020 <https://www.iol.co.za/news/opinion/online-learning-punishes-the-poor-46963674> (accessed 01 February 2021).

49 As above.

50 As above.

that students who relied on feeding schemes and free food from university events were found without any alternative.⁵¹ Obviously, since we live in a classist society, it would be naïve to conclude that I am ignorant of the fact that not all black students suffered from these challenges, it is safe though to say the majority of them did.⁵²

In the sphere of basic education, public schools ceased any form of learning at first while private schools continued with online learning since they were equipped to do so.⁵³ Learners who benefitted from the Department of Basic Education's feeding schemes had to accept the reality of not having anywhere to eat when these schools closed down.⁵⁴ The inequalities created by racial epistemology are clearly visible at this time of a global pandemic. Before the onset of COVID-19, black pupils were already congested in their classrooms, sharing desks and at times fighting for chairs.⁵⁵ When this pandemic started, it exposed how impossible learning would become for black learners in particular. It exposed the exclusionary nature of having private and public schools. Private schools are better resourced, are very expensive, and fee hikes are introduced every year which results in the exclusion of black learners since most of them are unable to afford these schools.⁵⁶ Consequently, the majority of black learners remain discarded in some public schools which are underfunded and have poor infrastructure.⁵⁷ In my opinion, this is a consequence of, not only the colonial-apartheid implications, but also the fact that some of the promises of the progressive realisation of socio-economic rights are yet to be realised.⁵⁸

The announcement by former President Jacob Zuma that free education would be implemented was not the solution that the #feesmustfall and #FreeDecolonisedEducation protests sought.⁵⁹ Education remains unfree because even National Student Financial

51 As above.

52 As above.

53 As above.

54 Maverick Citizen 'There is no school feeding' *Daily Maverick* 12 June 2020 <https://www.dailymaverick.co.za/article/2020-06-12-there-is-no-school-feeding/> (accessed 1 January 2021).

55 B Phakhathi 'School infrastructure is still largely inadequate' *Business Day* 8 April 2019 <https://www.google.com/amp/s/www.businesslive.co.za/amp/bd/national/2019-04-08-school-infrastructure-is-still-largely-inadequate/> (accessed 2 January 2021).

56 Mackenzie (n 28) 67.

57 Phakhathi (n 56).

58 Staff Writer 'The most expensive schools in South Africa in 2021' *Business Tech* 12 January 2021 <https://businesstech.co.za/news/trending/459994/the-most-expensive-schools-in-south-africa-in-2021/> (accessed 19 January 2021).

59 A Areff & D Spies 'Zuma announces free higher education for poor and working-class students' *News24* (Johannesburg) 16 December 2017 <https://www.google.com/amp/s/www.news24.com/amp/news24/southafrica/news/zuma-announces-free-higher-education-for-poor-and-working-class-students-20171216> (accessed 23 January 2021).

Aid Scheme (NSFAS) qualifying students continue to get financially excluded since NSFAS does not cover all costs.⁶⁰ NSFAS was a government loan scheme founded in 1999 under the name Tertiary Education Fund for South Africa (TEFSA), which was later changed to NSFAS in 2000.⁶¹ It was implemented through an Act of Parliament (Act 56 of 1999). Its primary function was to loan disadvantaged students money on condition that they pay it back after graduation.⁶² This was later changed to what former President Jacob Zuma referred to as 'free education'.⁶³ The announcement of 'free education' by the former President only applies to students from households within a certain income bracket.⁶⁴ The 'missing middle' category is often ignored, and their circumstances are not considered.⁶⁵ The 'missing middle' includes students who are deemed too wealthy to benefit from NSFAS but in reality, these students struggle to fund their higher education because of various reasons.⁶⁶ In my view, some of these reasons may be; where both parents earn above the threshold amount but have other children depending on them, where the parents earn above the threshold amount but have debts, and last but not least, where there is a single parent who earns above the threshold amount but has other financial commitments that are out of their control. The fight for free and decolonised education was a fight for the universities in South Africa and during this fight, the needs, lived realities, histories and norms of the indigenous people of this country have been reflected.⁶⁷ Pivotal to that realisation is the notion of de-commodifying education because the indigenous people of this country, who were previously economically disadvantaged, cannot afford it.⁶⁸

The #feesmustfall and #FreeDecolonisedEducation calls would ask whether proper teaching and learning can take place amid a pandemic. Can one learn while anxious? Can learning take place amid questions like 'who is next', 'am I next', and so many other questions which would have highlighted the state of despair that this pandemic has ushered in? Is it possible for teaching and learning to take place while the parents of these students or pupils are facing

60 S Shoba 'Unprecedented number of students at risk of financial exclusion, says Wits SRC' *Daily Maverick* 17 February 2021 <https://www.dailymaverick.co.za/article/2021-02-17-unprecedented-number-of-students-at-risk-of-financial-exclusion-says-wits-src/> (accessed 3 March 2021).

61 Western Cape Government https://www.westerncape.gov.za/general-publication/student-guide-funding-nsfas?toc_page=1. (accessed 6 June 2021).

62 As above.

63 As above.

64 As above.

65 As above.

66 N Garrod & A Wildschut 'How large is the missing middle and what would it cost to fund it' (2021) 3 *Development Southern Africa* at 484.

67 Savo (n 9) 3.

68 As above.

retrenchments⁶⁹ or when their parents stand in long queues just so that they can receive a mere R 350.00 for food which should supposedly last the whole month?⁷⁰ Can one learn without the promised data and laptops or the pay-outs that the NSFAS' free education debacle promised yet seldomly delivered?⁷¹ It is therefore worth noting that this is not what 'free education' meant because free education is not a call for the tuition fees of disadvantaged students to be paid for, but a call for education to cease from being made a commodity.⁷² It is then further safe to say that in 2020, teaching and learning did not take place, but instead, measures were put in place to ensure that government and universities, particularly universities that were previously exclusively reserved for white students, are not seen as failures.⁷³ Some of the measures that some institutions took were, amongst others, giving students data and some laptops, and giving some students university-based accommodation.⁷⁴ However, not every student benefitted from these measures, and most importantly, students in poor universities did not benefit from these measures since their institutions did not have sufficient resources.

3.2 #feesmustfall and #FreeDecolonisedEducation

In the year 2016, students from all around South Africa began to protest for free and decolonised education.⁷⁵ The protests followed an 8% fee hike in tuition fees but ended up comprising of a wider call for education to no longer be commodified, the dismantling of racial epistemology, and the cessation of outsourcing.⁷⁶ In essence, the call for #feesmustfall and #FreeDecolonisedEducation was a call for the

69 N Makhubele 'COVID-19 impacting the workplace: Outlining retrenchments in good faith' *De Rebus* 1 August 2020. <http://www.derebus.org.za/covid-19-impacting-the-workplace-outlining-retrenchments-in-good-faith/> (accessed 22 February 2021).

70 N Majola 'Long queues as people scramble for Covid-19 relief grants' *News24* 15 July 2020 <https://www.news24.com/news24/southafrica/news/long-queues-as-people-scramble-for-covid-19-relief-grants-20200715> (accessed 27 January 2021).

71 South African Government (n 5).

72 JA Mbembe 'At the center of the Knot' (2012) 38 *Social Dynamics* at 11

73 Pikoli (n 8).

74 Universities such as the University of Pretoria, the University of Cape Town, and the University of Johannesburg are, amongst others, universities which had resources to facilitate the rollout of these measures. See South African Government (n 5).

75 G Mavunga '#feesmustfall protests in South Africa: A critical realist analysis of selected newspaper articles' (2019) 7 *Journal of Student Affairs in Africa* at 81.

76 As above.

decommodification of learning, and for African history to be rewritten and retaught from an African perspective.⁷⁷

The definition of decolonisation varies depending on who/where it is borrowed from. Decolonisation, with regards to racial epistemology, means the dismantling of racial epistemology, in that, education ceases to be a commodity and the education system and all forms of learning in this country reflect the knowledge, lived experiences, needs, histories, and traditions of the indigenous people of this country.⁷⁸ Ramose defines decolonisation as the deconstruction of the system to allow for the restoration of title and sovereignty over the system to the indigenous people.⁷⁹ Decolonisation would result in the conquerors denouncing their title and sovereignty over the South African territory.⁸⁰ Accordingly, this would be the abolition of the conqueror's South Africa.⁸¹

Decolonisation accounts for reparations, it interrogates the foundations of colonial-apartheid South Africa, and it calls for the reconstitution of South Africa.⁸² Decolonisation is also defined by Fanon as setting up a new humanism.⁸³ In my view, Fanon acknowledges that the only way to move away from colonisation is through a complete destruction of the systems that were created by colonisation, and by replacing these systems with new ones.⁸⁴ Ramose writes that the negotiated settlement that took place in the early 1990s in South Africa was faced with two paradigms that had an imperative role to play, namely; decolonisation and democratisation.⁸⁵ Expanding and exploring upon Ramose, he defines decolonisation, as just noted above, and democratisation as, conforming to the conqueror's claims concerning extinctive prescription.⁸⁶ In other words, democratisation does not undo the colonial-apartheid foundations of South Africa but instead assimilates black people into a South Africa that is founded, maintained, and preserved based on the racial capitalism, ontology, and epistemology of conquest.⁸⁷ This is the reason why this article calls for decolonisation of the education system and all forms of learning in South Africa and Africa as a whole.

77 As above. According to Mbebe, decommodifying education means removing the notion of students having to pay for knowledge, whether through a bursary or sponsor. It means that education is accessible to all without any financial barriers. See also Mbembe (n 75) 11.

78 Savo (n 9) 5.

79 MB Ramose 'An African perspective on justice and race' (2001) at 14.

80 As above.

81 As above.

82 As above.

83 F Fanon *The Wretched of the Earth Black Skin* (1968) 245.

84 Fanon (n 86) 35.

85 Ramose (n 82) 14.

86 Ramose (n 82) 15.

87 As above.

Decolonisation of the education system would mean that the natives are taught about their history, culture, laws, traditions, and livelihoods from an African perspective.⁸⁸ It would mean undoing the racial epistemology of conquest through undertaking the task of decolonising the curriculums, universities, and residence cultures which, in my view, continue to perpetuate racial inequality and patriarchy. Furthermore, it would entail undertaking the task of implementing equity in the management of these institutions through the appointment of black and underrepresented people in managerial positions. Last but not least, decolonisation of the education system would require education institutions to be part of society, open to society and to contribute to society, particularly to poor communities through, for example, their law clinics and other organisations capable of making change.⁸⁹ Such contribution to society would also require a declaration from these institutions that they did not only benefit from, but also played a role in the creation of a South Africa that is founded on the racial capitalism, ontology, and an epistemology of conquest.

This then takes us to the question, can decolonised education exist in a country that is not decolonised? The answer to this question is not in the affirmative. It is my view that in order for the racial epistemology of conquest to be undone, it must be accompanied by the undoing of the racial ontology and racial capitalism of conquest. In other words, security officers, waiters, domestic workers, taxi drivers, and all other people in low-income positions who cannot afford education should join the call.

It is safe to say that the #feesmustfall and #FreeDecolonisedEducation calls are a decolonial call both in education and in general. Decolonisation should not start at higher education institutions; it must start with primary schools and high schools. African learners from primary and high schools are introduced to western literature; they read and hear of the 'Shakespeare[s]' and never know of the 'Nguni wa Thiong'o[s]'.⁹⁰ The decommodification of education should also start there. How is it possible that in a country that many have celebrated to be democratic, we have pupils in private schools costing more than R200 000 per annum whilst others receive it for free?⁹¹ If people are willing to pay so much money for private school education, then it should tell

88 Savo (n 9) 5.

89 As above.

90 Savo (n 9) 5.

91 See L Cribbs 'Is quality education reserved for the wealthy and elite? Do public schools make the grade?' 23 January 2020. <https://medium.com/age-of-awareness/is-quality-education-reserved-for-the-wealthy-and-elite-6c021ea3ff4c> (accessed 06 June 2021). Cribbs writes about the United States of America, but her article is also applicable to the South African situation.

us something about the quality of learning and teaching in some public schools.⁹²

In my view, the inequalities that the COVID-19 pandemic highlighted in the year 2020 show that racial capitalism is still in existence, and the only way that it can be dismantled in 'post'-apartheid South Africa is through a decolonial call, particularly the one that was led under the #feesmustfall and #FreeDecolonisedEducation protests. This pandemic has shown us once again that although the initial call for free and decolonised education was successful in ensuring the end of outsourcing to some extent, and the implementation of the NSFAS' free education debacle, nothing much has changed. This pandemic exposed to us the need for the call to be revisited, and for decolonisation to be the primary consideration this time around. It is my view that had the decolonisation of the education system and all forms of learning been achieved, then black and poor institutions of learning such as the University of Limpopo, Vaal University of Technology, Tshwane University of Technology, and others, would not have been left behind after the implementation of online learning. The implementation of online learning would have taken cognisance of the fact that many black students live in homes that are not conducive to learning, and most importantly, that effective teaching and learning cannot take place during a pandemic.

Last year, more than 300 academics from various higher education institutions in South Africa signed a statement where they rejected the claims by universities that 2020 was a successful academic year.⁹³ They argue that these institutions are ignorant of the damage caused by lockdown regulations and that online learning will affect tertiary education terribly.⁹⁴ These academics have also noted how the lack of contact classes affected the critical thinking development of students.⁹⁵ They reveal how the pandemic brought with it so much loss and anxiety among both students and lecturers and how the dropout rate was a bit higher in the second semester.⁹⁶ These academics simply reiterate the argument presented in this article, in that, the COVID-19 pandemic highlighted the persisting inequalities in higher education institutions and society at large.⁹⁷ Accordingly, it cannot be said that 2020 was a success nor that any effective teaching and learning did take place during that time. Hopefully, this pandemic has also played a role in making academics more aware of the lived

92 As above.

93 Pikoli (n 8).

94 As above.

95 As above.

96 As above.

97 As above.

realities, needs, and backgrounds of the poor black students of this country.

It has already been highlighted that the creation of South Africa was not only confined to the racial epistemology of conquest, but also to racial capitalism and ontology. It is also worth noting that such creation was accompanied by violence.⁹⁸ Accordingly, it is my opinion that a call that seeks to dismantle these foundations will also be met with violence similar to how it was exposed in the previous protests. In my view, government and universities will continue to brutalise and even kill in defence of South Africa's colonial institutions and will either do this through the South African Police Service or through private securities. Moreover, the anxiety, pain, and fear that comes with seeking to undo such a long history of violence and deprivation are also worth noting. However, a fitting response is to be borrowed from Fanon when he says; 'Each generation must out of relative obscurity discover its mission, fulfil it, or betray it'.⁹⁹

4 Conclusion [Ending ...?]

South Africa was created on the basis of the racial epistemology, ontology, and capitalism of conquest.¹⁰⁰ This article focussed on racial epistemology. When South Africa attained democracy, these foundations were not dismantled.¹⁰¹ As a result, the education system and all forms of learning in South Africa are very much still Eurocentric.¹⁰² This is the reason why students in South Africa started the #feesmustfall and #FreeDecolonisedEducation movements in 2016. These calls were however not realised. When the coronavirus started, it exposed the inequalities that student activists were fighting for. Calling this part of the article an ending would be a mistake as this is not an ending but a way forward. For many, the revolutionary hashtags #feesmustfall and #FreeDecolonisedEducation fell with the victimisation and arrest of student activists, but for this article, this idea lives on. It lives on in academic papers, on social media, and many other platforms at our disposals, including the streets.

Mayihlome Ihlasele!¹⁰³

98 Modiri (n 21) 320.

99 Fanon (n 86) 205.

100 Modiri (n 21) 320.

101 As above.

102 Savo (n 9) 2.

103 The term '*Mayihlome Ihlasele*' is an isiZulu phrase which was used during anti-colonial-apartheid protests signifying non-resistance and not backing down. Directly translated the term means 'Let us arm ourselves and attack'.

POLICE AND POWER IN A PANDEMIC: REFLECTIONS ON THE RISE OF POLICE BRUTALITY DURING COVID-19 AND ITS IMPLICATIONS ON SOCIAL JUSTICE IN SOUTH AFRICA

by Mason du Plessis*



Abstract

The global COVID-19 pandemic came at a time of already increasing police brutality and has since accelerated this nationwide issue. This increasingly frequent behaviour is due to the calling of a state of disaster, the limiting of fundamental rights by force, and the overlooking of essential methods that help to hold the police accountable. This article will critically reflect on the increase in police brutality in South Africa during the initial lockdown period, highlighting how it affects social justice.

1 Introduction

It has been more than a year since the initial case of the respiratory syndrome coronavirus 2 (SARS-CoV-2) was identified in five patients in Wuhan, China.¹ This was later deemed COVID-19 and labelled a pandemic by the World Health Organization. South Africa's National

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1 J Zamoarini et al 'COVID-19 and the uniqueness of South Africa' (2020) 35 *Southern African Journal of Infectious Diseases* at 1.

Institute of Communicable Diseases confirmed its first case on 5 March 2020.² To this current date (22 June 2021) 58 795 people have reportedly died from COVID-19 in South Africa.³ With numerous restrictions on the rights to freedom of movement and freedom of trade, and the implementation of curfews and a nationwide lockdown, a necessary authority is required to enforce the law. However, the increase in the need for policing and the lack of well-defined parameters of enforcement have opened a large gap for the police to abuse its power and utilise unnecessary force.

The police are, first and foremost, public servants. They are the people who are meant to protect the civilians of society and to assist with the enforcement of fundamental rights in the Bill of Rights. Enshrined in sections 13(3)(a) and 13(3)(b) of the South African Police Service Act,⁴ is the requirement that when a member of the police is executing an official duty, that duty must be done with due regard to his or her powers in a manner that is reasonable, and that should force be used, it ought to be minimum force which is reasonable in the presented circumstances. This has, however, not been the case during the national lockdown.

With the killing of George Floyd in the city of Minneapolis, USA, at the knee of a police officer, the police have become an ironic symbol for violence and crime. The global community has become more politically conscious and aware of injustices perpetrated by those in authority. During the initial outbreak of the pandemic in Kenya, the police killed seven people and caused injuries which led to the hospitalisation of 16 when enforcing a curfew imposed on 27 March 2020.⁵ In Nigeria, 18 people were killed by police during its lockdown.⁶ In response to the surge in violence, people across the globe have retaliated against the police and are now demanding accountability from law enforcement.⁷

South Africa has unfortunately not been immune to events of police brutality. This article will critically reflect on the increase in police brutality in South Africa as a result of the South African government's attempts to manage the pandemic by initially outlining how a state of disaster encourages brutality, followed by how COVID-19 affects the most vulnerable of South African citizens.

2 C Sawnepoel & M Labuschaignen 'Between a rock and a hard place: COVID-19 and South Africa's response' (2020) 7 *Journal of Law and the Biosciences* at 5.

3 COVID-19 Corona Virus South African Resource Portal <https://sacورونا.virus.co.za/> (accessed 22 June 2021).

4 South African Police Service Act 68 of 1995.

5 Amnesty International *COVID-19 crackdowns: Police abuse and the global pandemic* (2020) at 4.

6 Amnesty International (n 5) 15.

7 Staff Writer 'George Floyd Death: Clashes as protests spread across US' *BBC News* 30 May 2020 <https://www.bbc.com/news/world-us-canada-52857334> (accessed 22 June 2021).

Consequently, an in-depth analysis of both the South African Defence Force and the South African Police Service during the first stage of the lockdown will take place.

2 How a state of disaster encourages brutality

Prior to analysing the increase in police brutality in South Africa, one must understand the legislation behind the master plan for addressing COVID-19. Dr Nkosazana Dlamini-Zuma (the Minister of Cooperative Governance and Traditional Affairs) declared a national state of disaster under section 27(1) of the Disaster Management Act.⁸ A national state of disaster entails the implementation of regulations that restrict the rights of people in a state, such as the right of movement or congregation, in order to mitigate the damage produced by an external natural disaster such as an earthquake, hurricane, or in the case of COVID-19, a pandemic.⁹ Despite the number of confirmed cases only topping 61 with zero deaths at the time, a national state of disaster was declared on 5 March 2020 and right-limiting legislation ensued.¹⁰ The Constitution provides regulations that address emergencies such as wars or natural disasters, however, with regard to public health crises' and especially one of this magnitude, there are instances where it falls short. Despite the implemented regulations being considered necessary by officials in the efforts to slow the spread of the virus, they are regarded amongst the strictest worldwide.¹¹

On 10 April 2020, Collins Khosa was brutally killed by blunt force trauma to the head when the South African National Defence Force (SANDF) confronted him and his brother-in-law after finding a bottle of alcohol in his yard during the national ban on alcohol sales. Not only did the SANDF have no reason to enter the premises, it also denied having abused Khosa despite eight eye witnesses attesting that the soldiers poured beer on Khosa and his brother-in-law, strangled Khosa, and hit him with the butt of a rifle to reportedly 'prove a point'.¹² Once this matter was brought to the Gauteng High Court, it was stated in the Founding Affidavit that had the commanding officers responded promptly and effectively to the incidents of lockdown brutality by developing a proper Code of Conduct or by reminding

8 Disaster Management Act 57 of 2002.

9 Disaster Management Act (n 8) sec 27(1).

10 eNCA 'Coronavirus cases in SA rise to 61' 15 March 2020 <https://youtu.be/ErUeNJ2utVQ> (accessed 19 February 2021).

11 P Whittle *The Implementation of the Disaster Management Act Regulations for COVID-19 and the Justice and Security Sector: A Provincial Overview* (2020) at 2.

12 G Nicolson 'Eight Witnesses saw soldiers assault Collins Khosa' *Daily Maverick* (Johannesburg) 10 June 2020 <https://www.dailymaverick.co.za/article/2020-06-10-eight-witnesses-saw-soldiers-assault-collins-khosa-ipid-report/> (accessed 19 February 2021).

security forces of their legal obligation, then Collins Khosa may have not been killed at the hands of the SANDF.¹³ The Court further held that Use of Force Guidelines must be developed and publicised.¹⁴ Prior to the judgment of *Khosa*, no formal guidelines for policing conduct during a state of disaster such as COVID-19 had been published.

In terms of a state of disaster, it rests on section 36 of the Constitution to limit certain rights.¹⁵ Pertaining COVID-19 in South Africa, limitations have taken the mode of national regulations proposed by Ministers. These range from, but are not limited to, the Minister of Cooperative Governance and Traditional Affairs to the Minister of Transport.¹⁶ These regulations lack involvement or oversight from Parliament, which is standard practice for a state of emergency. A state of emergency that is utilised for instances of state security entails that fundamental rights can be suspended temporarily for no more than three months at a time, whereas under a state of disaster, said period of right limitation can be extended with ease by notice in the Gazette.¹⁷ This can be seen by the extension of the regulations throughout 2020 and even into 2021. One can then argue that the duration and prolonging of said regulations have encouraged an environment wherein the police are ever-present. It is further argued that cases of police brutality are more likely to rise as these regulations persist.

Regulations imposed under the state of disaster have been critically analysed and many of these regulations have been brought to court. For example, the case of *De Beer v Minister of Cooperative Governance and Traditional Affairs* was brought before the North Gauteng High Court where various regulations promulgated under section 27 of the Disaster Management Act were invalidated.¹⁸ It was revealed that the Court ignored the threshold test for the limitation of rights as well as the rationality test (the word 'rationality' was used as a synonym for 'constitutionality') with regards to newly implemented regulations to mitigate the spread of COVID-19. Thus, regulations that were implemented seemingly lacked the necessary parliamentary oversight, therefore contributing to a lack of concise

13 *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* 2020 (3) ALL SA 190 (GP) (*Khosa*) para 35.

14 *Khosa* (n 13) para 44.

15 Constitution of the Republic of South Africa, 1996 (Constitution) sec 36.

16 J Brickhill 'Constitutional Implication of COVID-19: The Striking Down of Lockdown Regulations' 07 June 2020 <https://juta.co.za/press-room/2020/06/07/constitutional-implications-covid-19-striking-down-lockdown-regulations-issue-14/> (accessed 19 February 2021).

17 L le Roux 'Human Rights during a state of Emergency' April 2020 <https://www.lexisnexis.co.za/lexis-digest/resources/covid-19-resource-centre/practice-areas/public-law/human-rights-during-a-state-of-emergency> (accessed 14 April 2021).

18 2020 11 BCLR 1349 (GP).

governing legislation. Parliament overlooked the procedure of limiting rights under the Constitution whilst enacting regulations. This enabled the police to do the same when enforcing these regulations. It was further emphasised that any action taken under the National Disaster Management Act must comply with all constitutional provisions relating to the limitation of rights subject to parliamentary and judicial control.¹⁹ It can be argued that the lack of stringent oversight with the implementation of a state of disaster has resulted in policing methods and conduct being overlooked where penalties for the breaking of regulations are present, but the methods and manners of enforcement have been left to be fulfilled 'off the cuff'.

The limitation of rights has led to provisions such as section 49(1)(b) of the Criminal Procedure Act,²⁰ which determines the amount of force allowed when apprehending resisting offenders, being strategically ignored thus furthering police brutality. An example of a regulation that encourages such brutality is Regulation 11E of the Disaster Management Act which provides that 'no person is entitled to compensation for any loss or damage arising out of any act or omission by the enforcement officer under these Regulations'.²¹ Such a regulation suggests a way out for policing misconduct and enables law enforcement to evade accountability. In conjunction with the aforementioned writing, it can be determined that official oversight mechanisms have malfunctioned at a crucial time as foundational codes of conduct for exercising power during a state of disaster have not been formulated.²²

In addition to a lack of policing guidelines being implemented, there already exists a culture within law enforcement of flouting the rule of law, and the state of disaster has seemingly made an excuse for excessive force.²³ Rhetoric that encourages abuse of power disguised under the veil of 'necessary force' has been damaging to the country during lockdown. As discussed in *Khosa*, the speech of several high-ranking law enforcement members has seemingly encouraged police abuse. On 7 April 2020 in a national address by the Minister of Police, the police force was encouraged to 'push South Africans back to their homes if they refuse' and it was further stated that 'it is our duty, if you want to protect yourself and the rest of us, we must start by protecting you ... so we need to push a little bit'.²⁴ These

19 IM Rautenbach 'Unruly Rationality, Two High Court Judgments on the Validity of the COVID-19 Lockdown Regulations' 2020 (4) *Tydskrif vir die Suid-Afrikaanse Reg* at 830.

20 Criminal Procedure Act 51 of 1977.

21 *Khosa* (n 13) para 43.

22 J Brickhill (n 16).

23 Parliament of the Republic of South Africa 'IPID Investigations of Public Complaints of Police Misconduct During the Lockdown Period' 27 April 2020 https://static.pmg.org.za/200429IPID_Investigations_during_Lockdown.pdf (IPID) at 5.

24 *Khosa* (n 13) para 39.

statements took place after previous mentions of the fact that the people were not listening to the police. Although subliminal, one could argue that said speech was aggressive in nature.

Following the words of the Minister of Police, the now suspended executive member of the Matjhabeng Local Municipality endorsed police brutality by instructing the SADF to ‘not hesitate to *skop* and *donder*’ citizens when enforcing the state of disaster lockdown.²⁵ It can be understood that a fine line between the constitutionality and efficiency of force must be balanced, however, it must be reinforced that the South African Police Service Act²⁶ must continue to be complied with especially in terms of section 13 which outlines that the exercising of power and functions are always subject to the Constitution with due regard to the fundamental rights of every person.²⁷

3 The effects of COVID-19 on vulnerable citizens in South Africa

COVID-19 has already widened the divide between wealth and poverty with upper-end wage earners having the freedom to work remotely and maintain a ‘semi-stable’ income during a pandemic, whilst the poorer majority of South African citizens have been financially compromised immensely as the majority of the lower-paying jobs require in-person interactions.²⁸ This financial impact is illustrated by the increase of unemployment by 2.2 million people in the third quarter of 2020 alone.²⁹

In a climate where millions of South Africans are already infected with tuberculosis, HIV, or both, and where only 16 percent of the population has access to medical aid, COVID-19 is affecting the vulnerable far more than those with financial and social security.³⁰ It is now even more imperative that the government manages the pandemic in a way that promotes the upliftment of society, rather than the degradation thereof. The COVID-19 regulations have negatively affected the informal sector and poorer communities of South Africa which lack food security and access to water.³¹ This has

25 *Khosa* (n 13) para 37.

26 South African Police Service Act 68 of 1995.

27 *Khosa* (n 13) para 58.

28 CDH ‘The COVID-19 effect: Its impact on industries and how to reduce insolvency risks’ 5 May 2020 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/business-rescue-newsletter-5-may-the-covid-19-effect-its-impact-on-industries-and-how-to-reduce-insolvency-risks> (accessed 20 June 2021).

29 Stats SA ‘Quarterly Labour Force Survey’ 12 November 2020 <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2020.pdf> (accessed 14 April 2021).

30 Swanepoel & Labuschaignen (n 2) comment 2.

31 Swanepoel & Labuschaignen (n 2) 3.

resulted in more cases of lockdown infringements arising in poorer, more vulnerable areas out of mere necessity.³² People who leave their houses for water or food due to a lack of access to basic sanitation and food security run the risk of violating lockdown restrictions. With more restrictions presumably taking place in poorer communities, a greater policing presence would responsively exist in poorer areas in South Africa when compared to their wealthier counterparts.³³ This therefore means that the poor and most vulnerable become most susceptible to police brutality.

4 Abuse by the SAPS and SANDF resulting in the infringement of fundamental rights

Police brutality and the violent abuse of power are systematic and deeply set in the foundations of modern South Africa as the echoes of the apartheid-era law enforcement ring to this day. The disadvantaged black citizens who felt the harsh hand of the apartheid police force form part of the same group that remains vulnerable to abuse by the South African Police Service.³⁴ The COVID-19 pandemic has only accelerated an already rampant epidemic of police brutality.³⁵

The Independent Police Investigative Directorate (IPID) is the arm of government tasked with investigating public complaints of police misconduct and holding said officers accountable. The IPID provided a summary of investigations of police misconduct during the initial lockdown period of 26 March to 17 April 2020.³⁶ Its total intake of cases during COVID-19 operations amounted to 403 cases of misconduct.³⁷ Within the context of excessive force, 152 cases of assault by police officers arose between 26 March and 17 April 2020.³⁸ The IPID further recorded that there were five deaths due to excessive use of force and 37 discharges of official firearms.³⁹ The most poignant fact is that in total, the COVID-19 cases account for 49.4% of all cases investigated by the IPID for the previously mentioned period.⁴⁰ Despite President Cyril Ramaphosa's call for respect,

32 Swanepoel & Labuschaignen (n 2) 4.

33 Andrew Harding 'Coronavirus in South Africa: Unravelling the mystery' *BBC News* 19 December 2020 <https://www.bbc.com/news/world-africa-55333126> (accessed 24 June 2021).

34 IPID (n 23) 5.

35 As above.

36 IPID (n 23) 5.

37 IPID (n 23) 6.

38 As above.

39 IPID (n 23) 6.

40 As above.

humility, and compassion at the SAPS training academy prior to the 21-day lockdown, these abhorrent instances still ensued.⁴¹

The words ‘underfunding’ and ‘underspending’ are synonymous to the IPID. The IPID does not have the necessary revenue to take on its vast case load. In terms of the IPID’s overall expenditure and performance, the department’s Administration Programme reportedly declined from its 86% performance target in the 2018/19 financial year to 33% in the 2019/20 financial year.⁴² Voids exist in the number of reports due to reporting being more difficult during the pandemic. If one wants to lodge a complaint, one must open a case at one’s nearest police station and only report to the IPID office if the police fail to or is unable to assist.⁴³

This is inherently biased against civilians who are assaulted by police officers as they may encounter the same police officers at the station. A victim of rape who was raped by a police officer, for example, has to face the possibility of encountering the person who raped them when reporting the crime. Furthermore, the requirement to be physically present to report is inefficient as people may fear contracting COVID-19 at such places. Other issues, such as not being able to afford the airtime or travel fees to report an act of abuse by a police officer, need to be considered. A new problem emerging from this requirement is that in the context of COVID-19 where masks are mandatory for both police officials and civilians, identification of perpetrators faces are obscured thus making it harder to identify the police official who is abusing their position.⁴⁴

Independent and journalistic reporting has been fundamental in highlighting the use of excessive force by the government. Social media has been able to give every person a voice and has exposed activity by the police that would otherwise have been easily hidden. Not only does it bring former issues to light, but it is also far more wide-reaching than traditional media.

41 D Knoetze ‘Police kill three people three days lockdown normal South Africa date reveals’ 1 April 2020 <https://www.groundup.org.za/article/police-kill-three-people-three-days-lockdown-normal-south-africa-data-reveals/> (accessed 16 February 2021).

42 Parliamentary Monitoring Group ‘Budget Review and Recommendation Report of the Portfolio Committee on Police on the Independent Police Investigative Directorate (IPID) performance for the 2019/2020 financial year dated 25 November 2020’ (2020) at 1.

43 South African Government ‘Lodge a Complaint About Police Misconduct’ <https://www.gov.za/services/victim-empowerment/lodge-complaint-about-police-misconduct?gclid> (accessed 19 February 2020).

44 A Faul ‘State abuses could match threat COVID-19’ *Reliefweb* 2 April 2020 <https://reliefweb.int/report/south-africa/state-abuses-could-match-threat-covid-19-itself> (accessed 16 February 2021).

On the first day of the national lockdown, the police deployed 24 000 officers who were armed with guns and sjamboks instead of sanitisers and thermometers.⁴⁵ On the streets of Hillbrow in Johannesburg, rubber bullets were used to enforce lockdown restrictions.⁴⁶ The South African Human Rights Watch argued that it is imperative that the police engage with the public to gain their trust and enhance their protection.⁴⁷ It is of primary concern that the fundamental human rights of everyone in South Africa, such as freedom and security of the person and the right to life, remain intact.⁴⁸

On Sunday 29 March 2020, a 41-year-old man named Sibusiso Amos, was shot by lockdown enforcement officers while he was under his home's veranda. During the incident, children aged 5, 6, and 11 were also injured.⁴⁹ Many SAPS and SANDF officials have taken it upon themselves to use their own methods of 'discipline and punishment'. Controversial videos had surfaced on social media of officials pushing Soweto residents, who were not obeying lockdown laws, to do push-ups and perform squats in the streets.⁵⁰ Despite this not being physically violent, these sorts of measures are a blatant abuse of power. CBS Evening News compiled various videos of security forces firing rubber bullets at people contravening lockdown laws and similar cases of police officers making people hold a squat and kicking them back into position where they were unable to do so.⁵¹ Many videos also show such disciplinary actions taking place with police officers without the required personal protective equipment (PPE) such as masks.⁵²

5 Recommendations

For police brutality to be curbed, the reformation of the police as a whole is required. In the American context of 2020, a viral theory of

45 AllAfrica 'South Africans Accuse Police, Soldiers of Heavy-Handedness During COVID-19 Lockdown' 30 March 2020 <https://www.youtube.com/watch?v=adNAF6Sph4I> (accessed 23 March 2021).

46 Knoetze (n 41).

47 Human Rights Watch 'South Africa: Set Rights-Centered COVID-19 Measures' 7 April 2020 <https://www.hrw.org/news/2020/04/07/south-africa-set-rights-centered-covid-19-measures> (accessed 20 February 2021).

48 SA Human Rights Commission 'Media statement SAHRC continues to monitor human rights observance and calls for calm' 31 March 2020 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/2298-media-statement-sahrc-continues-to-monitor-human-rights-observance-and-calls-for-calm> (accessed 19 February 2021).

49 Human Rights Watch (n 47).

50 C Cilliers 'Watch police and SANDF force Soweto residents to do hard exercise as punishment' *The Citizen* 30 March 2020 <https://citizen.co.za/news/covid-19/2262188/watch-police-and-sandf-force-soweto-residents-to-do-hard-exercise-as-punishment/> (accessed 18 February 2021).

51 IPID (n 23).

52 AllAfrica (n 45).

defunding the police emerged and sparked a new conversation.⁵³ However, I would argue that overfunding is not the issue in South Africa. Rather, it is the misplacement and mismanagement of allocated funds. Revenue should be placed in institutions such as the IPID, and training and teaching methods of de-escalation should be encouraged instead of fuelling an already tense situation. If SAPS is to attempt to redeem its reputation, it would be in its own interests to purposefully repress the reports that display acts of unlawfulness. Collusion between SAPS and the IPID (which encourages the suppression of accounts of police brutality) may arise due to the economic and governmental power SAPS currently holds over the IPID. Independence between the SAPS and the IPID is therefore essential. The police should be legally held accountable with punishments equal to those of civilians for the same action. The dismissal or suspension of violent police officers is not an adequate solution.

Enforcement agencies must avoid arresting and detaining individuals for merely breaching lockdown regulations as this only increases the risk of contagion and might further the spread of COVID-19.⁵⁴ The exercise of police power must always follow the principles of necessity and proportionality.⁵⁵ The COVID-19 pandemic must be treated, first and foremost, as a public health crisis that requires evidence-based public health measures steeped in respect for human rights. It is further required that new legislation that is accurate, decisive, and that respects fundamental human rights is created and old legislation is amended to align itself with the aforementioned principles. The education of members of the public on their fundamental rights and the ability that they have to report and pursue civil litigation for damages in such instances, would ensure that their suffering is not overlooked by the state.⁵⁶

6 Conclusion

The severe increase in police brutality during the COVID-19 pandemic has only accelerated an already prominent trend of abuse of power and violence. This has also led to a deterioration of the relationship between law enforcement and the public with the deterioration making it difficult to enforce beneficial laws due to the already

53 UCLA Criminal Justice Program 'What happens after we defund the police? A brief exploration of alternatives to law enforcement' (2020) at 1.

54 Amanda Khoza 'How South African prisons are managing COVID-19' *New Frame* 16 September 2020 <https://www.newframe.com/how-south-african-prisons-are-managing-covid-19/> (accessed 23 June 2021).

55 Amnesty International (n 5) 5.

56 Saferspaces 'Police Brutality in South Africa' 31 August 2011 <https://www.saferspaces.org.za/understand/entry/police-brutality-in-south-africa> (accessed 20 February 2021).

existing distrust prior to the pandemic.⁵⁷ Furthermore, in uncertain times with rampant misinformation being spread, people are bound to question COVID-19 regulations. Therefore police must, at all costs, be held accountable for its undue violence in order for this devastating addiction to be curbed.

57 J Modise et al 'Service delivery, law enforcement and trust: A South African Police Service Perspective' (2020) 32 *Alternation* at 227.

COVID-19 AND ACCESS TO REPRODUCTIVE HEALTH RIGHTS FOR WOMEN IN HIGHER EDUCATION INSTITUTIONS IN SOUTH AFRICA

by Thuli Zulu*



Abstract

Reproductive health rights are rights that are internationally and domestically recognised as human rights. The right to contraception forms part of reproductive health rights. These rights have a great impact on the social, political, and economic well-being of women. This paper studies the impact that COVID-19 has had on health, specifically on access to contraceptives, as these services have not been deemed as essential during the lockdown. The lockdown has seen the closure of higher education institutions like colleges, Technical Vocational Education and Training (TVET) colleges, universities, and universities of technologies, where the majority of women who depend on public health facilities access their contraceptives, resulting in these women having to access contraceptives from their home communities. This paper further studies the challenges that these women face in accessing contraceptives from their homes, such as stigma and the lack of information that accompanies it. Lastly, this paper finds that the women that access their contraceptives in institutions of higher learning do not have any alternatives. It finds that the closure of these institutions has resulted in these women being stranded without contraceptives, resulting in a violation of their reproductive health rights.

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1 Introduction and background

On 31 December 2019, the World Health Organisation (WHO) was first notified by China of a pneumonia of unknown cause.¹ The severe acute respiratory syndrome coronavirus 2, SARS-CoV-2 (COVID-19), was identified as the causative virus by Chinese authorities with evidence of human-to-human transmission by 20 January 2020. On 30 January 2020, the outbreak was declared a Public Health Emergency of International Concern (PHEIC) and a pandemic on 11 March 2020.² Since its emergence in China, the pandemic has since spread with a strong hold in Europe and with multiple traces all over the world. The spread of the pandemic called for severe lockdowns worldwide with South Africa being one of the countries most severely affected by the pandemic.³

The first case of the novel coronavirus was reported in South Africa on 5 March 2020 from the province of KwaZulu Natal. The case was of a man that had travelled to Milan, Italy.⁴ On 15 March 2020, President Cyril Ramaphosa declared a State of Disaster under the auspices of the State of Disaster Management Act 57 of 2002.⁵ Following the report of the first case of COVID-19, the government imposed a strict lockdown on 23 March 2020 that would initially have lasted for three weeks, commencing on 26 March 2020.⁶ At the declaration of the State of Disaster, South Africa had recorded 554 cases with no reported deaths.⁷ The State of Disaster and the lockdown was subsequently extended to April 2020 and was praised as the most severe lockdown in the African region.⁸ On 24 April 2020, President Cyril Ramaphosa introduced five stages reopening the economy known as levels 1-5. Level 4 of the lockdown was subsequently introduced on 1 May 2020 where certain activities, such as exercising, were allowed under strict lockdown protocols.⁹ This lockdown resulted in outlets such as restaurants, taverns, and some medical outlets such as local clinics closing down. People who were capable of doing their work remotely were mandated to do so.

1 Staff Writer 'Timeline: China and World Health Organization during COVID-19 crisis' *Reuters* 13 January 2021 <https://www.reuters.com/article/us-health-coronavirus-who-china-timeline-idUSKBN2910FR> (accessed 11 May 2021).

2 K Tang et al 'Sexual and reproductive health (SRH): A key issue in the emergency response to the coronavirus disease' (2020) 17 *Reproductive Health* at 1.

3 Tang et al (n 2) 1.

4 N Stiegler et al 'South Africa: Challenges and successes of the COVID-19 lockdown' (2020) 7 *Ann Med Psychol (Paris)* at 696-697.

5 C Arndt et al 'Covid-19 lockdowns, income distribution, and food security: An analysis for South Africa' (2020) 26 *Global Food Security* at 10410.

6 Stiegler et al (n 4) 697.

7 As above.

8 Stiegler et al (n 4) 697.

9 As above.

Since then, the pandemic has continued to expose the dysfunctionalities of South Africa's healthcare system.¹⁰ This is not peculiar as pandemics all over the world have proven to exacerbate ailing healthcare systems.¹¹ To illustrate, in 2015 the Zika virus in Latin America caused several complications in women's reproductive health ranging from issues surrounding abortion to those of birth.¹² One of these constraints is the delivery of socio-economic services to people, including services related to reproductive health.¹³ In the public health systems, access to reproductive health is severely limited with the Department of Health having already announced a shortage of contraceptives in 2018.¹⁴

Past pandemics have also shown that the failure to provide for services relating to sexual health rights, mental health, and gender-based services leads to sexually transmitted infections (STIs), miscarriages, unsafe abortions, depression, and inter-partner violence, amongst others.¹⁵ The COVID-19 pandemic has interrupted the manner in which these services are received.¹⁶ Access to healthcare has been affected as the numbers have continued to rise and priority has been given to providing medical care relating to COVID-19.¹⁷ In doing so, there has been a divergence from the provision of reproductive health rights services.¹⁸

This paper explores the gendered impact that the coronavirus has had in South Africa. More specifically, the paper considers the impact at the lockdown has had on women who access their contraceptives at institutions of higher learning. It is argued that women who access their contraceptives at institutions of higher learning do so out of convenience and necessity. These women are from less privileged backgrounds and have no alternative to these institutions. Most notably, their right to reproductive health through access to contraceptives is enshrined in the Constitution and the closure of these institutions hinders these women's human rights.

This paper starts by setting out the legal framework concerning reproductive health rights. Thereafter, the growing need for contraceptives for women who attend institutions of higher learning will be discussed together with the challenges that these women face

10 Arndt et al (n 5) 10413.

11 J Hussein 'COVID-19: What implications for sexual and reproductive health and rights globally?' (2020) 1 *Sexual Reproductive Health Matter* at 2.

12 As above.

13 As above.

14 M Mojela 'Injectable contraceptives shortage in Limpopo is "not a crisis"' 9 October 2018 <https://health-e.org.za/2018/10/09/injectable-contraceptives-shortage-in-limpopo-is-not-a-crisis/> (accessed 5 August 2021).

15 As above.

16 Mojela (n 14).

17 As above.

18 KS Hall et al 'Centring sexual and reproductive health and justice in the global COVID-19 response' (2020) 395 *The Lancet* at 1176.

at the closure of these institutions. These challenges will be considered alongside the subsequent challenges that many women face with their community healthcare providers. The challenges identified by the paper are those of stigmatisation and a lack of information when accessing contraceptives.

Finally, the paper investigates alternatives that can be used for women accessing contraceptives in South Africa. As we observe the decrease in numbers of infections and the gradual lifting of lockdowns, it becomes important to assess the impact that the virus has had on the provision of women's human rights services and to strategise on inclusive approaches to the unpredictable times that lie ahead.

2 Legal instruments and reproductive health rights during COVID-19.

Reproductive health rights are fundamental to the realisation of human rights.¹⁹ Reproductive health is understood to mean 'a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes'.²⁰ South Africa has international and continental obligations towards the realisation of reproductive health rights. South Africa is a party state to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) where Article 3 states that parties to the Convention should enact legislation and take all other appropriate measures to realise equality between men and women, both in the workplace and their personal spaces.²¹ Article 14(b) of CEDAW speaks directly to women's rights to their reproductive health. The article ascertains that women have the right 'to have access to adequate healthcare facilities, including information, counselling, and services in family planning'.²²

On a regional level, the African Union has adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in 2003.²³ Article 14 of the Protocol places specific emphasis on women's reproductive rights and

19 For a discussion on reproductive and sexual reproductive rights as fundamental to human rights see United Nations 'Report of the International Conference on Population and Development' (1994) (Report on Population and Development) paras. 7.2 & 7.3. 5.; and Beijing Declaration and Plan for Action, 1996 in United Nations 'Fourth World Conference on Women' (1995) paras. 92 & 95.

20 Report on Population and Development (n 19) para 7.2.

21 Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979), UN Treaty Series (1249) 13 (CEDAW).

22 CEDAW (n 21).

23 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003) (Maputo Protocol).

encapsulates them having control over their reproduction, choosing whether or not to have children and, if so, how many, as well as their right to any information concerning family planning.²⁴ General Comment 2 on Articles 14(1)(a), (b), (c), and (f) and Articles 14(2)(a) and (c) of the Maputo Protocol further reiterate the state's obligation to provide contraception. It states that, 'It is crucial to ensure availability, accessibility, acceptability and good-quality reproductive healthcare, including family planning, contraception and safe abortion for women'.²⁵ The right to reproduction is also domesticated in our Constitution in section 12.²⁶ The section affirms that '[e]veryone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction'.²⁷

To put into effect the constitutional right to reproduction, the Department of Health adopted guidelines that are in line with providing for the right to reproductive health.²⁸ The guidelines take a human rights approach in acknowledging the need for contraception among women.²⁹ They do so by integrating the right to contraception as part of health services that women are entitled to.³⁰ The guidelines enforce the right to reproductive health through the legislative, regulatory, and institutional frameworks included therein.³¹ The implementation of the framework would grant free access to reproductive health services to women who were previously excluded from accessing these services. The framework seeks to maximise ways that women can take care of their overall health whilst upholding their human rights.³²

3 Women's need of contraception use in higher education institutions

Young people's sexual activities are reported to be on the increase, which is a communal and public concern.³³ In a study conducted

24 Maputo Protocol (n 23) Art 14.

25 General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

26 Constitution of the Republic of South Africa, 1996 (Constitution) sec 12.

27 As above.

28 Department of Health 'Sexual and Reproductive Health and Rights: Fulfilling our commitments 2011-2021 and beyond' (2011) <http://bit.ly/1ALD1Y2> (accessed 21 May 2021) (Department of Health Guidelines).

29 Department of Health Guidelines (n 28) iv.

30 Department of Health Guidelines (n 28) 3.

31 Department of Health Guidelines (n 28) 2-3.

32 Department of Health Guidelines (n 28) 3.

33 MH Coetzee et al 'Assessing the use of contraceptives by female undergraduate students in a selected higher educational institution in Gauteng' (2015) 38 *Curationis* at 1535.

amongst 15 to 24-year-old South African women, it was estimated that only 52.2 percent of sexually experienced women are using contraceptives.³⁴ Eighty percent of undergraduate students at higher educational institutions are sexually active due to the consumption of mass media and urbanisation.³⁵ It is eventually vital that they have access to safe, accessible, and adequate contraceptive services.³⁶ The South African public health system has since provided free sexual reproductive health assistance which includes free contraceptives made accessible at institutions for higher learning.³⁷

The closure of institutions of higher learning in April 2020 saw 1 725 million students worldwide leaving their institutions to be confined to their homes to limit the spread of the coronavirus.³⁸ This movement presented risks for young people though its main aim was to protect those same people from the virus. Some of these risks include sexual abuse, exploitation, and negative outcomes from sex such as unplanned pregnancies.³⁹

The responsibility of contraception between young couples is often delegated to the woman.⁴⁰ This is because oftentimes, men would shift the pregnancy burden to women, arguing that women are the ones that carry the unborn child, hence it is their responsibility to not fall pregnant.⁴¹ Women in higher education institutions then find themselves relying solely on the services offered by these institutions to access contraceptives to avoid unwanted pregnancy.⁴² Again, we are confronted by the gendered aspect of the lockdown as it is women that must find alternative ways of accessing contraception to prevent pregnancy.

The use of contraception in institutions for higher learning is severely affected by socio-physiological factors which consequently affect their knowledge of reproductive health rights.⁴³ Women in

34 D Govender et al 'Don't Let Sexual and Reproductive Health become Collateral Damage in the Face of the COVID-19 Pandemic: A Public Health Perspective' (2020) 24 *African Journal of Reproductive Health* at 1536.

35 As above.

36 C MacPhail et al 'Contraception use and pregnancy among 15-24-year-old South African women: A nationally representative cross-sectional survey' (2007) 5 *BMC Medicine* at 8.

37 Department of Health Guidelines (n 28) 23.

38 K Odada 'Adolescent girls and women have a right to know: Accessing information on sexual and reproductive health and rights in the wake of COVID-19' 24 September 2020 <https://africlaw.com/2020/10/22/adolescent-girls-and-young-women-have-a-right-to-know-accessing-information-on-sexual-and-reproductive-health-and-rights-in-the-wake-of-covid-19/> (accessed 17 July 2021).

39 Odada (n 38).

40 F Ngozi 'Ugoji an Examination of University Students' Attitude to Contraceptive Use' (2013) 2 *American International Journal of Social Science* at 19.

41 As above.

42 Ngozi (n 40) 20.

43 M Makhaza et al 'Knowledge and Use of Contraceptives among Tertiary Education Students in South Africa' (2014) 5 *Mediterranean Journal for Social Sciences* at 503.

institutions of higher learning understand that the use of contraception allows them to make better economic decisions as it lessens the financial burden especially for those in larger families.⁴⁴

The unplanned pregnancy of women within institutions of higher learning leads to many undesired consequences. Unplanned pregnancies usually require women to drop out of these institutions to rear the child, making the cycle of poverty ongoing.⁴⁵ The women's use of contraceptives obtained at higher institutions of learning allows them to complete their qualifications, to freely look for employment without the hindrance of having to care for children, and to make independent marital decisions.⁴⁶ This speaks to these women having agency over, and being able to plan for their future. Providing for contraceptives in institutions for higher learning means that in doing so, these institutions are advancing the students' autonomy over what happens to their lives. This is to ensure that the students' academic welfare is catered for and to protect their overall well-being.

4 Stigmatisation and the lack of information in accessing contraceptives in communities

Access to contraception is the ability to attain services through an acceptable effort and at an acceptable cost by the majority of the population in need of these services.⁴⁷ Access is the cornerstone of the quality of family planning programmes. A successful family planning programme is unachievable without access. At entry-level, access to contraceptives is a function of the availability of contraceptive commodities at service delivery points. Contraceptive supply systems in the public health system are the responsibility of the government, as they must purchase and distribute commodities that allow potential users to access them.⁴⁸ Women are faced with many challenges in accessing contraceptives. Stigma due to political, religious, or social convictions plays a huge role in women not accessing contraception, and a lack of information leads to women not being able to use contraceptives effectively. These two challenges will be considered more thoroughly below.⁴⁹

44 As above.

45 Makhaza et al (n 43) 502.

46 As above.

47 MJ Welsh et al 'Access to modern contraception' (2006) 20 *Best Practice & Research Clinical Obstetrics & Gynaecology* at 325.

48 As above.

49 As above.

4.1 Stigmatisation in accessing contraceptives

Stigma is used as a primary power role in social control. This power is saturated in people of authority, in this instance being nurses that bear the primary duty of supplying contraceptives to young women that need them.⁵⁰ This power shapes the manner that we understand healthcare services, specifically free healthcare services.⁵¹ Women who receive free medical health services are often under much more scrutiny than their counterparts who receive paid medical services.⁵² These women are forced to take more precautions during sexual activities because they do not want to be considered a burden to the system.⁵³ Stigma has dire consequences for women who are in need of these services as it affects those less advantaged socially, economically, and politically in accessing healthcare services.⁵⁴ It results in discrimination against young women accessing their reproductive healthcare rights.

Stigmatisation is a barrier that many African women face in accessing contraceptives.⁵⁵ To provide for reproductive services free of stigma, these services should include, amongst other things, reproductive rights and confidential, stigma-free, and unbiased contraception; counselling options and services; treatment and prevention of sexually transmitted infections (STIs), including HIV; and information and counselling services on sexuality.⁵⁶ In understanding how stigma affects different categories of women, we must consider the micro-aggressions that human immunodeficiency virus (HIV) positive women face in accessing contraceptives, as these women are stigmatised further because of a general stereotype that HIV-positive women are hypersexual.⁵⁷ HIV-positive women are amongst the thousands of women who have had to leave their institutions of higher learning which had made it easier for them to access their contraceptives.⁵⁸ The need for free contraception in

50 AO Savage-Oyekunle & A Nienaber 'Adolescent girls' access to contraceptive information and services: An analysis of legislation and policies, and their realisation, in Nigeria and South Africa' (2015) 15 *African Human Rights Law Journal* at 442.

51 Welsh (n 47) 325.

52 As above.

53 Welsh (n 47) 325.

54 As above.

55 L Nyblade et al 'Perceived, anticipated and experienced stigma: exploring manifestations and implications for young people's sexual and reproductive health and access to care in North-Western Tanzania' (2017) 10 *Culture, Health & Sexuality an International Journal for Research, Intervention and Care* at 1092.

56 As above.

57 For a discussion on the importance of contraceptive accessibility for HIV-positive women, see Dugg et al 'Contraceptive Use and Unmet Need for Family Planning among HIV Positive Women: A Hospital Based Study' (2020) 64(1) *Indian Journal of Public Health* at 32.

58 Dugg et al (n 57) 32.

higher education institutions is linked to the socio-economic standing of HIV-positive women, which further exposes their vulnerability.

There are many perceived biases faced by young women who go to public health institutions to access contraceptives. These biases are on account of these women being young and unmarried with the notion being that they should, therefore, have no business asking for contraceptives.⁵⁹ Political taboos, religion, and traditional values also play a huge role in young women being afraid to collect contraceptives at public clinics.⁶⁰ These women constantly find themselves trapped in the intertwined socio-belief spectre that seeks to control their lives, silencing any reproductive choices that they are entitled to, and violating their rights to freely choose their preferred modes of contraception.⁶¹

This group of women, stigmatised when accessing contraceptives, are thus subject to unplanned pregnancies despite access to contraceptives being free.⁶² They are usually scolded by nurses and are then deterred from enquiring into or requesting these services. In an empirical study by Woods, one nurse was asked why she scolds young female patients when they come to access contraceptives. She responded that 'it is important that they let women know of the dangers of having sex when they are still young and all the diseases that come with it'.⁶³ One young woman, when asked if this scolding contributes to them (her and other young women) not having sex, replied that 'sex is nice and they will not stop going to public clinics to access contraceptives'.⁶⁴ The response by this young woman shows the agency that young women have in having sex and in turn accessing contraceptives. It is then in the government's hands to deliver on the right to reproductive health as per its obligations.

4.2 Lack of information in accessing contraceptives

The right to information is codified in our Constitution. This right states that everyone 'has the right to freedom of expression which includes freedom to receive and impart information or ideas'.⁶⁵ Section 32 (1) of the Constitution further states that:⁶⁶

- Everyone has the right of access to—
 (a) any information held by the state; and

59 Nyblade et al (n 55) 1092.

60 As above.

61 As above.

62 K Wood et al 'Blood Blockages and Scolding Nurses: Barriers to Adolescent Contraceptive Use in South Africa' (2006) 14 *An international journal on sexual and reproductive health and rights* at 110.

63 Wood (n 62) 113.

64 As above.

65 Constitution (n 26) sec 32.

66 Constitution (n 26) sec 32(1).

- (b) any information that is held by another person and that is required for the exercise or protection of any rights.

The right to information in accessing contraception was enforced by the Cairo International Conference on Population and Development (ICPD). South Africa is part of the international community that has adopted guidelines to provide for voluntary family planning programmes.⁶⁷ These programs entail women receiving accurate information on the modes of contraception available to them in a manner free of coercion and in line with international standards.⁶⁸ This information must be distributed, taking into account the socio-economic backgrounds of women this information is directed to.

Information should be provided on large scales to reach the large number of women in need of it, specifically women in destitute areas.⁶⁹ This information must be clear and must enable women to make informed and final decisions regarding contraception. In order to affect the reach of information circulated, social markets and a variety of communication channels should be utilised. These channels can include magazines, newspapers, radio stations, television, and social media.⁷⁰ This is in line with the resolutions that were taken at the Cairo conference,⁷¹ and the Contraception Guidelines enacted by the Department of Health.⁷²

In accessing reproductive healthcare services, women should be adequately informed of what these services entail. Research has shown that the reason women do not use contraceptives is often because they do not have sufficient information about modes of contraceptives, their side effects, and the ability to reverse the effects of these contraceptives.⁷³ Women who do not use contraceptives also tend to show little knowledge of their reproductive systems.⁷⁴ However, these women cannot be solely blamed for this ignorance. The reproductive health programmes have

67 Welsh (n 47) 324.

68 As above.

69 E Durojaye 'Access to contraception for adolescents in Africa: a human rights challenge' (2011) 44 *The Comparative and International Law Journal of Southern Africa* at 28.

70 Welsh (n 48) 324.

71 United Nations 'Report of the International Conference on Population and Development Cairo, 5-13 September 1994' 1994 at 1-156.

72 Department: Health Guidelines (n 28) 11-12.

73 See J Harries et al 'A multidimensional approach to inform family planning needs, preferences and behaviours amongst women in South Africa through body mapping' (2019) 16 *Reproductive Health* at 159; L Myer & Others 'Knowledge and use of emergency contraception among women in the Western Cape province of South Africa: A cross-sectional study' (2007) 7 *BMC Women's Health* at 14; and J Smit et al 'Emergency contraception in South Africa: Knowledge, attitudes, and use among public sector primary healthcare clients, Contraception' (2004) 64 *PubMed* at 337.

74 Harries et al (n 73) 6.

failed to be of assistance in supplying women with enough information regarding contraception consequences.

It is notable that misconceptions due to a lack of information surrounding contraception are also caused by misunderstandings concerning the different modes of conception. These misconceptions include that the progesterone-only injectable contraceptive, Depo-Provera, causes cancer and that contraceptives cause infertility.⁷⁵ Women have pointed out that it is hard for them to seek information from places of mistrust, and that familiarity plays a vital role in accessing information about contraception.⁷⁶ Part of creating this trust between them and the people providing these services is by means of counselling.⁷⁷

Students in the higher education sector are not susceptible to the lack of information that comes with contraception misinformation. In their study, Kabir et al write that some sexually active students lament that they would like to have more information on how contraceptives work.⁷⁸ This is despite them having knowledge on the use of the different modes of contraception. Universities are the engines of knowledge production but despite this, they rarely have programs that educate on the different aspects of sexual reproduction as much attention is still directed to HIV and AIDS programmes by the state.⁷⁹ Due to this lack of knowledge, some students show disdain for the use of contraception out of fear of infertility, cancer, and weight gain.⁸⁰ The pandemic has aided to this lack of information where contraception is concerned. Women who find themselves going back to their primary residences are not only confronted with the shortage of contraception but also with the lack of information on where and when to go about accessing these services.

5 A way forward: Access to contraceptives during the COVID-19 pandemic

This paper has shown that there is an unmet demand for contraception during societal disruptions. This demand leads to unplanned pregnancies and the consequences that come therewith. It is vital that during national disasters, crucial information regarding

75 Harries et al (n 73) 7.

76 Harries et al (n73) 6.

77 As above.

78 M Kabir 'Sexual behaviour among students in tertiary institutions in Kano, Northern Nigeria' (2004) 16 *Journal of Community Medicine & Primary Health Care* at 22.

79 As above.

80 JC Oonyu 'Contraceptive Knowledge and Practices of Undergraduate Female Students at Makerere University Uganda' (2020) 7 *Women's Reproductive Health* at 66.

the different modes of contraception is continuously communicated. This is because unplanned pregnancies may also result in a spike of domestic violence, as women are often solely blamed for unplanned pregnancies that they are not solely responsible for.

Reproductive health is a concern, especially in the public health system. There is no definitive research of when we would be able to be rid of the virus given the way that it is evolving. It is then important for the scientific community to generate epidemiological, and psycho-social behavioural links between the pandemic and reproductive health rights.⁸¹ In particular, there is a strong need for timely planning and actions for epidemiological research and surveillance of the key vulnerable groups of women and adolescents. There is also a need to assess the immediate, medium, and long-term effects on their sexual and reproductive health rights. Perhaps more importantly, we need to solidify operational strategies and actions to protect sexual reproductive health rights together with the rights of women, young people, and vulnerable populations during the epidemic.⁸²

A way forward for providing contraceptives to women during the surge of the COVID-19 virus is through adopting an intersectional approach that prioritises the needs of women. This approach also includes adequate communication between the state and the women in need of the contraceptives.

The effective use of CEDAW in conjunction with the Maputo Protocol and the South African laws and policies on the right to reproductive health would aid in guaranteeing women's reproductive rights during the pandemic. CEDAW brings women's rights at the forefront of prioritising their human rights.⁸³ In its Preamble, the CEDAW notes that despite the various international laws put in place to protect women's rights, discrimination against them on the basis of gender persists.⁸⁴

The Maputo Protocol is also important in prioritising African women in delivering reproductive health rights. In Article 14, the Protocol reiterates that states ought to ascertain women's reproductive health rights such as the right to contraception.⁸⁵ These international and regional obligations are reiterated in South African legislation and policies to complement the right to reproductive health as enshrined in the Constitution.⁸⁶ In Objective 4 of the

81 Tang (n 2) 2.

82 As above.

83 CEDAW (n 21) Preamble.

84 As above.

85 Maputo Protocol (n 23) Art 14.

86 Constitution (n 26) sec 27.

National Integrated Sexual & Reproductive Health and Rights Policy,⁸⁷ the policy's strategy is outlined to 'strengthen the health system to deliver integrated sexual and reproductive health rights services at the lowest feasible level in the healthcare system'.⁸⁸

To fully ascertain human rights for Black and poor women, these women must be at the helm of policy-making in rolling out contraception during the pandemic. The representation of these women should be equal in that it must encompass the diverse groups of women affected by the shortage of contraceptives during the pandemic.⁸⁹ The women who received their contraceptives from institutions of higher learning form an integral part of this inclusion. It is vital that the stigmatisation experienced by these women is properly addressed to realise this full inclusion.

The inaccessibility of contraceptives during the pandemic is driven by the need for people to socially distance themselves with the health system severely being under pressure. In solving the predicament caused by social distancing weighed up against the need to collect contraceptives, public health officials can use one or more of these methods to ensure that contraceptives are readily available to women that need them during this time. For example, they can ensure that hotlines are made accessible for women to confidentially request for contraceptives to be delivered at their places of residence.⁹⁰ The public health system can also ensure an online system where women who are not able to go to public health facilities can log on to request contraceptives. These online services should be made free of charge, given that most of the women in need of these services are from disadvantaged backgrounds.

Alternatively, the existing modes of contraception can be utilised to their full capacity to realise women's rights to reproduction. Uses of long-term contraception such as intrauterine contraception (IUC), progestin implants, and contraception patches may be extended in their use given that it is safe to do so.⁹¹

The declaration of different levels of the lockdown in South Africa means that during the lockdown, essential services are usually prioritised. Sexual and reproductive health rights have since taken

87 National Department of Health 'National Integrated Sexual & Reproductive Health and Rights Policy' (2019) at 15.

88 As above.

89 UNAIDS 'Six concrete measures to support women and girls in their diversity in the context of the COVID-19 pandemic' 2020 https://www.unaids.org/sites/default/files/media_asset/women-girls-covid19_en.pdf (accessed 11 May 2021) at 2.

90 UNAIDS (n 89) 7.

91 A Black et al 'Contraception consensus: Updated guidance during pandemics and periods of social disruption' 2020 <https://sogc.org/common/Uploaded%20files/2020-04%20Contraception%20Consensus%20-%20Final%20Submitted.pdf> (accessed 10 September 2021).

backstage in the deliverance of essential services. An alternative to the suggestion of the virtual methods of providing contraceptives is for the government to declare reproductive healthcare rights as essential.⁹² These include the providence of condoms, pre-and post-exposure prophylaxis, antiretroviral therapy, diagnosis and treatment of sexually transmitted infections, safe abortion, contraception, and maternal and newborn care. The declaration of Sexual and Reproductive Health Rights as essential reprioritises them as human rights and affords women protection against unwanted pregnancy during this pandemic.

6 Conclusion

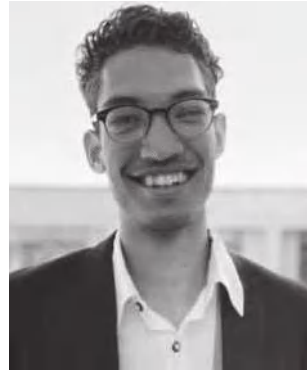
This paper set out the legal framework on the advancement of sexual and reproductive health rights as human rights. It argued that South Africa is party to international and regional instruments that guarantee this right as a human right. Despite this categorisation, the paper has argued that failure to classify reproductive healthcare as an essential service at the scourge of the pandemic means that these rights are denied to millions of women that depend on public health facilities.

The paper has further discussed the need for contraceptives during the COVID-19 pandemic. It illustrated that with the lockdown, there would be a rise in unplanned pregnancies due to the scarcity of contraceptives. It further showed that women in higher learning institutions use contraceptives to further plan their lives. The closure of higher education institutions has thus presented these women with further challenges, such as stigmatisation and the lack of information, which they face regarding accessing contraceptives. Lastly, the paper has proposed alternative means to accessing contraceptives whilst the world continues to combat the spread of the virus.

92 T Mbatha 'The dreadful effects of lockdown on access to sexual and reproductive health services' 31 July 2020 <https://www.spotlightnsp.co.za/2020/07/31/the-dreadful-effects-of-lockdown-on-access-to-sexual-and-reproductive-health-services/> (accessed 17 July 2021).

THE IMPACT OF COVID-19 ON HUMAN RIGHTS: A CRITICAL ANALYSIS OF THE LAWFULNESS OF MEASURES IMPOSED BY STATES DURING THE PANDEMIC UNDER INTERNATIONAL LAW

by Kyle Alex Cloete*



Abstract

The COVID-19 pandemic provided ideal conditions for the violation of human rights. In efforts to curb the spread of the virus, numerous states violated their international law obligations outlined in treaties and customary international law. This article aims to analyse state responses to the global pandemic and will consider how their lawfulness should be measured. To this end, the framework of due diligence is utilised as a system to regulate and assess the legality of state actions amidst times of emergency. Furthermore, this article argues that the principle of due diligence must be developed to sufficiently regulate instances of derogation that extend beyond restrictions. This development must also be informed by an intersectional approach that prioritises the protection of vulnerable groups, owing to the disproportionate impact of COVID-19 on these communities. Stemming from this analysis, the article will conclude by considering the landscape of state actions in handling COVID-19 under the banner of due diligence and imagines a construction of international law that more adequately protects human rights amid regional and global crises.

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‘Human rights in general, and dignity in particular, emphasise the notion that each person is entitled to be treated according to his or her own full merits. In the words of Ronald Dworkin, the concept of human rights requires that each person is entitled to ‘equal concern and respect. This means we should not simply be treated equally but also need to be taken seriously as separate and irreplaceable individuals’.¹

- Professor Christof Heyns

1 Introduction

A semblance of normality appears to be returning to many corners of the globe with vaccination drives underway and masks being deemed as non-essential by many states. Despite this shift in thought to a post-COVID world, it is necessary to glance back at how states have responded to the pandemic. Specifically, the lawfulness of state responses must be analysed in the context of international law, as many states have fallen short of their treaty and customary duties. The question begged by this article is: How do we determine whether a restriction is lawful or whether it, by exceeding the bounds of proportionality and necessity, violates human rights?

In attempting to answer this question, part one begins by outlining the response of a broad and representative collection of states to the COVID-19 pandemic. Part two then sets out an international law framework to evaluate the lawfulness of the restrictions imposed by states during COVID-19 under the umbrella of due diligence. Part three extends the discussion beyond restrictions and analyses the imposition of derogations during COVID-19 and the adequacy of due diligence to regulate these instances. The impunity that has accompanied derogations from human rights treaties and their disproportionate impact on marginalised groups is discussed in part four. Flowing from the analysis of derogations and the impunity that has been tied to them, the article concludes in part five by exploring how the derogation system could possibly be reformed under international law.

2 How states have responded to COVID-19

When COVID-19 arrived unannounced in December 2019, countries were ill-prepared and, overall, not sufficiently proactive in curbing its proliferation. After four months, the virus had spread to 185 states.² This pervasive spread led to a reported three million cases and 211

1 C Heyns ‘Autonomous weapons in armed conflict and the right to a dignified life: An African perspective’ (2017) 33 *South African Journal on Human Rights* at 67.

2 C Breitenbach et al ‘The first 100 days of COVID-19 coronavirus – How efficient did country health systems perform to flatten the curve in the first wave?’ (2020) 8872 *Munich Personal Repec Archive* at 1.

000 deaths.³ Within the first 100 days, 92% of states had realised the need for health and containment policies. By 08 April 2020, 92% of the world was in one form of lockdown or another.⁴

The difficulties that states experienced in their efforts to respond to COVID-19 are appreciated. This is particularly true of the first days of the pandemic when the quick spread necessitated rapid reactions without any certainty and with very limited data.⁵ The responses from states in the early stages of COVID-19 vary markedly. On one end of the spectrum, states such as Sweden, Belarus, and Japan opted against imposing onerous restrictions on movement and gatherings.⁶ On the other end, China, Spain, and India imposed some of the most stringent and longest lockdown orders.⁷ These contrasting policies adopted by states illustrate the difficulties faced in reacting to this virus and emphasises the need for a consistent framework to regulate the legality of state action in international law.

Responding to a disease outbreak is not a new phenomenon for humanity. As far back as ancient times, the bubonic plague devastated Europe, Asia, North Africa, and Arabia, resulting in the death of 30-50 million people.⁸ A century ago, the Spanish Flu spread across the world and caused 20-25 million casualties globally.⁹ More recently, epidemics such as SARS, Ebola, and the Swine Flu have threatened the public health of many states and led to thousands of deaths.¹⁰ With the spread of COVID-19, states are once again tasked with responding to a health emergency with the duty to protect individuals and prevent – or at the very least limit the loss of human life.

To this end, measures have been introduced in the fight against COVID-19. Chief amongst these are lockdown orders. Of the 188 states

3 A Lubrano 'The world has suffered through other deadly pandemics. But the response to coronavirus is unprecedented' 28 April 2020 <https://www.inquirer.com/health/coronavirus/coronavirus-philadelphia-spanish-flu-world-war-two-civil-war-pandemic-aids-20200322.html> (accessed 17 June 2021).

4 M Canales & I Berman-Vaporis 'How the coronavirus outbreak grew from a few cases in China to a global pandemic in less than three months' 13 October 2020 <https://www.nationalgeographic.com/magazine/graphics/the-first-100-days-how-5-countries-grappled-with-covid-19s-spread> (accessed 17 June 2021).

5 R Mbuva & T Marwala 'On Data-Driven Management of the COVID-19 Outbreak in South Africa' (2020) *medRxiv* at 6; E Bertone et al 'Effectiveness of the Early Response to COVID-19: Data Analysis and Modelling' (2020) 8(2) *Systems* at 21; G Babu et al 'Pandemic preparedness and response to COVID-19 in South Asian countries' (2021) 104 *International Journal of Infectious Diseases* at 169.

6 International Centre for Not-for-Profit Law 'COVID-19 Civic Freedom Tracker' 7 April 2020 <https://www.icnl.org/covid19tracker/?location=63&issue=&date=&type=> (accessed 11 June 2021).

7 International Centre for Not-for-Profit Law (n 6).

8 Lubrano (n 3).

9 P Wilton 'Spanish flu outdid WWI in number of lives claimed' (1993) 148(11) *Canadian Medical Association Journal* at 2037.

10 D Huremović 'Brief History of Pandemics (Pandemics Throughout History)' in D Huremović (eds) *Psychiatry of Pandemics* (2017) at 24-26.

that have reported COVID-19 cases, more than 80 have implemented lockdowns prohibiting gatherings with greater than 10 people, while a further 57 restricting gatherings between 10 and 100 people.¹¹ The remainder either opted for no restrictions at all, limitations of gatherings with more than 100 people, or lacked reportable data on the matter.¹²

The Massachusetts Institute of Technology (MIT) concluded in a 2020 study that there is a legitimate rationale behind these restrictions. It was found that large gatherings disproportionately contribute to the scourge that is COVID-19.¹³ MIT stressed that COVID-19 super-spreader events – that is, events during which one person infects more than six other people – are far more frequent than anticipated and have an outsized contribution to coronavirus transmission.¹⁴ Therefore, restrictions on public movement, for instance, may have a legitimate and justifiable rationale. It is necessary, however, to assess whether such restrictions fall within the bounds of legality. Arguably one of the fundamental frameworks that may be useful in this assessment is ‘the duty of due diligence’ under international law.

3 The duty of due diligence under international law

Coco and de Souza Dias posit that there is an international obligation for states to prevent and halt the COVID-19 outbreak.¹⁵ They argue that the applicable legal framework of due diligence provides a lens through which to assess state responses to the pandemic. ‘Due diligence’ describes the principle of international law concerned with assessing the adequacy of a state’s response in addressing certain risks, harms, or threats according to the means available.¹⁶ Under the umbrella of due diligence, states are not judged on whether or not they are successful in mitigating the particular harm. Instead, the fulfilment of this duty is measured according to the reasonable steps that should have been taken by a state.¹⁷ In other words, it is an obligation of conduct as opposed to an obligation of result. This principle has been acknowledged as far back as 1927 in the *Lotus*

11 T Hale et al ‘A global panel database of pandemic policies (Oxford COVID-19 Government Response Tracker)’ (2021) 5 *Nature Human Behaviour* at 531-532.

12 Hale et al (n 11) 532.

13 F Wong & JJ Collins ‘Evidence that coronavirus superspreading is fat-tailed’ (2020) 117(47) *PNAS* at 29416.

14 As above.

15 A Coco & T de Souza Dias ‘Prevent, Respond, Cooperate: States’ Due Diligence Duties vis-à-vis the Covid-19 Pandemic’ (2020) 11(2) *Journal of International Humanitarian Legal Studies* at 218.

16 Coco & de Souza Dias (n 15) 219.

17 As above.

case.¹⁸ The International Court of Justice confirmed the importance of due diligence by asserting that there was a due diligence duty upon Albania flowing from its treaty and customary obligations in the *Corfu Channel* case.¹⁹ More recently, the *Pulp Mills* case emphasised that due diligence is a relevant international law principle in the particular field of international environmental law.²⁰ These, amongst other cases and academic writings, motivated the International Law Association to form a study group on the matter. The group stressed the importance of the concept and concluded that it remains an important consideration for state actions under international law.²¹

In the context of COVID-19, Coco and de Souza Dias identify five relevant due diligence duties that states are bound to, namely: the no-harm principle; the protection of the right to life; the protection of the right to health; several obligations under the 2005 International Health Regulations (Health Regulations); and the duty to protect persons in the event of a disaster.²² For the purposes of this article, emphasis is placed on the duty to protect the rights to life and health under international human rights law, while the Health Regulations obligations are briefly touched on, as these are the most relevant. The no-harm principle falls beyond the scope of this discussion as it primarily concerns the relationship between states instead of the link between states and their citizens.

Treaties and international customary law have concretised states' duty to protect their citizens from events and risks that pose harm within the legal framework of international human rights law. With regard to COVID-19, there is a clear obligation to protect the right to life. The Human Rights Committee in General Comment 6 emphasises that states are obliged to institute measures for the protection of life during epidemics.²³ In *Hristozov & Others v Bulgaria*,²⁴ the European Court of Human Rights confirmed this position by ruling that the actions or failures by states in terms of their healthcare policies could violate the right to life. The right to health is also relevant during the pandemic. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights (CESCR) states are mandated to: 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.²⁵ Housed within this right is the duty imposed on states to prevent, treat, and control

18 *S.S Lotus (France v Turkey)* PCIJ (7 September 1927) (1927) Ser. A No. 10 at 68.

19 *Case of the Corfu Channel United Kingdom v Albania* ICJ (9 April 1949) (1949) ICJ Reports 4.

20 *Case of the Pulp Mills on the River Uruguay Argentina v Uruguay* ICJ (20 April 2010) (2010) ICJ Reports 14.

21 International Law Association 'Working Session Report: Study Group on Due Diligence In International Law' (2016) at 6.

22 Coco & de Souza Dias (n 15) 221-222.

23 UN Committee on Human Rights General Comment 6: Article 6 (Right to Life) (30 April 1982) para 30.

24 (2012) ECHR 106.

epidemics and other diseases.²⁶ Similar wording is employed by various other international instruments such as Article 11 of the European Social Charter, Article 16 of the African Charter of Human and Peoples' Rights and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.²⁷

These obligations are not limited to the realm of international human rights law. They carry significance in the specialised field of the right to health under the Health Regulations.²⁸ These regulations, adopted by the World Health Organisation (WHO) and binding upon 196 states, carry a host of due diligence obligations relevant to COVID-19.²⁹ The Health Regulations are not a treaty but operate as a legally binding instrument. The WHO, empowered by Article 21 of the Health Regulations, can issue binding regulations to combat the international spread of disease.³⁰

The obligations in the Health Regulations include the requirements to detect, assess, notify, and report on disease outbreaks; respond promptly and effectively to public health emergencies; and provide accurate and timeous information on health emergencies to the public.³¹

This framework of due diligence provides clear duties that states must fulfil and consider in their policies and these principles offer an effective mechanism for assessing the duty to respond reasonably to COVID-19. As such, limitations on large gatherings – and any other COVID-19 restriction – should be weighed up against these principles. It is imperative that these measures operate within this legal framework in order to curb the proliferation of the virus while upholding human rights.

While due diligence provides an adequate framework for pandemic restrictions, it does not go far enough to protect human rights amidst emergency situations such as the COVID-19 pandemic. This structure must be extended to account for instances of derogations that are more invasive and pose a greater threat to human rights as states depart entirely from certain rights for some time in response to a national threat. The next part of this article is

25 International Covenant on Economic, Social and Cultural Rights (16 December 1966) United Nations Treaty Series (993) 3 (ICESCR) Art 12.

26 ICESCR (n 25) Art 12.

27 Coco & de Souza Dias (n 15) 235.

28 Coco & de Souza Dias (n 15) 224.

29 World Health Organisation *International Health Regulations* (2005) (Health Regulations); World Health Organisation 'International Health Regulations: Overview' https://www.who.int/health-topics/international-health-regulations#tab=tab_1 (accessed 12 September 2021).

30 Health Regulations (n 29) Art 21.

31 Health Regulations (n 29) Arts 6(2) & 13(1).

dedicated to the analysis of the existing derogation system and evaluating the need for its reform.

4 Derogation

Human rights are often the first casualties of a crisis.³² This sentiment has rung true with COVID-19 as many states have opted against the protection of human rights. Instead, they have elected to suppress certain human rights entirely by invoking or implementing derogations. The due diligence framework does not adequately address these instances of derogation. Therefore, a more specific response is required.

Derogation, as defined by the International Committee of the Red Cross, typically refers to the suspension or suppression of law under specific circumstances.³³ Put differently, derogation is ‘a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties’.³⁴

Proponents of derogations claim that these clauses do not go against the spirit of human rights as they are only invoked in specific emergency contexts such as COVID-19.³⁵ Moreover, they serve to protect fundamental rights such as the protection from torture and the right to life.³⁶ It follows that these rights are non-derogable.³⁷ Additionally, derogations are accompanied or are supposed to be accompanied by safeguards for implementation. One such example is Article 4(1) of the International Covenant on Civil and Political Rights which provides that states may only derogate from a right ‘to the extent strictly required by the exigencies of the situation’.³⁸

In response to COVID-19, more than 40 states have formally derogated from treaty obligations through notification to the United Nations.³⁹ Such states include Armenia, Romania, Moldova, Peru, Ecuador, Colombia, Ethiopia, Namibia, Paraguay, Senegal, and

32 C Fariss et al ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’ (2011) 65(4) *International Organisation* at 673.

33 International Committee of the Red Cross ‘Derogations’ <https://casebook.icrc.org/glossary/derogations#:~:text=The%20term%20derogation%20is%20used,treaty%20rights%20in%20emergency%20situations> (accessed 18 June 2021).

34 Fariss (n 32) 674.

35 LR Helfer ‘Rethinking Derogations from Human Rights Treaties’ (2021) 115(1) *American Journal of International Law* at 35.

36 GL Neuman ‘Constrained Derogation in Positive Human Rights Regime’ in EJ Criddle (ed) *Human Rights in Emergencies* (2016) at 15-31.

37 International Covenant on Civil and Political Rights (16 December 1966) United Nations Treaty Series (999) 171 (ICCPR) Art 4.

38 ICCPR (n 37) Art 4(1).

39 Laws on the Rights of Peaceful Assembly Worldwide ‘Derogations by States Parties from Article 21 ICCPR, Article 11 ECHR, and Article 15 ACHR on the Basis of the COVID-19 Pandemic’ (2020) at 1-4.

Thailand.⁴⁰ These states have attempted to soften the blow by imposing ‘sunset clauses’ to limit the timeframe of the derogation.⁴¹ Unfortunately, this has not always provided the intended protection. Many states have perpetually extended their derogation clauses owing to the unpredictable and pervasive nature of the pandemic. This is evidenced in the practice of Guatemala, Armenia, Ecuador, South Africa, and Peru.⁴² Consequently, individuals are left unprotected as their rights are indefinitely suspended.

It is also concerning that the state practice illustrated above only outlines the official derogations during COVID-19. While more than 40 states submitted their derogations, over 100 states have imposed severe suspensions on individual rights.⁴³ This is concerning as states have ignored and disregarded their obligations to provide notice of their intention to derogate. For example, both France and the United States of America (USA) declared states of emergency and instituted measures characteristic of derogation procedures yet failed to make notifications in this regard, as obliged by the ICCPR.⁴⁴

While some states are unwilling to submit notifications of derogation, others lack the avenue to derogate altogether. Unlike the ICCPR and ECHR, a multitude of other global and regional human rights treaties lack an express derogation clause altogether.⁴⁵ Consequently, many states have suppressed individual rights without a legal framework within which to properly administer these restrictions, such as under the African Charter.⁴⁶

The effect of these failing sunset clauses and unmonitored derogations is that individual rights are left in constant flux as states are left to their own devices in deciding which rights are dispensable when responding to a pandemic. These unregulated expressions of power are especially alarming in the context of COVID-19 when states wield heightened authority in response to a health emergency of this magnitude.

5 The pandemic of impunity

The unregulated administration of increased state power creates an associated danger to the pandemic – the proliferation of human rights violations that go unpunished. Of concern is not only the failure

40 A Le Bret ‘COVID-19 pandemic and derogation to human rights’ (2020) 7(1) *Journal of Law and the Biosciences* at 3; *Laws on the Rights of Peaceful Assembly Worldwide* (n 39) 1-4.

41 Helfer (n 35) 39.

42 *Laws on the Rights of Peaceful Assembly Worldwide* (n 39) 1-4.

43 International Centre for Not-for-Profit Law (n 6).

44 Le Bret (n 40) 4; ICCPR (n 37) Art (4)1.

45 Helfer (n 35) 30.

46 As above.

to comply with these procedural safeguards but also that unmonitored derogations lay fertile soil for impunity. As noted by the European Commission for Democracy Through Law: ‘experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency’.⁴⁷ This is not only an academic concern but a legitimate issue evident in the fact that states have limited additional rights to those relevant to the spread of the virus. Although derogations such as those to the right to movement are justified for the purposes of curbing the virus, many derogations have extended to the rights to privacy, a fair trial, and family life.⁴⁸ Some states have even transgressed non-derogable rights such as the right to life and the prohibition of torture and cruel, inhumane or degrading treatment.⁴⁹ States have also used the pandemic as an opportunity to suppress all political dissent.⁵⁰

Stories of this nature have littered headlines across the world for the past year. In Mexico, a 45% increase in attacks against the press was documented since 2019 with at least seven journalists being assassinated due to their work.⁵¹ In France, there have been reports of Islamophobia, racism, and police brutality.⁵² There have also been extrajudicial killings of civilians at the hands of police in Nigeria and Bolivia.⁵³ Hungary enacted emergency laws that provided unfettered power to rule by decree.⁵⁴ These stories depict gross human rights violations that often go unpunished.

47 European Commission for Democracy Through Law ‘Compilation of Venice Commission Opinions and Reports on States of Emergency’ (2020) at 5.

48 N Coghlan ‘Dissecting Covid-19 Derogations’ 5 May 2020 <https://verfassungsblog.de/dissectingcovid-19-derogations/> (accessed 16 June 2021).

49 K Dzehtsiarou ‘COVID-19 and the European Convention on Human Rights’ 27 March 2020 <https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/> (accessed 16 June 2021).

50 Helfer (n 35) 30.

51 Article 19 ‘Mexico: Setbacks to freedom of expression in 2020’ 12 November 2020 <https://www.article19.org/resources/mexico-setbacks-to-freedom-of-expression-in-2020/> (accessed 12 June 2021).

52 S Desai ‘Protests in France against police impunity’ 21 March 2021 <https://www.aa.com.tr/en/europe/protests-in-france-against-police-impunity/2182965> (accessed 12 June 2021).

53 Amnesty International ‘Healing The Pandemic of Impunity 20 Human Rights Recommendations For Candidates In The 2020 Presidential Elections In Bolivia’ (2020) at 22-23; TF Abiodun et al ‘Unlawful Killings of Civilians by Officers of the Special Anti-Robbery Squad (SARS) Unit of the Nigerian Police in Southwest Nigeria: Implications for National Security’ (2020) 3(1) *African-British Journals* at 55-56.

54 S Gebrekidan ‘For Autocrats, and others, Coronavirus is a chance to grab even more power’ 30 March 2020 <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html> (accessed 18 June 2021).

A further justification for the reformation of the due diligence framework and derogation system is the need to rectify the disproportionate impact of restrictions and derogations. Vulnerable groups who find themselves on the margins of society pay the heaviest for the failings of governments.⁵⁵ COVID-19 has magnified and deepened pre-existing societal inequalities with heightened inequality exacerbating vulnerable groups' exposure to the virus.⁵⁶ In the USA, for example, studies of disproportionate COVID-19 cases suffered by ethnic and racial minorities compared to their white counterparts exemplify this point.⁵⁷ The report illustrates how individuals of Hispanic or Latino ethnicity have COVID-19 hospitalisation rates that are four times higher than that of non-Hispanic white persons.⁵⁸ Closer to home, Amnesty International has stated that a contributing factor to South Africa being the first African country to reach one million cases is the difficulty faced by most South Africans to socially distance as they live in poor quality and overcrowded housing in townships.⁵⁹

Inequality does not only manifest in the contraction of disease but is also inextricably tied to the creation of policy itself.⁶⁰ The increased restriction of movement and stay-at-home orders provide a case-in-point. The imposition of self-containment has had a correlative relationship with an increase in domestic violence, with several states reporting raises in domestic abuse and violence of around 30%.⁶¹ While domestic abuse is an issue suffered by men and women, it disproportionately affects women and has prompted the WHO to declare it a public health issue.⁶² The UN Committee on the Elimination of Discrimination against Women has also declared the prohibition against gender-based violence a principle of customary international law.⁶³ It is concerning that the isolating conditions of the pandemic have made it more difficult to effect redress in this regard.

55 R Siegel & P Mallow 'The Impact of COVID-19 on Vulnerable Populations and Implications for Children and Health Care Policy' (2021) at 1-2.

56 As above.

57 JM Wilder 'The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States' (2021) 72 *Clinical Infectious Diseases Editorial Commentary* at 709.

58 Centers for Disease Control and Prevention Health Equity Considerations and Racial and Ethnic Minority Groups <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/increased-risk-exposure.html> (accessed 18 June 2021).

59 Amnesty International 'Failing to Learn the Lessons? The Impact of Covid-19 on a Broken and Unequal Education System' (2021) at 9.

60 Lebet (n 40) 9.

61 UN Women 'COVID-19 and Ending Violence Against Women and Girls' 2020 <https://www.unwomen.org/en/digital-library/publications/2020/04/issue-brief-covid-19-and-ending-violence-against-women-and-girls> (accessed 18 June 2021).

62 World Health Organisation 'Global status report on violence prevention' (2014) at 7-8.

63 Lebet (n 40) 9.

These findings have prompted the UN High Commissioner for Human Rights to condemn the disparity between those who have protection amidst the pandemic and those who are forced to fend for themselves. To rectify this state of affairs, the Commissioner stressed the need for ‘policies that uphold our equality, and which deliver universal and equal access to social welfare protections and health care’.⁶⁴ This article echoes the call from the Commissioner by arguing that a critical aspect of reforming due diligence and derogation systems is prioritising the protection of vulnerable individuals by considering the issues they face and how measures disproportionately impact them.

6 How should states respond?: Reforming derogation systems

As illustrated above, a duty to prevent, respond to, and curb COVID-19 has been established under the legal framework of due diligence. As a result, states must ensure that they respect, protect, promote, and fulfil human rights even amid a public health crisis.⁶⁵ In doing so, states will be able to strike a balance between protecting the life of the nation whilst upholding their international obligations in compliance with the principles of necessity and proportionality.

This does not go far enough, however, as it fails to provide an appropriate solution for the lawful implementation of derogation. To fill this lacuna, the work of Helfer is helpful. Helfer argues that the issues with derogation are rooted in the system itself and we must reshape it or risk violating the very essence of international law.⁶⁶ Five main remedies are proposed for the development of the derogation system. These are underpinned by a normative framework that holds that derogations ‘aim to reduce human rights violations during emergencies relative to the level of violations that would have occurred without such a mechanism’.⁶⁷ This position stands in contrast to those who claim that derogations are nothing more than a necessary evil to permit states a degree of freedom to administer their affairs amidst crisis as a product of their sovereignty.⁶⁸ Helfer rejects this idea by claiming that states are more – not less – likely to violate human rights during emergencies and that monitored

64 M Bachelet ‘Addressing the disproportionate impact of COVID-19 on minority ethnic communities’ 24 November 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26541&LangID=E> (accessed 11 June 2021).

65 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, Communication 155/96, African Commission on Human and Peoples’ Rights, Thirtieth Annual Activity Report (2001) at 43.

66 Helfer (n 35) 34.

67 Helfer (n 35) 35.

68 As above.

derogations can provide regulation and constraint to the exercise of power.⁶⁹

First, there needs to be a stronger link between national and international law when invoking derogation. To this end, Helfer suggests that greater embeddedness offers a solution.⁷⁰ Notification should be attached to the domestic invocation of emergency powers.⁷¹ This hopes to facilitate greater compliance with derogation requirements while also constraining the powers of states amidst emergencies.⁷²

Second, an increase in engagement with these notifications is required. Regional and international bodies must go beyond merely accepting notifications and should begin questioning the need for derogation whilst considering the ramifications of human rights.⁷³

Third, greater engagement should not only come from human rights institutions but must also improve from states themselves. To this end, there must be a greater emphasis on sharing information and prioritising accountability. States should go beyond declaring derogations and should also explain the rationale behind them.⁷⁴

Fourth, the issue of timing must be addressed. The timing of derogation declarations requires attention as states often utilise derogations after the horse has bolted – that being after the suppression of human rights. Notifications of derogations should instead notify the intention to suppress rights. To rectify this, Helfer suggests that states should be incentivised to report promptly, or that an outer limit be imposed on the invocation of derogation.⁷⁵

The period between human rights violations and their ventilation before an international forum is another issue under this banner. The phrasing of exhaustion requirements often contributes to these prolongments and it appears unlikely that change will occur in this regard.⁷⁶ A better review of derogation notifications by international bodies is a more realistic and appropriate solution.⁷⁷

Finally, Helfer calls for greater clarity on the scope of derogations. This clarity must encompass the precise conditions necessary to invoke a period of derogation and proposes that, where they are sufficient, limitations should instead be invoked.⁷⁸ Clarity is required on whether derogation is at all possible under treaties

69 As above.

70 Helfer (n 35) 36.

71 As above.

72 Helfer (n 35) 36.

73 As above.

74 Helfer (n 35) 38.

75 As above.

76 As above.

77 Helfer (n 35) 39.

78 Helfer (n 35) 40.

without an express provision to this effect.⁷⁹ Scholars have argued that the African Charter and CESCRCR implicitly permit states to suspend certain rights during emergencies and COVID-19 has proven that an alternative conclusion does not deter states from suppressing rights in any event.⁸⁰ Therefore, it is necessary to review and revisit these treaties to gain clarity on this issue.

Helfer argues that these changes will reform the derogation system and move it away from its current use as a system that incentivises states to invoke extraordinary powers free from sufficient regulation or monitoring.⁸¹ While I concur with Helfer's normative baseline that reform could make strides towards a more comprehensive system that installs checks and balances on the exercise of state power, his amended system is insufficient as it stands. This amended system needs a more intentional and progressive normative framework. States must introduce policies with greater clarity, transparency, and timing and the considerations informing the policies must also evolve. COVID-19 has reaped the fruits of inequality and suffering from the seeds sown preceding this pandemic. Therefore, states must be deliberate in protecting marginalised groups and reversing the divisions present in society. In doing so, an intersectional approach must be adopted. This approach should prioritise the protection of groups marginalised on the basis of race, gender, sexual orientation, age, and every other relevant consideration.

Blueprints for this conscious approach are provided by those on the international stage. The United Nations Population Fund has developed a gender-based approach to COVID-19,⁸² while the Centre for Human Rights has detailed the unique and disproportionate impact of the pandemic on the LGBTQI+ community across Africa.⁸³ Similarly, Lebret aims to account for the disproportionate impact of derogations on vulnerable communities including the detained and the elderly.⁸⁴

States should draw inspiration from these approaches when deciding whether to derogate from rights and how their power will be exercised. The sun must set on the age of unregulated and unjustified derogations. Derogations in their current form facilitate impunity that is felt the most by the most marginalised in society. A new dawn is needed. One where states that derogate from rights must do so transparently and within the context of a commitment to the

79 As above.

80 As above.

81 Helfer (n 35) 40.

82 UN Population Fund 'Covid-19: A Gender Lens Technical Brief Protecting Sexual and Reproductive Health and Rights, and Promoting Gender Equality' (2020) at 5-6.

83 Centre for Human Rights 'Understanding the disproportionate impact of COVID-19 on LGBTQI+ persons in Africa' (2020) at 2-3.

84 Lebret (n 40) 12-15.

protection of these rights. The policies adopted must be borne from the people it protects as the citizens of a state will differ on a case-by-case basis.

7 **Conclusion**

COVID-19 is not the first health crisis and it certainly will not be the last. Periods of emergency are an inevitability but these times of disaster cannot continue to be defined by gross human rights violations that go unpunished. To curb this trend, states must exercise their power according to international law standards. To this end, due diligence should be utilised and evolved so that states can exercise power in a lawful and just manner. Derogation systems are in dire need of reform. Unless these changes are realised, human rights will continue to be the first casualties in times of crisis.

HERD IMMUNITY OR POLITICAL POWER?

by Samantha Smit*



Abstract

This article evaluates the vaccine rollout plan in South Africa and whether it intends to achieve herd immunity or gain more power for the government. The importance of South Africa achieving herd immunity will be considered alongside the restrictions preventing the private sector from gaining access to vaccines thus, arguably, slowing the process of achieving herd immunity. Finally, this article explores different strategies that the government could consider in order to accelerate the vaccination rollout without relinquishing its political power.

1 Introduction

Load. Aim. Fire. This was the consequence faced by many people who formed part of the Jewish community in the Second World War Holocaust, where the life expectancy was staggeringly low, and most people felt they had a fifty-fifty chance of surviving to the end of the

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war.¹ Never in our wildest dreams did our generation think we would face similar odds outside of a war. However, for people with comorbidities or other health risks, the odds have appeared very similar to those encountered during the Second World War.²

This might seem like a dramatic view, but it may be justified by the fact that even though COVID-19 is a relatively new virus, it has nonetheless given rise to a devastating global pandemic.³ When COVID-19 arrived in South Africa on 05 March 2020, no vaccines were available worldwide.⁴ However, as the situation progressed, the world's scientists and epidemiologists came together to develop a vaccine for the deadly virus.⁵ Typically, it takes 10-15 years before a vaccine is fully developed, however, in this instance, the quickest vaccine ever developed took only four years.⁶ Creating and testing the COVID-19 vaccine was very cumbersome and several pharmaceutical companies invested capital in producing it at an unprecedented rate.⁷ These companies are now asking for an above-market price for the vaccine as they have had to invest a lot of capital and, currently, only rich countries are willing and able to pay these prices.⁸ These high vaccine prices are not always attainable for the governments of developing countries with many only being able to secure a limited number of vaccines due to their limited resources.⁹

When vaccines became available to purchase, the South African government did not immediately start the procurement process and only announced on 11 January 2021 that South Africa had begun buying vaccines.¹⁰ This was after other countries such as Canada had already signed deals for prospective vaccines as early as August 2020

- 1 P Tammes 'Survival of Jews during the Holocaust: the importance of different types of social resources' (2007) 26 *International Journal of Epidemiology* at 331.
- 2 IS Kalla & A Laher 'COVID-19: The concept of herd immunity – is it a strategy for South Africa?' (2020) 2 *Wits Journal of Clinical Medicine* at 39.
- 3 *Mohamed v President of the Republic of South Africa* 2020 (5) SA 553 (GP) para 7.
- 4 National Institute for Communicable Diseases 'First case of COVID-19 coronavirus reported in SA' 5 March 2020 <https://www.nicd.ac.za/first-case-of-covid-19-coronavirus-reported-in-sa/> (accessed 8 May 2021).
- 5 M Apuzzo & DD Kirkpatrick 'Covid-19 changed how the world does science, together' *New York Times* 14 April 2020 <https://www.nytimes.com/2020/04/01/world/europe/coronavirus-science-research-cooperation.html> (accessed 10 May 2021).
- 6 G Grey 'The Scientists' Collective 10-point proposal for equitable and timeous access to COVID-19 vaccine in South Africa' (2021) 111 *South African Medical Journal* at 89.
- 7 A Dhali 'COVID-19 vaccines: Equitable access, vaccine hesitancy and the dilemma of emergency use approvals' (2020) 13 *South African Journal of Bioethics and Law* at 77.
- 8 As above.
- 9 Grey (n 6) 89.
- 10 The Presidency Republic of South Africa 'Statement by President Cyril Ramaphosa on South Africa's vaccine rollout plan' <http://www.thepresidency.gov.za/speeches> (accessed 10 April 2021).

while the vaccines were still undergoing trials.¹¹ There is a concern that South Africa and other developing countries were kept out of discussions concerning the vaccine's initial distribution due to their inability to pay the high prices required for these vaccines.¹² Even though developed nations such as Canada, the United Kingdom (UK), and the United States of America (USA) only represent 14% of the world's population, they had (at date of writing) already purchased 53% of the most promising vaccines.¹³

This article will, firstly, discuss the South African government's initial vaccine rollout strategy. Secondly, the importance of South Africa achieving herd immunity will be discussed together with the consequences of not doing so. Thirdly, the different role-players prohibiting private citizens and companies from procuring and administering COVID-19 vaccines will be identified. Finally, possible recommendations on how the government can fast-track its vaccine rollout strategy to achieve herd immunity will be discussed.

2 A brief synopsis of the vaccine rollout strategy in South Africa

In an address to the nation, President Ramaphosa stated that the vaccine rollout would start in February 2021. The planned vaccine rollout has three phases that would prioritise different categories of people with each phase. In phase one, essential health care workers, who amount to 1.2 million of the country's population, would be prioritised.¹⁴ This phase was planned to start during February and to be completed by the end of March.¹⁵ In phase two, essential workers such as teachers, police officials, municipal workers, and other frontline personnel would be prioritised.¹⁶ People in institutions such as old age homes, shelters, and prisons, and everyone over the age of 60 would be prioritised together with adults with comorbidities.¹⁷ The total number of people that the government planned to vaccinate in

11 D Ljunggren 'Canada signs deals with Pfizer, Moderna for experimental Covid-19 vaccines' *India Times* <https://health.economicstimes.indiatimes.com/news/pharma/canada-signs-deals-with-pfizer-moderna-for-experimental-covid-19-vaccines/77379276> (accessed 10 April 2021).

12 Grey (n 6) 90.

13 Staff Writer 'Rich countries hoarding Covid vaccines, says People's Vaccine Alliance' *BBC News* 9 December 2020 <https://www.bbc.com/news/health-55229894> (accessed 12 April 2021).

14 National Institute for Communicable Diseases 'All you need to know about COVID-19 and Vaccines' (2021) 3 *Wits Journal of Clinical Medicine* (NICD) at 86.

15 M Merten 'From May to October Phase Two should see 13 million vaccinated, Zweli Mkhize claims' *Daily Maverick* 30 March 2021 <https://www.dailymaverick.co.za/article/2021-03-30-from-may-to-october-phase-two-should-see-13-million-vaccinated-zweli-mkhize-claims/> (accessed 13 April 2021).

16 NICD (n 14) 86.

17 As above.

this phase was around 16 million.¹⁸ During phase three, the government planned to vaccinate the remaining adult population of approximately 22.5 million people.¹⁹ Phase three was initially set for completion by the end of 2021.²⁰

Although the phase one rollout was initially scheduled to be completed at the end of March, the government had since moved the target to later in the year.²¹ It is clear that it will not be successful in vaccinating all essential healthcare workers by the initially scheduled date.²² The government had stated that phase one of the vaccine rollout would only be concluded in the middle of May.²³ It is, therefore, apparent that the government's vaccine rollout plan had hit a few speed bumps in terms of meeting its planned targets. One of the main reasons for the belated administering of vaccines is the global vaccine shortage.²⁴ Developed countries such as Canada, the USA, and the UK started procuring vaccines much earlier and had thus potentially monopolised the vaccine market.²⁵ As a result, developing countries such as South Africa had struggled to secure sufficient vaccines. Canada had, for example, procured enough vaccines to inoculate its entire population five times over – resulting in it having a surplus of vaccines that it could possibly sell at an above-market price due to the global shortage.²⁶ Considering government projections (at the date of writing), and the pace at which vaccines are currently being administered, South Africa will only reach herd immunity by 2022.²⁷ This is in the absence of a modified approach which South Africa desperately needs.

18 The Presidency Republic of South Africa (n 10).

19 NICD (n 14) 86.

20 South African Government 'COVID-19 Coronavirus strategy' <https://www.gov.za/covid-19/vaccine/strategy> (accessed 12 April 2021).

21 Merten (n 15).

22 SAMRC 'Presentation to the portfolio committee on health: Update on the COVID-19 vaccine rollout' 30 March 2021 <https://www.samrc.ac.za/sites/default/files/attachments/2021-03-24/PortfolioCommittee.pdf> (accessed 22 April 2021).

23 SAMRC (n 22).

24 *Solidarity and Another v Minister of Health and 16 Others* (3623/21) (*Solidarity*) Health Justice Initiative Application for Admission as an *Amicus Curiae* para 31.

25 Dhai (n 7) 77.

26 Staff Writer 'Moral issue: African official blasts Covid-19 vaccine inequality' *News24* 10 December 2020 <https://www.news24.com/news24/africa/news/moral-issue-african-official-blasts-covid-vaccine-inequality-20201210> (accessed 6 May 2021).

27 Bhekisisa Team 'SA is not reaching herd immunity. Our new goal is containment – here's how it works' *News24* 3 June 2021 <https://www.news24.com/health24/medical/infectious-diseases/coronavirus/sa-is-not-reaching-herd-immunity-our-new-goal-is-containment-heres-how-it-works-20210603-2> (accessed 6 September 2021).

3 Reaching herd immunity as a matter of urgency

3.1 The loss of life due to COVID-19.

COVID-19 is a rapidly changing pandemic and the strategy to combat it has constantly been adapted to prevent the unnecessary loss of life and to improve health standards.²⁸ Nevertheless, the best strategy to save lives is to achieve herd immunity.²⁹ In order to achieve herd immunity safely and successfully, the state aims to vaccinate 67% of the population which is approximately 40 million people in South Africa.³⁰ Since the start of the pandemic, and at the time of writing this article, 84 751 people in South Africa have died as a result of COVID-19.³¹ In light thereof, it should be the government's primary objective to vaccinate as many people as quickly as possible to prevent a continued rise in COVID-related deaths.

3.2 The impact of COVID-19 on the South African economy

Following the surge in COVID-19 numbers and the state-imposed lockdowns, a recession had hit the economy with the gross domestic product (GDP) of several countries declining significantly.³² Unemployment is, globally and locally, at its highest in ten years and continues to increase.³³ It is projected that countries that are close to achieving herd immunity will be able to resume normal economic activities and their economies will be in a far better position.³⁴ Therefore, South Africa will likely remain in a recession for years to come if the current vaccination strategy is not changed drastically to achieve herd immunity sooner. In the absence of a different approach by the government, South Africa will not achieve herd immunity soon

28 *Esau v Minister of Co-operative Governance and Traditional Home Affairs* 2020 11 BCLR 1371 (WCC) paras 155.1 & 157.

29 World Health Organisation 'Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19' 31 December 2020 <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19> (accessed 18 April 2021).

30 NICD (n 14) 86.

31 H Ritchie et al 'Coronavirus Pandemic (Covid-19) – the data' 12 September 2021, 18 Months since the start of the pandemic in South Africa' <https://ourworldindata.org/coronavirus> (accessed 30 April 2021).

32 Stellenbosch University Bureau for Economic Research 'Economic activity expected 2020-2022: first quarter' (2021) 36 *BER: Economic Prospects* at 3.

33 A O'Neill 'Number of unemployed persons worldwide from 1991 to 2021 and projections until 2022' <https://www.statista.com/statistics/266414/unemployed-persons-worldwide/> (accessed 23 April 2021).

34 Stellenbosch University Bureau for Economic Research (n 32) 8.

enough to enable the resumption of normal economic activities in the planned period.³⁵

3.3 Return to rationality

COVID-19 has had a substantial effect on the population's general mental well-being. The fear of contracting the virus has led to elevated levels of stress.³⁶ Many isolate themselves to avoid infection and this restricts their social interactions with others to the bare minimum with no physical contact.³⁷ This behaviour causes anxiety and depression.³⁸ Additionally, unemployment, fatality rates, continuous lockdowns, and movement restrictions have significantly changed daily lives and have ultimately led to mental health problems and increased substance abuse.³⁹ This increase in substance abuse has led to a significant increase in reports of gender-based violence cases in South Africa throughout the year.⁴⁰ This is now commonly referred to as the 'second pandemic' in South Africa.

Social interactions such as hugging or shaking hands have also been cautioned against.⁴¹ This was instituted as part of the safety protocols to limit the amount of close contact that individuals have with one another and to reduce the virus' spread.⁴² Social gatherings such as religious services, sports events, visiting family, and attending funerals have also been restricted.⁴³ These events give people a sense of belonging and form a substantial part of who we are in our societies.⁴⁴ Mental health issues will thus continue to rise until the virus is under control through herd immunity.

35 Bhekisisa Team 'South Africa's not reaching herd immunity. Our new goal is containment' *Mail and Guardian* 04 June 2021 <https://mg.co.za/health/2021-06-04-south-africas-not-reaching-herd-immunity-our-new-goal-is-containment/> (accessed 8 September 2021).

36 Y Lahav 'Psychological distress related to COVID-19 – The contribution of continuous traumatic stress' (2020) 277 *Journal of Affective Disorders* at 129-137.

37 As above.

38 E Mbunge 'Effects of COVID-19 in South African health system and society: An explanatory study' (2020) 14 *Diabetes and Metabolic Syndrome: Clinical Research and Reviews* at 1809-1814.

39 S Dubey 'Psychosocial impact of Covid-19' (2020) 14 *Diabetes and Metabolic Syndrome: Clinical Research and Reviews* at 779-788.

40 C Gould 'Gender-based violence during lockdown: Looking for answers' (2020) 113 *Servamus Community-based Safety and Security Magazine* at 56-57 (accessed 3 May 2021).

41 Department of Health 'Mental Health and Covid-19' 22 October 2020 <https://sacoronavirus.co.za/2020/10/22/mental-health-and-covid-19/> (accessed 7 May 2021).

42 O Home 'COVID-19: Protecting people and societies' <https://www.oecd.org/coronavirus/policy-responses/covid-19-protecting-people-and-societies-e5c9de1a/> (accessed 2 May 2021).

43 Disaster Management Act, 2002: Amendment of Regulations Issued in Terms of Section 27(2) 2002 (Disaster Management Act Amendment of Regulations) sec 36(4)(ii).

44 Department of Health (n 41).

4 The different role players prohibiting private citizens and companies from procuring COVID-19 vaccines

4.1 The role of legislation: To protect and promote, or to restrict?

In South Africa, no person may purchase vaccines from abroad and distribute them if the vaccines have not been registered with and approved by the South African Health Products Regulatory Authority (SAHPRA).⁴⁵ This is because SAHPRA's function is, among others, to ensure that the vaccines meet the standards of quality, safety, efficiency, and efficacy.⁴⁶ For a vaccine to be used in South Africa, SAHPRA must either register it or grant authorisation for its emergency use. Moreover, even if a vaccine is approved for use or emergency use by the government, private entities are still precluded from importing the vaccine.⁴⁷ This means that neither the government nor a private entity may import the COVID-19 vaccine without SAHPRA's approval.⁴⁸ The government has reiterated that until now (at date of writing), the issue precluding private institutions from procuring the vaccine has been that it was only approved for emergency use. Thus, it could only be procured by the government as only it has authorisation.⁴⁹

The government had attained authorisation for emergency use of the vaccine instead of registering the vaccine to make it quickly available as possible means to addressing the COVID-19 health crisis.⁵⁰ The government has applied for a licence under section 21 of the Medicines and Related Substances Act to temporarily allow for the sale of the unregistered COVID-19 vaccine, such as the AstraZeneca vaccine, as the process of registration takes time and may cause a delay in the rollout.⁵¹ During this time multiple other vaccines, such as the Johnson and Johnson, Pfizer, Coronavac, and Sputnik V vaccines, were going through the formal registration process.⁵²

45 Medicines and Related Substances Act 101 of 1965 (Medicines Act) sec 21.

46 Medicines Act (n45) sec 2B(1)(a).

47 *Solidarity* (n 24); Director-General of the National Department of Health Affidavit <https://powersingh.africa/wp-content/uploads/2021/02/50F-0001-Minister-of-Health-Answering-Affidavit-2021-02-22.pdf> (National Department of Health Affidavit) para 13.3.2. This matter has, however, been withdrawn.

48 Medicines Act (n 45) sec 21(1).

49 Medicines Act (n 45) sec 21.

50 Grey (n 6) 89.

51 Medicines Act (n 45) sec 21.

52 SAHPRA 'COVID-19 Vaccines Regulatory Status Update' https://www.sahpra.org.za/wp-content/uploads/2021/01/SAHPRA_COVID-19-vaccines-update.pptx (accessed 10 July 2021).

The private sector could, therefore, not import any COVID-19 vaccines because it had not gone through the formal process of registration. However, since 31 March 2021, COVID-19 vaccines have been approved by SAHPRA and private institutions are now eligible to apply for licences to import them.⁵³ This licence to import is generally approved by SAHPRA.⁵⁴ If SAHPRA approves licences for private institutions to import registered COVID-19 vaccines, they can start negotiations with pharmaceutical companies for purchase agreements. Currently, private companies can still not import their own vaccines, however, the government does provide approved private institutions to inoculate their employees.⁵⁵

4.2 The government's responsibilities: Reducing inequalities versus saving lives in a global pandemic

When all the effective vaccines have been successfully registered with the SAHPRA and private persons and institutions have obtained licences, they will be allowed to import COVID-19 vaccines.⁵⁶ For them to get over the final hurdle of administering the vaccine after it is imported, private institutions need the government to approve them as a vaccine facility. Furthermore, only a doctor or nurse may administer the vaccine if they have been approved by the government to do so.⁵⁷ The government has expressed concern that if private persons and institutions were to be granted licences, the supply of vaccines available to it would be significantly reduced.⁵⁸ Thus, it can be argued that the government is indirectly preventing private persons from being able to procure vaccines with procedural hurdles and is, as a result, limiting their right to acquire the various lifesaving COVID-19 vaccines.⁵⁹

Even if the private sector received approval from the SAHPRA, it would not be able to buy the COVID-19 vaccines as it is not permitted to administer them. When private institutions approached the government for permission to purchase and administer the vaccines

53 SAHPRA 'SAHPRA Registers the COVID-19 Vaccine Janssen AD26.COV2-S [Recombinant] With Conditions' 01 April 2021 <https://www.sahpra.org.za/news-and-updates/sahpra-registers-covid-19-vaccine-janssen-ad26-cov2-s-recombinant-with-conditions/> (accessed 09 May 2021).

54 Medicines Act (n 45) sec 22C(1)(b).

55 South African Government News Agency 'Government prepares for businesses to start offering COVID-19 vaccines to workers' 02 June 2021 <https://www.sanews.gov.za/south-africa/government-prepares-businesses-start-offering-covid-19-vaccines-workers>.

56 Medicines Act (n 45) sec 22C.

57 S Rall 'Medical staff have been trained to administer Covid vaccines' 1 February 2021 <https://www.iol.co.za/news/south-africa/kwazulu-natal/medical-staff-have-been-trained-to-administer-covid-vaccines-8e22c080-5b6e-4f7c-84d5-99f2c1f50bb0> (accessed 5 June 2021).

58 National Department of Health Affidavit (n 47) para 14.4.2.

59 Constitution of the Republic of South Africa, 1996 (Constitution) sec 27(1).

for their employees, the government denied the request or allowed only a selected few companies to administer the vaccines.⁶⁰ As the private sector is no longer precluded from importing the vaccines, the government is actively preventing it from administering the vaccines. This effectively invalidates the private sector's ability to import the vaccine.⁶¹ Currently, only Impala, Sibanye, and Discovery are among the few private institutions that are permitted to administer vaccines.⁶² If the government approves more private institutions, then more people will be vaccinated quicker, and herd immunity will be reached sooner.

The government explains that this would, in its view, promote an unequal wealth distribution as rich companies with better resources will be provided with vaccines sooner than the government can get access because private institutions can pay the inflated prices.⁶³ It is also concerned that private institutions may be able to provide vaccines with a higher efficacy rate, that is, the Pfizer and Moderna vaccines which have a 90% efficacy rate as opposed to the Johnson and Johnson vaccine which has a slightly lower efficacy rate of 85%.⁶⁴ This can create a situation where people with more resources receive better vaccines before those who may need it more but could not afford to purchase these vaccines on their own – such as the elderly or people with comorbidities.⁶⁵ By not granting the private sector the ability to administer the COVID-19 vaccine, the government is the sole source from which South Africans can access vaccines.⁶⁶ It is argued that if a person has the available resources to procure the COVID-19 vaccine through their medical aid or other financial means then they

- 60 N Wilson et al 'Private sector wants in on SA's vaccine rollout' *Sunday Times* 22 March 2021 <https://www.timeslive.co.za/sunday-times-daily/news/2021-03-22-private-sector-wants-in-on-sas-vaccine-rollout/> (accessed 14 May 2021).
- 61 C Nortier 'Private sector can procure vaccines from government, Mkhize tells National Council of Provinces' *Daily Maverick* 25 February 2021 <https://www.dailymaverick.co.za/article/2021-02-25-private-sector-can-procure-vaccines-from-government-mkhize-tells-national-council-of-provinces/> (accessed 10 May 2021).
- 62 D Slater 'Mining healthcare sites gear up to increase vaccine rollouts' 25 June 2021 <https://www.miningweekly.com/article/mining-healthcare-sites-gear-up-to-increase-vaccine-rollouts-2021-06-25> (accessed 26 June 2021).
- 63 National Department of Health Affidavit (n 47) para 14.4.3.
- 64 LH Sun 'Pfizer, Moderna vaccines 90 percent effective in study of essential workers' *The Washington Post* (Washington D.C.) 29 March 2021 <https://www.washingtonpost.com/health/2021/03/29/vaccine-effective-essential-workers-study/> (accessed 26 April 2021); WHO 'The Johnson & Johnson COVID-19 vaccine: What you need to know' <https://www.who.int/news-room/feature-stories/detail/the-j-j-covid-19-vaccine-what-you-need-to-know> (accessed 6 May 2021).
- 65 United Nations 'Unequal Vaccine Distribution Self-Defeating, World Health Organization Chief Tells Economic and Social Council's Special Ministerial Meeting' 16 April 2021 <https://www.un.org/press/en/2021/ecosoc7039.doc.htm> (accessed 10 May).
- 66 P Mukherjee & N Dlodla 'Experts urge state to share vaccine plan with private sector' 20 January 2021 <https://www.businesslive.co.za/bd/national/2021-01-20-experts-urge-state-to-share-vaccine-plan-with-private-sector/> (accessed 29 April 2021).

should not be precluded from protecting themselves against a possibly fatal virus. The government is thus using its power to restrict people's right to life and access to health care services instead of promoting and protecting these important rights, as COVID-19 is a deadly virus.

In Indonesia, the government allowed private institutions to purchase their vaccines.⁶⁷ In this model, two vaccine rollout strategies are happening simultaneously with the main goal of inoculating as many people as possible as Indonesia also has high COVID-19 infections.⁶⁸ In both strategies, vaccines will be bought from foreign suppliers and these vaccines have been approved by their regulatory authority.⁶⁹ The government's rationale behind this decision was that it would reduce the pressure on the national budget and lead to more people being vaccinated sooner.⁷⁰ Indonesia, similarly to South Africa, is a developing country. The South African government could use Indonesia as an example that shows that a joint effort between the private and public sectors is possible.⁷¹

The government's current plan is to procure all the vaccines with the funds available in the public purse and to distribute and administer the vaccines as it sees fit. The government has also informed all private institutions that it will introduce a vaccine rollout plan that will be managed independently and solely by it. With a global health pandemic, the concern of the government should not be that wealthy people will be afforded better medical treatment as they have better resources available, but to vaccinate as many people as soon as possible. The government is concerned that if it allows private institutions to procure and administer vaccines for their employees, that will increase the inequalities in South Africa as private companies have the means to procure these vaccines.⁷² As such, it has decided to remain the main provider of the COVID-19 vaccine and to allocate it primarily based on need thereby linking South Africa's hope to achieve herd immunity to the government's available resources.

The question which arises is whether the government is placing the right to be treated equally above all other rights such as the right to bodily integrity and right to health care through gaining access to

67 J Emont 'A New Covid-19 Experiment from Asia: Letting Companies Buy Vaccines' 5 March 2021 <https://www.wsj.com/articles/businesses-to-buy-covid-19-vaccines-for-employees-in-indonesias-plan-to-ease-pandemic-11614940206> (accessed 12 May 2021).

68 Emont (n 67).

69 As above.

70 As above.

71 N le Roux & A Schoeman 'A comparative analysis of the design of special economic zones: The case of South Africa, Malaysia and Indonesia' (2016) 9 *Journal of economic and Financial Sciences* at 756.

72 LO Gostin, SA Karim & BM Meier 'Facilitating Access to a COVID-19 Vaccine through Global Health Law' (2020) 48 *Journal of law, Medicine & Ethics* at 623.

the lifesaving COVID-19 vaccines.⁷³ In *S v Makwanyane*, Langa J stated the following:⁷⁴

I place more emphasis on the right to life. Section 9 of the Constitution proclaims it in unqualified terms. It is the most fundamental of all rights, the supreme human right.

As such, the right to life and lifesaving medicine should supersede the right to equality and the government should not place the right to equal medical treatment above people's right to life. If the government continues to prevent private companies from administering vaccines, then it effectively places the right to equality above the right to life thereby endangering people's lives unnecessarily.

4.3 Pharmaceutical companies' dilemma: Protecting humanity or maximising profits?

When the global vaccine rollout started, no restrictions were put on the number of vaccines that a country could buy. This led to the unequal distribution of COVID-19 vaccines with developed countries being able to procure a surplus of vaccines.⁷⁵ Some developed countries have almost reached herd immunity and have more vaccines available than they need to reach herd immunity, while most developing countries have not been able to vaccinate even 10% of their populations.⁷⁶ Pharmaceutical companies have placed no restrictions on the purchasing of vaccines as the only requirement is the ability to pay.⁷⁷ This has thereby created a shortage of vaccines available.⁷⁸ The United Nations (UN) condemned this practice by developed countries and implored them to refrain from buying more vaccines than they require so that all countries can achieve herd immunity.⁷⁹ Thus, a balance must be struck when considering the protection of humanity versus the profit margin of private institutions.

73 Constitution (n 59) sec 12(2).

74 1995 (3) SA 391 (CC) para 217.

75 United Nations 'Human Rights and access to COVID-19 vaccines' 17 December 2020 https://www.ohchr.org/Documents/Events/COVID-19_AccessVaccines_Guidance.pdf (accessed 22 April 2021).

76 A Mirza & E Rauhala 'Here's just how unequal the global coronavirus vaccine rollout has been' *The Washington Post* 06 May 2021 <https://www.washingtonpost.com/world/interactive/2021/coronavirus-vaccine-inequality-global/> (accessed 11 May 2021).

77 United Nations (n 75) 1.

78 S Shah et al 'Vaccine delays in developing nations risk prolonging pandemic' 17 February 2021 <https://www.wsj.com/articles/faltering-covid-19-vaccine-drive-in-developing-world-risks-prolonging-pandemic-11613557801> (accessed 9 May 2021).

79 United Nations (n 75) 2.

5 Recommendations

5.1 Partnering with private companies in procuring vaccines

As stated by the United Nations Committee on Economic, Social and Cultural Rights, the right to the highest attainable standard of health is one of the fundamental human rights of every human being.⁸⁰ The right to health is important, and as stated in the Constitution, the government must take reasonable legislative measures to achieve the progressive realisation of this right.⁸¹ If the government is concerned that allowing private institutions to purchase and administer vaccines will create vaccine inequalities, then it should work jointly with the private sector. This can be done, for example, by negotiating with the private sector to pay for the vaccines procured by the government thus ensuring that its employees receive the vaccines earlier. Conversely, for every dosage of the vaccine bought for their employees, companies could be required to donate an additional dosage thereby saving the government's limited resources. This way the government would be procuring vaccines for both the private sector which can afford the vaccines as well as for the vulnerable members of society who are reliant on the state to vaccinate them.

Private companies have offered assistance in purchasing vaccines and it is advised that the government make use of the offer and create a joint effort between the private and public sectors.⁸² Should the government remain reluctant to partner with the private sector and access its extensive resources, it will not bode well for South Africa.⁸³ If the government remains steadfast in not relinquishing its political power, then our society's ability to access vaccines and combat the pandemic will be adversely affected.

In a global health crisis, such as the COVID-19 pandemic, there is no room for political arm wrestling as the government's main focus should be to protect lives and to prevent the unnecessary loss of life. In the context of COVID-19, the best way to prevent the unnecessary loss of life is to achieve herd immunity as soon as possible. Through preventing private institutions from assisting the government in rolling out the vaccine strategy, it is compromising the process of saving lives. As such, the government should find an amicable solution that includes the private sector even if it results in an inequitable distribution of the vaccine.

80 UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) 'Substantive issues arising in the implementation of the International Covenant Economic, Social and Cultural Rights: General Comment 14' (04 May 2001) UN Doc E/C/12/2000/4 (2001).

81 Constitution (n 59) sec 27(1).

82 Wilson et al (n 50).

83 Grey (n 6) 93-94.

Such a solution would allow people to get vaccinated at the cost of private institutions, thereby granting the government the opportunity to use its allocated funds to address shortcomings in the budget which is already under enormous strain.⁸⁴ Another benefit of partnering with private institutions to procure these vaccines is that private institutions have more funds available and have the discretion to pay more for vaccines than the government. Private institutions could, for example, purchase these vaccines from Canada at an above market price as they have the resources to pay the inflated prices whereas the government does not have the luxury of overpaying for medical supplies when there are many other commitments and obligations that the government must address.

In the government's court papers for the case of *Solidarity v Minister of Health*,⁸⁵ it was stated that by allowing private persons and institutions to purchase their vaccines the vaccine supply available to the government would reduce. If that is the government's concern, then it should rather ask private persons and institutions to not procure vaccines that are of interest to the government, such as the Johnson and Johnson vaccine.⁸⁶ This will eliminate the competition between the government, private persons, and institutions for the same vaccine supply and more people will be vaccinated in a shorter period which is what the government's ultimate goal is. Accordingly, private persons and institutions should be given the necessary permission to administer the vaccine so that they can start their process of procurement, negotiations, and distribution.

Although the government is conscious of creating vaccine inequalities, allowing the private sector to help buy these vaccines may not necessarily translate to unequal distribution. The government will remain in control of the vaccine rollout, and vulnerable people will still be vaccinated, but not at the government's expense.

The government has recently started to partner with private institutions with the aim of increasing the number of vaccinations per day.⁸⁷ The government is allowing private institutions to apply to become a vaccination site and if they are approved then the government supplies them with vaccines. Although the government is still the sole purchaser of the vaccines in South Africa, it is now distributing some of these vaccines to private institutions to vaccinate

84 *Public Servants Association and Others v Minister of Public Service and Others* 2021 3 BLLR 255 (LAC) para 31.

85 National Department of Health Affidavit (n 47) para 14.4.2.

86 C Zimmer, J Corum & S Wee 'Coronavirus Vaccine Tracker' *New York Times* 4 May 2021 <https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html> (accessed 10 May 2021).

87 South African Government News Agency (n 55).

their employees.⁸⁸ This is already a step in the right direction to accelerate the achievement of herd immunity in South Africa.⁸⁹ The number of private vaccination sites is also steadily increasing resulting in more people being vaccinated every day.⁹⁰

5.2 Compulsory licence

As can be seen from past pandemics, such as the influenza pandemic,⁹¹ herd immunity is the best defence against a contagious virus such as COVID-19.⁹² However, as the government of a developing country, the South African government does not have the same resources as developed countries to purchase these vaccines at retail prices. Furthermore, the UN has suggested that the COVID-19 vaccine must be treated as a public good instead of a marketplace commodity where access thereto is reliant only on a country's ability to pay.⁹³

A compulsory licence is granted when a patent holder cannot meet the demand for the patented product – as is the case of the COVID-19 vaccine – or when the price of the product is too high.⁹⁴ South Africa's patent law does provide for compulsory licensing, but this route of procuring the vaccines will take time and there is also the burden of litigation costs.⁹⁵ Therefore, if the government does not want to partner with private institutions or deregulate some of the current controls, then it should apply for a compulsory licence to produce these vaccines domestically so that the population has access to adequate vaccines to achieve herd immunity.⁹⁶ An effective response to the COVID-19 virus entails timely access to affordable vaccines as a shortage of this lifesaving medicine will lead to the unnecessary loss of life.⁹⁷

88 S Carmen 'How the private sector can support South Africa's Covid-19 vaccine rollout' *News24* 10 August 2021 <https://www.news24.com/health24/medical/infectious-diseases/coronavirus/how-the-private-sector-can-support-south-africas-covid-19-vaccine-rollout-20210810>.

89 As above.

90 As above.

91 JK Taubenberger & DM Morens '1918 Influenza: the Mother of All Pandemics' (2006) 12 *Emerging Infectious Diseases* at 17.

92 World Health Organisation (n 29).

93 United Nations (n 75).

94 M du Bois 'State Use Provisions for Patent Law, and Expropriations: Some Comparative Law Guidelines for South Africa during the Covid-19 Crisis and Beyond' (2020) 23 *Potchefstroom Electronic Law Journal* at 3.

95 Patents Act 54 of 1978 sec 4.

96 Oxfam International 'Campaigners warn that 9 out of 10 people in poor countries are set to miss out on COVID-19 vaccine next year' 09 December 2020 <https://www.oxfam.org/en/press-releases/campaigners-warn-9-out-10-people-poor-countries-are-set-miss-out-covid-19-vaccine> (accessed 10 May 2021).

97 World Trade Organisation 'Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19' 02 October 2020 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True> (accessed 12 May 2021).

In the height of the HIV/AIDS endemic, the antiretroviral (ARV) medicine was patented and as a result, its accessibility was limited.⁹⁸ The effect was that only a small percentage of the people infected had access to the medication.⁹⁹ From the start of the HIV/AIDS pandemic and up until 2019, 7.5 million people in South Africa were infected and 72 000 people died in 2019 as a result.¹⁰⁰ Currently, according to the World Health Organisation's (WHO) head of emergencies, it is estimated that one in ten people will be infected with the COVID-19 virus.¹⁰¹ This means that 10% of the population, which is roughly 6 million people, will be infected with the virus in South Africa, and 84 751 people have already died.¹⁰²

Patenting the ARV medicine meant that people across the world were dying because of the high costs and the lack of access to this lifesaving medication. If the World Trade Organization (WTO) does not allow for a temporary compulsory license, less privileged and poorer countries will experience detrimental effects due to the patent on the COVID-19 vaccine. In November 2001, the WTO Ministerial Conference in Doha adopted the Declaration on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health.¹⁰³ The Doha declaration introduced two flexibilities into the TRIPS agreement. Firstly, that the TRIPS agreement should not prevent people from protecting public health and should rather promote access to medicine for all.¹⁰⁴ Secondly, it was submitted that compulsory licensing for non-commercial use – which means that the patent can be used without the patent holders' consent – is allowed in certain circumstances.¹⁰⁵

With HIV/AIDS, this flexibility was relied upon by Rwanda and Canada.¹⁰⁶ Canada wanted to produce generics of the ARV medicine

98 HP Hestermeyer 'Access to Medication as a Human Right' (2004) 8 *Max Planck Yearbook of United Nations Law* at 103.

99 JT Gathii 'Rights, Patents, Markets and global AIDS pandemic' (2002) 14 *Florida Journal of International Law* 261 at 334.

100 Avert 'HIV and AIDS in South Africa' <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> (accessed 22 April 2021).

101 J Keaton 'WHO: 10% of world's people may have been infected with virus' *AP News* 5 October 2020 <https://apnews.com/article/virus-outbreak-united-nations-health-ap-top-news-international-news-54a3a5869c9ae4ee623497691e796083> (accessed 13 May 2021).

102 Ritchie (n 31).

103 M Kaplan 'The 2008 H1N1 Swine Flu Pandemic: Reconciling Goals of Patents and Public Health Initiatives' (2010) 20 *Fordham Intellectual Property, Media & Entertainment Law Journal* at 991.

104 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UN Treaty Series 299 (TRIPS Agreement) Art 31.

105 As above.

106 D Harris 'TRIPS after 15 years: Success or failure, as measured by compulsory licensing' (2011) 18 *Journal of Intellectual Property Law* at 390.

so that the people of Rwanda who could not afford it would have access to the generics.¹⁰⁷ The process from obtaining the compulsory licence to distributing the medicine in Rwanda took four years.¹⁰⁸ If we follow the same procedure with the COVID-19 vaccine, the delay by the pharmaceutical companies will result in thousands, if not hundreds of thousands, of deaths. That is why a compulsory licence should be granted for the vaccine for COVID-19 until countries like South Africa can achieve herd immunity.

There is also a socio-economic perspective that must be considered. The right to health in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has been interpreted by the Committee on Economic, Social and Cultural Rights (CESCR) to place prioritised duties on states regarding essential medicines.¹⁰⁹ The COVID-19 vaccine is expensive because it has been patented. Many countries do not have access to this vital medication as developed countries have the resources to pay for this lifesaving medicine. The developed countries have also received the first choice of easily affordable vaccines.¹¹⁰ The result is that poor and developing countries such as South Africa receive fewer vaccines in comparison.

If the South African government is considering the route of obtaining a compulsory licence, it should consider amending the Patents Act to provide clarity on aspects such as whether prior negotiations are a requirement and how remuneration should be decided. The COVID-19 pandemic has shown the government that a situation where a compulsory licence is needed may arise and that the legislation on when and how such a licence may be issued is crucial.¹¹¹ For this reason, the government needs to ensure that its Patents Act is in line with Article 31 of the TRIPS Agreement and that in a situation of emergency, the government has the power to issue a compulsory licence without prior negotiations on how the patent holder's remuneration will be decided.¹¹² If the government does not want to partner with private institutions then it should apply for a compulsory licence to ensure that South Africa is not left behind in the process of procuring vaccines and achieving herd immunity.

South Africa and India approached the WTO in October 2020 to issue a patent waiver on COVID-19 health technologies which would increase the production of COVID-19 vaccines by issuing compulsory

107 Harris (n 106) 389.

108 Harris (n 106) 391.

109 International Covenant on Economic, Social and Cultural Rights (16 December 1966) United Nations Treaty Series (1993) 3 (ICESCR) Art 12.

110 A Dhali 'Access to COVID-19 vaccines as a global public good: A co-ordinated global response based on equality, justice and solidarity is key' (2021) 14 *South African Journal for Bioethics and Law* at 2.

111 du Bois (n 94) 27.

112 As above.

licenses.¹¹³ The waiver has not yet been granted due to some hesitancy on the parts of various stakeholders. Pharmaceutical companies invested a lot of capital into developing these vaccines in a very short period and are hesitant to now make them freely available. Therefore, the government should consider involving the private sector in its negotiations as they have more funds available than the public sector which would fast-track the herd immunity process in South Africa.

5 Conclusion

If the government continues with its current plan in trying to obtain herd immunity, it will take South Africa many years to achieve its goal and a lot of people will die in the process. Thus, the government needs a new strategy.

As it stands, the application has still not been granted by the WTO and months have passed during which people are still dying because they do not have access to COVID-19 vaccines. Although a compulsory licence is a more effective strategy in the long run due to the limited availability of COVID-19 vaccines, the process is still lengthy. Thus, in the short run, the government should partner with private institutions. The private and public sectors cannot each retreat to their separate corners – they must collaborate and create a joint strategy with the primary goal of saving as many lives as possible.¹¹⁴ The government does not know if and when its application for the compulsory licence will be granted and, in the meantime, people are still being infected and dying. It is, therefore, recommended that the government consider partnering with private institutions in the short run to prevent the unnecessary loss of life in South Africa.¹¹⁵

Anne Frank said during the Holocaust that '[w]hat is done cannot be undone, but one can prevent it happening again'. Throughout history, humanity has often paid dearly for the foolhardy and autocratic leadership in times of dire crisis. As South Africans, we can only hope that this pandemic will not reflect in our history as one of those decisive moments.

113 World Trade Organisation 'Waiver from certain provisions of the trips agreement for the prevention, containment and treatment of COVID-19' <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q://IP/C/W669.pdf>.

114 JM Pietersen 'The nexus between public administration and disaster management: A case of Covid-19 in South Africa' (2020) 3 *Journal of Public Sector Development and Governance* at 43.

115 Pietersen (n 114) 44.

THE DEFENSIBILITY OF SOCIO-ECONOMIC RIGHTS IN A STATE OF DISASTER: A SOUTH AFRICAN PERSPECTIVE

by Ishmael Khayelihle Mbambo*



Abstract

The drafting of the final Constitution was a deliberate act of imposing an obligation on the newly formed democratic South Africa to recognise socio-economic rights. This was an important step in the transformation process brought about due to the transformative nature of the Constitution (better known as transformative constitutionalism), in a country that had witnessed the gross violation of human rights and institutionalised discrimination that considerably led to many of its citizens living in dire poverty through social and economic exclusion. This discussion aims to explore the justifiability of these constitutionally protected rights. In doing so, an analysis of international standards will be considered in determining whether the socio-economic rights could be said to be justifiable, followed by the constitutional influence, along with other legislative sources and judicial precedents on the matter including the role propagated by the value of ubuntu.

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1 Introduction

From the dawn of a new reality of the global pandemic caused by the coronavirus disease (COVID-19), His Excellency, President Cyril Ramaphosa has strived to, ‘... save lives and livelihoods’.¹ Whether this ambitious task has been a success is an ongoing debate, as it was a very delicate balance that the Commander-in-Chief sought to achieve. His words not only embody good leadership but are also mandated by the highest law in the land. Since South Africa became a constitutional state with the adoption of the 1996 Constitution,² it founded a rights-based administration with clear goals of transforming society from a deeply divided past, and subsequently took away parliamentary sovereignty.³ This transformation resulted in the formation of a hybrid system that contained characteristics of both capitalist and communist ideologies, striking a desirable balance between fostering economic growth and taking care of its previously disadvantaged citizens.⁴

In effect, this blend between the two distinct theories implies the inclusion of socio-economic rights in the Constitution, which commands the government to take reasonable measures to promote those rights as a way of redressing past injustices and forging human development.⁵ The following discussion will explore the question of whether socio-economic rights are defensible in South Africa, particularly as the country is in a state of disaster, with limited resources that are continuously stretched further to flatten the curve of infections. In answering this question, I will assess what socio-economic rights are, the factual and philosophical dynamics that necessitate the existence of these rights, the views of the international community, and how our own courts deal with these rights.

2 Background of COVID-19 and South Africa’s state of disaster.

In the interests of keeping the discussion in the legal realm and refraining from presenting a scientific viewpoint, this section will only

1 The Presidency ‘President Cyril Ramaphosa: South Africa’s response to the COVID-19 Coronavirus Pandemic’ <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africa%E2%80%99s-response-covid-19-coronavirus-pandemic-17-jun-2020> (accessed 27 January 2021).

2 Constitution of the Republic of South Africa 1996 (Constitution).

3 K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 1 *South African Journal on Human Rights* at 146.

4 RJ Goldstone ‘A South African Perspective on Social and Economic Rights’ (2006) 2 *Human Rights Brief* at 7.

5 S Liebenberg ‘The Value of Human Dignity in Interpreting Socio-economic Rights’ (2010) 1 *South African Journal on Human Rights* at 21

outline the definition and origins of the COVID-19 pandemic as a trigger for invoking the Disaster Management Act (DMA).⁶ In 2020, COVID-19 became a household name as young and old alike were made aware of the global pandemic. It was unlike any other war that has been fought before since the world was fighting against an invisible enemy. The scientific community became instrumental in the fight and successfully traced the origins of the outbreak to Wuhan, China.⁷ It became known as the 2019-novel coronavirus (2019-nCoV) on 12 January 2020, a term coined by the World Health Organization, but was officially named the coronavirus disease 2019 (COVID-19).⁸

The disease mainly attacks the respiratory system and spreads through the respiratory tract by way of droplets, respiratory secretions, and direct contact.⁹ With COVID-19 quickly spreading across the globe and officially reaching the shores of the Republic on 05 March 2020,¹⁰ the government took decisive action in a bid to slow down the rate of infections by declaring a state of disaster on 15 March 2020.¹¹ This decision was made possible by the powers vested in the government by virtue of section 27 (1) of the DMA.¹² Although limiting the rights of its citizens through imposing curfews and lockdowns, this was the necessary evil which managed to give the country a chance to better prepare for the effects of the pandemic.¹³ This preparation was critical if the country was to stand a chance at winning against the enemy invisible to the naked eye.¹⁴ Now that I have dealt with what COVID-19 is and why South Africa is, at the time of writing, in a state of disaster, I turn to the discussion on socio-economic rights and their defensibility.

6 Disaster Management Act 57 of 2002.

7 YR Guo et al 'The origin, transmission and clinical therapies on coronavirus disease 2019 (COVID-19) outbreak – an update on the status' (2020) 7 *Military Medical Research* at 10. It is believed to have originated from a reservoir of bats and unknown intermediate hosts, with high affinity as a virus receptor to infect humans.

8 Guo (n 7) 11. The Coronavirus Study Group (CSG) of the International Committee also proposed to name the new coronavirus 'SARS-CoV-2' on 11 February 2020 which is another scientific term used to refer to COVID-19.

9 Q Li et al 'Early transmission dynamics in Wuhan, China of novel coronavirus-infected pneumonia' (2020) 382 *New England Journal of Medicine* at 2.

10 National Institute for Communicable Diseases 'First case of COVID-19 announced – An update' 05 March 2020 <https://www.nicd.ac.za/first-case-of-covid-19-announced-an-update/> (accessed 31 January 2021).

11 Government Gazette 43096 (15 March 2020). See also *Mohammed and Others v President of the Republic of South Africa and Others* 2020 (5) SA 553 (GP) (*Mohammed*) para 11.

12 *One South Africa Movement and Another v President of the RSA and Others* 2020 (5) SA 576 (GP) paras 34-36.

13 *Mohammed* (n 11) para 77.

14 *Mohammed* (n 13); Neukircher J confirmed this and held, 'I cannot find that the restrictions imposed are either unreasonable or unjustifiable, and thus the application must fail'.

3 What are socio-economic rights?

Khoza accurately identifies that socio-economic rights are those rights that give people access to certain basic needs necessary for human beings to lead a dignified life.¹⁵ Diko narrows down the scope of these rights and states that they consist of the rights to education, food, health, land, water, environmental rights, as well as the rights to social security and housing.¹⁶ From the above list, the rights that have been greatly impacted by the pandemic and state of disaster are the right to food, health, social security, and housing.¹⁷ The government's plan of action has been aimed at ensuring that there are no evictions during the state of disaster, and in increasing social assistance, expanding and upgrading hospitals, and providing food parcels to the most vulnerable.¹⁸

These rights are often referred to as second-generation rights which are mainly distinguishable from first-generation rights in that the former imposes a positive duty on the state whereas the latter infers a negative duty on the state (duty not to encroach on protected rights).¹⁹ Frankenberg takes us through a historical analysis to determine the origins of second-generation rights and asserts that they date as far back as 1793 in the French Constitution which mandated the state to assist its citizens who were in need.²⁰ The eighteenth-century also has traces of the existence of these rights in Bavaria and Prussia where the state was viewed as an 'agent of social happiness' with the responsibility to care for the needy and to provide work for those who lacked the means and opportunities to support themselves.²¹

In South Africa, various statutes are in place to ensure that there is progressive realisation of these rights. The list includes (but is not limited to) the Reconstruction and Development Fund Act (RDFFA),²² the Social Assistance Act (SAA),²³ and the National Health Act (NHA).²⁴ The RDFFA is '... an integrated, coherent socio-economic policy framework' that seeks to '... mobilise all our people and our country's resources toward the final eradication of apartheid and the

15 S Khoza *Socio-economic rights in South Africa* (2007) at 1.

16 T Diko *Socio-economic rights: Know your rights* (2005) at 3.

17 This is so because the restrictions imposed by the DMA impacted food security as well as the progressive realisation of social security and housing.

18 The Presidency (n 1).

19 DM Davis 'Socio-economic rights' (2012) 5 *The Oxford Handbook of Comparative Constitutional Law* at 1021.

20 G Frankenberg 'Why Care? The Trouble with Social Rights' (1996) 17 *Cardozo Law Review* at 1373.

21 Davis (n 19) 1023.

22 Reconstruction and Development Fund Act 7 of 1994 (RDFFA).

23 Social Assistance Act 1 of 2004

24 National Health Act 61 of 2003.

building of a democratic, non-racial and non-sexist future'.²⁵ Most people are familiar with Reconstruction and Development Plan (RDP) houses, which are the most notable features of the RDFA since they enable the provision of free low-cost housing on a means test basis. The SAA, on the other hand, gives effect to section 27(1)(c) of the Constitution. It allows people who are unable to support themselves the opportunity to receive a variety of government-funded grants.²⁶ More so, the NHA also ensures that people are given access to free primary healthcare considering the obligations imposed by the Constitution.²⁷

It is unfortunate that little to no progress has been made since the announcement of the state of disaster to ensure that there is progressive realisation of the above statutory obligations. A vivid example of the government's failure to provide adequate housing saw the painful eviction of Bulelani Qolani, a resident of Khayelitsha, who was manhandled by police, while naked, for allegedly erecting an illegal structure on land owned by the City of Cape Town.²⁸ There are, however, some success stories to be told as the government was able to increase the value of social assistance grants from the beginning of the pandemic and bolstered the Department of Health's funding to allow for the procurement of vaccines and expansion of the number of hospital beds in public healthcare facilities across the country. A major hurdle that has effectively slowed down and inhibited the government's progress is corruption and the mismanagement of government funds which has resulted in the government taking three steps back after making a great stride forward.²⁹

4 Underlying factors to socio-economic rights in South Africa

From a global perspective, South Africa is the most unequal society with a Gini coefficient of 0.72, meaning that the distribution of wealth is so uneven that a large part of the population is unable to benefit from economic growth.³⁰ Hamilton rightly identifies poverty

25 RDFA (n 22) sec 1.1.1.

26 They include (but are not limited to) the care dependency grant, child support grant, foster care grant, and the disability grant.

27 Constitution (n 2) sec 27(1)(a).

28 eNCA 'City of Cape under fire' 2 July 2020 <https://youtu.be/8PWIGfJKZsc> (accessed 25 March 2021).

29 Corruption Watch 'In South Africa Covid-19 has exposed greed and spurred long needed action against corruption' 4 September 2020 <https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption> (accessed 26 March 2021)

30 L Hamilton *Are South Africans free?* (2014) at 4 which states 'The Gini coefficient is widely accepted summary measure of income (or wealth) inequality ranges from zero (perfect equality in the distribution of income or wealth) to one (perfect inequality in the distribution of income or wealth)'.

as the state of being unable to afford the minimum standard of living by individuals in a community.³¹ This is the unfortunate reality faced by millions of people in South Africa. This state can be categorised as relative poverty as it exists along the racial divide, where the black racial group is the poorest in the country when compared to other races.³² Socio-economic rights play a pivotal role in bridging the equality and poverty gaps through legislative interventions that promote equal opportunities for all and advance comprehensive social protection.

Much of this inequality and poverty can be said to be the result of many years of colonialism and oppression which began with the arrival of settlers in the Cape in 1652 under the leadership of Jan Van Riebeeck, to the beginning of the National Party's reign in 1948, through the apartheid regime which thereafter led to the dawn of democracy in 1994.³³ Consequently, the antiquity of racism and poverty, and the skewed distribution of wealth along racial lines ensure that distributional questions cannot be ignored.³⁴ More so, the apartheid government perpetuated inequality through its influx control policy which limited African occupation of urban areas.³⁵ It is for this reason that the 1992 Draft Bill of Rights proposed by the African National Congress (ANC) sought to address these problems through the inclusion of socio-economic rights.³⁶ The Draft Bill was also greatly influenced by the very first document that was drafted by the ANC which sought to advance African claims in South Africa, namely, the Atlantic Charter.³⁷ The majority of the political divide across South Africa had negotiated to have a constitutional state premised on the enjoyment of fundamental human rights in order to avert a possible catastrophe and put an end to the deep conflict between a minority which reserved all control over the political instruments of the state for itself, and a majority who sought to resist that domination.³⁸

The state of disaster has worsened the poverty experienced by millions of South Africans since the various lockdowns enforced

31 Hamilton (n 30) 5.

32 Hamilton (n 30) 6.

33 DG Kleyn & F Viljoen *Beginners guide for law students* (2011) at 4.

34 DM Davis 'Socioeconomic rights: Do they deliver the goods?' (2008) 6 *Oxford University Press* at 688.

35 *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) paras 41-47.

36 ANC Draft Bill of Rights 1996 at 215.

37 See the report on the Atlantic Charter Committee 1943 which was unanimously adopted on 16 December 1943.

38 *The Azanian People's Organisation (AZAPO) and Others v The President of the Republic of South Africa and Others* (CC) (CCT17/96) [1996] ZACC 16 paras 1-2.

limitations and halted economic activity, depending on which alert level of the lockdown the country is under.³⁹ Without any income, the most vulnerable of our communities get the short end of the stick. It has, however, not been all doom and gloom, since the government has tried to mitigate the impacts of these harsh restrictions on economic activity by introducing an emergency Social Relief of Distress Grant for the unemployed (unemployment grant).⁴⁰ The R350,00 unemployment grant was not the only mitigating factor as the government also distributed food parcels across the country and social assistance grants were increased.⁴¹ Although, in my view, R350,00 a month is a small amount as an unemployment grant, it was better than deprivation of economic activity for nothing in return considering the extreme budget constraints that the government had and still has.

5 Ubuntu and human dignity: The philosophical basis for socio-economic rights

'Ubuntu', in the present democratic era, is an indispensable constitutional value that is aimed at preserving a person's human dignity⁴² and can be useful in determining the defensibility of socio-economic rights.⁴³ It constitutes the philosophical basis upon which to create dependable social and economic transformation which safeguards human welfare.⁴⁴ There is no single definition attached to it, but it can be understood to be a humanist thesis unique to African jurisprudence, aimed at ending human suffering,⁴⁵ and demands respect for human dignity regardless of outward appearances.⁴⁶ More so, it represents the core values of African ontologies which include respect for humans, human dignity, the need for humility,

39 SA Government 'About alert system' 07 August 2020 <https://www.gov.za/covid-19/about/about-alert-system#> (accessed 26 March 2021). The SA lockdown is split into five levels. The lowest (level 1) relaxes most restrictions whereas the highest (level 5) is the harshest level that halts all economic activity with the exception of essential workers.

40 Greytown Gazette 'Sassa launches new Covid-19 relief grant programme' *News24* 13 May 2020 <https://www.news24.com/news24/southafrica/local/greytown-gazette/sassa-launches-new-covid-19-relief-grant-programme-20200512> (accessed 26 March 2021). The grant was announced at the beginning of the hard lockdown in March 2020.

41 T Mathe 'R350 a month: Inside the lives of special grant recipients' *Mail & Guardian* 7 February 2021 <https://mg.co.za/news/2021-02-07-r350-a-month-inside-the-lives-of-special-grant-recipients/> (accessed 26 March 2021).

42 *S v Makwanyane* 1995 (3) SA 391 para 237.

43 M Rapatsa & G Makgato 'Dignity and ubuntu: Epitome of South Africa's socio-economic transformation' (2016) 5 *Journal of Economic Literature* at 66

44 Rapatsa & Makgato (n 43) 65.

45 Rapatsa & Makgato (n 43) 66.

46 W Buqa 'Storying Ubuntu as a rainbow nation' (2015) 36 *Verbum et Ecclesia* at 36.

interdependence, and communalism, and it augments social solidarity.⁴⁷ In my view, ubuntu is undoubtedly the philosophical basis upon which the President established the Solidarity Fund which was set up to raise funds to help with the fight against COVID-19.

By the same token as the concept of ubuntu, human dignity has been considered an ambiguous term that ubuntu purports to preserve as it has no concise definition.⁴⁸ Rapatsa however describes it as a term that:⁴⁹

... signifies human worth, an idea that no one should be stripped of self-worth, subjected to abuse, degradation, torture, harassment and/or neglect of any kind threatening one's dignity. It is concerned with respecting and protecting personhood.

Much of this respect for human dignity was absent during the leadership of the National Party, hence in the current South African perspective, human dignity is a constitutionally entrenched human right contained in section 10 of the Bill of Rights whereas ubuntu has an elevated status of being an underlying value of the Constitution.⁵⁰ More so, the Constitution has a retroactive effect insofar as it aims to redress the injustices of the past and to protect the eventualities of the future.⁵¹

The relevance of ubuntu in this discussion deserves acknowledgment, as it is the idea behind the recognition of defensible socio-economic rights in South Africa (albeit not the only one). Rapatsa rightly points out that from the birth of a new democracy, it became ostensibly clear that the post-1994 government had to strive for the restoration of human dignity, and that the notion of ubuntu would be instrumental to that pursuit.⁵² This is so because South Africa did not punish wrongdoers of the apartheid government as the Germans did with the Nazi offenders who slaughtered millions of people and perpetuated gross human rights violations under Hitler's reign.⁵³ Instead, South Africa advocated the use of the world-renowned ideology, which ended colonial dominance and led to the overthrow of apartheid (avoiding a possible civil war), by using restorative rather than retributive justice to correct the past

47 NM Kamwangamalu 'Ubuntu in South Africa: a Sociolinguistic Perspective to a Pan-African Concept' (1999) 13 *Critical Arts: South-North Cultural and Media Studies* at 41.

48 D Shultziner 'Human Dignity – Functions and Meanings' (2003) 3 *Global Jurists Topics* at 21.

49 Rapatsa & Makgato (n 43) 67.

50 The Constitution of the Republic of South Africa Act 200 of 1993. The Postamble on national unity and reconciliation states that, '...there is a need for understanding but not vengeance, and for reparation but not for retaliation, a need for ubuntu but not victimization'. Despite this not being included in the final Constitution, it is inferred in the current jurisprudence.

51 Klare (n 3) above 182-184.

52 Rapatsa & Makgato (n 43) 68.

53 A McDonald *The Nuremberg Trials: The Nazis brought to justice* (2015) at 2.

injustices.⁵⁴ As a result, it would be futile to aspire for restoration without the reasonable socio-economic development which is promoted by ubuntu, using the wide-ranging pillars of dignity identified by Diczfalusy to ensure that people have access to clean water, sufficient food, shelter, health care, education, personal security, a healthy environment, and job opportunities.⁵⁵

6 International instruments

Although this article is from the South African perspective, I will briefly consider the international standards since international instruments must be considered in interpreting the rights in the Bill of Rights.⁵⁶ The United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR) is instrumental in considering whether socio-economic rights are defensible. General Comment 24 (2017) of the Committee on ESCR states at paragraph 10 that every state party bears the responsibility of ensuring that it provides the minimum essential levels of protecting socio-economic rights.⁵⁷ More so, the Universal Declaration of Human Rights⁵⁸ imposes a similar duty on member states, and South Africa ratified the treaty in line with section 231(2) of the Constitution on 10 October 2012.

Biltchitz's interpretation of the minimum core obligation is that it is the yardstick below which individuals should not be allowed to fall without strong justification.⁵⁹ This minimum core obligation provides a lower standard that shows that socio-economic rights are defensible because member states are supposed to ensure that they act positively to provide basic necessities for their citizens. Our courts have also interpreted this minimum core obligation principle, as will be discussed below, to emphasise the point that South Africa is bound by international standards and must ensure that her citizens do not live below the lowest standard, as described.⁶⁰ The declared state of disaster therefore cannot reasonably be argued to be an exception to meeting the minimum core obligation and defensibility of socio-economic rights. I make this assertion based on the fact that the

54 This was made possible through the Truth and Reconciliation Commission which sought to provide closure to the victims of apartheid through public hearings and apologies. Whether this was the true justice that the people deserved is a question many still debate on, but it did help prevent a civil war.

55 E Diczfalusy 'In search of human dignity: gender equity, reproductive health and healthy ageing' (1997) 59 *International Journal of Gynaecology and Obstetrics* at 206.

56 Constitution (n 2) sec 39(1)(b).

57 International Covenant on Economic, Social and Cultural Rights 1996.

58 Universal Declaration of Human Rights 1948.

59 D Biltchitz 'Socio-economic rights, economic crisis and legal doctrine' (2014) 12 *Journal of Constitutional Law* at 730.

60 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 34-35.

lockdown restrictions negatively affect entrenched socio-economic rights and thus the government is obligated to take positive steps to mitigate the impacts as not doing so would be allowing its citizens to fall below the minimum core obligation on which it is bound to uphold.

The Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others (TAC case)*⁶¹ held that the minimum core obligation is not easily defined because it is country-specific and includes at least the minimum decencies of life consistent with human dignity that guarantee that no one should live a life below that of a dignified existence.⁶² It also asserted that the very notion of individual human rights (including socio-economic rights) presupposes that anyone who is in that position should be able to find relief from a court of law.⁶³ This position emphasises the view that socio-economic rights are defensible when looking at the minimum core obligation because member states should ensure that their citizens live lives that are not below a dignified existence. The rights purport to achieve exactly that, to ensure that the government acts proactively in realising these rights to ensure that people lead dignified lives. Our courts have, however, rejected the minimum core obligation in *TAC and Mazibuko and Others v City of Johannesburg and Others (Mazibuko case)*⁶⁴ in favour of a higher threshold, with limitations for provision of basic necessities for historically disadvantaged groups.⁶⁵

7 The judiciary's interpretation of socio-economic rights

7.1 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Republic of South Africa (First Certification Judgment)*⁶⁶

The Constitutional Court, in this case, had to certify the proposed provisions of the final Constitution. The matter was brought by the Chairperson of the Constitutional Assembly, a member of task team that had been entrusted with drafting the Constitution. The Court decisively dealt with the question of whether socio-economic rights could be said to be defensible and legitimate from a constitutional

61 *TAC* (n 60).

62 *TAC* (n 60) para 28.

63 *TAC* (n 60) para 29.

64 2010 (4) SA 1 (CC).

65 NM Mlilo 'To be reasonable or not? A critique of the South African Constitutional Court's approach to socio-economic rights' LLM dissertation, University of Johannesburg, 2016 at 29.

66 1996 (4) SA 744 (CC).

law perspective. It held that the socio-economic rights in sections 26, 27, and 29 were indeed defensible regardless of the objections that they were not universally accepted fundamental rights.⁶⁷ The Court also dismissed the objection that adjudication on these rights and subsequent enforcement would be in direct violation of the doctrine of separation of powers since it would have budgetary implications on the state and encroach on the duties of the legislature and executive, stating that:⁶⁸

In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.

It went on further to state that the fact that socio-economic rights will almost inevitably give rise to such implications, 'does not seem to be a bar to their justiciability'.⁶⁹

7.2 *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom case)*⁷⁰

This case dealt with the state's constitutional obligation in relation to the right to housing.⁷¹ It was made clear that the government bears the responsibility to fulfil the minimum core obligation as discussed above. Yacoob J had the following view in relation to the case:⁷²

The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions ...

Mrs Irene Grootboom and the other respondents, a vulnerable group of 510 children and 390 adults, were rendered homeless as a result of their eviction from their informal homes situated on private land which was earmarked for formal low-cost housing.⁷³ The owner of the land obtained an ejection order against the occupiers on 8 December 1998 but they did not vacate as they had nowhere else to

67 *First Certification Judgment* (n 66) para 76. The Court reasoned by stating that, '... such an objection cannot be sustained because CP II permits the CA to supplement the universally accepted fundamental rights with other rights not universally accepted'.

68 *First Certification Judgment* (n 66) para 77.

69 *First Certification Judgment* (n 66) para 78.

70 2001 (1) SA 46.

71 Section 26 of the Constitution states that, '(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.

72 *Grootboom* (n 71) para 2.

73 *Grootboom* (n 71) para 4.

go.⁷⁴ The state now had the duty to provide alternative accommodation to the evicted settlers but the settlers were exposed to intolerable conditions and sought protection from the courts to intervene and enforce their rights.⁷⁵ In the High Court judgment, the Court held that the right to housing was not absolute and limited to the extent that the state takes reasonable steps to ensure the progressive realisation of the right.⁷⁶ It however additionally held that the children applicants' right to shelter contained in section 28 of the Constitution did not have any limitations and thus the Court ordered for the state to provide shelter.⁷⁷

In the Constitutional Court judgment, the Court held that government must provide shelter for both the children and adults since they were in desperate need, and further held that the rights to housing/shelter 'must be understood in their textual setting ... a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context'.⁷⁸ This reaffirmed the argument that even though these rights may have direct financial consequences on the government, their defensibility is indisputable. The Court came up with a 'test for reasonableness' which provides that where the state does not take reasonable measures within its available resources to fulfil its obligation to provide access to the socio-economic right in issue, it would be in breach of its constitutional obligation.⁷⁹

7.3 *Soobramoney v Minister of Health (Kwazulu-Natal)* (*Soobramoney case*)⁸⁰

This case discussed, in depth, the meaning of the right to healthcare contained in section 27 of the Constitution. It gave an important precedent that held that, even though people may have legitimate socio-economic rights, which can be enforceable in a court of law, the budgetary implications are an equally important factor to be considered in granting relief. The appellant had brought his case to compel the government to provide him with access to emergency medical services because he required dialysis in order to save his life.⁸¹ The concurring judgment by Madala J (albeit made with different reasoning) explained how limited resources affect the claim to this right in the following words:⁸²

74 *Grootboom* (n 71) para 9.

75 *Grootboom* (n 71) para 11.

76 *Grootboom* (n 71) para 14.

77 *Grootboom* (n 71) para 16.

78 *Grootboom* (n 71) para 22.

79 *Grootboom* (n 71) para 9.

80 1998 1 SA 765 (CC).

81 *Soobramoney* (n 81) para 6.

82 *Soobramoney* (n 81) para 40.

In another sense the appeal before us brings into sharp focus the dichotomy in which a changing society finds itself and in particular the problems attendant upon trying to distribute scarce resources on the one hand, and satisfying the designs of the Constitution with regard to the provision of health services on the other. It puts us in the very painful situation in which medical practitioners must find themselves daily when the question arises: Should a doctor ever allow a patient to die when that patient has a treatable condition? In the context of this case, the question to be answered is whether everybody has the right of access to kidney dialysis machines even where resources are scarce or limited.

This supports the views expressed by Chaskalson P with whom the majority of the judges concurred, that if the government is not capable of providing apposite medical treatment as a result of its lack of resources, even a life-threatening permanent disease, which required dialysis in the specific case, could be denied by the public authorities.⁸³ In a critical analysis of these rights, Sachs opined that, ‘... SERs, however, by their very nature require rationing, at least for the main part. Competition for resources is built into the DNA of SERs’.⁸⁴ With that said, this does not affect the defensibility of socio-economic rights in South Africa since they were ‘carefully crafted’ to include internal limitations.⁸⁵

8 Conclusion

From the above discussion, it is clear that the Constitution provides a firm foundation for a claim of defensibility of socio-economic rights in South Africa, and that these rights are not just benefits of having good leadership. Despite the current state of disaster, the position on their defensibility has not changed. In the government’s efforts to save lives, it has not neglected its duty to progressively realise these rights, and its decision to expand its social assistance efforts to include the unemployment grant was the most commendable effort. Although there is still much to be done it is worth celebrating the small wins that the government makes which will, on aggregate, translate to huge progress. There is however very little the government has done on the economic side in their bid to save lives and livelihoods. In trying to achieve the delicate balance that was alluded to at the beginning of this discussion, more emphasis may have been put on saving lives than livelihoods. As there was little to no economic activity that was created by the government from the beginning of the state of disaster, I believe the scales on lives versus livelihoods tipped more favourably on the side of lives since the

83 *Soobramoney* (n 81) para 35.

84 A Sachs ‘Introduction to the introduction’ in M Clark et al *Socio-economic rights: Progressive realization?* (2016) at 27.

85 *Grootboom* (n 71) para

COVID-19 related death rate was significantly lower than in other countries which had the same number of infections as South Africa.

Having the rights entrenched in the Constitution means that when interpreted in a holistic view as affirmed in *Grootboom*, no one, including the state, should infringe upon these rights, and the state has a duty to promote and fulfil the obligations imposed by these rights. The obligations of the international society also support the view that these rights are fundamental to human existence and that, at the very minimum, governments should be able to provide for the most vulnerable who are unable to provide for themselves as a result of a wide number of contingencies that include (but are not limited to) poverty, unemployment, inequality and the death of breadwinners. Human life is sacred in all the diverse belief systems which people are inclined to and therefore preserving it along with human worth is of utmost importance. These rights undertake to ensure that this objective is fulfilled, and their defensibility cannot be denied, although constrained by the availability of resources as laid out in *Soobramoney*.

THE ACCESSIBILITY AND EFFECTIVENESS OF SOUTH AFRICAN CIVIL LOWER COURTS

by Llewelyn Curlewis* & Delano Abdoll**



Abstract

Although the Constitution of the Republic of South Africa, 1996 guarantees everyone the right of access to courts and civil justice, many people still find themselves in a position where they cannot access the South African justice system, specifically concerning civil legal matters. While this problem has been recognised by various academics, authors, and even Constitutional Court judges, the understanding of what this right means empirically has only recently been understood in relation to South Africa's civil justice system. This article, therefore, concentrates on the accessibility and effectiveness of South African civil courts. The focus is on civil lower courts given that most people who are exposed to the civil justice system do so by means of the Magistrates Courts only.

1 Introduction

As early as 2010 in an article titled 'Evidenced-Based Access to Justice', Abel underlined the concern that despite the call for evidence-based research having permeated the field of the criminal justice system,¹ a comparable evidence-based approach had been

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1 LK Abel 'Evidence-Based Access to Justice' (2010) 13(3) *JLASC* at 295.

notably absent from the many efforts to expand access to the justice system for people facing civil legal problems.² In her observation, Abel accurately identified that one of the reasons for this lack of evidence, particularly in relation to the civil justice system, was that no generally accepted metric for evaluating access to justice tools existed at the time.³

However, in 2016, the Open Society Justice Initiative (OSJI) and the Organisation of Economic Co-operation and Development (OECD) jointly hosted an expert workshop⁴ that was aimed to facilitate a roundtable discussion on how to define, measure, and evaluate access to justice and legal needs.⁵ With participants from around the world,⁶ including South Africa, having taken part in this event, the workshop went on to release a significant founding document, which it titled ‘Understanding Effective Access to Justice – Workshop Background Paper’.⁷ The document highlighted that central to its purpose was the idea of laying down the groundwork for a more citizen-oriented access to justice framework, which could conceptualise and measure the legal needs of people who encountered the civil justice system.⁸

Because of these efforts, the OECD and Open Society Foundations developed the so-called ‘Guide on Legal Needs Surveys and Access to Justice’ tool, which was later published on 31 May 2019.⁹ The Guide was designed to support the effective implementation of target 16.3 of the United Nations Sustainable Development Goals,¹⁰ which seeks to ‘promote the rule of law at the national and international levels and ensure equal access to justice for all’.¹¹ In essence, the Guide outlined a range of opportunities for countries to implement a more people-oriented approach, using legal needs-based indicators as metrics for measuring people’s access to justice and civil courts.¹² Indeed, these developments have been instrumental to the reformulation of how access to justice in the context of people facing civil legal problems needs to be understood.¹³ Unfortunately, it is also clear that the general discourse surrounding South African people’s

2 As above.

3 Abel (n 1) 297.

4 C Coxon ‘International Workshop on measuring effective access to justice – an overview’ 16 January 2017 <https://ukaji.org/2017/01/16/international-workshop-on-measuring-effective-access-to-justice-an-overview/> (accessed 5 May 2019).

5 As above.

6 As above.

7 OECD & Open Society Foundations ‘Understanding Effective Access to Justice’ 3-4 November 2016 <http://www.oecd.org/gov/Understanding-effective-access-justice-workshop-paper-final.pdf> (accessed 5 May 2019).

8 As above.

9 OECD & Open Society Foundations ‘Legal Needs Surveys and Access to Justice’ 31 May 2019 <https://www.oecd.org/gov/legal-needs-surveys-and-access-to-justice-g2g9a36c-en.htm> (accessed 18 January 2020) at 3 & 15.

10 As above.

11 OECD & Open Society Foundations (n 9) 3 & 15.

12 As above.

13 OECD & Open Society Foundations (n 9) 37.

access to courts remains almost exclusively comprised of inward-focused reflections by members of the legal profession only.¹⁴

It is against this background that this article seeks to analyse the current perspective on access to civil justice in South Africa. Firstly, the article considers the theoretical framework of section 34 of the Constitution of the Republic of South Africa, 199¹⁵6 concerning the civil legal problems faced by South Africans. Secondly, it offers a brief discussion on selected academic literature and jurisprudence relating to the accessibility and effectiveness of South African civil lower courts. Lastly, the article examines the findings of the 'Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries 2019' report (Global Insights Report¹⁶), which to date, provides the most recent empirical data on the everyday justice problems faced by South Africans who have come into contact with the civil justice system.

2 The theoretical framework of section 34 of the Constitution

In order to consider the constitutional right of access to courts in South Africa,¹⁷ which includes the right of access to justice, one must first interpret and have due regard to the provisions of section 34 of the Constitution,¹⁸ which states that:¹⁹

[e]very person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or other independent and impartial tribunal or forum.

An important consequence of this section 34 right is that by insisting on the resolution of legal disputes by fair, independent, and impartial

14 See HJ Erasmus 'Historical Foundations of The South African Law of Civil Procedure' (1991) *The South African Law Journal* at 276; D McQuoid-Mason 'Access to justice in South Africa' (1997) 17 *Windsor Y.B Access Just.* 230 at 2; G Budlender 'Access to Courts' (2004) 121 *SALJ* at 341; A Pillay 'Accessing Justice in South Africa' (2005) *Florida Journal of International Law* at 463; P Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* at 355; J Dugard 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice' (2008) 24 *SAJHR* at 216; R Kelbrick *Civil Procedure in South Africa* (2012) at 17; M Nyenti 'Access to justice in the South African social security systems: Towards a conceptual approach' (2013) 46 *De Jure* at 906; D McQuoid-Mason 'Access to Justice in South Africa: Are there Enough Lawyers?' (2013) 3(3) *Onati Socio-legal Series* at 564; J Dugard 'Closing the doors of justice: An examination of the constitutional court's approach to direct access, 1995-2013' (2015) 31 *SAJHR* at 112-113; and C Theophilopoulos 'Constitutional transformation and fundamental reform of civil procedure' (2016) 1 *TSAR* at 91.

15 Constitution of the Republic of South Africa, 1996 (Constitution).

16 World Justice Project 'Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries' 2019.

17 *Nedbank Ltd v Thobejane and Similar Matters* 2019 (1) SA 594 (GP) (Thobejane) para 33.

18 B Bekink *Principles of South African constitutional Law* (2012) at 389.

19 Constitution (n 15) sec 34.

institutions, it prohibits the resort of self-help,²⁰ which in turn, fosters respect for the rule of law.²¹

2.1 The status of the right

Like all rights and freedoms entrenched in the Bill of Rights of the Constitution, the right of access to courts through the operation of section 34²² is only susceptible to change or removal through the requirements of section 74 of the Constitution.²³ To add to this, authors Garth & Cappelletti have also advocated that, essentially, the right of access to courts should be regarded as the most basic human right.²⁴

2.2 The structure and nature of the right

The structure of section 34 of the Constitution was recently considered in *Nedbank Ltd v Gqirana NO and Another and Similar Matters*.²⁵ In this case, the Court identified three components being central to the right of section 34, namely:²⁶

- (i) the right for disputes to be decided before a court;
- (ii) the right to a *fair* public hearing; [and]
- (iii) that where appropriate the court may be replaced by an independent, impartial tribunal or forum.

Whilst different dissections of the right have been recognised,²⁷ it is the second component of the right, ‘the right to a *fair* public hearing’, that is most significant to the nature of section 34, which is somewhat a topic of debate. The upshot being that the right may apply to both civil and criminal litigation, depending on one’s interpretation of the provisions thereof.

The Constitutional Court has, however, clarified the position to some extent in *S v Pennington and Another*²⁸ and *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of*

20 I Currie & J De Waal *The Bill of Rights Handbook* (2013) at 711.

21 Thobejane (n 17) para 44. See also *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) para 11.

22 *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2020] 1 All SA 52 (SCA) para 18. See also S Vettori ‘Mandatory mediation: An obstacle to access to justice?’ (2015) 15(2) *African Human Rights Law Journal* at 356.

23 Constitution (n 15) sec 74.

24 BG Garth & M Cappelletti ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* at 185.

25 2019 (6) SA 139 (ECG) (*Gqirana NO*).

26 *Gqirana NO* (n 25) para 44.

27 See *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) 529 (CC) para 211.

28 1997 (4) SA 1076 (CC) para 46.

South Africa t/a The Land Bank and Another.²⁹ The cases are authorities for the proposition that section 34 of the Constitution is an embodiment of a right that exists for the benefit of civil litigants only.³⁰ Certainly, in the context of the second component of the right, it is not entirely difficult to support this conclusion on the basis that contrary to section 35 of the Constitution; ‘The right embodied in s[ection] 34 is a right to a fair public hearing, [and] not a right to a trial’.³¹

2.3 The application of the right of access to courts in relation to civil legal problems

Insofar as the application of the right of access to courts in relation to civil legal problems is concerned, there are mainly three legal questions that this article seeks to address namely; (i) who are the beneficiaries of the right; (ii) which courts would most individuals use to exercise this right; and (iii) how will one determine when a civil litigant achieves meaningful access to courts in terms of the right? In turn, an answer to each of these questions is presented below.

2.3.1 *The beneficiaries of the right*

The first legal question aims to identify the beneficiaries of the right of access to courts. The necessary starting point is the ordinary wording of section 34, which clarifies that the right of access to courts is available to ‘everyone’, and not ‘every citizen’ or ‘every person’. This interpretation was specifically confirmed in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*³² where the Constitutional Court held that: ‘[if] the Constitution provides that a constitutional right is available to “everyone” it should be given its ordinary meaning’.³³

Similarly, in *Tetty and Another v Minister of Home Affairs and Another*,³⁴ Mthiyane J emphasised that:³⁵

... the Constitution has placed South African law on the sound basis that every individual who comes before the Courts in this country, whether

29 2011 (3) SA 1 (CC) para 38.

30 See T Bekker ‘The Late Amendment of Pleadings – Time for a New Approach? *Randa v Radopile Projects* CC 2012 (6) SA 128 (GSJ)’ 2017 *Obiter* at 81.

31 *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* 2011 (3) SA 1 (CC) para 38 (own emphasis).

32 2004 (4) SA 125 (CC) para 26.

33 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) paras 26-27.

34 1999 (3) SA 715 (D) 729B-729C.

35 As above.

high or low, rich or poor, alien or local, is entitled to enjoy the benefits flowing from the supremacy of the Constitution.

It is therefore apparent from these judgments alone that section 34 of the Constitution applies not only to South African citizens but to everyone who finds themselves within South African borders, for example, visitors, and undocumented migrants.³⁶

2.3.2 *The hierarchy of South African courts*

The second legal question concerns the accessibility of the most approached civil courts. In this regard, section 166 of the Constitution makes mention of five categories of courts,³⁷ which are recorded as follows:³⁸

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Courts;
- (d) the Magistrates' Courts; and
- (e) any other court established or recognized in terms of an Act of Parliament (for example Small Claims Courts which are established in terms of the Small Claims Court Act, 61 of 1984).

However, this is not to say that every category of courts is directly accessible to persons who encounter civil legal problems. Instead, it is the use of further legal principles, such as the rules of jurisdiction, that guide individuals and practitioners in establishing an appropriate court to remedy specific legal problems.³⁹

More importantly though, is the category of civil lower courts, given that most people who come into contact with the civil justice system will do so through Magistrates Courts only. To quote authors Anleu & Mack directly the vast majority of citizens who come into contact with the judicial system will usually have their case considered (and most likely *only* considered) in a lower court.⁴⁰

36 *Sharenisa v Minister van Veiligheid en Sekuriteit en Ander* (2394/2009) [2010] ZAFSHC 149 para 18.

37 Bekink (n 18) 391.

38 Constitution (n 15) sec 166.

39 See D van Loggerenberg 'Civil Justice in South Africa' (2016) 3(4) *BRICS Law Journal* at 125-147 for an in-depth discussion on the South African court structure, judicial hierarchy, and alternative civil dispute resolution mechanisms.

40 SR Anleu & K Mack 'Magistrates, Magistrates Courts, and Social Change' (2007) 29(2) *Law & Policy* at 183-184.

In fact, even the Department of Justice and Constitutional Development has acknowledged that special attention must be given to the Magistrates Courts,⁴¹ particularly concerning ‘the levels of access the indigent have to justice, and how accessible courts are to ordinary citizens’.⁴²

Thus, to formulate an answer to this particular question without stressing the extent to which civil lower courts are used by individuals would simply be misplaced. To this end, it is accepted that prospective litigants in South Africa are most likely to exercise their right of access to courts in the Magistrates Courts only. Whether this right is exercised properly and effectively is a question we consider next.

2.3.3 *Meaningful access to courts*

The question of ‘what is meaningful access to courts, and how does one determine when a litigant has achieved it?’⁴³ is specifically addressed in the case of *Turner v Rogers*.⁴⁴ Decided in 2011, the United States Supreme Court held that:⁴⁵

[A] litigant does not have meaningful access to the courts if all he can do is file initial papers or walk into the courthouse door. [Instead] for a litigant to have meaningful access, he must be able to identify the central issues in the case and present evidence and arguments regarding those issues.

The definition of meaningful access to courts is strikingly similar to that posited by Budlender, who stated that the right of access to courts, even in South Africa, means more than ‘the legal right to bring a case before a court’.⁴⁶ Budlender’s argument in this regard was that, to bring a case before a court, a prospective litigant must:⁴⁷

... have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be able to initiate the case and present it to court.

41 Department of Justice and Constitutional Development ‘Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state’ 09 February 2012 <https://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf> (accessed 26 September 2019) at 27.

42 As above.

43 LK Abel ‘*Turner v Rogers* and the Right of Meaningful Access to the Courts’ (2012) 89(4) *Denver University Law Review* at 805.

44 564 US 431 (2011).

45 As above.

46 Budlender (n 14) 341.

47 As above. See also J Bamberger ‘Confirming the Right to Meaningful Access to the Courts in Non-Criminal Cases in Washington State’ (2005) 4 *Seattle Journal for Social Justice* at 389-390 where the author lists five requirements as opposed to four.

Put differently, access to courts meant that only right bearers who are properly capacitated to access the formal justice system would be 'legally empowered to pursue, claim and enforce their civil rights'.⁴⁸ Alternatively, absent the assistance of a lawyer or legal representative, an individual's right of access to courts would, most probably, not be exercised in any meaningful way.⁴⁹ One example that encapsulates the scenario of why the right to effective access to courts is so desperately needed in civil justice systems is *Airey v Ireland*.⁵⁰ At a time when legal aid was not available in Ireland for people facing civil legal problems, the European Court of Human Rights considered it 'most improbable' that a person in Ms Airey's position would be able to present her case both properly and effectively.⁵¹

This equally remains the position in South Africa, save for the fact that, contrary to the rights of detained⁵² and accused persons,⁵³ there is no specific constitutional right to the services of a legal representative at the state's expense for civil litigants who cannot afford it.⁵⁴ Needless to say that if ordinary people, whether rich or poor, are not able to bring a case before a court and present it both properly and effectively,⁵⁵ there lies a real risk that their civil legal rights will not be protected and/or vindicated in any meaningful way.⁵⁶

3 Literature review and case law interpretations

The next part of this article seeks to critically analyse the basis upon which academics, authors, and even Constitutional Court judges claim that 'most South Africans do not have effective access to justice'.⁵⁷ In doing so, it considers the rationale behind the so-called 'majority claim' whilst determining the practical extent to which evidence-

48 N Leach 'The Paralegal and the Right of Access to Justice in South Africa' LLD dissertation, University of Western Cape, 2018 at 25.

49 See *Bangindawo and Others v Head of the Nyanda Regional Authority and Another; Hlantlalala v Head of the Western Tembuland Regional Authority and Others* 1998 (2) SACR 16 (TK) 277D-277G.

50 (1979) 2 EHRR 305.

51 Budlender (n 14) 340.

52 Constitution (n 15) sec 35(2)(c).

53 Constitution (n 15) sec 35(3)(g).

54 McQuoid-Mason (n 14) 3.

55 Budlender (n 14) 355.

56 J Brickhill 'The right to a fair civil trial: The duties of lawyers and law students to act *pro bono*' (2005) 21 SAJHR at 294.

57 P de Vos 'Marikana funding case hints at larger problems with gaining access to justice' 17 October 2013 <https://constitutionallyspeaking.co.za/marikana-funding-case-hints-at-larger-problems-with-gaining-access-to-justice/> (accessed 3 May 2018).

based research is absent from most, if not all, academic literature and case law interpretations.

3.1 Literature review

To date, very little empirical research has been undertaken to assess how many people in South Africa have meaningful access to courts, let alone the category of Magistrates Courts only.⁵⁸ Instead, what one finds is a trail of statements made by academics and authors that are generally not supported by empirical data and/or statistical information. These types of statements often give rise to issues of ambiguity which, for the most part, makes it extremely difficult for readers to understand whether the levels of people's access to courts have improved at any given stage.

For example, if one considers the statement made by de Vos in 2009, where he states that 'most South Africans, as a practical matter, do not have access to our courts'⁵⁹ and compares it to Hodgson's statement made in 2015, which claims that 'people, the majority of whom do not have easy access to the legal profession, and the law',⁶⁰ one will immediately recognise that neither of these statements is supported by statistical information. This, of course, creates several problems. One such problem concerns how one is meant to differentiate between the measurement of access and/or the lack of access referred to in de Vos' and Hodgson's statements. Surely, the number of persons associated with the term 'majority' as in 2009, cannot be compared to the 'majority' referred to in 2015. Another problem in this regard is that neither of these statements clarify with any certainty whether the term 'majority' entails 50.01% of the general population or a percentage that leans closer towards 99.99% of the general population? After all, the difference between the two is substantial.

58 L Botha & A Kok 'An empirical study of the early cases in the pilot equality courts established in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' (2019) 19 *African Human Rights Law Journal* at 322.

59 P de Vos 'Without access to court there is no rule of law' 7 June 2009 <https://constitutionallyspeaking.co.za/without-access-to-court-there-is-no-rule-of-law/> (accessed 26 September 2018).

60 TF Hodgson 'Bridging the gap between people and the law: Transformative constitutionalism and the right to constitutional literacy' in M Bishop & A Price (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) at 190.

Furthermore, when discussing the level of access that people have to the legal profession, one must appreciate the fact that South Africa does not have enough legal practitioners to service the entire population.⁶¹ To this extent, one needs only to consider the fact that a few years ago:⁶²

[South Africa only] had 25 283 practising attorneys and 2 915 advocates at the Bar ... [which is] a total of just over 28 000 ... legal practitioners [who] have to render services to a country with a population of [approximately] 55,7 million people. That means that [based on these numbers] there's just under 2000 people to 1 practising legal professional.

What is even more telling is that contrary to the statistical information provided above, most academic literature only mentions, generally, how many people have access to the legal profession or the courts. In addition, many authors fail to specify which courts, if any, are considered accessible or inaccessible to ordinary people. It is thus as if the determination of which court a particular author is referring to is something left to the imagination of the readers themselves.

Notably, these are only some of the reasons why empirical legal data which deals with the accessibility, and effectiveness of South African civil courts remains absent from academic literature.

3.2 Case law interpretations

Perhaps the most significant Constitutional Court case which dealt with the importance of the right of access to courts is *Mohlomi v Minister of Defence*.⁶³ Decided in 1995, when the right of 'access to a court' was still protected under section 22 of the interim Constitution of the Republic of South Africa Act 200 of 1993,⁶⁴ the Court had already recognised that:⁶⁵

... most persons [were] either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons ... [t]heir rights in terms of s[ection] 22 are thus, ... infringed.

61 Department of Justice and Constitutional Development 'Keynote Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP at an international Conference on Access to Justice, Legal Costs and other interventions, hosted by the South African Law Reform Commission at the Garden Court Marine Parade, Durban' 1 November 2018 https://www.justice.gov.za/m_speeches/2018/20181101-LegalCosts_dm.html (accessed 16 January 2020).

62 N Manyathi-Jele 'Latest statistics on the legal profession' 23 July 2015 <https://www.derebus.org.za/latest-statistics-legal-profession/> (accessed 8 May 2018).

63 1997 (1) SA 124 (CC) (*Mohlomi*).

64 Interim Constitution of the Republic of South Africa Act 200 of 1993.

65 *Mohlomi* (n 63) para 14.

The question that possibly arises is, what have our courts done since the handing down of this judgment? According to Du Toit, it would seem that the Constitutional Court has only worsened the position for ordinary persons by passing formalistic rulings which fail to consider the practical difficulties of gaining access to civil courts.⁶⁶

A classic example of this is the Constitutional Court case of *Bernstein and Others v Bester and Others NNO*,⁶⁷ where Ackermann J remarked, *inter alia*, that ‘in order to have substance and be meaningful, the right of access to court must imply the right of access to a fair judicial process’.⁶⁸ While the Court acknowledged that rights should ‘have substance and be meaningful’,⁶⁹ it failed to appreciate that without a litigant’s ability to gain access to a court, the right to a fair judicial process cannot be meaningful, to begin with.

Likewise, in *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)*,⁷⁰ the Constitutional Court merely accepted the proposition that the purpose of section 34 ‘was to ensure that persons have the right to have their disputes determined fairly by a court of law until final determination, which includes a right of appeal’.⁷¹

Again, it is not that section 34 of the Constitution does not include a right of appeal, however, it is simply noticeable that apart from the right of appeal, the right of access to justice as the gateway to the right is still not recognised under South Africa’s judicial authority.

Thus, from these two cases, one might agree with Du Toit’s contention that the Constitutional Court’s interpretation of the right of access to courts has been far less progressive than one would intend it to be.⁷² Having said this, it is not to say that the Constitutional Court has never considered the practical difficulty of people gaining access to courts. In fact, in *Public Servants Association Obo Ubogu v Head of the Department of Health, Gauteng and Others*,⁷³ the Constitutional Court specifically emphasised that section 34 of the Constitution guarantees everyone the right to access the courts.⁷⁴ Whether that ‘access’, in terms of section 34, is infringed or not, is

66 Linette du Toit *Assessing the Performance of South Africa’s Constitution: Chapter 5. The Performance of the Judiciary* (2016) at 15.

67 1996 (2) SA 751 (CC).

68 *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para 103.

69 As above.

70 1996 (4) SA 331 (CC).

71 *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)* 1996 (4) SA 331 (CC) para 10.

72 du Toit (n 66).

73 2018 (2) SA 365 (CC).

74 *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC) para 67.

the type of legal question which, ironically, none of our courts have been able to address.⁷⁵

4 Data analysis and interpretation

One of the limitations recognised in this article is that there is no exclusive empirical data on people's interactions with civil lower courts and civil justice. Furthermore, the findings of the Global Insights Report only offers a broad perspective as to how people in South Africa seem to deal with their everyday justice problems.⁷⁶ Apart from this, there is also very little research dedicated to the interface between the accessibility and effectiveness of the Magistrates Courts concerning civil legal problems.⁷⁷

Therefore, this section insubstantially analyses the Global Insights Report, which provides the most recent empirical data on the everyday justice problems faced by South Africans. In this regard, the findings of the Access to Justice 2019 report are taken directly from the General Population Poll conducted for the World Justice Project Rule of Law Index 2017-2018.⁷⁸ This means that before an analysis of the Access to Justice 2019 Report is considered, one must first take note of the findings contained in the World Justice Project Rule of Law Index.⁷⁹

75 See *Msila v Government of South Africa and Others* 1996 (1) SACR 365 (SE) 368-369; *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd* (No 1) 1997 (4) SA 908 (W) 917-919; *Ernst & Young and Others v Beinash and Others* 1999 (1) SA 1114 (W); *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) paras 11-20; *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC) paras 5-6; *De Beer NO v North-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) paras 10-15; *Van der Walt v Metcash Trading Ltd* 2002 (4) 317 (CC) para 14; *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO, New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) para 30; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 68; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 334-335; *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions, Zuma And Another v National Director of Public Prosecutions* 2008 (2) SACR 557 (CC) para 61; *Manong & Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) para 15; and *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others* 2014 (12) BCLR 1465 (CC).

76 World Justice Project (n 16).

77 Anleu & Mack (n 40) 183.

78 World Justice Project Rule of Law Index 2017-2018 (Rule of Law Index).

79 As above.

4.1 World Justice Project Rule of Law Index: South Africa

4.1.1 Introduction

The first global study which systematically and comprehensively measured the accessibility and effectiveness of South African civil courts is the Rule of Law Index.⁸⁰ In that study, South Africa ranked 35th out of 113 countries for civil justice.⁸¹

Recognised as the seventh factor of the Rule of Law Index,⁸² civil justice entailed the measuring of seven sub-factors that contributed towards South Africa's global ranking.⁸³ The factor scores, which South Africa obtained for civil justice, included the following:⁸⁴

Table 1:⁸⁵

Factor 7: Civil Justice		
7.1	Accessibility and affordability of civil courts, including whether people are aware of available remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers	0.46
7.2	Whether the civil justice system discriminates in practice based on socio-economic status, gender, ethnicity, religion, national origin, sexual orientation, or gender identity	0.48
7.3	Whether the civil justice system is free of bribery and improper influence by private interests	0.70
7.4	Whether the civil justice system is free of improper government or political influence	0.65
7.5	Whether civil justice proceedings are conducted, and judgments are produced in a timely manner without unreasonable delay	0.54
7.6	The effectiveness and timeliness of the enforcement of civil justice decisions and judgments in practice	0.65
7.7	Whether alternative dispute resolution mechanisms (ADRs) are affordable, efficient, enforceable, and free of corruption	0.77

80 As above.

81 Rule of Law Index (n 78) 38.

82 P Pleasence & N Balmer 'Measuring the Accessibility and Equality of Civil Justice' (2018) 10 *Hague Journal on the Rule of Law* at 258.

83 Rule of Law Index (n 78) 38.

84 Rule of Law Index (n 78) 13 & 17.

85 As above.

By measuring South Africa's civil justice factor score in accordance with the accepted definitions used for each subfactor, the study concentrated on:⁸⁶

- (i) whether ordinary people could resolve their grievances peacefully and effectively through the civil justice system;
- (ii) whether the civil justice system is accessible; affordable; and free of discrimination, corruption and improper influence;
- (iii) whether court proceedings are conducted without unreasonable delays, and if decisions are enforced effectively; and
- (iv) the accessibility, impartiality and effectiveness of ADR mechanisms.

Overall, South Africa's factor score for civil justice as framed by these considerations was recorded at 0.61.⁸⁷

4.1.2 Research design and methodology

Whilst appreciating that the empirical data used for South Africa's measurement of civil justice by the World Justice Project is arguably the first of its kind, the data source used for the study was collected during the year 2016 using a sample of 1 000 participants who engaged in face-to-face interviews.⁸⁸ In this context, the World Justice Project collected data from the public using a General Population Poll questionnaire, which included 153 perception-based questions and 191 experience-based questions, along with socio-demographic information on all respondents.⁸⁹ The greatest advantage of the questionnaire and polling methodology employed by the World Justice Project was that it provided first-hand information on the lived experiences and perceptions of ordinary people regarding a range of pertinent rule of law questions.⁹⁰

Paying specific attention to South African people's access to civil justice, the General Population Poll questionnaire modules were appropriately translated into local languages and used a probability sample of 1 000 respondents in three cities, namely Johannesburg, Cape Town, and Durban.⁹¹

86 Rule of Law Index (n 78) 38.

87 Rule of Law Index (n 78) 131.

88 Rule of Law Index (n 78) 163.

89 As above.

90 Rule of Law Index (n 78) 157.

91 As above.

4.2 Global Insights on Access to Justice 2019: South Africa

4.2.1 Access to justice module

Unlike the Rule of Law Index, the Global Insights Report provides a more specialised profile for South African people’s access to justice, using a nationally representative probability sample of 1 014 respondents in the country.⁹²

In an attempt to deepen the evidence base for inclusive measures of access to justice, the World Justice Project developed a separate survey module that focused on people’s legal needs.⁹³ Comprising of 128 of the 340 questions contained in the General Population Poll survey, the access to justice module⁹⁴:

... was designed to capture data on how ordinary people deal with their legal problems, highlighting the most common legal problems, respondents’ assessment of their legal capability, and sources of help.

Conducted in 101 countries and jurisdictions around the world, the Global Insights Report offers a country profile for South Africa using a nationally representative probability sample of 1 014 respondents. In collecting the data contained in South Africa’s profiled report, the study was conducted in 2018 using face-to-face interviews as the research methodology.

4.2.2 How to read the country profiles

An important aspect of the Global Insights Report relates to how one should interpret each of the country profiles. According to the report, each profile consists of six parts. Described briefly, each of these parts are understood as follows:⁹⁵

Table 2:

Part 1: Legal Problems	This part of the profile shows the percentage of those surveyed who experienced any legal problems in the last two years.
Part 2: Legal Capability	This part of the profile shows the percentage of respondents who knew where to get advice and information; could obtain all the expert help they wanted; and were confident they could achieve a fair outcome.

92 World Justice Report (n 16) 4.

93 As above.

94 As above.

95 World Justice Report (n 16) 11.

Part 3: Sources of Help	This part of the profile shows the percentage of respondents who reported obtaining information, advice, or representation to help them better understand or resolve their legal problems.
Part 4: Problem Status	This part of the profile shows the percentage of respondents whose problems are ongoing or who are still in the early stages of dealing with their problems.
Part 5: Process	This part of the profile shows the percentages of respondents who felt that the process followed to resolve their legal problem was fair as well as those who gave up along the way.
Part 6: Hardship	This part of the profile is broken down into specific categories of difficulties experienced by respondents who encountered a legal problem in the last two years.

4.2.3 South Africa

In light of the above, the results for South Africa for 2018 are summarised below.

Part 1: Legal Problems

Fifty percent of the 1 014 respondents who were surveyed in the Global Insights Report experienced a legal problem in the last two years, being 2016-2018. For purposes of convenience, the incidence by type of problems is ranked from the most to least common:⁹⁶

Table 3:

Consumer	25%
Land	10%
Citizenship & ID	9%
Housing	9%
Family	7%
Money & Debt	6%
Employment	3%
Education	2%
Citizenship & ID	2%
Public Services	2%
Accidental Illness & Injury	1%
Law Enforcement	0%

96 Word Justice Report (n 16) 96 & 121.

Part 2: Legal Capability

Of the 507 respondents who experienced a legal problem over the last two years, 62% knew where to get advice and information; 49% felt they could get all the professional legal help they wanted; and 59% were confident they could achieve a fair outcome.⁹⁷

Part 3: Sources of Help

Thirty-seven percent of the respondents who experienced a legal problem over the last two years were able to access help.⁹⁸ The type of advisor reported by these respondents was recorded as follows:⁹⁹

Table 4:

Friend or Family	40%
Lawyer or Professional Advice Service	25%
Government Legal Aid Office	17%
Court or Government Body or Police	16%
Religious or Community Leader	11%
Other Organisation	8%
Civil Society Organisation or Charity	6%
Health or Welfare Professional	6%
Trade Union or Employer	4%

Part 4: Problem Status

On the one hand, 39% of respondents stated that their problems were done and fully resolved, however, on the other hand, 20% of respondents gave up on pursuing any action further to resolve the problem.¹⁰⁰

Part 5: Process**Table 5:**¹⁰¹

Fair	67% of respondents felt the process followed to resolve the problem was fair, regardless of the outcome.
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97 World Justice Report (n 16) 96.

98 As above.

99 World Justice Report (n 16) 96.

100 As above.

101 World Justice Report (n 16) 92.

Time	On average, it took respondents 2.8 months to solve the problem.
Financial difficulty	17% said it was difficult or nearly impossible to find the money to solve the problem.

Part 6: Hardship

Fifty-four percent of respondents experienced hardships throughout this process. The types of hardships experienced included:¹⁰²

Table 6:

Health	36% experienced a physical or stress-related illness.
Economic	24% experienced loss of income, employment, or the need to relocate.
Interpersonal	22% experienced a relationship breakdown or damage to a family relationship.
Substance Abuse	10% experienced problems with alcohol or drugs.

4.3 Analysis and interpretation

In analysing the factor scores which South Africa obtained in the Rule of Law Index, one immediately recognises that the lowest score with regard to civil justice related to the accessibility and affordability of South African civil courts. The research findings also indicated that the highest score for civil justice related to the country's accessibility and efficacy of alternative dispute resolution mechanisms.

Apart from this, the definitions of the various sub-factors for civil justice as contained in the Rule of Law Index provide a detailed response to the main research questions posed in this article, namely: (i) how to measure concepts such as 'access to courts' and 'access to justice'; and (ii) how to attribute the results of these measurements to a South African legal context.

It is, therefore, no surprise that the civil justice indicators, which were identified by the Rule of Law Index, provided a very strong basis for the development of the access to justice survey module,¹⁰³ which was also a key component to the Global Insights Report.

Furthermore, South Africa's ranking as 35th out of 113 countries around the world is something that our country should not overlook.

¹⁰² As above.

¹⁰³ See World Justice Project 'Access to Justice Module – WJP General Population Poll 2018' 2018 https://worldjusticeproject.org/sites/default/files/documents/WJP%20General%20Population%20Poll_Access%20to%20Justice%20Module_2018.pdf (accessed 24 January 2020).

Nevertheless, we can only hope that the country's position with regard to civil justice as per future World Justice Project studies will strengthen over the next few years.

Additionally, the findings of the Global Insights Report, as set out in paragraphs 3.3.3.1 to 3.3.3.6 above, offers meaningful insight into the perspectives and/or experiences of ordinary South Africans with the highlights of these insights being that: (a) exactly 50% of all respondents who were surveyed did not experience a legal problem over the last two years; (b) the most commonly encountered legal problem related to issues of consumerism; and (c) of those who did experience a legal problem over the last two years, almost half felt that they could get all the professional legal help they requested.

5 Conclusion

This article has offered a critical analysis and evaluation of South African civil lower courts. It has also elaborated on several legal issues, which clarify the theoretical framework of the right of access to courts in relation to civil legal problems. In doing so, it firmly established, amongst other things, that all persons in South Africa, whether rich or poor, alien and foreign, are entitled to access to civil lower courts and civil justice.

In addition, the research demonstrated that central to academic literature and case law interpretations is the lack of reliable evidence-based research which accounts for the practical experiences and/or perceptions of ordinary people. While international studies such as the Rule of Law Index and Global Insights Report have offered meaningful insights into the country's civil justice system, there remains a theoretical issue in that such projects do not clarify whether the scope of civil courts encompasses all categories of courts. Accordingly, this particular issue gives rise to possible innovations for creating specific metric tools such as the General Population Poll Access to Justice Module, which focuses on and caters for civil Magistrates Courts only.

THE PLIGHT OF REFUGEES IN SOUTH AFRICA

by Abigail Emily Ashfield*



Abstract

Democratic South Africa emerged in 1994 through a horrific history of exclusion, racial discrimination, and segregation. Following years of sanctions, boycotts, and disgrace from the international community, South Africa promised its people and the world that a new dawn had risen. A transformative constitution ushered in this change, determined to ensure equal rights and protection for all and to never repeat the crimes of the past. Unfortunately, this idealistic goal has not extended to all those who call South Africa home. The hard-fought battle against apartheid which was aided by many African countries did little for the status of asylum seekers and refugees in the post-1994 state. Refugees continue to be targeted and ostracised in our 'free and equal' land. This has given rise to violations of the international obligations that South Africa voluntarily assumed in 1996 in respect of refugees. Owing to the continued human rights violations of refugees and the state's failure to translate visions of an equal and democratic South Africa beyond the borders of citizenship, redress is sorely needed. To this end, the landscape of refugee law is explored and outlined, both on the domestic plane and the international stage. A critical analysis of these sources will serve to concretise the position of refugees and asylum seekers, the shortfalls of the existing system, and the need for greater transformation and equality.

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1 Introduction

The purpose of this article is to shed light on the current plight of refugees faced in South Africa. As a point of departure, it is acknowledged that xenophobia remains a prevalent struggle faced by refugees and asylum seekers, but it shall not be the dominant discussion of this paper. The article's primary aim is to critically analyse the legal position of refugees through a thorough evaluation of the relevant jurisprudence, legislation, and the impact of transformative constitutionalism. Throughout this article, the core objective is to illustrate the trappings of being a refugee and to reimagine a system where greater consideration is given to the protection and promotion of the human rights of those vulnerable in our communities.

The paper is divided into five distinct but related parts. Part I presents the circumstances endured by asylum seekers and refugees and sets the scene of life as a refugee in South Africa. Part II outlines South Africa's international and domestic obligations to refugees. Against this backdrop, Part III analyses the judgment and order made in the case of *City of Cape Town v JB and Others (City of Cape Town)*.¹ Flowing from this analysis, the judgment made in *City of Cape Town* will be critiqued in Part IV. Finally, an alternative view is suggested in addressing the prevailing refugee crisis.

2 The position of refugees in South Africa

The presence of migrants in South Africa is not a new phenomenon. Migrants, both documented and undocumented, have streamed through South Africa's borders since the time of apartheid.² Various factors led to an increase in the number of migrants entering South Africa during the 1980s to late 1990s. Many African countries were in the struggle for independence with conflicts resulting in intolerable living conditions and the persecution of persons. The influx of Mozambican citizens seen in the 1990s during the ongoing civil war involving Renamo and Frelimo is a notable example of a factor which contributed to mass migration trends in South Africa.³

1 *City of Cape Town v JB and Others* 2020 (2) SA 784 (WCC) (*City of Cape Town*).

2 S Peberdy 'Setting the scene: Migration and urbanisation in South Africa' (2009) *The Atlantic Philanthropies* at 3-5.

3 S Nomazulu 'The impact of immigration on the labour market: Evidence from South Africa' unpublished MCom thesis, University of Fort Hare, 2008 at 15.

When entering into the new constitutional dispensation in 1994, specific focus was given to ensuring compliance with international obligations and standards.⁴ Although it took some time to finalise its domestic law guaranteeing protection for refugees and asylum seekers, South Africa did ratify both the 1951 Refugee Convention as well as the 1969 OAU Refugee Convention in 1996.⁵ On the foundation of these international obligations, the Refugees Act was enacted in 1998 giving effect to the promotion and protection of the rights of refugees and asylum seekers.⁶ Despite this, however, the circumstances and difficulties that refugees and asylum seekers face today depict a life of hardship, fear, and prejudice.

Refugees and asylum seekers in South Africa face threats of xenophobic attacks and violence based on their countries of origin. In 2019, a surge of xenophobia swept through South Africa causing riots and looting.⁷ To paint the picture of life as a refugee, three individuals will be looked at.

Jean, a Congolese shop owner, had his property broken into and looted during the 2019 riots. He was badly beaten when he approached his shop, sustaining serious injuries, similar to a previous attack that he had endured in 2008.⁸ A 16-year-old girl named Nathalie came to South Africa in 2009 from the Democratic Republic of Congo (Congo). She was attacked and beaten by classmates for being elected as a student representative for her grade. The guilty students were never punished, and Nathalie has not since returned to school for fear of her life.⁹ The life of Asad Abdullahi depicts the struggles of living as an asylum seeker in South Africa. He stated that after fleeing the war-torn and failed state of Somalia and traversing Africa at a very young age in search of safety, South Africa remains one of the most dangerous and violent places that he had ever lived in.¹⁰

It is undeniable that refugees and asylum seekers face incredible struggles when arriving in South Africa. This begs the question of whether they have escaped to a country that can actually protect

4 Constitution of the Republic of South Africa, 1996 (Constitution) secs 39(2), 232 & 233.

5 Convention Relating to the Status of Refugees (28 July 1951) United Nations Treaty Series (189) 137 (1951 Refugee Convention); OAU Convention on Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) United Nations Treaty Series (1001) 45 (1969 OAU Refugee Convention).

6 Refugees Act 130 of 1998.

7 Human Rights Watch 'South Africa: Widespread Xenophobic Violence' 17 September 2020 <https://www.hrw.org/news/2020/09/17/south-africa-wide-spread-xenophobic-violence> (accessed 18 June 2021).

8 Human Rights Watch 'They have robbed me of my life' 17 September 2020 <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south> (accessed 18 June 2021).

9 Human Rights Watch (n 8).

10 J Steinberg *A Man of Good Hope* (2014) at 195-200.

them. The many untold stories of violence and the hardships that refugees face also question whether the protective measures ensured by the Refugees Act are being practically implemented by the Department of Home Affairs, the courts, and local government.

3 The legal protection guaranteed to refugees in South Africa

3.1 International instruments on refugee protection

Refugee protection emanated after the formation of the League of Nations in response to the emerging conflict arising from the Russian Federation in 1921. A specialised agency, the International Refugee Organization, was appointed to address the growing number of displaced persons post World War II.¹¹ An increase in the need for regulation necessary to protect refugees led to the establishment of the United Nations High Commissioner for Refugees (UNHCR) in 1950. The UNHCR originated as a temporary agency but has since been permanently established.¹²

The United Nations enacted three noteworthy authorities on refugee law; the 1951 UN Convention on the Status of Refugees and its 1967 Refugee Protocol, as well as the 1950 Statute of the Office of the UNHCR.¹³ The 1951 Refugee Convention outlined the definition of a refugee and the subsequent protection granted as per the mandate set out by the United Nations. However, the definition lacked clarification on temporal and geographical elements that were later affirmed in the definition set out by the 1967 Refugee Protocol.¹⁴

A refugee is defined by Article 1A(1) of the 1951 Refugee Convention read in tandem with Article 1A(2) of the 1967 Refugee Protocol and embellished by Article 1 of the 1969 OAU Refugee Convention as: any person who is outside their country of origin and is unable or unwilling to return or avail themselves of its protection, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a social group, or political opinion. Article 1 of the 1969 OAU Refugee Convention broadens the application of protection by addressing groups of refugees as well as

11 GS Goodwin-Gill 'The International Law of Refugee Protection' in E Fiddian-Qasimiyeh, G Loescher, K Long & N Sigona (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) at 1.

12 J McAdam 'The Enduring Relevance of the 1951 Refugee Convention' (2017) 29 *International Journal of Refugee Law* at 1.

13 1951 Refugee Convention (n 5); Protocol Relating to the Status of Refugees (31 January 1967) United Nations Treaty Series (606) 267 (1967 Refugee Protocol); Statute of the Office of the United Nations High Commissioner for Refugees (14 December 1950) A/RES/428(V).

14 Goodwin-Gill (n 11) 2.

individual refugees.¹⁵ Moreover, the 1969 OAU Refugee Convention's definition specifically protects refugees experiencing armed conflict from war-torn countries.

This combined definition provides a wide scope of legal protection for refugees to the extent that persecution need not be current but can be a future or emerging threat while a citizen is absent from the country.¹⁶

The 1969 OAU Refugee Convention is a pertinent and essential instrument in combatting the influx of refugees throughout Africa. Africa's history has been plagued by colonisation and segregation which have led to continued armed conflict in the fight for independence.¹⁷ The result of this is the widespread dispersion of persons, with many African nationals seeking asylum and ultimately refugee status. The 1969 OAU Refugee Convention has in many ways set the tone for the treatment of refugees by upholding values of community, acceptance, and hospitality.¹⁸ It allows for people to be accepted into host countries on a 'face value' basis. This approach grants refugee status without extensive evidence or proof being required in order to accommodate those seeking assistance.¹⁹ It cannot be denied that the 1969 OAU Refugee Convention plays a fundamental role in protecting refugees originating in Africa. South Africa has a duty to give effect to the binding standards of the 1969 OAU Refugee Convention in developing its own protective measures for refugees and asylum seekers.

From this foundation, state obligations, and the subsequent implementation of such obligations in terms of the 1951 Refugee Convention, the 1967 Refugee Protocol, and the 1969 OAU Refugee Convention must be analysed. The 1951 Refugee Convention sets out the contracting states' obligation to ensure the welfare of refugees in Articles 20 to 23. Refugees are afforded the same rationing of resources as nationals,²⁰ therefore, equal housing opportunities should be given to refugees subject to domestic law and public authority. Additionally, less favourable terms cannot be imposed upon refugees where other non-citizens are treated more favourably.²¹ Refugees should also have access to basic education on

15 1951 Refugee Convention (n 8) Art 1A(1); 1969 OAU Refugee Convention (n 8) Art 1.

16 Goodwin-Gill (n 11) 2-3.

17 South African History Online 'South African's Foreign Relations During Apartheid, 1948' <https://www.sahistory.org.za/article/south-africas-foreign-relations-during-apartheid-1948> (accessed 18 June 2021).

18 African and Latin American Working Group 'Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees' (1992) *UNHCR* at 2.

19 African and Latin American Working Group (n 18) 4.

20 1951 Refugee Convention (n 5) Art 20.

21 1951 Refugee Convention (n 5) Art 21.

the same standard as nationals,²² and public relief assistance must be equally distributed to refugees as it is to the nationals within the country.²³

Likewise, Article 2(1) of the 1969 OAU Refugee Convention sets out the responsibilities of Member States when granting asylum. Member States must ensure the acceptance and settlement of refugees requiring asylum through domestic legislative mechanisms.²⁴ Articles 2(1) and (3) also emphasise the importance of adhering to the principle of *non-refoulement*, ensuring that no person seeking asylum is rejected at the border.²⁵

The 1951 Refugee Convention and 1967 Refugee Protocol were created to solve the refugee problem which was specifically presented after World War II.²⁶ The 1969 OAU Refugee Convention was thereafter enacted to combat the rising refugee numbers in Africa.²⁷ Unfortunately, the application of these international instruments has been underwhelming and has not achieved its goal in the seventy years since its enactment with the goal being to ultimately decrease the worldwide numbers of refugees as well as to enact a universal standard of protection for all refugees and asylum seekers.²⁸ Unfortunately, many borders still see mass influxes of asylum seekers with both refugees and asylum seekers receiving inadequate treatment and protection from their host countries. The refugee situation is anything but diminished, requiring states to continue providing solutions to the ever-increasing issue.

The most utilised and blanket solution when receiving asylum seekers is placing them in 'refugee camps' or 'refugee centres'. Encampment of refugees is favoured in many African and European countries as the natural consequence of seeking asylum.²⁹ Refugee camps, however, provide a paradoxical situation where on one hand their purpose remains a temporary solution, but on the other hand, refugees remain in the camps for undetermined periods of time.³⁰ Ironically, the camps become, to some extent, a form of permanent residence. This compromises the purpose of refugee camps, which are constructed as temporary settlements, as they should only be considered as a brief stepping-stone to refugee status being granted.

22 1951 Refugee Convention (n 5) Art 22.

23 1951 Refugee Convention (n 5) Art 23.

24 1969 OAU Refugee Convention (n 5) Art 2(1).

25 1969 OAU Refugee Convention (n 5) Arts 2(1) & (3).

26 Goodwin-Gill (n 11) 2.

27 1969 OAU Refugee Convention (n 5) Preamble.

28 1951 Refugee Convention (n 5) Preamble; 1969 OAU Refugee Convention (n 5) Preamble.

29 R Kreichauf 'From forced migration to forced arrival: the campization of refugee accommodation in European cities' (2018) 6(7) *Comparative Migration Studies* at 3.

30 Kreichauf (n 30) 4.

The UNHCR has set out three preferential solutions that states may implement when accommodating refugees in their countries.³¹ Voluntary repatriation remains the best option for states to utilise in decreasing refugee numbers.³² Refugees should unconditionally be able to return to their countries of origin and be received back as citizens if the past threat has ceased.³³

Should repatriation be impossible, the contracting state should strive for the integration of refugees into local communities, a system that South Africa has adopted.³⁴ Full integration speaks to both legal recognition and the holistic acceptance of refugees into everyday life in South Africa. Legal recognition takes the form of refugees being entitled to and receiving all rights afforded to permanent residents.³⁵ Additionally, refugees should be encouraged to immerse themselves in South African culture and communities in order to create a new home for their families.

Various factors must be considered in achieving local reintegration.³⁶ These factors cannot be invariably utilised as refugees come from all over the world seeking asylum, resulting in varied ways of living.³⁷ Local reintegration can only be achieved by accommodating individuals on a case-by-case basis. Often, refugees have come from traumatic backgrounds and still endure the psychological implications of this.³⁸ Many refugees also come from religions and cultures that are drastically different from the cultures of their host country.³⁹ Additionally, refugees have often been deprived of basic rights and opportunities which are essential for assimilation into a new country and to rebuilding one's dignity. A holistic approach should thus be taken to the process of integration in order to achieve long-lasting results.

Finally, resettlement can be facilitated by the state to relieve the pressure of one state receiving large numbers of refugees. Resettlement can either be in the country of safety or to a third country that can accommodate refugees.⁴⁰ The 1969 OAU Refugee

31 United Nations General Assembly Resolution 428(v) (14 December 1950) A/RES/428(V) Annexure para 1.

32 United Nations High Commissioner for Refugees *Voluntary Repatriation: International Protection* (1996) at 4-10.

33 UNHCR 'Voluntary Expatriation No.18 (XXXI)' (1980) paras (c) & (d).

34 JC Kanamugire 'Local Integration as a Durable Solution for Refugees in South Africa' (2016) 12(3) *Acta Universitatis Danubius* at 4.

35 Kanamugire (n 36) 5.

36 Goodwin-Gill (n 11) 6.

37 Goodwin-Gill (n 11) 7.

38 P Zambelli 'Hearing Differently: Knowledge-based Approaches to Assessment of Refugee Narrative' (2017) 29 *International Journal of Refugee Law* at 13.

39 Zambelli (n 40) 14.

40 Goodwin-Gill (n 11) 6.

Convention also proposes an option for Member States as set out in Article 2(4).⁴¹ If issues arise in granting asylum or providing for refugees then the host country may request that asylum seekers be accepted by another Member State. This grants a measure of relief to over-burdened countries faced with large numbers of refugees.

Although these available solutions cannot solve the root cause of the influx of refugees, the aim is to relieve both the host countries' responsibilities as well as to address the pressing needs of refugees throughout Africa.

3.2 Domestic protection ensured to refugees

South Africa has not been immune to the influx of refugees streaming through her borders. Rather, migrants and refugees have been intrinsically linked to South Africa's history.⁴² When 1994 brought the hard-earned prize of democracy, the newly elected government had to address and conform to the international standards on the treatment and protection of refugees. The Aliens Control Act 96 of 1991 had failed to fulfil the supposed assurances made to its applicants.⁴³ Therefore, a revised and updated piece of legislation was sorely needed to give effect to the 1951 Refugee Convention and its 1967 Refugee Protocol, as well as to the 1969 OAU Refugee Convention.

In response to this need, the Refugees Act was enacted in 1998 and came into operation in 2000.⁴⁴ Alongside it, the Immigration Act also addresses issues surrounding the admission of foreign nationals and the transgression of the immigration conditions resulting in arrest and deportation.⁴⁵ It allows foreign nationals to reside in South Africa provided that they remain self-sufficient and economically secure.⁴⁶ The Act also notes that the loss of economic stability results in 'undesirable immigrants' who are expected to return to their country of origin. Finally, the Immigration Act also addresses the treatment of those who reside in South Africa in contravention of the immigration laws. Residing in the country without the necessary documents brands one as an illegal foreigner, allowing the Department of Home Affairs to deport migrants back to their country of origin.⁴⁷

In contrast, the Refugees Act focuses on the protection of refugees and the treatment and procedures affordable to refugees

41 1969 OAU Refugee Convention (n 5) Art 2(4).

42 Peberdy (n 2) 5-6.

43 J Handmaker 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Indiana University Press* at 92-96.

44 Refugees Act (n 6).

45 Immigration Act 13 of 2002.

46 Immigration Act (n 47) Preamble.

47 Immigration Act (n 47) secs 2 & 34.

seeking asylum once they are physically in South Africa.⁴⁸ The Act protects two categories of foreign nationals; refugees and asylum seekers. The Refugees Act defines a refugee in section 3 as:⁴⁹

- (a) Owing to a well-founded fear of being persecuted by reason of his or her gender, race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having the nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, is unwilling to return to it; or
- (b) Owing to external aggression, occupation, foreign domination, or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or
- (c) Is a spouse or dependant of a person contemplated in paragraph (a) or (b)

This definition gives direct effect to the 1951 Refugee Convention's description of a refugee – allowing for a broad scope of protection for those who are formally granted refugee status. Important to note, the expansion of the definition per section 3(b) of the Act is a direct result of the 1969 OAU Refugee Convention which included armed conflict as a reason for seeking asylum. Prior to being granted refugee status, applicants must undergo a process that is set out in the Refugees Act. The process begins by lodging an application as an asylum seeker at the Refugee Reception Offices, administered by the Department of Home Affairs (DHA).⁵⁰ The DHA is responsible for implementing the Act and processing asylum applications.⁵¹

Finally, the Refugees Act sets out the general protection of refugees and asylum seekers in sections 27 to 30, giving effect to the 1951 Refugee Convention.⁵² Section 27 affords refugees (not asylum seekers) full access to all rights contained in the Bill of Rights. Section 27A of the Refugees Amendment Act sets out the rights and protections given to asylum-seekers and [vaguely] entitles asylum seekers to the rights contained in the Bill of Rights.⁵³ South African domestic law has indeed given effect to its international obligations ensuring adequate protection to asylum seekers and refugees. The

48 V Ramoroka 'The determination of refugee status in South Africa: A human rights perspective' unpublished LLM thesis, University of Pretoria, 2014 at 12-14.

49 Refugees Act (n 6) sec 3.

50 Refugees Act (n 6) secs 21-22.

51 Refugees Act (n 6) sec 22(6).

52 1951 Refugee Convention (n 5) Arts 27-30.

53 Refugees Amendment Act 33 of 2008 sec 27A.

practical implementations of this protection however leave much to be desired.

4 A summary and judgment of *City of Cape Town v JB and Others*

The case of *City of Cape Town v JB and Others* must be first set out in the context of the 2019 xenophobic attacks that struck fear into the hearts of many migrants across South Africa.⁵⁴ This was not the first bout of these attacks, nor regretfully does it seem to be the last. The conflict arose between taxi drivers operating throughout South Africa but specifically in Tshwane and Cape Town where migrants, predominantly Nigerians, were accused of having dealings in drug circles, child trafficking, and prostitution.⁵⁵ The conflict was originally confined to these two groups (South African taxi drivers and Nigerian businessmen), but soon a net was cast over all migrants living in South Africa. No distinction was made amid the anger and violence between documented and undocumented occupants, asylum seekers, or refugees.⁵⁶

At the height of this turmoil, hundreds of migrants left their homes as they felt unsafe to continue working and living in their communities. The City of Cape Town could not accommodate them nor could the UNHCR facilitate their demands to be resettled—to a safer country as the option of resettlement was incredibly limited.⁵⁷ Thus, protests and riots ensued in order to pressurise the UNHCR to meet their demands of resettlement.⁵⁸ With nowhere else to go during the sit-in protests, women, children, and men flocked to the Central Methodist Church which housed hundreds of people.⁵⁹ The men were forced to live on the streets due to space constraints and set up informal housing arrangements.⁶⁰ Against this backdrop, the City of Cape Town approached the Western Cape High Court for an order to clear the migrants off the streets.

The first section of the judgment focuses on the contravention of the City of Cape Town By-laws relating to Streets, Public Places and the Prevention of Noise Nuisances and outlines the procedures that the City and municipal police took to keep the refugees and asylum seekers ‘in check’ during these riots.⁶¹ Clause 22 of the City by-laws

54 *City of Cape Town* (n 1) para 4.

55 *City of Cape Town* (n 1) paras 4-10.

56 Human Rights Watch (n 7).

57 *City of Cape Town* (n 1) para 13.

58 *City of Cape Town* (n 1) paras 13-14.

59 *City of Cape Town* (n 1) para 16.

60 *City of Cape Town* (n 1) paras 16-17.

61 *City of Cape Town By-Laws Relating to Streets, Public Places and the Prevention of Noise Nuisances No.6469 of 2007 (City By-Laws)*.

set out the process that must be followed in the instance of contravention.⁶² The City is required to issue a notice as a first remedy and to then look to alternatives such as fines or imprisonment. The latter can only be applied through a court order after a consideration of the relevant circumstances. However, the City failed to issue notices against the respondents, nor did it rely on the available civil remedies.⁶³

The City clearly set out the functions and duties of its municipal police force but failed to identify their participation in arresting the respondents. The City did not rely on the municipal police service to perform its duties as established by Clause 23(1) of the City by-laws.⁶⁴ It seems that the City wished to avoid two scenarios. First, contrary to its behaviour and actions towards the respondents, the City did acknowledge that arresting the respondents should be a measure last resort.⁶⁵ To avoid the responsibility falling on its own municipal police, the City took a step back and relied on the South African Police Service (SAPS) to arrest the respondents instead. This thereby absolved the municipality from the high threshold of establishing the necessity of arrest.

Second, the City circumvented the procedure set out to warrant the SAPS' involvement. Although the SAPS was within its scope of authority, the municipal police first had to file a complaint of an alleged violation, which the SAPS then had to investigate.⁶⁶ At no stage did the City approach the SAPS to lodge a complaint.⁶⁷

The second part of the judgment then shifted focus to the applicability of the Immigration Act and the Refugees Act. It is unopposed that these instruments are applicable to the respondents as their complaints were directed at the DHA's functioning and administrative duties. In this regard, the City happily relied on the Immigration Act while failing to ensure the protection guaranteed by the application of the Refugees Act.⁶⁸

Thulare J identifies the relevant and applicable provisions in the Refugees Act which should apply to the respondents but fails to expand on how both the City and the DHA did not fulfil their mandate in acting upon these provisions. Oddly enough, Thulare J instead considers the behaviour of the respondents as deceitful in inciting fellow migrants to continue demanding relocation from the UNHCR.⁶⁹

62 *City of Cape Town* (n 1) para 26; City By-Laws (n 64) clause 22.

63 *City of Cape Town* (n 1) para 27.

64 City By-Laws (n 64) clause 23(1).

65 *City of Cape Town* (n 1) paras 29-31.

66 *City of Cape Town* (n 1) para 31.

67 *City of Cape Town* (n 1) paras 32-33.

68 *City of Cape Town* (n 1) paras 36-39.

69 *City of Cape Town* (n 1) paras 40-41.

The City found it necessary to arrest and detain the respondents to ascertain whether they were illegal residents in South Africa. Ultimately, the purpose of this investigation was to apply the Immigration Act to deport undocumented immigrants back to their country of origin.⁷⁰ The City was under the misconception that it need not apply section 26 of the Refugees Act which allows asylum seekers to appeal their applications either to the Standing Committee for Refugee Affairs or to the Refugee Appeal Authority before any final action is taken.⁷¹ The City was all too quick to rely on the consequences set out in the Immigration Act as justification of the treatment of the respondents.⁷²

Last, Thulare J addresses the actions of the first and second respondents. He reprimands their behavior and intent to stir up anger and frustration amongst the other protesters full knowing that their demands of resettlement would not otherwise be met.⁷³ Rather, it is suggested by Thulare J that the respondents should have applied to the various mechanisms for housing opportunities via the City as most South Africans are expected to do.⁷⁴

The application of international law is then discussed in terms of the principle of *non-refoulement* alongside the applicability of the Refugees Act.⁷⁵ The case of *Ruta v Minister of Home Affairs* is quoted in establishing the importance of the principle of *non-refoulement*.⁷⁶ However, further insight into the application of *non-refoulement* or its relevance in this matter was left unaddressed. The judgment is concluded by stating that the respondents bear the onus of proving why they cannot return to their habitual residences and that in failing this, they should return immediately – which is ironically stated directly after the consideration of *non-refoulement*.⁷⁷ The discussion of international law appears incredibly abrupt and as more of an afterthought.

Based on the findings of the case, an order was made to prohibit the respondents from contravening the City by-laws. Specifically, a prohibition was imposed upon the respondents to not stay overnight, sleep at any time, make fires, wash clothes, conduct personal hygiene, and urinate or defecate in the vicinity of the church, or on any public property including the streets. Conclusively, Thulare J ordered the DHA to conduct investigations into the statuses and applications of all migrants present at the church.⁷⁸

70 *City of Cape Town* (n 1) para 34.

71 *City of Cape Town* (n 1) para 38.

72 *City of Cape Town* (n 1) para 40.

73 *City of Cape Town* (n 1) paras 43-45.

74 *City of Cape Town* (n 1) para 47.

75 *City of Cape Town* (n 1) para 48.

76 2019 (2) SA 329 (CC) paras 24-25.

77 *City of Cape Town* (n 1) para 47.

78 *City of Cape Town* (n 1) para 58.

5 Critique of the *City of Cape Town v JB and Others* judgment

This section evaluates the *City of Cape Town* judgment heard by the Western Cape High Court. In doing so, it problematises the Court's failure to uphold the principles of substantive equality in its treatment of refugees in accordance with its constitutional mandate. Moreover, this section will outline how the *City of Cape Town* ruling violated South Africa's international law obligations and further criticises the inadequacy of domestic refugee law. It is argued that the Court's failure to engage with international law and to amend national policy has undermined the refugees' right to housing and family.

5.1 The Court failed to ensure substantive equality for refugees in South Africa

'No order is sought against the Respondents inside the church.' This was a statement made by Thulare J in his judgment against the migrants residing on the streets of Cape Town outside the Central Baptist Church.⁷⁹ This seemingly innocuous statement violates the Court's duty to uphold substantive equality and transformative constitutionalism.

In ruling on the *City of Cape Town* case, Thulare J placed emphasis on the contravention of the City by-laws by the respondents. It is undisputed that the respondents were indeed in violation of by-laws which the municipality had a duty to uphold for the benefit of individuals who were being affected by the protests.⁸⁰ However, the conditions in which the respondents found themselves also deserved attention and relief and should not have been ignored. This draconian approach centred solely on the by-laws of the municipality is overly positivistic and falls short of the constitutional mandate on courts to prioritise substantive equality and transformative constitutionalism.⁸¹

Accordingly, a transformative approach should have been adopted in this case. Transformative constitutionalism speaks to a revolutionary approach to the law to ensure that social and economic rights are realised with the Constitution as the vehicle for this change.⁸² The ultimate goal of transformative constitutionalism is to

79 *City of Cape Town* (n 1) para 16.

80 *City of Cape Town* (n 1) paras 26-27.

81 K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* at 146.

82 P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* at 352-354.

achieve a truly egalitarian society.⁸³ The courts play an active role in ensuring the realisation of a transformed society. Judges cannot only utilise legal reasoning but must provide judgments that reflect on and advance constitutional norms and values.⁸⁴ A technical approach to interpreting legal issues is thus no longer sufficient as social, historical, and economic circumstances must be considered when judgments are made.⁸⁵

This duty is evident in a few landmark judgments which depict the importance of the courts' role in considering the plight of vulnerable communities as a whole. The cases of *Grootboom*, *Treatment Action Campaign*, and *Khosa* all address the importance of fulfilling socio-economic rights with due regard to the capacity of the state.⁸⁶ These judgments had a significant impact on the applicants who received legal relief and the vulnerable individuals and communities that the cases were relevant to. In doing so, they upheld their duty to champion transformative constitutionalism even in the instance where positive laws are violated.

In the *City of Cape Town* case, it is reasoned that a greater issue was at play and this issue was not addressed. This resulted in a missed opportunity to improve the lives of refugees and migrants in general by enhancing their dignity and fulfilling their fundamental rights. The requests for adequate housing, protection, food, and water were not unreasonable and should not have been disregarded for the sake of fulfilling the City's by-laws.⁸⁷ In the context of 2019, refugees and asylum seekers felt great fear for their lives and were deprived of basic human rights – issues that were prevalent in this case but were left unaddressed.⁸⁸

Moreover, the impact of Thulare J's judgment on the women and children living in the church should not be ignored.⁸⁹ While these refugees were not before the Court in this issue, the ruling had a direct and substantial impact on them. The failure to grant the respondents the necessary protection resulted in the women and children residing in the church with little recourse to their situation. It was not only the respondents facing housing issues and xenophobic violence and, consequently, the Court should have extended the

83 Langa (n 86) 352.

84 Langa (n 86) 353.

85 Klare (n 85) 146-148.

86 *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) (*Grootboom*); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (TAC); *Khosa & Others v Minister of Social Development & Others*; *Mahlaule & Others v Minister of Social Development & Others* 2004 6 BCLR 569 (CC) (*Khosa*).

87 1951 Refugee Convention (n 5) Arts 27-30; Refugees Act (n 6) sec 27.

88 Human Rights Watch (n 7).

89 Klare (n 85) 146; Langa (n 86) 352.

protection of the Refugees Act to those not before the court but who were directly affected by the judgment.

Court orders and judgments hold great power in providing justice for the parties involved. Furthermore, serious ramifications can ensue in the social and economic aspects of people's lives on a greater scale.⁹⁰ Court decisions cannot be separated from reality, context, or the day-to-day circumstances that people face.

As a result, it would be fallacious to suggest that the court's role and responsibility lie solely with those who appear before it. In this case, the opportunity to advance transformation was squandered. The impact on lived experiences is seen in three categories namely; the ability to reduce or increase inequality, the ability to protect and promote an individual's dignity, and the ability to meet (in full or in part) the basic needs of individuals or communities.⁹¹ The Court's failure in improving the respondents' lived experiences has not only undermined the specific protection granted to the respondents, but has also left refugees nationwide unassured that the state will fulfil its obligations.

6 Inadequate adherence to international law

South African courts are bound to international law on three main accounts. First, section 39(2) of the Constitution requires the mandatory consideration on courts to apply or utilise international law when interpreting the Bill of Rights. Second, section 232 binds the courts to customary international law with the caveat of invalidity if it is found to be inconsistent with the Constitution or supporting legislation. Finally, section 233 instructs courts to choose a reasonable interpretation of legislation that is consistent with international law rather than an interpretation that conflicts with international law.⁹² These provisions ensure that not only are our international obligations complied with, but that international law remains intrinsically linked with the courts' decision-making processes.

The Constitution provides various instructions for courts to apply when interpreting domestic law within the ambit of international law. These provisions directly affect the involvement of international refugee law on the application of the Refugees Act and the protection of refugees and asylum seekers in South Africa. However, specific reliance on international law is found within the Refugees

90 *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC) para 157.

91 Constitutional Justice Report 'Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report' (2015) at 37.

92 Constitution (n 1) secs 39(2), 232 & 233.

Amendment Act.⁹³ The importance of the interpretation and application of the Act as well as its consistency with applicable international instruments cannot be undermined. Therefore, understanding the implementation of international obligations forms the starting point in the application of the Refugees Act.⁹⁴

6.1 Why international law should have been incorporated in the *City of Cape Town* case

The Western Cape High Court in the case of *City of Cape Town* relied heavily on the domestic law concerning refugees and migrants by considering both the Refugees Act and the Immigration Act.⁹⁵ It is, however, proposed that in considering the broader context in this dispute, far more reliance should have been given to international refugee law standards.

A pressing issue that the respondents face, as well as refugees and asylum seekers at large, is the issue of accessing socio-economic rights such as housing, health, and basic education.⁹⁶ The Refugees Act does not ensure access to adequate socio-economic rights as a general right to refugees and asylum seekers per section 27 of the Refugees Act.⁹⁷ Therefore, asylum seekers and refugees are essentially left unassisted in obtaining these fundamental needs.

Both refugees and asylum seekers are (with some limitation) granted entitlement to the rights set out in the Bill of Rights. Sections 26, 27, and 29 contained in the Bill of Rights ensures the right to access to adequate housing, healthcare, food, water, social security, and education, and these rights apply to refugees as they are covered by the protection of the Bill of Rights.⁹⁸ The Refugees Act, however, provides no express right to many socio-economic rights housed in Chapter 2 of the Constitution. Fortunately, the courts also have a duty to interpret the Bill of Rights in accordance with international law per section 39(2) of the Constitution.

The 1951 Refugee Convention specifically addresses the issue of housing, education, and public relief in Articles 21, 22, and 23.⁹⁹ The 1951 Refugee Convention outlines broader and more explicit protection of socio-economic than what is contained in South Africa's domestic law. It is suggested that in considering the socio-economic needs presented in the case of *City of Cape Town*, the Court should

93 Refugees Amendment Act (n 56) sec 1A.

94 1951 Refugee Convention (n 5); 1967 Refugee Protocol (n 13); 1969 OAU Refugee Convention (n 5).

95 *City of Cape Town* (n 1) para 26.

96 *City of Cape Town* (n 1) para 43.

97 Refugees Act (n 6) sec 27.

98 Constitution (n 4) secs 26, 27 & 29.

99 1951 Refugee Convention (n 5) Arts 21-23.

have ensured a practical implementation of the Bill of Rights by interpreting the purpose and objectives of the 1951 Refugee Convention together with additional international instruments.

7 The full significance of *non-refoulement* was overlooked in this dispute

The principle of *non-refoulement* has received customary international law status thus binding our courts to its implementation.¹⁰⁰ As well as being firmly established in the 1951 Refugee Convention and the 1969 OAU Refugee Convention, a host of jurisprudence has emerged on the issue of *non-refoulement* starting with the case of *Soering v United States* where it was confirmed that an individual cannot be returned to a country where they face the possible risk of degradation, torture, or inhumane treatment.¹⁰¹ In the case of *Chahal v United Kingdom*, the European Court of Human Rights further affirmed the principle's application in criminal cases.¹⁰² Through both the jurisprudence and international instruments, the principle affords wide protection to refugees and narrow room for states to act in contradiction of *non-refoulement*.

The Western Cape High Court did mention *non-refoulement* and its place in both international and domestic law. It is acknowledged that the Court's technical approach to *non-refoulement* cannot be faulted. The spirit behind this principle was, however, not translated in this judgment. *Non-refoulement* remains the cornerstone of international refugee law and ensures protection to those who are entitled to receive it. It prevents the expulsion of asylum seekers whose applications, including those on appeal, have not been finalised by the DHA.¹⁰³ *Non-refoulement* upholds enshrined constitutional values and the rights to dignity, life, and protection against torture and cruel or inhumane treatment. The dignity of asylum seekers is thus ensured by preventing forced returns as well as by providing a safe environment while refugee applications are pending.¹⁰⁴

The principle of *non-refoulement* speaks to an assurance that through the process of applying for asylum, asylum seekers will not be subject to being forcibly returned nor will they be subjected to the same treatment faced in the country from which they fled.¹⁰⁵

100 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' 26 January 2007 <https://www.refworld.org/docid/45f17a1a4.html> (accessed 10 August 2021) at 2.

101 *Soering v United Kingdom* [1989] 11 EHRR 439 para 111.

102 *Chahal v United Kingdom* [1996] 23 EHRR 413 paras 151-154.

103 Goodwin-Gill (n 11) 4.

104 As above.

However, the Court did not elaborate on the City's intent in arresting protesting individuals and its subsequent plan of deportation. The City was far too quick in allowing for the deportation mechanisms of the Immigration Act to be put into effect on the assumption that all asylum seekers could be classified as illegal migrants. Regardless of the ensured protection that asylum seekers are granted through *non-refoulement*, the Court did not hold the City accountable for placing migrants in a position of possible expulsion without acknowledging their entitled protections.

8 The state's obligation to provide housing for refugees and asylum seekers as a basic socio-economic right

The enactment of the 1951 Refugee Convention and its subsequent domestication is aimed at solving the refugee crisis and providing refugees with welfare benefits during the application process as well as once their status as refugees has been established.¹⁰⁶ However, the judgment in *City of Cape Town* did little to realise this protection.

The state must provide housing opportunities per Article 21 of the 1951 Refugee Convention.¹⁰⁷ Article 21 of the 1951 Refugee Convention sets out three limitations to the right to housing granted to refugees. Namely, that refugees should be accorded the right to housing by the host state, refugees should receive the same treatment as other non-citizens in the country, and that the realisation of the right to housing must be in line with the domestic law of the host country.¹⁰⁸ Similarly, the 1969 OAU Refugee Convention states that African countries have a duty to 'find ways and means of alleviating refugees' misery and suffering as well as providing them with a better life and future indicative of providing refugees with sufficient access to socio-economic rights'.¹⁰⁹ These requirements, flowing from international obligations, place a burden on executive and administrative authorities to ensure that refugees and asylum seekers are given equal opportunities in attaining housing.¹¹⁰

Section 26(1) of the Constitution does not limit the right to housing to citizens but uses the term 'everyone' inclusive of refugees

105 UNHCR (n 104) 2-4.

106 1951 Refugee Convention (n 5) Preamble & Arts 21-23; Refugees Act (n 6) Preamble & Art 27.

107 1951 Refugee Convention (n 5) Art 21.

108 1951 Refugee Convention (n 5) Art 21.

109 1969 OAU Refugee Convention (n 5) Preamble.

110 *Katabana v Chairperson of the Standing Committee for Refugee Affairs* 2012 SA 362 (HC) para 6.

and asylum seekers.¹¹¹ This constitutional right is directly reflective of South Africa's international obligations. Unfortunately, the legislative protection for refugees' rights to housing ends there. The Housing Act as well as the National Housing Policy and Subsidy Programmes exclude non-citizens from housing projects and adequate housing.¹¹² This discrepancy presented a unique opportunity for the Court in the case of *City of Cape Town* to directly address the inadequate effect that South Africa's domestic law has given to its international obligations as the Court had the responsibility to hold the executive accountable for its appalling approach to housing schemes.¹¹³

It appeared rather simple in both the judgment and the opinion of the local government that refugees will receive the same treatment as citizens regarding housing and that they should simply wait their turn. In reality, this promise is nearly never fulfilled. In a housing report, it was revealed that 2% of people (citizens and non-citizens) received government housing, and a further 2% received housing via non-governmental organisations.¹¹⁴ Similar sentiments on the issue of housing were made by a Congolese refugee stating 'There is no respect for this right to housing. In South Africa, they accept refugees here but they don't do anything – we are just left like this'.¹¹⁵

It cannot be sufficient for the Court to disregard this housing obligation by allowing the Cape Town municipality to rely on the defense of insufficient resources.¹¹⁶ Understandably, certain welfare benefits may be restricted due to lack of funds, however, refugees already make up a disadvantaged group and should not be subject to further degradation or discrimination by not being able to live in homes that are safe and accessible. The 1951 Refugee Convention highlights the importance of acknowledging the special treatment which states must give to refugees and asylum seekers even within the limitation of resources.¹¹⁷ The order made should have outlined this protection and given the municipality the directive of practical implementation to realise the right to access housing.

111 Constitution (n 1) sec 26(1).

112 C Kavuro 'Refugees' Access to Socio-Economic Rights: Favorable Treatment for the Protection of Human Dignity' LLD thesis, University of Stellenbosch, 2018 at 268-270.

113 Constitution (n 1) sec 7(2).

114 J Greenburg & T Polzer 'Migrant Access to Housing in South African Cities' (2008) 2 *Migrant Rights Monitoring Project* at 4.

115 Greenburg & Polzer (n 118) 2 & 11.

116 Kavuro (n 116) 275.

117 1951 Refugee Convention (n 5) Preamble & Arts 21-23.

9 The actions of the DHA were egregious and furthered asylum seekers' inability to achieve refugee status

The Department of Home Affairs is notoriously known for its delays when processing applications from asylum seekers. Its continued violation of procedures has been highlighted in various cases, most notably the case of *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*.¹¹⁸ The Court, in this case, criticised the Department of Home Affairs' decision in closing down the Cape Town Refugee Reception Offices and concluded that the DHA had acted irrationally and unlawfully.¹¹⁹ The closure of the Cape Town Refugee Reception Offices put a heavy strain on asylum seekers as they now had to travel to alternative Reception Offices and were unable to lodge any new applications.¹²⁰ The Court recognised the DHA's total disregard for protective legislative frameworks (including the Refugees Act) and failure to ensure the protection of asylum seekers in its application process. The Court ordered that the Refugee Reception Offices be re-opened.¹²¹

Although the facts of *Minister of Home Affairs v Scalabrini Centre* differ in every regard to the case of *City of Cape Town*, a similar reluctance by the DHA in implementing protective measures can be found. Admirably, Thulare J ordered the Department to identify and process the respondents and asylum seekers living on the streets and in the church. He went as far as to secure transport and temporary tents for the DHA officials to conduct sessions.¹²² The lack of urgency displayed by the DHA in cementing asylum applications undoubtedly contributes to the dissatisfaction and frustrations that many asylum seekers face.

9.1 The state has a domestic and international obligation to keep families united

In addressing the direct issue in the case of *City of Cape Town*, the Court overlooked the effect of removing the respondents from the streets outside the church. During the protests and conflict, women and children were living in the church while the men resided on the streets in the area surrounding the church. The church property could

118 *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (4) All SA 571 (SCA) (*Minister of Home Affairs v Scalabrini Centre*).

119 *Minister of Home Affairs v Scalabrini Centre* (n 122) paras 74-76.

120 *Minister of Home Affairs v Scalabrini Centre* (n 122) paras 5 & 10-14.

121 Scalabrini Centre of Cape Town 'The Cape Town Refugee Reception Office closure case, explained' 20 March 2018 <https://www.scalabrini.org.za/news/the-cape-town-refugee-reception-office-closure-case-explained/> (accessed 28 July 2021).

122 *City of Cape Town* (n 1) para 58.

not sustain all of the refugees and asylum seekers who sought shelter during the xenophobic attacks.¹²³ Thus, families were effectively separated due to the arrests and the order made removing the men (fathers, brothers, and uncles) from the streets.

The fundamental right to a family unit and the necessity of maintaining the family unit has been illustrated in various international instruments, most notably in Article 14(1) of the Universal Declaration of Human Rights.¹²⁴ Jastram and Newland argue that this right creates a duty on the state to refrain from actions that would separate a united family and obligates the state to provide opportunities for families to be reunited.¹²⁵ The importance of keeping families intact speaks to the assistance and protection that family members provide for one another.¹²⁶ The fundamental functions of a family are physical care, protection, and emotional support.¹²⁷ Moreover, the economic purpose of the family must also be considered; namely who the breadwinner is and how provision is ensured for the rest of the family.¹²⁸

The order made against the respondents in the case of *City of Cape Town* interfered with the family unit by separating men from their women and children. The women and children were deprived of physical care, protection, and emotional support at a time that was already traumatic and stressful. Additionally, many families lost their source of income as a result of the separation and due to the fact that the women and children continued living in the church. The case of *Dawood v The Minister of Home Affairs* confirms this foundational international principle by applying it to our domestic law.¹²⁹ This order cannot be seen in isolation and must be considered in light of the consequences of removing the respondents, which the Court failed to take into consideration.

10 Conclusion

This discussion should not be seen in a light of impending doom or inescapable negativity on the topic of refugees and asylum seekers in South Africa. Rather, an opportunity is presented to further the protection of these categories of migrants by creating a safe environment for them to live in. The courts should be relentless in

123 *City of Cape Town* (n 1) paras 4-12.

124 Universal Declaration of Human Rights 1948 Art 14(1).

125 K Jastram & K Newland 'Family Unity and refugee protection' in E Feller, V Turk & F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 557.

126 Jastram & Newland (n 129) 558.

127 Jastram & Newland (n 129) 555-557.

128 Jastram & Newland (n 129) 562-563.

129 *Dawood v The Minister of Home Affairs* 2000 (3) SA 936 (CC) para 28.

ensuring that the local governments and the DHA comply with this obligation.

The country that we all strive towards and dream of requires dedication and inclusivity from all of its stakeholders. The judiciary should lead this process and foster an attitude of equality for all refugees and asylum seekers by considering the underlying principles of human dignity, non-discrimination, and freedom. This attitude established by the courts should permeate through various non-profit organisations, churches, and individuals to contribute to the task of providing shelter and food to asylum seekers and refugees in South Africa. A land of dignity, freedom, and equality as envisioned by our Constitution, should not be a far-off goal for refugees in South Africa. A combined effort of all spheres of government is thus required to implement the legal system effectively. Only then will the conditions of refugees and asylum seekers improve.

AN ANALYSIS OF THE APPLICABLE LAWS ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS IN NAMIBIA

by Frieda Shifotoka*



Abstract

Traditional knowledge (TK) and cultural expressions are more vulnerable to infringements because of their nature and the lack of protection as intellectual property (IP) under many legal systems. TK can, however, contribute to the social and economic development of a country, the preservation of cultural heritage, and the increase in innovation and invention. It is for this reason that it is important to enact laws and formulate policies that recognise, promote, and protect TK and cultural expressions.

An analysis was made on the protection offered under Namibian laws to holders of TK and cultural expressions and considered the adequacy and effectiveness of such laws. The findings show that on a regional level, Namibia is a party to the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, however, the Protocol has not been incorporated into national IP-related laws. In terms of domestic laws, there are no IP laws that expressly recognise and protect works of TK and cultural expression. However, there are policies such as the National Intellectual Property Policy 2019-2024 and the Namibia Arts, Culture and Heritage Policy 2021/2022-2023/2026, which recognises the value of TK and the need to protect TK and cultural expressions.

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Therefore, it is recommended that government should develop a sui generis system that can help foster the preservation and development of TK and cultural expressions. The system should take into consideration the current social and economic structures so that it can be effective. The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore can be used as a guide in developing a sui generis system for Namibia.

1 Introduction

In comparison to types of work eligible for intellectual property (IP) protection, traditional knowledge (TK) and cultural expressions, also known as traditional cultural expressions (TCEs) in Namibia, although currently not eligible for IP protection under many legal systems, are more vulnerable to infringements because of their nature. One of the major challenges is the commercial exploitation of TK by third parties without the consent of the owners, and the lack of equitable benefit-sharing.¹ Another challenge is the ability to fulfil conditions for patent applications such as to clinically prove inventive steps for a process or product of TK.

However, the healer may base the medical treatment upon generations of clinical trials, which entails research studies in which one or more human subjects are prospectively assigned to one or more interventions to evaluate the effects of those interventions on health-related biomedical or behavioural outcomes.² Healers undertook such clinical trials in the past and on a solid empirical understanding of the interaction between the mixture and human physiology.³ This can further cause the exploitation of TK by third parties. It is even more challenging when documenting and preserving such work of indigenous people especially when it relates to copyright that requires expression of work to be expressed in a fixation.⁴ Therefore, there is a need for guidelines that can help protect and foster the preservation of TK and cultural expressions.

In Namibia, the case of the hoodia plant involving the San people who are one of the indigenous people who discovered the use of the plant is one example involving infringement of rights holders of TK. The San depend on plants and hunting animals and, traditionally, they use local plants for survival and for treatment as medicine.⁵

1 WIPO 'Intellectual Property and Traditional Knowledge' https://www.wipo.int/edocs/pubdocs/en/tk/920/wipo_pub_920.pdf (accessed 13 May 2021) at 8.

2 NIH 'Definition of a Clinical Trial' <https://grants.nih.gov/policy/clinical-trials/definition.htm> (accessed 20 July 2021).

3 WIPO (n 1) 8.

4 L Nandjembo *The Effectiveness of the Swakopmund Protocol on the Protection of Traditional knowledge in Namibia* (2017) at 40.

5 S James *An Introduction to the Regional Assessment of the Status of the San in Southern Africa* (2001) at 1.

Hoodia is one of the plants that have been used by the San people to prevent hunger and thirst while they travel long journeys as they hunt in harsh climates.⁶ Research was carried out on the use of wild plants in Southern Africa including hoodia and thereafter an extract from the hoodia plant containing an appetite suppressant agent was patented at the European Patent Office in the European Union by the Council for Scientific and Industrial Research (CSIR) South Africa in respect of six inventors from South Africa.⁷ The invention was for the unique appetite suppression in the extract from the hoodia plant and a patent was sought and granted without the consent of the San people and without recognising them as the IP rights holders.⁸ This patent was sold to a company in the United Kingdom that intended to sell products made out of hoodia extracts to overweight people.⁹ After the discovery, an agreement was however reached between CSIR and the South African San Council to uplift the standard of living and well-being of the San peoples of southern Africa¹⁰ and to give royalty to the San people.¹¹ This shows that San people, as indigenous people, had no legal protection under the Namibian laws, which is an indication of inadequacy when it comes to the protection of IP especially when it relates to TK.

Governments can help facilitate their use and help indigenous people contribute to economic development using traditional knowledge and cultural expressions and can improve their living standards in indigenous communities that often have many people living below the poverty line.¹² There is currently no international convention that protects TK and cultural expressions. This is because of both their nature and because they do not entirely fit into the current IP system.

This paper will look at the protection offered under Namibian laws to holders of TK and cultural expressions and will consider the adequacy and effectiveness of such laws with recommendations. Part two of the paper will address the need to protect TK and cultural expressions while part three will deal with the protection of TK and cultural expressions under Namibian laws including international laws, IP-related legislation, and national policies.

6 S Amoo & S Haring *Intellectual Property under the Namibian Constitution in Constitutional Democracy in Namibia: A critical analysis after two decades* (2010) at 303.

7 European Patent Office 'Use of extracts from Hoodia gordonii and Hoodia lugardii for the preparation of a medicament for use in the suppression of appetite' (2004) at 1.

8 Amoo & Haring (n 6) 303.

9 As above.

10 S Laird & R Wynberg *Biodiversity prospecting & access and benefit-sharing: An introductory Primer* (2003) at 13.

11 Amoo & Haring (n 6) 303.

12 WIPO *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore: A Guide For Countries in Transition* (2013) at 3.

2 The need to protect TK and cultural expressions

TK is observed in the daily activities of indigenous communities including crop farming, livestock management, food processing, healing methods, and handy-craft.¹³ The rationale for protecting TK is centered on principles of fundamental justice and the ability to protect, preserve, and control cultural heritage.¹⁴ In addition, the reasons for the protection of TK are centered on equity, preservation of traditional practices, conservation of biodiversity, the sustainability of livelihoods, and resilience to human-made and natural disasters.¹⁵ There is also the associated right to receive a fair return on what communities have developed.¹⁶ TK generates value that is not adequately recognised or compensated in both plants and animals. Traditional farmers have nurtured and conserved both plants and animals.¹⁷ They have further improved the value of plant genetic resources through a continuous selection of the best plant-adapted varieties.¹⁸

TK and traditional cultural expressions are not only important because they are part of cultural heritage and contribute to the welfare and sustainable development of the communities as they also have the potential to contribute to the economic wealth of culture-related enterprises and industries.¹⁹ Additionally, TK and cultural expressions can be a source of aspiration and can help promote innovation and creativity.²⁰ Because ownership of TK and cultural expressions is vested in a group,²¹ this also means that many people have access to such work, which therefore makes TK and cultural expressions vulnerable to exploitation by third parties without consent. Therefore, it is also important to protect TK and cultural expressions in order to prevent uncontrolled exploitation by third parties, misappropriation and to prevent use contrary to cultural norms.²²

Apart from IP laws, the protection of TK by other means such as existing laws helps to preserve the self-identification of people and can ensure that the continued existence of indigenous and traditional

13 Namibia Arts, Culture and Heritage Policy, 2001 Art 32.

14 J Wekundah *Why Protect Traditional Knowledge?* (2012) at 11.

15 UN 'United Nations Permanent Forum on Indigenous Issues: Together we achieve' 2019 at 1.

16 As above.

17 UN (n 13) 1.

18 As above.

19 WIPO *Intellectual Property and Traditional Knowledge* at 8.

20 WIPO (n 12) 3.

21 WIPO (n 19) 10.

22 M Ouma 'Protection of Traditional Knowledge and Traditional Cultural Expressions in Kenya' (2014) 78 *WTO Colloquium Papers* at 77.

people, their practices, and customs are preserved.²³ Therefore, the rationale for having appropriate laws on TK is centred around the protection of TK, the preservation of TK, the heritage and the promotion of TK, indigenous peoples' cultures and identities, and the motivation for innovation.

3 Protecting TK and cultural expressions under Namibian law

3.1 Protection under international law

In terms of the Namibian Constitution, the general rules of public international law and international agreements binding upon the country shall be recognised under Namibian laws.²⁴ This means that international agreements being acceded to or ratified by the country will be recognised as law in Namibia. In terms of IP, Namibia is a member of the World Intellectual Property Organization (WIPO), which is a specialised agency of the United Nations (UN) which has an objective to promote worldwide IP protection through the cooperation of states and collaboration with international organisations.²⁵ In addition, Namibia is a party to many of WIPO's conventions and treaties, including the Berne Convention for the Protection of Literary and Artistic Works 1886, and the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty 1970, amongst others. Negotiations are ongoing in terms of establishing an agreement on ways of protecting TK and cultural expressions within the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC), which was established in 2000.²⁶

The IGC is a platform where WIPO member states discuss IP-related issues that arise within the context of access to genetic resources, benefit-sharing, the protection of TK, and traditional cultural expressions.²⁷ In this forum, members have formal negotiations which aim to reach an agreement on international instruments that can promote the effective protection of genetic resources, TK, and traditional cultural expressions.²⁸

The UN Declaration of the Rights of Indigenous Peoples (UNDRIP) emphasises the protection of indigenous peoples' rights to their TK

23 WIPO (n 12) 3.

24 Constitution of the Republic of Namibia, 1990 (Constitution) Art 144.

25 Convention Establishing the World Intellectual Property Organization, 1967 Art 3(1).

26 WIPO *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2016) at 1.

27 As above.

28 WIPO (n 26) at 2.

and places an obligation on states to take effective measures that will recognise and protect them in the exercise of their rights.²⁹ Indigenous communities are some of the groups that are allowed to express their views and participate in the WIPO members' IGC decision-making processes in accordance with the UNDRIP. Namibia was one of the 144 states that voted for the adoption of the UNDRIP. The UNDRIP stipulates the following:³⁰

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

In respect of Biodiversity, the Convention on Biological Diversity (CBD), which Namibia is a party to, also recognises the close ties of indigenous peoples and local communities to biological resources, and the contributions that TK can make to the Convention and to sustainable biological diversity.³¹ A working group was established under the CBD with the aim to address the implementation and protection of TK.

Namibia became a member of the World Trade Organization (WTO) when it acceded to the Marrakesh Agreement establishing the WTO, which is contained as an annexure to the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),³² amongst other agreements. TRIPS aims to 'reduce distortions and impediments to international trade and taking into account the need to promote effective and adequate protection of intellectual property rights',³³ amongst other things.³⁴ Although TRIPS has provisions that are generally applicable to IP, there are, however, no specific provisions in respect of TK and cultural expressions.

29 United Nations Declaration of the Rights of Indigenous Peoples (02 October 2007) UN Doc (A/RES/61/295) (2007) Art 31(2).

30 United Nations Declaration of the Rights of Indigenous Peoples (n 29) Art 31(1).

31 Convention on Biological Diversity (05 June 1992) 1760 UN Treaty Series 69 Art 8(j).

32 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UN Treaty Series 299 (TRIPS).

33 TRIPS (n 32) 320.

34 As above.

3.2 The protection of TK and cultural expressions under regional laws

Namibia is a member of the African Regional Intellectual Property Organization (ARIPO) which was established by virtue of the Lusaka Agreement in 1976 to develop and harmonise IP laws, amongst other things.³⁵ Namibia signed the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Swakopmund Protocol), which was adopted on 09 August 2010 and entered into force on 11 May 2011. The Swakopmund Protocol has two purposes, namely, to protect holders of TK against any infringement of IP rights and to protect cultural expressions against any misuse and unlawful exploitation that is beyond unlawful expressions.³⁶

The Swakopmund Protocol protects both TK and cultural expressions. It has important provisions specifically tailor-made on the criteria to be used when protecting TK, cultural expressions and the beneficiaries thereof, and the rights conferred to holders, limitation, assignment and licensing, duration, enforcement, and remedies, amongst other things. What is notable in terms of the criteria is that no formal requirements and protection shall be extended to TK which is:³⁷

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a local or traditional community; and
- (iii) integral to the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

Instead, emphasis is placed on documentation by way of registers for the preservation of TK. In respect of beneficiaries, the local and traditional communities, and individuals who are recognised in such communities are the recognised right holders of TK.³⁸ Therefore, TK can be owned jointly by local or traditional communities. In addition, to prevent unfair compensation, there is a provision that promotes the equitable and fair benefit sharing of TK, which shall include non-monetary benefits such as the recognition of the holders and the source of origin of TK.³⁹

35 UN General Assembly, DRC: Ceasefire Agreement (Lusaka Agreement) (23 July 1999), S/1999/815 Art 3(a).

36 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010 (Swakopmund Protocol) sec 1.1(a)-(b).

37 Swakopmund Protocol (n 36) sec 4.

38 Swakopmund Protocol (n 36) sec 6.

39 Swakopmund Protocol (n 36) sec 9.

In respect of the duration of protection, the period of protection is 25 years in respect of TK owned by individuals.⁴⁰ The period is longer than the protection granted under existing IP systems which include, for example, 20 years for patents. In addition, where the TK is owned by a local community or tradition, the protection will be expanded for as long as the criteria for protection can be fulfilled.⁴¹

In respect of cultural expressions, there is provision for protection to be granted in respect of whatever form or mode of the expressions with no formalities required for protection. It is provided that such expressions are:⁴²

- (a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and
- (b) characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.

Local and traditional communities are the only ones allowed to own the rights in cultural expressions and will be granted protection against all acts of misuse or unlawful exploitation for as long as the cultural expressions fulfil the protection criteria.⁴³

Another important provision included in respect of cultural expressions is the section on the management of rights relating to cultural expressions which entail awareness-raising, education, guidance, monitoring, and dispute resolution in relation to the protection of cultural expressions.⁴⁴ Under this provision, authorisation in terms of the exploitation of cultural expressions shall be granted by the authority which acts on behalf of and in the interest of the communities.⁴⁵ In considering such authorisation, the following provisions shall be applicable:⁴⁶

- (a) authorizations shall be granted only after appropriate consultations with the communities concerned, in accordance with their traditional processes for decision-making and public affairs management;
- (b) authorizations shall comply with the scope of protection provided for the expressions of folklore concerned and shall, in particular, provide for the equitable sharing of the benefits arising from their use;

40 Swakopmund Protocol (n 36) sec 13.

41 As above.

42 Swakopmund Protocol (n 36) sec 16.

43 Swakopmund Protocol (n 36) secs 18 & 21.

44 Swakopmund Protocol (n 36) sec 22.1.

45 Swakopmund Protocol (n 36) sec 22.3.

46 As above.

- (c) uncertainties or disputes as to which communities are concerned shall be resolved, as far as possible, in accordance with customary laws and protocols, where applicable, of those communities;
- (d) any monetary or non-monetary benefits arising from the use of the expressions of folklore shall be transferred directly by the national competent authority to the community concerned;
- (e) enabling legislation or administrative measures shall provide guidance on matters such as procedures for applications for authorization, fees that the national competent authority or ARIPO Office may, where necessary, charge for its services, official publication procedures, dispute resolution, and the terms and conditions governing authorizations that may be granted by the national competent authority.

For as long as the cultural expressions fulfil the protection criteria as previously discussed, cultural expressions will be eligible for protection against acts of misappropriation, misuse, and unlawful exploitation.⁴⁷ The exclusion of reservations⁴⁸ from the Protocol is seen as a way of putting obligations on member states to implement the Protocol into their national laws and to accord the standard of protection provided in respect of TK and cultural expressions. Despite the Protocol being adopted more than 10 years ago in Namibia, it has not yet been incorporated into its national laws.

3.3 Protection under national laws

In respect of the protection of TK and cultural expressions under Namibian law, protection is offered in terms of the Constitution which is the supreme law in Namibia, international law, legislation, and national policies as will be discussed below.

3.3.1 The Namibian Constitution

Culture and tradition are part of the Namibian communities, and the right is recognised and protected by the Constitution in the article below:⁴⁹

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

In addition, customary law which regulates the customs, practices, and beliefs of indigenous groups and communities is also a branch of law that is enforceable under the Namibian Constitution. Customary

47 Swakopmund Protocol (n 36) sec 21.

48 J Dugard *International Law: A South African Perspective* (2005) at 411.

49 Constitution (n 24) Art 19.

law is valid on condition that it is not in conflict with the provisions of the Constitution.⁵⁰

By virtue of the recognition of culture and tradition in the Constitution, the application of international laws, and being party to various international agreements, Namibia is obliged to enact legislation that recognises and protects TK and cultural expressions.

3.3.2 Legislation

Industrial Property Act

The Industrial Property Act, 2012⁵¹ provides for the registration, protection, and administration of industrial properties in Namibia including patents, utility models, and trademarks.

The Industrial Property Act does not expressly have provisions on TK or cultural expressions in respect of trademarks, industrial designs, utility models, and trade secrets. This does not prevent TK or cultural expressions from being registered as trademarks or utility models. There are examples where trademarks with names that have traditional origins have been registered to distinguish goods and services. These include *Omaere* which has an origin from traditional milk made by the *Ovaherero* people and *meme mahangu* which has an origin from the Oshiwambo culture referring to millet.⁵² In addition, one of the other ways of protecting TK under the Industrial Property Act is to register it as a collective and certification trademark.⁵³ Certification trademarks relate to marks that are capable of distinguishing goods and services certifying, *inter alia*, the quality, value, geographical origin, and characteristics of the goods and services.⁵⁴ Collective trademarks are marks that can distinguish the goods and services of members belonging to an association from those not part of the association.⁵⁵ Because of the nature of TK in that it often belongs to an indigenous community,⁵⁶ registering TK as collective or certification trademarks can have a mutual benefit to the community.

However, in respect of patents, the provision of the Industrial Property Act requires that an application for a patent where the subject matter is derived from, developed, or associated with indigenous or TK must disclose the country of origin providing such

50 Constitution (n 24) Arts 19 & 66(1).

51 Industrial Property Act 1 of 2012.

52 Nandjembo (n 4) 35.

53 Industrial Property Act (n 51) Part 10.

54 Industrial Property Act (n 51) sec 131.

55 As above.

56 WIPO (n 12) 15.

indigenous or TK, from whom in the country it was obtained, and any other information regarding the nature or source.⁵⁷

Copyright and Neighbouring Rights Protection Act

In terms of copyright, the Copyright and Neighbouring Rights Protection Act (Copyright Act),⁵⁸ does not also contain specific mention of creation from indigenous TK or cultural expressions. However, the provisions in the Copyright Act do not specifically exclude TK and cultural expressions⁵⁹ and can be interpreted to include protection for cultural expressions especially in terms of performer's rights, and artistic work which can include sculptures and certain weaving skills, literary work, and musical work. However, there is hope for TK as, in respect of the Namibia Draft Copyright Bill, protection is to be extended to works of 'expression of traditional cultural heritage'.⁶⁰

Traditional cultural heritage is defined in terms of the Draft Bill as follows:⁶¹

... shall be understood as productions made up exclusively of characteristic elements of traditional artistic and literary heritage, which is developed and continued by a national community of Namibia or by individuals who are considered to meet this community's traditional artistic expectations, especially popular tales, popular poetry, popular songs and instrumental music, popular dance and shows and artistic expressions of rituals and productions of popular art.

In terms of the Draft Bill, the provisions on traditional cultural heritage also extend to authors that are creators of works with characteristic elements of traditional cultural heritage. The provisions also extend to individual authors that are known and have been dead for more than 70 years.⁶² In respect of ownership of expression of the cultural traditional heritage of known authors and in accordance with the Draft Copyright Bill, such ownership shall belong to the author, and any person who claims to be the author of such work must prove that they are indeed the author.⁶³ Royalties that are to be paid in respect of known authors shall be shared between the right holders and the Collective Management Organization (CMO) in accordance with the distribution rules of the organisation.

57 Industrial Property Act (n 51) sec 24(2).

58 Copyright and Neighbouring Rights Protection Act 6 of 1994 (Copyright Act).

59 Nandjembo (n 4) 33.

60 Draft Copyright Bill, 2019 <https://www.bipa.na/?wpdmact=process&did=NjgyLmhvdGxpbms=> (accessed 16 July 2021).

61 Copyright Act (n 58) sec 4.

62 As above.

63 Draft Copyright Bill (n 60) 32.

Further provisions in the Bill protect any expression of cultural traditional heritage that is part of the national heritage in Namibia. Where expressions of cultural traditional heritage which are part of the national heritage are used with the intention of gain outside their traditional or customary context, authorisation shall be granted from the relevant CMO. The uses that require authorisation in terms of the Draft Copyright Bill are contained as follows:⁶⁴

- 8(a) any publication, reproduction and distribution of copies of expressions of traditional cultural heritage which are part of national heritage; and
- 8(b) any public recitation or performance, any transmission by wire or wireless means, and any other form of communication to the public of expressions of traditional cultural heritage which are part of national heritage.

It can be a challenge to protect TK and cultural expressions by means of copyright because such work may not be eligible as it is often not original. In addition, even where the work is original, there can be another challenge where the requirement of originality is met by an author who is not part of the local community in terms of which the tradition originated from.⁶⁵ This is because most TK and cultural expression is easily accessible and has become part of the public domain.⁶⁶ However, the Draft Copyright Bill once made law, will be applicable to TK and cultural expressions in respect of copyright as it includes provisions that can help determine the nature of TK and cultural expressions in respect of copyright. In addition, because of the nature of copyright protection in that, it is granted in respect of a specific author, it can create a challenge if one tries to apply this to TK and cultural expressions which are often owned by communities.⁶⁷

3.3.3 National policies

National Intellectual Property Policy 2019-2024

The mission of the policy is to create a balanced and effective IP system in Namibia, which amongst other things, values and protects creativity and innovation by 'fostering an enabling environment for

64 Draft Copyright Bill (n 60) 33.

65 WIPO 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore: Background Paper No 1' (2003) at 13.

66 WIPO (n 65) 14.

67 WIPO 'Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore A Guide For Countries in Transition' at 16.

generation, commercialization and utilization of creative, cultural, and inventive assets'.⁶⁸

The Policy defines TK as:⁶⁹

... any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.

In respect of cultural expressions, the policy defines the term as:⁷⁰

... are any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (a) Verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (b) Musical expressions, such as but not limited to songs and instrumental music;
- (c) Expressions by movement, such as, but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and
- (d) Tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms.

There is a specific objective aimed to 'provide adequate protection and promote the use of TK and traditional cultural expressions (TCEs); and ensure equitable sharing of benefits arising from the use of TK, TCEs, and TK associated with the use of genetic resources by 2024'.⁷¹ In terms of this objective, the following strategic interventions are needed:⁷²

- (a) Develop and enact a law aimed at facilitating the implementation of the Swakopmund Protocol on the protection of traditional knowledge and traditional cultural expressions.
- (b) Expedite the process of enacting the ABS Bill.
- (c) Participate actively in international fora where efforts and negotiations are made to develop international instruments

68 Namibia National Intellectual Property Policy, 2019-2024 at 22.

69 Namibia National Intellectual Property Policy (n 69) 7.

70 Namibia National Intellectual Property Policy (n 69) 6.

71 National Intellectual Property Policy (n 69) 30.

72 National Intellectual Property Policy (n 69) Strategy 17.3.1.

addressing needs and concerns related to TK, TCEs and genetic resources.

- (d) Use IP laws where appropriate to protect traditional knowledge and expressions of folklore and address concerns related to traditional knowledge and TCE's.
- (e) Support and strengthen the use of the national database on traditional knowledge.
- (f) Strengthen the ongoing initiative to educate traditional knowledge holders on their rights and legal instruments to address their needs and concerns
- (g) Develop guideline and model agreements on the transfer and use of expressions of folklore, traditional knowledge and associated genetic resources and promote their use.

This policy acknowledges and recognises TK and cultural expression in Namibia. The policy specifically defines what constitutes TK and cultural expressions, something which is currently not expressly defined in IP-related legislation in Namibia.⁷³ From the definitions of TK and cultural expressions, it is clear that protection can be accorded by means of copyright, trademarks, and patents for creative work and innovations of traditional and cultural origin. The Policy should be used as a reference point in the process of drafting relevant laws applicable to TK and cultural expressions.

Namibia Arts, Culture and Heritage Policy 2021/2022-2023/2026

This policy acknowledges the challenges associated with traditional and indigenous knowledge, including the duty to respect and protect traditional and indigenous knowledge from exploitation by non-indigenous parties, and to promote its application in the human, social and economic development of Namibia.⁷⁴ The Policy sets several considerations when protecting traditional and indigenous knowledge and states that such protection must reflect the need to maintain an equal balance between the rights and interests of those who develop, preserve and maintain TK innovations and practices, and those who use and benefit from such knowledge and cultural expressions.⁷⁵ Additionally, the legal protection to be adopted must be made to the specific characteristics of TK and cultural expressions, 'including their community context, the nature of their development, preservation and transmission, their link to community's cultural and social identity, integrity, beliefs, spirituality and values'.⁷⁶

There are also specific interventions to be made in terms of cultural expressions in respect of crafts such as pottery, baskets,

73 Industrial Property Act (n 51); Copyright Act (n 58).

74 Namibia Arts, Culture and Heritage Policy 2021/2022-2023/2026 at 32.

75 As above.

76 As above.

wood carvings, leather works, jewellery and patchwork, traditional dances, traditional music and instruments, traditional literature, traditional drama and dance, visual arts, and design and folk art.⁷⁷

Although there are good strategies and intervention procedures under the two policies, the biggest challenge is the absence of legislation that specifically recognises TK and cultural expressions and which right holders can rely on for protection and remedy in instances of right infringements.⁷⁸ This makes it difficult for creators and innovators of TK to seek remedies and relief as they become forced to seek alternatives such as instituting proceedings based on common law or under other existing legislation such as the Copyright Act, or seeking guidance from the courts on whether TK and cultural expressions are recognised and can be protected under IP laws. The successes of protecting TK and cultural expressions might be limited because such works are often not original and might be difficult to describe in respect of the compounds or products to be patented because of the ancient roots in TK.⁷⁹ Thus, the available protection for TK and cultural expressions in respect of patents may not be sufficient for such work.⁸⁰ The best way to protect TK and cultural expressions is through the development of a *sui generis* system that is specific to such work or through the adoption of other means such as the protection of trade secrets and undisclosed information.⁸¹ Therefore, there is a need for national legislation that specifically recognises and protects TK and cultural expressions, and the Swakopmund Protocol can be used as a benchmark by the legislators.

4 Conclusion

The importance of protecting TK and cultural expressions cannot be overemphasised as this does not only benefit TK holders and communities, but also ensures that TK continues to contribute to the social and economic development of the country, the preservation of cultural heritage, and the increase in innovation and invention. This paper has identified the challenges in the existing international, regional, and national systems in terms of the protection of TK and outlined the need to enact laws that properly fit the profile and nature of TK. On an international level, there are international conventions that can be used to protect the rights of TK holders, such as the CBD, and negotiations are ongoing for the drafting of an international convention on TK and cultural expressions with the

77 Namibia Arts, Culture and Heritage Policy (n 74) 35.

78 Nandjembo (n 4) 33.

79 Nandjembo (n 4) 39.

80 Nandjembo (n 4) 34.

81 WIPO (n 65) 17.

WIPO. On a regional level, ARIPO has advanced the adoption of the Swakopmund Protocol, which acts as a model law for ARIPO members.

Domestically, the Industrial Property Act makes reference to TK, however, the provisions are not adequate as TK does not fit in with the requirements for protection, and the provisions merely acknowledge the use of TK in patents. The Copyright Bill provides for the protection of works that entail expressions of cultural traditional heritage and if passed into law, will be the first IP law in Namibia to have express provisions that holders of TK and cultural expressions can use to protect their work in terms of IP. The challenge in having a system that adequately protects TK and cultural expressions already exists at a global level as there is currently no international agreement under IP that expressly protects TK. Therefore, it is recommended that Namibia develop a *sui generis* system that fits within its social and economic structures to protect TK and cultural expressions and to use the Swakopmund Protocol as a guide.

FUTURE GENERATIONS AND THE ENVIRONMENT: A RIGHT TO INTERGENERATIONAL EQUITY UNDER INTERNATIONAL LAW?

by Felix R Schröder*



Abstract

Climate change is becoming ever more pertinent and its impact ever more devastating. Issues such as deforestation, loss of biodiversity, and desertification are increasingly prevalent, leaving the present generation with numerous problems to contend with. But as climate change intensifies, those who will surely bear an even greater burden are the ones yet to come. Unless some form of equality is established between generations, future generations are likely to find themselves in a precarious and inhospitable environment. It is argued that one way of achieving an intergenerational balance is through a right to intergenerational equity. This article analyses the development and progression of the principle of intergenerational equity in international law. In doing so, the article interrogates the sources of international environmental law as well as international human rights law to determine whether a right to intergenerational equity exists. This analysis finds that no right to intergenerational equity has arisen under international law. Nonetheless, there seems to be a definitive trend toward the realisation of such a right on the international stage. Until such time as there is a right to intergenerational equity, certain institutions and mechanisms could be implemented or relied upon to safeguard the environmental interests of future generations.

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1 Introduction

It has become fairly difficult to deny the scientific evidence surrounding the changes that have been occurring across the globe. The media is saturated with headlines and articles detailing the damaging effects of climate change and the ever-increasing probability of an irreversible environmental cataclysm.¹ Issues such as desertification, deforestation, and loss of biodiversity are becoming more frequent and pronounced.² Not only is the present generation likely to face hardships as a result of environmentally damaging conduct, but those who will undoubtedly bear the heavier burden are the generations to come.³ The health, trade, peace, livelihoods, dignity, and even the life of future generations could be placed at risk if the environment is not protected and used by the present generations in a way that ensures that the interests of future generations are taken into account.

This begs the question, why have states not invoked the law, and specifically, international environmental law to address the matter?⁴ The unfortunate reality is that environmental norms and instruments are often not able to do much as many are not enforceable.⁵ Coming to the forefront in the international community only fairly recently, international environmental law has not seen the development, in respect of conventions and custom, that most other, relatively older areas of international law have seen.⁶ It consists of a vast number of soft-law instruments.⁷ The undesirable effect of this is that soft law has no binding legal effect and the norms subsequently lack an enforcement mechanism.⁸ Consequently, states often do not adhere to the guidelines or suggestions contained in soft-law instruments as there are no repercussions for non-compliance.⁹ Some states simply continue down the path of environmental destruction.

1 See, for example, United Nations 'Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting' 28 March 2019 <https://www.un.org/press/en/2019/ga12131.doc.htm> (accessed 3 February 2020).

2 LE Rodriguez-Rivera 'Is the human right to environment recognized under international law - it depends on the source' (2001) 12 *Colorado Journal of International Environmental Law and Policy* at 6.

3 EB Weiss 'Climate change, intergenerational equity, and international law' (2008) 9 *Vermont Journal of Environmental Law* at 616.

4 Rodriguez-Rivera (n 2) 9.

5 As above.

6 P Sand 'The evolution of international environmental law' in D Bodansky, J Brunnée (eds) *The Oxford Handbook of International Environmental Law* (2007) at 30. It must be noted that there are, nonetheless, quite a few multilateral environmental treaties in force.

7 J Dugard et al *Dugard's international law: A South African perspective* (2018) at 587.

8 As above.

9 Rodriguez-Rivera (n 2) 9.

The adverse effects of climate change and other environmentally damaging activities could effectively be addressed by a right to intergenerational equity. According to Edith Brown Weiss, in her influential contribution on the subject, intergenerational equity provides that the environment is held in common by every generation and requires the present generation to pass the environment on to the future generation in no worse condition as received.¹⁰ A right to intergenerational equity that can be invoked and enforced against states is therefore sorely needed.¹¹ It is critical that a legally binding and enforceable right that can be implemented is established with effect in order to halt, or at least deter, environmental degradation and to preserve the environment for future generations.¹²

The purpose of this article will be to determine whether a right to intergenerational equity exists under international law. Firstly, the doctrine of intergenerational equity will be briefly set out. This will be followed by an interrogation of the sources of international environmental law as well as human rights law to ascertain whether a right to intergenerational equity has arisen. Thereafter, alternative measures, other than a right to intergenerational equity which could be implemented to safeguard the environmental interests of future generations, will be discussed.

2 Brief overview of the doctrine of intergenerational equity

Before determining whether an intergenerational right to the environment exists in international law, it is necessary to establish what is meant by intergenerational equity. The damage to the present environment has to some degree been combatted under the auspices of various international and domestic legal instruments, but the same cannot be said for the environment in which future generations are to find themselves.¹³ Although necessary to ensure the protection of the environment, these laws do not offer much security for future generations.¹⁴ Intergenerational equity provides a solution in that it attempts to strike a balance between the present and future generations.¹⁵ Principles of intergenerational equity are derived from 'each generation's position as part of the intertemporal entity of

10 See, generally, EB Weiss *In fairness to future generations: international law, common patrimony, and intergenerational equity* (1989).

11 S Barrett 'Climate treaties and the imperative of enforcement' (2008) 24 *Oxford Review of Economic Policy* at 245.

12 As above.

13 LM Collins 'Environmental rights for the future: intergenerational equity in the EU' (2007) 16 *Review of European, Comparative & International Environmental Law* at 321.

14 As above.

15 As above.

human society'.¹⁶ Thus, the doctrine of intergenerational equity is premised on the concept that all generations have a shared responsibility towards the environment and to each other.¹⁷

Intergenerational equity comprises intergenerational rights and intergenerational obligations, also referred to as planetary rights and obligations.¹⁸ The present generation has the right to use the environment available to them. This is, however, accompanied by the obligation to not consume resources to the extent that future generations do not receive enough.¹⁹ Similarly, present generations have a planetary right to access the environmental legacy passed down to them by past generations.²⁰ This is subject to the obligation that they bequeath the legacy in no worse condition to future generations.²¹ Weiss describes this using the idea of a 'planetary trust'.²² Much like trusts in the ordinary sense are passed down from generation to generation for the benefit of trust beneficiaries, the environment should be passed down from generation to generation, remaining substantively intact.²³

It must be borne in mind that intergenerational equity is not a purely intergenerational matter, but also has an intragenerational dimension.²⁴ Indeed, it would be inadequate to constrain intergenerational equity to the relations of generations, *inter se*, as this would result in there being little to no guidance as to how the environmental rights and obligations of the present generation would be determined and implemented.²⁵ This could result in the exploitative and unfair assignment of intergenerational duties to specific members of the international community whilst other members are allotted all the rights and benefits.²⁶ In order to avoid this eventuality, intragenerational equity aims to regulate the manner in which the present generation gives effect to intergenerational equity. An example of this is that affluent and technologically advanced states should bear intergenerational burdens and duties and should assist less developed states.²⁷ Thus, the actions and decisions

16 EB Weiss 'In fairness to future generations and sustainable development' (1992) 8 *American University International Law Review* at 23.

17 Weiss (n 3) 616.

18 EB Weiss 'Intergenerational equity in international law' (1987) 81 *American Society of International Law Proceedings* at 129.

19 Collins (n 13) 323.

20 LM Warren 'Legislating for tomorrow's problems today – dealing with intergenerational equity' (2005) 7 *Environmental Law Review* at 169.

21 As above.

22 Weiss (n 16) 20.

23 Z Hadjiargyrou 'A conceptual and practical evaluation of intergenerational equity in international environment law' (2016) 18 *International Community Law Review* at 251.

24 Hadjiargyrou (n 23) 254.

25 Weiss (n 18) 129.

26 Hadjiargyrou (n 23) 254.

27 Collins (n 13) 323.

taken within a generation have a critical role to play in intergenerational equity.

3 A right to intergenerational equity under international environmental law

Article 38 of the Statute of the International Court of Justice provides that the main sources of international law are: international conventions, international custom, and general principles of law.²⁸ Judicial decisions and the teachings of publicists are subsidiary sources that aid in the determination and interpretation of the main sources.²⁹ The primary sources of international environmental law will be investigated to determine the status of intergenerational equity within the international legal system and, where applicable, will be substantiated and elaborated on using subsidiary sources.³⁰

3.1 International conventions

The concept of intergenerational equity has been included in a number of environmental conventions.³¹ For example, the Preamble to the International Convention for the Regulation of Whaling provides for the 'safeguarding for future generations' of the whale stocks.³² A further illustration can be found in the Preamble to the Convention on International Trade in Endangered Species of Wild Fauna and Flora which states that wild fauna and flora 'must be protected for this and the generations to come'.³³ Although intergenerational equity is included in these conventions, it is constrained to their respective preambles. This practice is repeated in a number of other environmental treaties.³⁴ In terms of the rules pertaining to treaty interpretation outlined in Article 31 of the Vienna Convention on the Law of Treaties, the preamble to a treaty is only of interpretive value and is, therefore, not binding.³⁵ This means that the principle of

28 Statute of the International Court of Justice, (26 June 1945), 33 UNTS 933 (ICJ Statute) Art 38.

29 ICJ Statute (n 28) Art 38(1)(d).

30 As above.

31 Hadjiargyrou (n 23) 262.

32 See the Preamble to the International Convention for the Regulation of Whaling, (2 December 1946), 161 UNTS 72.

33 See the Preamble to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, (3 March 1973), 993 UNTS 243.

34 Treaties which reference intergenerational equity in their preambles include: the Convention on the Conservation of Migratory Species of Wild Animals, (23 June 1979), 1651 UNTS 333; the Minamata Convention on Mercury, (10 October 2013), 55 ILM 582; and the Paris Agreement on Climate Change, (12 December 2015).

35 Vienna Convention on the Law of Treaties, (23 May 1969), 1155 UNTS 331 (1969) Art 31(2) provides that 'the context for the purpose of interpretation of a treaty shall comprise ... its preamble'.

intergenerational equity as provided for in these conventions cannot be enforced, and merely serves as an interpretive aid.

An example of a legally binding international environmental law instrument that comprises obligations to future generations is the United Nations Framework Convention on Climate Change (UNFCCC).³⁶ Reference to future generations is made in the operative text of the convention as opposed to its preamble.³⁷ Article 3(1) stipulates that ‘parties should protect the climate system for the benefit of present and future generations of humankind’.³⁸ The wording used in Article 3(3), particularly, ‘anticipate’, indicates a responsibility to future generations since the present generation is expected to take cognisance of the impact that its use of the environment could have.³⁹

Even though these principles form part of the text of the Convention, it seems that they themselves are, in effect, not binding.⁴⁰ Looking at the *chapeau* to Article 3, it is evident that it is couched in mandatory language through the use of the word ‘shall’.⁴¹ However, directly following on that are the words ‘be guided’ which indicates that the principles in Article 3 are to be used for the purpose of interpretation and implementation.⁴² Furthermore, the inclusion of ‘*inter alia*’ to the *chapeau* means that alternative principles to the ones appearing in Article 3 may be used and applied.⁴³ Thus, given the context of Article 3, it would seem that this provision, albeit binding on its parties, does not provide for a legally enforceable right to intergenerational equity.⁴⁴ Article 3 only serves to steer states in the proper direction for the implementation of the treaty.⁴⁵

3.2 Customary international law

To establish whether a rule of customary international law exists requires an investigation into its two components: state practice, or *usus*, and the consent to be bound, or *opinio juris*.⁴⁶ *Usus* entails the

36 LM Collins ‘Revisiting the doctrine of intergenerational equity in global environmental governance’ (2007) 30 *Dalhousie Law Journal* at 123.

37 United Nations Framework Convention on Climate Change, (9 May 1992), 31 ILM 849 (UNFCCC) Art 3.

38 UNFCCC (n 37) Art 3(1).

39 UNFCCC (n 37) Art 3(3).

40 A Boyle ‘Some reflections on the relationship of treaties and soft law’ (1999) 48 *International and Comparative Law Quarterly* at 908.

41 UNFCCC (n 37) Art 3.

42 D Bodansky ‘The United Nations Framework Convention on Climate Change: A commentary’ (1993) 18 *Yale Journal of International Law* at 502.

43 As above.

44 Collins (n 36).

45 As above.

46 ICJ Statute (n 28) Art 38(1)(b).

practice of a state that is indicative of a customary international law rule.⁴⁷ *Opinio juris* refers to the execution of such state practice with an accompanying psychological belief that there is a legal right or obligation on the state.⁴⁸ In the case of *Germany v Italy*, the International Court of Justice provided guidance as to what qualifies as a source of state practice and *opinio juris*.⁴⁹ These sources include national laws, assertions made by the state, and claims made before foreign courts.⁵⁰ Treaties and soft-law instruments are also sources of state practice.⁵¹ Before a rule of customary international law can be established, the state practice must be of such a nature as to satisfy a threshold test.⁵² The practice should be widespread and virtually uniform in order to qualify as customary international law.⁵³ What follows is a discussion of sources of state practice and *opinio juris*.

3.2.1 National constitutions and court decisions

The Court in *Germany v Italy* made reference to national laws serving as evidence for state practice.⁵⁴ This would naturally include the constitution of a nation. At least sixty states have in their respective constitutions a provision endorsing intergenerational equity.⁵⁵ These constitutional provisions either place a duty on public authorities to

47 International Law Commission 'Draft Conclusions on the Identification of Customary International Law' *Report of the International Law Commission on the Work of its Seventieth Session*, Supplement No 10, UN Doc. A/73/10 (2018) (Identification of Customary International Law) Conclusion 4.

48 Identification of Customary International Law (n 47) Conclusion 9.

49 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* ICJ (3 February 2012) (2012) ICJ Reports (*Jurisdictional Immunities of the State*) para 55.

50 As above.

51 Identification of Customary International Law (n 47) Conclusion 11.

52 Identification of Customary International Law (n 47) Conclusion 8.

53 As above.

54 *Jurisdictional Immunities of the State* (n 49).

55 Constitution of the Republic of Albania (1998) Art 59(e); Constitution of the Principality of Andorra (1993) Art 31; Constitution of the Republic of Angola (2010) Art 39(2); Constitution of the Argentine Nation (1853) Art 41; Constitution of Armenia (1995) Art 48(10); Constitution of Austria (1920), Art 14(5a); Constitution of Belgium (1831) Art 7bis; Constitution of the Kingdom of Bhutan (2008) Art 5(1); Constitution of Bolivia (2009) Arts 9(6), 33 & 108(15); Constitution of the Federative Republic of Brazil (1988) Art 225; Constitution of Burundi (2005) Art 35; Constitution of the Republic of Cuba (1976) Art 27; Constitution of the Czech Republic (1993) Charter Of Fundamental Rights And Basic Freedoms; Constitution of the Republic of Timor-Leste (2002) Art 61(1); Constitution of the Republic of Ecuador (2008) Arts 317, 395(1) & 400; Constitution of the Arab Republic of Egypt (2014) Arts 32, 46, 78 & 79; Constitution of Eritrea (1997) Art 8(3); Constitution of the Republic of Fiji (2013) Art 40(1); Constitution of the Fifth French Republic (1958) Preamble; Constitution of the Republic of The Gambia (1996) Art 215(4)(d); Constitution of Georgia (1995) Art 37(4); Basic Law of the Federal Republic of Germany (1949) Art 20(a); Constitution of the Republic of Ghana (1992) Art 36(9); Constitution of Guyana (1980) Art 149J(2); Constitution of Hungary (2011) Art P. (1) & 38(1); Constitution of the Islamic Republic of Iran (1979) Art 50; Constitution of Japan (1946) Art 11; Constitution of Kenya (2010) Art 42(a); Constitution of the Republic of Latvia (1922) Preamble; Constitution of

protect the environment for present and future generations, or they adopt a rights-based approach whereby present and future generations are afforded rights to the environment.⁵⁶ Most of these constitutional provisions were enacted fairly recently, no sooner than 2004, indicating that responsibility to future generations is gradually making its way to the forefront and that states are increasingly recognising the principle of intergenerational equity.⁵⁷

Sixty is approximately a third of all states, meaning that the virtually uniform threshold required for state practice has not been satisfied.⁵⁸ Although this amount does not meet the threshold requirement, it does provide a great deal of support for the possibility of a customary rule of intergenerational equity in the future. At the very least, it serves as an indication of the general direction that some states are moving towards, which is towards protecting the environmental interests of future generations.

Another source of state practice and *opinio juris* are the decisions of national courts.⁵⁹ A domestic case that explicitly dealt with the doctrine of intergenerational equity was the Supreme Court of the Philippines decision of *Oposa v Factoran*.⁶⁰ The cause of action, in this case, arose from the negative impact that timber licensing agreements were having on the Philippine environment.⁶¹ The suit was brought as a class action by minor children, assisted by their parents, claiming that the rate of deforestation was causing serious injury and irreparable damage to the present generation as well as to

Lesotho (1993) Art 36; Constitution of the Grand Duchy of Luxembourg (1868) Art 11*bis*; Constitution of Madagascar (2010) Preamble; Constitution of the Republic of Malawi (1994) Art 13(1)(iii); Constitution of the Republic of Maldives (2008) Art 22; Constitution of the Kingdom of Morocco (2011) Art 35; Constitution of Moldova (1994) Preamble; Constitution of Mozambique (2004) Art 117(2)(d); Constitution of Namibia (1990) Art 95(1); Constitution of Niger (2010) Arts 35 & 149; Constitution of the Kingdom of Norway (1814) Art 112; Constitution of Papua New Guinea (1975) Art 4(1); Constitution of Poland (1997) Art 74(1); Constitution of Portugal (1976) Art 66(2)(d); Constitution of Qatar (2003) Art 33; Constitution of the Russian Federation (1993) Preamble; Constitution of Seychelles (1993) Preamble; Constitution of the Republic of South Africa (1996) sec 24(b); Constitution of South Sudan (2011) Art 41(2); Constitution of Swaziland (2005) Arts 210(2) & 216(1); Constitution of the Kingdom of Sweden (1974) Art 2; Federal Constitution of the Swiss Confederation (1999) Art 2(4); Constitution of Tajikistan (1994) Preamble; Constitution of Tunisia (2014) Preamble; Constitution of Uganda (1995) XXVII The Environment (i) & (ii); Constitution of Uzbekistan (1992) Preamble; Constitution of the Oriental Republic of Uruguay (1966) Art 47(1)(b); Constitution of Vanuatu (1980) Art 7(d); Constitution of Venezuela (1999) Art 127; Constitution of Zambia (1991) Art 255; Constitution of Zimbabwe (2013) Arts 73(1)(b), 289(e) & 298(c).

56 Collins (n 36) 136.

57 Centre for International Environmental law 'Submission to the UN Special Rapporteur on Human Rights and the Environment' 31 October 2017 <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf> (accessed 8 August 2020).

58 Identification of Customary International Law (n 47) Conclusion 8.

59 Identification of Customary International Law (n 47) Conclusion 6 & 10.

60 *Oposa v Factoran* 224 SCRA (1993) 792.

61 *Oposa v Factoran* (n 60) 798.

future generations.⁶² The Court held that ‘their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility’.⁶³ Furthermore, the Court stated that each generation has a duty to preserve and protect the environment for the next generation.⁶⁴ In addition to this case, other national courts have also taken cognisance of, or have applied, the principle of intergenerational equity in their decisions, such as the courts of South Africa,⁶⁵ Argentina,⁶⁶ India,⁶⁷ Kenya,⁶⁸ and Australia.⁶⁹ Of late there has been a surge of court cases being brought, especially by children, based on intergenerational equity and the protection of future generations in response to concerns over climate change.⁷⁰ For example, in *Future Generations v Ministry of the Environment*, 25 children and young adults instituted an action against government officials and municipalities in Colombia alleging that the deforestation of the Colombian Amazon is violating their rights and the rights of future generations.⁷¹ The Supreme Court of Colombia applied intergenerational equity and held that the deforestation did infringe the rights of future generations.⁷² Other successful climate change cases include *Urgenda v The Netherlands* and *Leghari v Pakistan* where the courts found that governmental inaction in addressing climate change infringed the rights and duties owed to present and future generations.⁷³

Although this new wave of climate change litigation has seen victories for future generations, there have also been unsuccessful cases, often based on a lack of standing. The Court in *Kivalina v ExxonMobil* dismissed an action brought against 22 energy producers

62 *Oposa v Factoran* (n 60) 799.

63 *Oposa v Factoran* (n 60) 803.

64 As above.

65 *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (1999) 2 All SA 381 (A).

66 *Salas, Dino y otros C/ Salta, Provincial de y Estado Nacional s/ amparo.*, S. 1144. XLIV (2009).

67 *Karnataka Industrial Areas v Sri C. Kenchappa & Ors*, Supreme Court of India, AIR 1996 SC 1350 (2006).

68 *Waweru v Republic of Kenya* (2007) AHRLR 149 (KeHC 2006).

69 *Willoughby City Council v Minister Administering the National Parks and Wildlife Act, Land and Environment Court of New South Wales* (1992) 78 LGERA 19. The Court used the public trust doctrine to find that the Australian government had a duty to protect and preserve national parks for the benefit of future generations.

70 J Setzer & C Higham ‘Global trends in climate litigation: 2021 snapshot’ 2 July 2021 <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/> (accessed 9 July 2021).

71 *Future Generations v Ministry of the Environment*, Corte Suprema de Justicia, Sala Civil, STC4360-2018, No. 11001-22-03-000-2018-00319-01 (2018) (*Future Generations*).

72 *Future Generations* (n 71) 37-38.

73 *Urgenda Foundation v Kingdom of the Netherlands*, Hoge Raad, ECLI:NL:HR:2019:2007 (2019); *Leghari v Pakistan* (2015) 25501/201 WP. The Court in *Urgenda* focused more on a duty of care whereas the Court in *Leghari* took a rights-based approach.

for their role in aggravating climate change.⁷⁴ According to the Court, the plaintiffs lacked standing as they were unable to show that the flooding of the Kivalina village caused by climate change was attributable to the energy producers as the contributors to climate change (hence the flooding) are manifold.⁷⁵ Moreover, in *Juliana v United States*, the Ninth Circuit Court of Appeals dismissed a case instituted by children, with the necessary assistance, requiring the government of the United States to address and mitigate greenhouse gas emissions.⁷⁶ The plaintiffs did not succeed in demonstrating redressability and consequently did not have standing.⁷⁷

Albeit a step in the right direction, the reference to intergenerational justice by domestic tribunals still seems to be the exception rather than the rule. Although this would not be enough to satisfy the virtually uniform threshold required for *usus* and *opinio juris*, these decisions offer a blueprint for how intergenerational equity can be applied practically in a judicial setting.⁷⁸

3.2.2 *Soft-law instruments*

Non-binding instruments, or soft law, are a source of customary international law in that they could assist in establishing the virtually uniform state practice or *opinio juris* needed for a rule of custom.⁷⁹ As aforementioned, there are many international treaties in which the interests of future generations are recognised in their preambles. Although preambular provisions are not binding and thus do not encapsulate a right to intergenerational equity in themselves, they do form part of soft law, which means that they could play a role in the development of an emerging rule of customary international law.⁸⁰ However, despite the state practice that these provisions may evidence, it is unlikely that any state acted with a sense of legal obligation as a result of a preamble, given its interpretative nature.⁸¹ Thus, the requisite *opinio juris* for a rule of custom is absent.⁸²

A further soft-law instrument, namely the Stockholm Declaration, pioneered a generalised approach to preserving the environment for future generations.⁸³ For instance, Principle 2 stipulates that ‘The

74 *Native Village of Kivalina v ExxonMobil Corp.*, 663 F. Supp. 2d 863 (2009) (*Kivalina*).

75 *Kivalina* (n 74) 880-881.

76 *Juliana v United States* No. 18-36082 (2020).

77 *Juliana v United States* (n 76) 30.

78 Collins (n 36) 135.

79 Boyle (n 40) 903.

80 J Anstee-Wedderburn ‘Giving a voice to future generations: intergenerational equity, representatives of generations to come, and the challenge of planetary rights’ (2014) 1 *Australian Journal of Environmental Law* at 49.

81 As above.

82 Identification of Customary International Law (n 47) Conclusion 9.

83 Collins (n 36) 121.

natural resources of the earth ... must be safeguarded for the benefit of present and future generations'.⁸⁴ Following Stockholm, the Rio Declaration on Environment and Development provides, in Principle 3, that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.⁸⁵ Adopted during the 1992 Rio Earth Summit, Principle 2(b) of the Forest Principles states: 'Forest resources and forest lands should be sustainably managed to meet the ... human needs of present and future generations'.⁸⁶

The central tenets of intergenerational equity are encapsulated in the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations.⁸⁷ Being a UNESCO declaration, all 193 member states as well as the 11 associate members of UNESCO agree and consent to this declaration.⁸⁸ The notion of intergenerational equity can again be seen in the 2002 Johannesburg Declaration on Sustainable Development, where a pledge was made to 'the peoples of the world, and the generations that will surely inherit this earth' in relation to sustainable development.⁸⁹

The multiplicity of soft law incorporating the doctrine of intergenerational equity can establish a compelling case for the doctrine to become a rule of custom.⁹⁰ However, a compelling case is the most that it can signify. Due to the intrinsic non-binding nature of soft law, it is unlikely that any state when signing or adopting any of the above soft-law instruments did so with the intention that they were required to do so by law.⁹¹ A vital element in the determination of a rule of customary international law, namely *opinio juris*, is absent and thus no rule of custom can arise in these circumstances.⁹² At most, these soft-law instruments indicate an emerging trend of recognising the principle of intergenerational equity.

84 Declaration of the United Nations on the Human Environment, (16 June 1972), UN Doc. A/CONF.48/14/Rev. 1, 11 ILM 1416 (1972) (Stockholm Declaration) Principle 2.

85 UN Conference on Environment and Development, (14 June 1992), UN Doc. A/CONF.151/26 (Vol. I), 31 ILM 874 (1992) (Rio Declaration) Principle 3.

86 United Nations 'Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests', (14 August 1992), UN Doc. A/CONF.151/26 (Vol. III) (1992) Principle 2(b).

87 See, for example, Article 1 which states 'The present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded'.

88 Collins (n 36) 127.

89 World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development, (4 September 2002), UN Doc. A/CONF.199/20 (2002) para 37.

90 Boyle (n 40) 903.

91 Identification of Customary International Law (n 47) Conclusion 9

92 Identification of Customary International Law (n 47) Conclusion 2.

3.2.3 *General principles of international law*

The final source of international environmental law that will be discussed is 'the general principles of law recognized by civilised nations' provided for in Article 38(1)(c) of the Statute of the International Court of Justice.⁹³ The application of these principles is regarded as universal meaning all members of the international community should observe them.⁹⁴ Notwithstanding their general application, the function of the general principles of law has been described as 'gap-filling', in that they are only invoked in instances where there is a lacuna in either treaty law or international customary law.⁹⁵ Thus, it seems that this source does not enjoy the same hierarchal status as conventions or rules of custom, even though international law does not explicitly discriminate between sources.⁹⁶ General principles of law that will be addressed are sustainable development, the precautionary principle, and common but differentiated responsibilities.⁹⁷

First, sustainable development, which is defined in the Brundtland Report as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs', shares several similarities with intergenerational equity.⁹⁸ The above definition clearly states that the needs of future generations must be taken into account. Sustainable development thus limits the extent to which the present generation can make use of natural resources. This is identical to the conservation of options in terms of intergenerational equity which, likewise, delineates how resources are to be used by the present generation.⁹⁹

Second, the precautionary principle places a duty on states to protect the environment and to take positive steps towards reducing environmental destruction even in instances where the potential damage to the environment is not supported by definitive scientific evidence.¹⁰⁰ There is thus an anticipatory element to this principle as it requires states to take into account the damage that their activities could have on the future environment.¹⁰¹ This means the

93 ICJ Statute (n 28) Art 38(1)(c).

94 International Law Commission 'First report on general principles of law' Report of the International Law Commission on the Work of its Seventy-first Session, UN Doc A/CN.4/732 (2019) (ILC Report on General Principles) at 48.

95 ILC Report on General Principles (n 94) 44.

96 Dugard et al (n 7) 44.

97 M Biddulph & D Newman 'A contextualized account of general principles of international law' (2014) 26 *Pace International Law Review* at 304.

98 World Commission on Environment and Development *Our Common Future* (1987) (Brundtland Report) 43.

99 Weiss (n 18) 129.

100 Biddulph & Newman (n 97) 304.

101 Dugard et al (n 7) 597.

precautionary principle protects future generations as there is an obligation on states to have regard for their interests to the environment. The similarity to intergenerational equity is fairly manifest as it too requires the present generation to respect the environmental interests of future generations.¹⁰²

Third, in terms of the principle of common but differentiated responsibilities, states have, to varying degrees, a shared responsibility to the environment.¹⁰³ In other words, all countries are accountable for the well-being of the environment, but the same standard of responsibility is not applied uniformly to developed and developing states.¹⁰⁴ Countries that have contributed a greater deal to environmental degradation should bear a heavier burden in respect of protecting the environment, as well as those states that are wealthier and more technologically advanced than other countries.¹⁰⁵ This corresponds with the principle of conservation of access, in terms of intergenerational equity, which states that the present generation can access the environment provided that it does not consume it to the extent that future generations are no longer able to access the environment and natural resources.¹⁰⁶ The intragenerational dimension of intergenerational equity reflects this general principle since, in terms of intragenerational equity, developed states are vested with planetary obligations whereas developing states are vested with fewer responsibilities and more planetary rights.¹⁰⁷ Furthermore, developed states are required to assist developing states with accessing environmental resources.¹⁰⁸

As can be seen, various elements of the doctrine of intergenerational equity are reflected in the general principles of international law. The principle of sustainable development is almost identical to the conservation of options which is one of the integral principles of intergenerational equity. The precautionary principle, much like the doctrine of intergenerational equity, protects the interests of future generations to the environment. The principle of common but differentiated responsibilities reflects not one but two aspects of intergenerational equity. Thus, there is strong evidence that the doctrine of intergenerational equity could potentially be recognised as a general principle of international environmental law.

102 Weiss (n 3) 616.

103 Collins (n 36) 133.

104 CD Stone 'Common but differentiated responsibilities in international law' (2004) 98 *American Journal of International Law* at 277.

105 As above.

106 Weiss (n 18) 130.

107 Hadjiargyrou (n 23) 254.

108 Warren (n 20) 169.

4 A right to intergenerational equity under the human rights paradigm

The existence of a right to intergenerational equity in international environmental law seems to be unlikely. However, an investigation into the human rights paradigm could garner more positive results. A human right can be defined as a right bestowed on a human by reason only of the fact that they are human.¹⁰⁹ Since it is fairly certain that future generations, as the present generation, will be human, the link between human rights and intergenerational equity seems to be self-evident. Moreover, environmental law and human rights law have been recognised as being interdependent and indivisible from one another.¹¹⁰ Thus, the possibility exists for applying human rights law to future generations. Having a human right to intergenerational equity could be greatly advantageous as it would avail the enforcement mechanisms that have developed in respect of human rights law, which are currently absent under international environmental law.¹¹¹

Being a *lex specialis* of international law, the sources of human rights law that will be looked at are international conventions and customary international law.¹¹²

It must be borne in mind that human rights have been subjected to a fair share of criticism in that they may not be the most appropriate means of protecting the interests of future generations. Of particular importance is the criticism offered by some environmental law scholars.¹¹³ Their critique of the applicability of the human rights paradigm falls on its anthropocentric nature.¹¹⁴ They believe that since human rights are afforded to humans by virtue of their humanness that there is a rift between the environment and human beings and that the latter finds itself in a position of power over the former.¹¹⁵ Thus, these scholars argue that vesting nature with protection emanating from the human rights paradigm would inevitably lead to the interests of the environment being made

109 RP Hiskes 'The right to a green future: human rights, environmentalism, and intergenerational justice' (2005) 27 *Human Rights Quarterly* at 1349.

110 *Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights* Inter-American Court of Human Rights (IACrHR) para 52.

111 LM Collins 'Are we there yet - the right to environment in international and European Law' (2007) 3 *McGill International Journal of Sustainable Development Law and Policy* at 125.

112 ICJ Statute (n 28) Art 38.

113 D Shelton 'Human rights, environmental rights, and the right to environment' (1991) 28 *Stanford Journal of International Law* at 109.

114 As above.

115 PE Taylor 'From environmental to ecological human rights: a new dynamic in international law' (1998) 10 *Georgetown International Environmental Law Review* at 352.

subordinate to the interests of humans.¹¹⁶ They suggest, in relation to nature and the environment, that the environment itself be given rights and humans be endowed with analogous duties.¹¹⁷

However, this proposition has been rebutted to some degree.¹¹⁸ It is submitted that ecological ethicists have erred when stating that the consequence of bestowing environmental human rights is the division of man from nature.¹¹⁹ Legal scholars who support the establishment of human rights of an environmental nature state that humans are intrinsically bound together with ecological beings and are, therefore, inseparable from nature.¹²⁰ This naturally means that any human right that endorses a human being's interest to live in a clean and healthy environment would, as a matter of course, provide the environment with protection as well.¹²¹

4.1 International conventions

Given the fact that the international community has only fairly recently begun to concern itself with the well-being of the environment and its protection, international human rights treaties are often devoid of any environmental provisions.¹²² Human rights arose fairly soon after the Second World War, whereas environmental rights, it has been argued, began to emerge in the early 1970s with the United Nations Conference on the Human Environment (the Stockholm Declaration).¹²³ Thus, at the outset, it is anticipated that it is unlikely for a human right seeking to protect the environmental interests of future generations to have arisen under treaty law.

Certain provisions in ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries provide for the protection of the environment of indigenous people.¹²⁴ Article 7 states that governments, in conjunction with the relevant indigenous peoples, should devise and implement steps 'to protect and preserve the environments of the territories' where indigenous people live.¹²⁵ In addition, Article 7 makes provision for environmental impact assessments that must be carried out together with the people

116 As above.

117 N Gibson 'The right to a clean environment' (1990) 54 *Saskatchewan Law Review* at 13; K Bosselmann 'Human rights and the environment: redefining fundamental principles?' in B Gleeson & N Low (eds) (2001) *Governing for the environment: Global problems, ethics and democracy* at 125; Collins (n 111) 124.

118 Shelton (n 113) 110.

119 As above.

120 As above.

121 Collins (n 111) 124.

122 D Shelton 'Human rights, Health & Environmental Protection: Linkages in Law & Practice' (2002) Health and Human Rights Working Paper Series No 1, 6.

123 Stockholm Declaration (n 84) Principle 1.

124 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, (27 June 1989), C169 (Indigenous and Tribal Peoples Convention).

125 Indigenous and Tribal Peoples Convention (n 124) Art 7(4).

concerned, and these assessments must be taken into account when development projects are considered by governments.¹²⁶ Article 7 ensures that the environmental concerns of indigenous and tribal peoples are heard and it enables them to play an active role in protecting their environment for both present and future generations. Article 15 provides for the protection of indigenous peoples' rights to natural resources located on their land.¹²⁷ This provision goes further and stipulates that in the event that ownership of these resources vests in the government, the extent of the prejudice that indigenous people will suffer by way of any exploration of these resources must be taken into account, and, if appropriate, they should either share in the benefits of the exploration or receive compensation for any loss suffered.¹²⁸

On a regional level, two binding human rights conventions provide for a right to the environment.¹²⁹ The African Charter on Human and Peoples' Rights (African Charter) provides in Article 24 that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.¹³⁰ Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) recognises the right of everyone to a healthy environment and places an obligation on the state to protect and preserve such an environment.¹³¹ From the text of these two articles, it can be seen that a right to the environment is expressed fairly overtly in these two conventions. To determine whether this right has an intergenerational dimension will require employing Article 31 of the Vienna Convention on the Law of Treaties.¹³² In terms of Article 31, the ordinary meaning of a word should be attributed to it when interpreting a provision.¹³³ Neither convention makes any explicit reference to future generations nor intergenerational equity.¹³⁴ However, the word 'development', appearing in the African Charter, and 'preservation', from the San Salvador Protocol, are both, in their ordinary meaning, inherently intertemporal and are usually associated with an elapse of time.¹³⁵ Thus, it can be argued that these two articles could indeed provide for a human right to

126 Indigenous and Tribal Peoples Convention (n 124) Art 7(3).

127 Indigenous and Tribal Peoples Convention (n 124) Art 15.

128 As above.

129 African Charter on Human and Peoples' Rights, (27 June 1981), CAB/LEG/67/3 rev. 5, 21 ILM 58 (1981) (African Charter); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, (17 November 1988), A-52 OASTS 69 (1998) (San Salvador Protocol).

130 African Charter (n 129) Art 24.

131 San Salvador Protocol (n 129) Art 11.

132 Vienna Convention on the Law of Treaties (n 35) Art 31.

133 As above.

134 African Charter (n 129) Art 24; San Salvador Protocol (n 129) Art 11.

135 As above.

intergenerational equity even though they do not expressly mention one.

Apart from the aforementioned treaties which contain substantive human rights, there are also procedural environmental human rights that play a vital role in environmental protection.¹³⁶ These procedural rights encompass aspects such as: following an inclusive approach to the establishment of environmental policy by involving the public in decision-making processes; making environmental information widely available; and the accessibility of legal redress.¹³⁷ The significance of environmental procedural rights lies in the fact that they enable public participation in decision-making processes.¹³⁸ Since it is the public who has to deal with any potential negative environmental changes, it should have a say in deciding how such changes should be handled or what should be done about them.¹³⁹ Making environmental information available and providing for legal redress empowers the public to take an effective stance against environmental destruction and to fight for the interests of future generations.

An example of a provision in a binding treaty that addresses environmental procedural rights is Article 3 of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.¹⁴⁰ It stipulates that the public must be informed of any activities which may negatively impact their environment and be given the opportunity to object to, or give comments in relation to such activities.¹⁴¹ At a regional level, the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention) requires its parties to include the public in decision-making, ensures access to information, and provides for access to justice in environmental matters.¹⁴² This is done, according to Article 1, to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'.¹⁴³ Where the Aarhus Convention applies to European and some Asian states, a similar regional treaty on environmental procedural rights has been

136 Rodriguez-Rivera (n 2) 15.

137 As above.

138 Collins (n 111) 129.

139 As above.

140 Convention on Environmental Impact Assessment in a Transboundary Context, (25 February 1991), 30 ILM 800 (1991) (Espoo Convention) Art 3.

141 Espoo Convention (n 140) Art 3 para 8.

142 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (25 June 1998), 2161 UNTS 441 (1998) Art 1.

143 As above.

concluded between Latin American and Caribbean states known as the Escazú Agreement.¹⁴⁴ The purpose of the Escazú Agreement, as laid down in Article 1, is the implementation of the rights to environmental information, public participation in environmental decisions, and access to environmental justice in order to safeguard the right to a healthy environment of both the present and future generations.¹⁴⁵ Furthermore, Article 3 of the Escazú Agreement lists intergenerational equity as one of the guiding principles that states need to take into account when undertaking any obligations in terms of the treaty.¹⁴⁶

4.2 Customary international law

As has been mentioned, a rule of customary international law exists once there is sufficient state practice and *opinio juris*.¹⁴⁷ The relevant sources that will be discussed include national constitutions, national legislation, and soft-law instruments.

4.2.1 National constitutions and legislation

The provisions of domestic constitutions provide evidence of state practice specifically in the realm of human rights given the duty placed on states by human rights law to protect their citizens.¹⁴⁸ As previously mentioned, there are currently at least sixty states that recognise and uphold the principle of intergenerational equity in their constitutions.¹⁴⁹ However, not even a quarter of these constitutions enshrine a right to intergenerational equity, with the majority rather placing an obligation or duty on states to protect the environment for future generations. The German Constitution, for example, provides the following in respect of intergenerational justice: ‘Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals’.¹⁵⁰ In a similar vein, the Constitution of Brazil obliges not only the state but also individuals to protect the environment for the sake of all generations – present and future.¹⁵¹

144 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 9 April 2018 (Escazú Agreement).

145 Escazú Agreement (n 144) Art 1.

146 Escazú Agreement (n 144) Art 3(g).

147 Identification of Customary International Law (n 47) Conclusion 2.

148 J Lee ‘The underlying legal theory to support a well-defined human right to a healthy environment as a principle of customary international law’ (2000) 25 *Columbia Journal of Environmental Law* at 313.

149 See (n 55) for a comprehensive list of national constitutions.

150 Basic Law for the Federal Republic of Germany, 1949 Art 20(a).

151 Constitution of the Federative Republic of Brazil, 2015 Art 225.

In addition to national constitutions, further evidence of state practice can be found in national legislation.¹⁵² New Zealand's Resource Management Act stipulates that, as part of its overarching purpose of sustainable management, regard must be given to future generations so that they too will have the ability to use and enjoy natural resources.¹⁵³ Another example of national legislation that recognises intergenerational justice is the National Environmental Management Act of South Africa, which provides that 'everyone has the right to have the environment protected, for the benefit of present and future generations'.¹⁵⁴ The principle of intergenerational equity is also explicitly mentioned in section 3A(c) of Australia's Environment Protection and Biodiversity Conservation Act 1999.¹⁵⁵

These domestic practices do not seem to be 'sufficiently widespread' and 'general' as is required to meet the threshold for state practice.¹⁵⁶ Stated differently, the inclusion of intergenerational equity in national constitutions and national legislation remains too inconsistent for a rule of customary international law.¹⁵⁷ Although not enough to establish a rule of custom, this could, nonetheless, evidence a developing customary rule.

4.2.2 *Soft-law instruments*

In terms of soft law, a human right to the environment was first introduced into the realm of international law in 1972 by the Stockholm Declaration.¹⁵⁸ Principle 1 provides for a right to an environment that is conducive to the dignity and well-being of all humans.¹⁵⁹ In addition, and of particular importance, Principle 1 explicitly states that humans have the 'solemn responsibility to protect and improve the environment for present and future generations'.¹⁶⁰ Thus, although there is not an express human right to intergenerational equity, there is at least a recognised responsibility on the present generation to account for the interests of future generations.

Following its debut, this right to the environment, provided for in Principle 1 of the Stockholm Declaration, has appeared in numerous soft-law instruments, international reports, and judicial decisions.¹⁶¹

152 Identification of Customary International Law (n 47) Conclusion 6.

153 Resource Management Act 1991 (New Zealand) sec 5(2)(a).

154 National Environmental Management Act 107 of 1998 Preamble.

155 Environment Protection and Biodiversity Conservation Act 1999 sec 3A(c).

156 Identification of Customary International Law (n 47) Conclusion 8.

157 Anstee-Wedderburn (n 80) 50.

158 Rodriguez-Rivera (n 2) 17.

159 Stockholm Declaration (n 35) Principle 1.

160 As above.

161 Collins (n 111) 132.

For example, Annexe 1 of the Report of the Brundtland Commission states that: 'All human beings have the fundamental right to an environment adequate for their health and well-being.'¹⁶² Principle 1 of the Stockholm Declaration is, furthermore, recognised and reiterated by the Brundtland Commission in Chapter 12 of its report.¹⁶³ The 1989 Hague Declaration on the Environment likewise links environmental preservation to 'the right to live in dignity in a viable global environment, and the consequent duty of the community of nations *vis-à-vis* present and future generations to do all that can be done to preserve the quality of the environment'.¹⁶⁴ The wording of the Hague Declaration bears a striking resemblance to the Stockholm Declaration in that both tie environmental protection to the human right to dignity and unequivocally endorsed an obligation to future generations.¹⁶⁵ In addition, Resolution 45/94 passed by the General Assembly of the United Nations, apart from reaffirming Principle 1 of the Stockholm Declaration, also stipulates that 'all individuals are entitled to live in an environment adequate for their health and well-being'.¹⁶⁶

The 1992 Rio Declaration, which is a product of the Conference on Environment and Development, again mimics Principle 1 of the Stockholm Declaration, but not so expressly as the previously mentioned reports and instruments.¹⁶⁷ It provides that: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.¹⁶⁸ Looking at the wording of this principle, it seems that there is no recognition of any right.¹⁶⁹ Although no direct reference is made to a right to the environment, it is argued that the essence of what such a right would encompass is indeed represented in the language used in Principle 1.¹⁷⁰ Furthermore, Principle 3 of the Rio Declaration echoes the crucial second part of Principle 1 of the Stockholm Declaration that discusses the obligations towards future generations.¹⁷¹ Principle 3 states that the 'right to development must

162 Brundtland Report (n 98) 286.

163 Brundtland Report (n 98) 271.

164 Hague Declaration on the Environment, (11 March 1989), 28 ILM 1308 (1989).

165 Hague Declaration on the Environment (n 163); Declaration of the United Nations on the Human Environment (n 84). The Hague Declaration places an obligation on the 'community of nations *vis-à-vis* present and future generations to do all that can be done to preserve the quality of the environment'. Similarly, the Stockholm Declaration states that all humans have the 'responsibility to protect and improve the environment for present and future generations'.

166 United Nations General Assembly 'Need to ensure a healthy environment for the well-being of individuals' (14 December 1990), UN Doc. A/RES/45/94 (1990).

167 Collins (n 111) 132.

168 Rio Declaration (n 85) Principle 1.

169 Collins (n 111) 132.

170 Lee (n 148) 308.

171 Rio Declaration (n 85) Principle 3.

be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.¹⁷² Thus, it can be seen that the Rio Declaration essentially repeats Principle 1 of the Stockholm Protocol in Principle 1 and Principle 3.

Of significance is that the Rio Declaration was adopted in the presence of 178 states.¹⁷³ Moreover, it has been incorporated into a few soft-law instruments that have similarly been accepted by a large number of states.¹⁷⁴ For example, Principle 2 of the 1994 United Nations Conference of Population and Development, which was signed by 179 states,¹⁷⁵ and Principle 6 of the 1995 World Summit for Social Development, which 186 states assented to.¹⁷⁶ This means that on three subsequent occasions, almost every state adopted Principle 1 of the Stockholm Declaration and, thus, also the environmental protection it attempts to afford to future generations.¹⁷⁷

Whether this repeated acknowledgement of the environmental interests of future generations by almost the entire international community amounts to a rule of customary international law depends on the intention of the states to be bound.¹⁷⁸ In other words, there needs to be sufficient *opinio juris*. Looking at the wording of these instruments, it becomes apparent that there is no evidence that suggests that states adopted them with a sense of a legal obligation to do so.¹⁷⁹ Therefore, it seems that these provisions are not binding but only amount to mere ambitions. They could at most serve as evidence of an emerging trend leaning towards the establishment of a right to intergenerational equity in terms of international customary law.

5 Alternative means of safeguarding the interests of future generations

At present, it remains contentious whether intergenerational equity has attained binding status in international law. No right seeking to protect the interests of future generations to the environment has

172 As above.

173 Lee (n 148) 308.

174 Lee (n 148) 309.

175 Programme of Action, 13 September 1994, UN Doc. A/CONF.171/13 (1994) Principle 2.

176 Copenhagen Declaration, 14 March 1995, UN Doc. A/CONF.166/9/Annex (1995) Principle 6.

177 Lee (n 148) 309.

178 Identification of Customary International Law (n 47) Conclusion 9.

179 For example, the Principles of the Stockholm Declaration are preceded by the *chapeau* which states that they are 'common convictions'. Similarly, the signatory states to the Rio Declaration 'proclaim' the Principles. The requisite acceptance of state practice as law is clearly absent. See Identification of Customary International Law (n 47) Conclusion 9.

attained customary law status. In the absence of such a right, the question beckons as to how, if it all, future generations can be ensured an environment of a similar standard to that of the present generation. Although a right would be the preferred means for environmental protection given its legal force, there are other potential institutions and avenues to safeguarding the interests of future generations to the environment.

5.1 Commissioner or ombudsman for future generations

An ombudsman or commissioner is an authoritative figure who is ordinarily tasked with investigating and analysing governmental conduct.¹⁸⁰ They check the decisions of the executive in the event that they are unreasonable, and they exercise their powers independently from other bodies.¹⁸¹ Hence, the role of an ombudsman for future generations can be described along the lines of an ‘environmental watchdog, alerting governments and citizens to any emerging threats’.¹⁸²

Comprising of children and those not yet born, future generations do not necessarily possess the ability to voice their concerns about the environment, nor institute legal action in an attempt to curb environmental degradation.¹⁸³ They are thus in need of a guardian who will ensure that their interests are taken into account, and who will fight on their behalf should it be required.¹⁸⁴ A commissioner or ombudsman for future generations would exactly fill such a position. They would be able to act as a mouthpiece, through their scrutinising and advisory functions, to ensure that the concerns of future generations are heard and addressed.¹⁸⁵

The idea of appointing a commissioner for future generations has received a fair bit of attention from the international community.¹⁸⁶ During the preparations for the 2012 United Nations Conference on Sustainable Development, also known as Rio+20, a few proposals were made for the establishment of a commissioner or ombudsman for future generations.¹⁸⁷ For example, the establishment of such an

180 Anstee-Wedderburn (n 80) 52.

181 Hollis ‘Old solutions to new problems: providing for intergenerational equity in national institutions’ (2010) 14 *New Zealand Journal of Environmental Law* at 49.

182 Brundtland Report (n 98) 273.

183 United Nations General Assembly ‘Report of the Secretary-General on intergenerational solidarity and the needs of future generations’, (15 August 2013), UN Doc. A/68/322 (2013) (Report of the Secretary-General) para 5.

184 Hollis (n 181) 49.

185 Hadjiargyrou (n 23) 274.

186 Anstee-Wedderburn (n 80) 54.

187 As above.

ombudsman was proposed in the Zero Draft of the outcome document.¹⁸⁸ Paragraph 57 states that: 'We agree to further consider the establishment of an Ombudsperson, or High Commissioner for Future Generations, to promote sustainable development'.¹⁸⁹ This provision has been criticised for taking a casual approach to the establishment of the ombudsman or commissioner, rather than calling for their expeditious appointment.¹⁹⁰ However, the mere recognition of such an important position for an international conference, albeit in the preparation stage, is a positive step towards protecting future generations as it indicates that cognisance is at least taken of future generations.

Furthermore, there have been attempts by a few states to establish an ombudsman of some sort for future generations. In 2001, the Israeli government inaugurated the Commission for Future Generations which was to act as a representative for future generations in Parliament.¹⁹¹ The Commissioner had the authority to demand information from the government that was not readily available to citizens and, importantly, had the power to intervene in the legislative process in the event that the interests of future generations would be prejudiced.¹⁹² What proved highly advantageous was that since the Commission was an organ of state, it enabled government officials, whose concerns about future generations or related matters would ordinarily have gone by the board, to have their concerns heard, and also circumvented several bureaucratic hurdles in the process.¹⁹³ Unfortunately, the Commission only lasted one term and came to an end in 2006.¹⁹⁴ The reasons for its termination were said to have been political and entailed the cost of sustaining such an institution as well as its necessity.¹⁹⁵ Although this commission for future generations undoubtedly had a positive impact through its power of intervention and its role in the distribution of information, it did have its flaws as evidenced by its relatively short existence.¹⁹⁶ Thus, a salient lesson to be learnt from this would be to establish a commission that is independent of the government of a nation and, in particular, free from political influence.

Following the dissolution of the Commission for Future Generations, the Parliamentary Commissioner for Future Generations

188 United Nations 'The Future We Want: Zero Draft' (2012) <https://www.icriforum.org/rio20-update-zero-draft-of-outcome-document-now-available/> (accessed 23 April 2020) (Zero Draft).

189 Zero Draft (n 188) para 57.

190 Anstee-Wedderburn (n 80) 58.

191 J Tremmel *Handbook of intergenerational justice* (2006) at 246.

192 Tremmel (n 191) 247.

193 Tremmel (n 191) 261.

194 Report of the Secretary-General (n 183) para 43.

195 Hadjiargyrou (n 23) 274.

196 Hadjiargyrou (n 23) 275.

was instituted by the Hungarian government in 2008.¹⁹⁷ Similar to the Israeli Commission, the Commissioner was vested with the power to collect information, perform investigative functions, provide advice in relation to the interests of future generations, and stay environmentally damaging policies and legislation.¹⁹⁸ In 2012, the Parliamentary Commissioner was incorporated into the more comprehensive Office of the Commissioner for Fundamental Rights, where it now holds the position of Deputy Commissioner.¹⁹⁹ Here again, it can be seen that once created, a commissioner or ombudsman for future generations does not tend to exist for very long. In this case, rather than disbanding, as was the case with the Israeli Commissioner for Future Generations, the Hungarian Parliamentary Commissioner does still play a role but to a lesser extent than before.

In 2016, the Future Generations Commissioner for Wales was established and is the sole ombudsperson for future generations currently in existence.²⁰⁰ Her primary functions entail, firstly, advising authoritative bodies, including the Welsh government, on matters regarding the interests of future generations and, secondly, liaising with the public on such matters.²⁰¹

From the above, it becomes evident that an ombudsman or commissioner for future generations has the potential to benefit future generations, and it may indeed seem like an attractive mechanism to employ in safeguarding their interests, especially on a national level, as has been attempted by some states. However, in practice, they do not boast exceptional achievement or performance.²⁰²

5.2 International Court of Justice

Apart from the institution of a commissioner for future generations, the International Court of Justice could come to the aid of future generations. This Court is described as the 'principal judicial organ of the United Nations',²⁰³ and its function is the settlement of disputes through the application of international law.²⁰⁴ The purpose of the Court is thus to resolve any differences between parties and to

197 Report of the Secretary-General (n 183) para 44.

198 As above.

199 As above.

200 Future Generations Commissioner for Wales <https://futuregenerations.wales/team/sophie-howe/> (accessed 23 April 2020).

201 As above.

202 Hadjiargyrou (n 23) 275.

203 ICJ Statute (n 28) Art 1.

204 ICJ Statute (n 28) Art 38(1). This article provides that the function of the ICJ 'is to decide in accordance with international law such disputes as are submitted to it ...'.

prevent them from taking matters into their own hands by requiring them to refer their dispute to an independent arbitrator.²⁰⁵ In addition to adjudicating disputes, the Court also has the power to give advisory opinions to specifically authorised institutions.²⁰⁶

The International Court of Justice can be approached to adjudicate a matter concerning the interests of future generations, provided that its jurisdiction is consented to by the parties.²⁰⁷ Although there has not been a matter before the Court that expressly deals with intergenerational equity as of yet, that has not prevented this institution from acknowledging a duty to future generations in a few dissenting judgments,²⁰⁸ and an advisory opinion.²⁰⁹

One such example is the 1995 *Nuclear Tests* case, in which New Zealand approached the Court in response to a French media statement, which detailed France's intention to execute a series of nuclear tests in the South Pacific region.²¹⁰ New Zealand's claim was based on paragraph 63 of the earlier 1974 *Nuclear Tests* case, which required the Court to examine the situation should anything happen that may affect the basis of the 1974 Judgment.²¹¹ According to New Zealand, paragraph 63 entitled it to have the 1974 Judgment (which dealt with France carrying out atmospheric nuclear tests) resumed should France act in such a way that would affect the Judgment.²¹² France's intention to execute nuclear tests was interpreted by New Zealand as affecting the basis of the 1974 Judgment. However, the Court, in 1995, dismissed New Zealand's claim as France intended to conduct underground nuclear tests and not the atmospheric nuclear tests on which the 1974 Judgment was based.²¹³

In his dissenting opinion, Judge Weeramantry expressly recognised the principle of intergenerational equity.²¹⁴ He stated that it is a 'rapidly developing principle of contemporary environmental law'.²¹⁵ Furthermore, he acknowledged the Court's responsibility to act as a trustee or guardian for future generations as

205 D Shelton 'Form, function, and the powers of international courts' (2009) 9 *Chicago Journal of International Law* at 557.

206 ICJ Statute (n 28) Art 65.

207 ICJ Statute (n 28) Art 36(1) & (2).

208 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* (1995) ICJ Reports 288; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment (25 September 1997) (1997) ICJ Reports 7.

209 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (8 July 1996) (1996) ICJ Reports.

210 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* (1995) ICJ Reports 288 (*Nuclear Tests*) 289.

211 As above.

212 As above.

213 *Nuclear Tests* (n 210) 306.

214 *Nuclear Tests* (n 210) 341 (Dissenting Opinion of Judge Weeramantry).

215 As above.

well as the responsibility of nations themselves to protect the interests of their future generations.²¹⁶ He mentions the inherent long-lasting effects of nuclear tests that could be detrimental to future generations, and how the Court and states have a duty to protect future generations from them.²¹⁷ Thus, his dissenting opinion provides support for intergenerational equity and highlights its significance. Although such a dissenting opinion is of no force in respect to the case in which it is given, it can have an influence on future decisions in the sense that it may persuade the Court to find in favour of the dissenting judge.²¹⁸

Another case where the interests of future generations were discussed was in *Gabčíkovo-Nagymaros Project*.²¹⁹ In its judgment, the Court highlighted the need to balance economic interests with environmental protection and acknowledged that future generations may well be negatively impacted by decisions taken in the present.²²⁰ Judge Weeramantry, in his dissenting opinion, posited that it is a universal duty to protect and preserve the environment.²²¹ In addition, he refers to the 'trusteeship of earth resources' which entails that humans are to act as guardians of the environment and should protect it.²²² Even though there is no direct reference to intergenerational equity, its essence and objectives are nonetheless reflected in this case. The acknowledgement of the precarious situation that future generations find themselves in, as well as the duty to safeguard the environment for future generations, are central tenets of the doctrine of intergenerational equity.

The International Court of Justice has also given an advisory opinion addressing future generations and the environment.²²³ In the *Legality of the Threat or Use of Nuclear Weapons*, the Court gave an advisory opinion on the question posed by the United Nations General Assembly which was: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'²²⁴ In its opinion, the Court stated, unequivocally, that nuclear weapons pose a serious

216 As above. Judge Weeramantry stated: '[T]his Court must regard itself as a trustee of those rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself'.

217 As above.

218 *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase* (18 July 1966) (1966) ICJ Reports 323 (Dissenting Opinion of Judge Jessup) 325.

219 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, (25 September 1997) (1997) ICJ Reports.

220 *Gabčíkovo-Nagymaros Project* (n 219) 78.

221 *Gabčíkovo-Nagymaros Project* (n 219) 110 (Separate Opinion of Vice-President Weeramantry).

222 *Gabčíkovo-Nagymaros Project* (n 219) 103 (Separate Opinion of Vice-President Weeramantry).

223 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (8 July 1996) (1996) ICJ Reports (*Legality of Nuclear Weapons*).

224 *Legality of Nuclear Weapons* (n 223) 226.

threat to future generations.²²⁵ Nuclear weapons could bring about genetic illnesses in future generations and could also damage the environment and cripple food production.²²⁶ Moreover, the opinion identified that the environment is directly linked to the health of not only the present generation but also ‘generations unborn’.²²⁷ Thus, in its advisory opinion, the Court emphatically came to the support of future generations. Despite not having legal force, this opinion elucidated where the International Court of Justice stands in respect of the interests of future generations.

Through its advisory jurisdiction and authoritative decisions, the Court can greatly assist in the development of international environmental law.²²⁸ It is important to note that the Court itself cannot make law, it can only clarify the law.²²⁹ One such example is where the Court is required to decide when a treaty provision has become a rule of custom and is no longer to be considered only as a contractual obligation.²³⁰ In this way, it can confirm the existence of, and give clarity on, a rule of general international law. In addition, the judgments of the Court can be enforced through the United Nations Security Council.²³¹ Therefore, the International Court of Justice could prove quite beneficial in protecting the environment for future generations.

5.3 Articles on State Responsibility

A further avenue to protect the interests of future generations until a right is established is by employing the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles).²³² The Draft Articles are in essence a codification of that part of international law pertaining to when a state’s responsibility will come into play and the consequences that the state will face as a result thereof.²³³ They are not centred around primary norms that address the scope of a rule of international law, but rather set out

225 *Legality of Nuclear Weapons* (n 223) 244.

226 As above.

227 *Legality of Nuclear Weapons* (n 223) 241.

228 R Jennings ‘The role of the International Court of Justice in the development of international environment protection law’ (1992) 1 *Review of European, Comparative & International Environmental Law* at 242.

229 ICJ Statute (n 28) Art 38(1)(d).

230 Jennings (n 228) 241.

231 Jennings (n 228) 243.

232 International Law Commission ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ *Report of the International Law Commission on the Work of its Fifty-third Session*, (2001), Supplement No 10, UN Doc. A/56/10 (Draft Articles on State Responsibility).

233 *United Nations Yearbook of the International Law Commission*, (2001), A/CN.4/SER.A/2001/Add.1 (Part 2) at 31.

secondary norms of state responsibility that detail the attribution of responsibility and the ramifications of such attribution.²³⁴ The Draft Articles, it seems, are not yet of a binding nature, although, as was noted during the seventy-fourth session of the United Nations General Assembly, states have praised them and are in the process of discussing whether the Draft Articles should be included in a binding convention or if they should be adopted by the General Assembly.²³⁵

Rather than laying down specific rights and duties, the Draft Articles adopt a more generalised approach to the obligations of states, their rights, and the consequences for violating any rights.²³⁶ This general approach is what makes the Draft Articles beneficial to the interests of future generations since it enables new and emerging principles, such as environmental protection and intergenerational equity, to be accounted for and to fall within the protective ambit of the Draft Articles.

To determine whether the Draft Articles are applicable and whether a state can be held responsible requires an assessment of Articles 1 and 2. According to Article 1, a state's international responsibility becomes applicable whenever that state commits an internationally wrongful act.²³⁷ Article 2 gives content to what an internationally wrongful act is by providing that a wrongful act is committed when the state breaches one of its obligations under international law and the conduct is attributable to that state.²³⁸ In other words, for a state to incur responsibility, there must be a breach of an international obligation and that breach must be attributable to the state. Breaches of international law encompass a broad, general spectrum of transgressions, which involve environmental destruction on both a small and large scale.²³⁹ Thus, a state can incur responsibility for an internationally wrongful act that causes damage to the environment.²⁴⁰

An example of such an internationally wrongful act is where a state, through the use of its territory, negatively impacts the territory of another state or persons in that state.²⁴¹ This is known as the prohibition of transboundary harm or the *sic utere tuo* principle.²⁴² This principle quite clearly helps achieve the goal of intergenerational

234 As above.

235 United Nations General Assembly 'Responsibility of states for internationally wrongful acts, comments and information received from Governments: Report of the Secretary-General', (12 July 2019), UN Doc. A/74/156 (2019).

236 J Crawford 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A retrospect' (2002) 96 *American Journal of International Law* at 876.

237 Draft Articles on State Responsibility (n 232) Art 1.

238 Draft Articles on State Responsibility (n 232) Art 2.

239 United Nations (n 233) 87.

240 Dugard et al (n 7) 588.

241 *Trail Smelter Arbitration (United States v Canada)* (1938-1941) (1965) 3 UNRIAA.

242 Dugard et al (n 7) 588.

equity as it preserves the environment by prohibiting its destruction through the actions of other states. In the *Corfu Channel* case,²⁴³ the International Court of Justice confirmed the customary status of the prohibition of transboundary harm.²⁴⁴ Thus, when a state breaches a rule of international law such as the *sic utere tuo* principle, it will incur international responsibility.

Interestingly, the previous 1980 Draft Articles on State Responsibility provided a list of international crimes.²⁴⁵ One of the stipulated crimes was ‘a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’.²⁴⁶ This provision was met by a fair amount of criticism from the international community and was subsequently excluded from the current Draft Articles.²⁴⁷ However, the scope of these crimes has been incorporated into Articles 40 and 41 of the Draft Articles which address state responsibility in relation to peremptory norms of international law.²⁴⁸ Thus, the possibility exists for there to be an environmental *jus cogens* norm for which state responsibility could be incurred.²⁴⁹ This would greatly benefit future generations as it is precisely massive pollution of the atmosphere and the sea that destroys the environment which they will eventually inherit. Unfortunately, there is much doubt regarding such a peremptory environmental norm, and it is unlikely that it exists as of yet.²⁵⁰

States that do incur responsibility for their internationally wrongful acts will have to deal with the legal consequences of their actions.²⁵¹ In terms of the Draft Articles, a state who has been injured can ask for cessation, assurance of non-repetition, and reparations.²⁵² Cessation and assurance of non-repetition are both aimed at preventing environmental damage and ensuring that such damage does not recrudescence.²⁵³ Reparations can take the form of restitution, compensation, or satisfaction.²⁵⁴ Restitution, on the one

243 *Corfu Channel Case (United Kingdom v Albania)*, Merits, (09 April 1949) (1949) ICJ Reports 22.

244 Jennings (n 228) 241.

245 International Law Commission ‘Draft Articles on State Responsibility’ *Report of the International Law Commission on the Work of its Thirtieth Session*, (1980), Supplement No 10, UN Doc. A/35/10 Art 19(3).

246 As above.

247 Crawford (n 236) 875.

248 Draft Articles on State Responsibility (n 232) Arts 40-41.

249 L Kotzé ‘Constitutional conversations in the Anthropocene: in search of environmental *jus cogens* norms’ (2015) 46 *Netherlands Yearbook of International Law* at 249.

250 As above.

251 Draft Articles on State Responsibility (n 232) Art 28.

252 Draft Articles on State Responsibility (n 232) Arts 30-31.

253 Draft Articles on State Responsibility (n 232) Art 30.

254 Draft Articles on State Responsibility (n 232) Art 34.

hand, entails placing the injured state in the same position that it was in before any environmentally damaging activity occurred.²⁵⁵ With restitution, the environment is restored to what it was before any activity took place.²⁵⁶ On the other hand, compensation and satisfaction require the injured state to be compensated for any damage that was inflicted upon its environment.²⁵⁷ In this instance, the environment remains degraded unless the injured state rehabilitates it itself.

With this in mind, it seems that the Draft Articles would not be the most appropriate mechanism for safeguarding the interests of future generations. The focus is on making amends after the environment has already been damaged and some environmental damage may well be irreversible.²⁵⁸ In such an event, no amount of reparations will be able to restore the environment to the standard that it was before the harmful act occurred.²⁵⁹ Nevertheless, the Draft Articles do offer some form of a deterrent to environmental damage by way of legal consequences.²⁶⁰ States will incur expenses of some form in having to remedy the environmental destruction that they caused.²⁶¹ This deterrence factor could indeed be the difference between a state deciding to impair the environment of another state or not. In this way, the environment could be preserved for future generations. Therefore, the Draft Articles on State Responsibility provide an avenue that could ensure the protection of the interests of future generations.

6 Conclusion

From the above, it can be concluded that, as of yet, there is no right to intergenerational equity in international law. Although it seems that a few treaties in the fields of international environmental law and human rights law have endorsed a right to intergenerational equity of some sort, the application of these conventions is constrained to specific regional areas. As for customary international law, the recognition of intergenerational equity in national constitutions, national legislation, and national court decisions remains too limited and inconsistent to establish a rule of custom. However, the large body of soft-law instruments addressing intergenerational equity and the increasing incorporation of the principle in domestic constitutions indicates a definite trend towards

255 Draft Articles on State Responsibility (n 232) Art 35.

256 United Nations (n 233) 96.

257 Draft Articles on State Responsibility (n 232) Arts 36-37.

258 Dugard et al (n 7) 592.

259 As above.

260 As above.

261 Draft Articles on State Responsibility (n 232) Art 28.

the recognition of a rule of custom. Intergenerational equity thus has the potential to develop into a rule of customary international law.

Until such a right becomes a reality, the environmental interests of future generations could be safeguarded by alternative institutions and mechanisms. A commissioner for future generations, the International Court of Justice, and the Articles on the Responsibility of States for Internationally Wrongful Acts are all capable of providing some sort of protection for future generations.

**THE IMPACT OF TRANSFORMATIVE
CONSTITUTIONALISM IN ADDRESSING THE
MARGINALISATION OF DOMESTIC WORKERS IN POST-
APARTHEID SOUTH AFRICA WITH SPECIFIC
REFERENCE TO *MAHLANGU AND ANOTHER V
MINISTER OF LABOUR AND OTHERS (COMMISSION
FOR GENDER EQUALITY AND ANOTHER AS AMICI
CURIAE)* [2020] JOL 48996 (CC)**

*by Kherina Narotam**



Abstract

*Domestic workers play an important role in supporting the labour market and the economy, enabling economically active members of society to pursue their careers and aspirations. Sadly, despite this, domestic work remains undervalued and unrecognised and domestic workers continue to suffer as the most oppressed and exploited sector of the economy. This paper will explore domestic workers' rights in post-apartheid South Africa, as well as the reforms and measures taken to improve their employment conditions. Transformative constitutionalism will be scrutinised with reference to the case of *Mahlangu and another v Minister of Labour and Others (Commission for Gender Equality and Another as amici curiae)* as a possible answer to the*

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continued marginalisation of domestic workers. Although transformative constitutionalism as a legal theory is still relevant for transformation, a large-scale cultural reform is also needed before domestic workers will finally enjoy the promise of a free and equal South Africa.

1 Introduction

The Constitutional Court in the case of *Mahlangu and Another v Minister of Labour and Others (Mahlangu)* was required to consider the constitutionality of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The Act in question expressly excluded domestic workers from the definition of an employee, thereby excluding them from the social benefits and compensation provided under COIDA.¹ The Court ultimately held that domestic workers should also be afforded the right to access social security in terms of COIDA and that section 1(xix)(v) of the Act was unconstitutional. Although the respondents agreed to the abolishment of section 1(xix)(v) of COIDA, the *Mahlangu* judgment is significant as it has brought to light the continued marginalisation and exploitation of domestic workers in South Africa despite the enactment of the final Constitution over 20 years ago.

This case note will be divided into four sections. Firstly, the *Mahlangu* judgment will be discussed and secondly, the implications of the case on the employers of domestic workers and the workers themselves will be analysed. The third section of this note will consider the socio-economic position of domestic workers in post-apartheid South Africa based on recent developments in the law and lastly, this note will shed light on the transformative approach to adjudication used by the Court in *Mahlangu* and will question whether the approach of transformative constitutionalism can contribute to aid the domestic profession in a way that will redress the injustices of the past.

2 Facts

Ms Mahlangu was employed as a domestic worker in a private home for 22 years in Pretoria. On the morning of 31 March 2012, she drowned in her employer's pool during the course of her work.² Following the incident, Ms Mahlangu's daughter and financial dependent (the first applicant) approached the Department of Labour

1 Compensation for Occupational Injuries and Diseases Act 130 of 1993 secs 1(xix)(v) & 22.

2 *Mahlangu and Another v Minister of Labour and Others (Commission for Gender Equality and Another as amici curiae)* 2021 1 BCLR 1 (CC) (*Mahlangu v Minister of Labour*) para 7.

requesting compensation for her mother's death.³ She was subsequently denied compensation and relief under COIDA.⁴

The first applicant, assisted by The South African Domestic Service and Allied Workers Union (SADSAWU), applied to the High Court to have section 1(xix)(v) of COIDA declared unconstitutional. *Amici curiae* for the case included the Commission for Gender Equality and the Women's Legal Centre Trust.⁵ Section 1(xix)(v) of COIDA defines an 'employee' as:

... a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind -

(v) But does not include a domestic employee employed as such in a private household.

2.1 Litigation before the High Court

In 2019, the Pretoria High Court declared section 1(xix)(v) invalid to the extent that it excluded domestic workers employed in private households from the definition of 'employee'.⁶ The High Court further held that the declaration of invalidity must apply retrospectively in order to provide relief to domestic workers who were injured or had died at work prior to the Court's judgment and order.⁷ As per section 167(5) of the Constitution, the Constitutional Court makes the final decision as to whether an Act of Parliament or a provision contained in it is in fact unconstitutional. In confirming the High Court's decision, the Constitutional Court elaborated on the reasons behind the declaration of unconstitutionality which the High Court neglected to address.⁸

2.2 Arguments presented to the Court

The applicants and *amici* submitted that the exclusion of domestic workers amounts to unfair discrimination and infringes on the fundamental dignity of domestic workers. It was argued that said discrimination operated on the basis of race and gender, as domestic workers are predominantly black women who have been historically marginalised.⁹

3 *Mahlangu v Minister of Labour* (n 2) para 8.

4 As above.

5 *Mahlangu v Minister of Labour* (n 2) para 9.

6 *Mahlangu and Another v Minister of Labour and Others* (79180/15) [2019] ZAGPPHC; *Mahlangu v Minister of Labour* (n 2) para 10.

7 *Mahlangu v Minister of Labour* (n 2) paras 10 & 13.

8 *Mahlangu v Minister of Labour* (n 2) paras 14-17.

9 *Mahlangu v Minister of Labour* (n 2) para 18.

They further contended that the exclusion of domestic workers under COIDA means that the only remedy available to them in these circumstances is the common law remedy of delict. To claim for damages one has to prove fault on the employer's part. Employees who are covered by COIDA are afforded a more accessible remedy that is available regardless of fault and independent of the financial capacity of their employer.¹⁰ Under section 22(1) of COIDA, employees are entitled to benefits prescribed by the Act if they are injured from a workplace accident resulting in either death or disablement. This is subject to specific provisions, such as if the accident resulted from the employee's own misconduct, but even in these cases the Act still allows for compensation in the case of serious disablement or death where there is a financial dependent.¹¹ An accident is deemed to have occurred if it is in the course of employment.¹² In other words, merely meeting with a workplace accident would in most cases be enough to enable employees or their dependents to claim compensation in terms of the Act. In terms of delict, however, the applicant (employee or employee's dependent) will need to prove either the existence of intent or negligence on the defendant's (employer's) part.¹³ It is evident that the burden of proof on the employee is increased. Section 1(xix)(v) of COIDA also precludes domestic workers from equal access to social security protection under the Constitution.¹⁴ The applicants further argued that the exclusion cannot be justified under section 36 of the Constitution as there is no apparent legitimate governmental purpose for this exclusion.¹⁵

The respondents conceded that the provision is unconstitutional and stated that the Minister is drafting the amendments to COIDA in order to include domestic workers in the Act. The respondents, therefore, conceded that the provision in question should be repealed from COIDA.¹⁶

3 Judgment

The Court first considered section 27 of the Constitution, which affirms that everyone has the right to equal access to social security for the purposes of supporting themselves and their dependents where necessary.¹⁷ The Court considered whether or not COIDA falls within the definition of section 27(1)(c) and whether 'compensation'

10 *Mahlangu v Minister of Labour* (n 2) para 19.

11 Compensation for Occupational Injuries and Diseases Act (n 1) sec 22(3)(a)(i-ii).

12 Compensation for Occupational Injuries and Diseases Act (n 1) sec 22(4).

13 JR Midgley *Delict Volume 15 Third Edition* (2016) at 135.

14 *Mahlangu v Minister of Labour* (n 2) para 19.

15 *Mahlangu v Minister of Labour* (n 2) para 20.

16 *Mahlangu v Minister of Labour* (n 2) paras 25-27.

17 Constitution of the Republic of South Africa, 1996 (Constitution) sec 27(1)(c).

can be construed as a type of social grant. It found that despite the use of the term ‘compensation’, COIDA does provide for social grants as envisioned by the Constitution.¹⁸ This is because the benefits of COIDA serve a similar purpose to that of social grants, and a narrow interpretation of section 27 would not serve the Constitution’s transformative goals.¹⁹

The Court, in its determination, analysed section 9 of the Constitution. It reiterated that equality is a foundational constitutional value that informs the interpretation of other rights contained in the Bill of Rights. The Court considered the direct and indirect discrimination against domestic employees in terms of section 9 and concluded that the exclusion of domestic workers from deriving benefits under COIDA limits their right to equality as well as equal protection under the law.²⁰ By including domestic workers under the definition of employee in COIDA, the goal of substantive equality can be achieved on a structural level and domestic workers will be further empowered, thereby bringing them closer to what the Court considers ‘substantive freedom’.²¹ In its enquiry, the Court also took cognisance of section 10 of the Constitution and its relationship to the right to access social security. It stated that the exclusion of domestic workers from benefits under COIDA has a discriminatory and damaging effect on the workers’ inherent dignity.²² This exclusion results in the undervaluation and disregard of domestic work and results in the impairment of domestic workers’ dignity.²³

The Court looked at section 27(2) of the Constitution which provides for an internal limitation to the right to social security. This section requires the state to take reasonable measures to realise the social security rights of section 27(1). The state’s responsibility includes enabling appropriate social assistance through the enactment of reasonable legislative and other measures.²⁴ The fact that COIDA predates the Constitution does not automatically mean that it is an unreasonable legislative measure. The Court looked at the Act objectively and found that the obligations of the state under section 27(2) include extending the application of COIDA to domestic workers.²⁵

The Court ultimately upheld the High Court’s decision and concluded that the exclusion of domestic workers from the Act could

18 *Mahlangu v Minister of Labour* (n 2) paras 47, 52 & 59.

19 *Mahlangu v Minister of Labour* (n 2) para 52.

20 *Mahlangu v Minister of Labour* (n 2) paras 88 & 117-119.

21 *Mahlangu v Minister of Labour* (n 2) paras 53-55.

22 *Mahlangu v Minister of Labour* (n 2) paras 69-70.

23 *Mahlangu v Minister of Labour* (n 2) paras 48, 65 & 108.

24 Constitution (n 17) sec 27(2).

25 *Mahlangu v Minister of Labour* (n 2) paras 60 & 65-66.

not be justified, and that section 1(xix)(v) of COIDA be declared unconstitutional and invalid with immediate retrospective effect.²⁶

4 Comments: Breakdown of the benefits now afforded to domestic workers

Before analysing the Court's decision in light of transformative constitutionalism, it is important to outline the effect that the judgment has had on the employer and what benefits are now afforded to domestic workers. As of 10 March 2021, new regulations have been Gazetted to bring effect to the Court's decision. All employers of domestic workers in terms of section 80 of COIDA now need to register and submit the necessary returns to the Compensation Fund.²⁷ In terms of The Basic Conditions of Employment Act, a 'domestic worker' is defined as:²⁸

An employee who performs domestic work in the home of his or her employer and includes –

- (a) a gardener;
- (b) a person employed by a household as driver of a motor vehicle; and
- (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker.

In summary, domestic workers will be afforded the same right to compensation for occupational injuries and diseases as payable to all other types of injured employees. Some of the remedies affordable to employees will include relief for temporary or total disablement, permanent disablement lump sum benefits, and pension monies for permanent disablement. Compensation payable to the dependants of employees who died because of 'on duty' circumstances includes funeral expenses, widow's lump-sum awards, widow's pension awards, child pension awards, partial dependency awards, and wholly dependency awards.²⁹

Although the fund exists to aid employees, it is the employer's responsibility to register on behalf of their employees. The decision in *Mahlangu* applies retrospectively, and thus employees appointed prior to the judgment must still be registered for compensation. Employers must generally register new employees within seven days of the first day of work. However, this deadline does not apply to the current change. Employers are instead encouraged to register without

26 *Mahlangu v Minister of Labour* (n 2) paras 116-122.

27 Government Gazette 'Notice on the Registration of Domestic Worker Employers in terms of section 80 of the Compensation for Occupational Injuries and Disease Act as amended G44250 notice 106 of 2021' (accessed 09 July 2021).

28 Basic Conditions of Employment Act 75 of 1997 sec 1.

29 Compensation for Occupational Injuries and Diseases Act (n 1) sec 80; Government Gazette (n 27) 5-8.

delay. Once registered with the fund, employers are required to also register and submit a Return on Earnings (ROE) annually. As per the amendment, domestic workers are listed as Class M, subclass 2500 at an assessment rate of 1.04.³⁰

4.1 Consequences of failure to register employed domestic workers with the Compensation Fund

If a domestic worker suffers workplace accident and it arises that the employer has either failed to register them with the Compensation Fund or has failed or refused to contribute to the Fund, such an employer will be liable for the employee's injuries and can face fines and other penalties determined by the Director-General.³¹ Employers are further susceptible to civil claims if any injuries or illnesses arise from the place of employment. Employees can bring a case for the cost of medical aid as well as for permanent disablement, compensation for death, and even pension payments. Examples of domestic injuries that are likely to occur include injuries resulting from household equipment such as irons, vacuum cleaners, cleaning chemicals, or a situation similar to that of Ms Mahlangu.³²

It should be noted that employers of domestic workers do not, for the most part, own businesses themselves. The change in law will therefore see an influx of new registrations with the Compensation Fund. It is submitted that statutory intervention may again be necessary in the future to monitor compliance with COIDA and the new inclusions. However, as will be discussed below, statutory intervention is often not in itself sufficient to police compliance with the law. This is especially apparent in the case of domestic workers whose work is often kept invisible and discrete.

5 The bleak prospects of domestic workers: Marginalised, undervalued, and demobilised in post-apartheid South Africa

Following the transition to democracy and the advent of constitutionalism, much effort has been made to give domestic

30 Government Gazette (n 27) 9. The classification refers to the different areas of employment while the tariff and assessment rates refer to the relative level of risk that the field of employment qualifies as. A higher tariff indicates a higher level of risk. The tariff is used to calculate the annual payments made by the employer to the fund.

31 Compensation for Occupational Injuries and Diseases Act (n 1) sec 87.

32 Government Gazette (n 27) 8.

workers access to the same rights as other employees, with the *Mahlangu* case being a prime example thereof.³³ What follows is a brief summary of some of the interventions taken to recognise domestic workers as a legitimate contribution to the labour force in post-1994 South Africa. I will use this post-apartheid legislative and socio-economic background to contextualise the implications of the *Mahlangu* case and to analyse the current position of domestic work in South Africa.

5.1 The right to organise and form trade unions

The Labour Relations Act was amended in 1995 to cover domestic workers, providing them with organisational rights and access to legal structures for dispute resolution.³⁴ Presently, the right of employees to associate freely is acknowledged in the Constitution as well as in the Labour Relations Act. This right allows every worker to participate in the founding and development of a trade union and further enables workers to join trade unions of their choosing.³⁵ For domestic workers, the South African Domestic Service and Allied Workers Union (SADSAWU) played a pivotal role in changing the landscape of domestic work in South Africa, especially during apartheid when it was arguably needed the most.³⁶ SADSAWU was an applicant to the *Mahlangu* case but in recent times has seen a steady decline in numbers since the enactment of the final Constitution. This is probably due to the realisation of most of its demands since constitutional democracy.³⁷ Despite these realisations, there were still many outstanding issues that affected domestic workers with the lack of protection under COIDA being one of the most significant and long-lasting issues.

33 S Ally 'Domestic Worker Unionisation in Post-Apartheid South Africa: Demobilisation and Depoliticization by the Democratic State' (2008) 35 *Politikon* at 2.

34 D Budlender *The introduction of a minimum wage for domestic workers in South Africa: Conditions of Work and Employment Series No 72* (2016) 1-3.

35 Labour Relations Act 66 of 1995 sec 4; Constitution (n 17) sec 18.

36 Ally (n 33) 6-7. The South African Domestic Workers Union (SADWU) is the predecessor of SADSAWU and was formed in 1986 with the goal of bringing more progressive efforts to unionise domestic workers during apartheid. The efforts of the women in this union set out the foundation that domestic workers would use to challenge and improve their living standards. 'SADSAWU' was formed in 2000 with the aim of giving a voice to domestic workers and ensuring that new labour laws were extended to include them. Notably, their efforts led to the inclusion of domestic workers in the Unemployment Insurance Fund for the first time in 2001.

37 Ally (n 33) 6-7.

5.2 Issues surrounding minimum wage and employment contracts

The Basic Conditions of Employment Act was amended in 1993 to provide protection to domestic workers.³⁸ The amendment made contracts between domestic workers and their employees mandatory.³⁹ Following this, the enactment of the National Minimum Wage Act in 2018 sought to address, *inter alia*, the inequalities of our society and the huge differences in income earned in South Africa.⁴⁰ Schedule 1 of the Act requires that domestic workers be paid a minimum wage of R19.09 an hour.⁴¹ This enactment is arguably the most significant stride that South Africa has made to afford domestic workers equal rights as employees.⁴²

5.3 Unemployment insurance benefits

In 1996, the Presidential of the Labour Market Commission suggested that Unemployment Insurance Contributions be paid by employers of domestic workers as a mechanism to further formalise their employment relationship.⁴³ Following this, the government revised the Unemployment Insurance Fund (UIF) system and in 2001, the Unemployment Insurance Fund Act was amended to cover domestic workers.⁴⁴ The fund provides for the payment of unemployment benefits to negate the harmful socio-economic consequences of unemployment.⁴⁵

6 Comment: The continued marginalisation of domestic workers

Despite the abovementioned interventions, domestic workers are still largely undervalued in today's society.⁴⁶ In January of 2020, there were just over a million actively employed domestic workers in South Africa.⁴⁷ Domestic work plays an important role in supporting the

38 Budlender (n 34) 1; Basic Conditions of Employment Act (n 28) sec 3.

39 Basic Conditions of Employment Act (n 28) sec 29.

40 National Minimum Wage Act 9 of 2018 Preamble.

41 National Minimum Wage Act (n 40) Schedule 1 item 1.

42 As above.

43 Budlender (n 34) 22.

44 Budlender (n 34) 1.

45 Unemployment Insurance Act 63 of 2001 sec 2.

46 *Mahlangu v Minister of Labour* (n 2) para 2.

47 StatsSA 'Statistical Release P0211 Quarterly Labour Force Survey Quarter 1: 2020' 23 June 2020 <https://www.statssa.gov.za/publications/P0211/P02111stQuarter2020.pdf> (accessed 05 August 2021) where 1 316 000 actively employed domestic workers were reported in the first quarter of 2020.

labour market and the economy of a country by relieving families and households of their obligations in the home.⁴⁸ What follows is an analysis of some of the struggles that domestic workers still face today.

6.1 The disregard of the vocation of domestic workers

Domestic work is still not regarded as 'real employment'. This is due to a variety of reasons and Tsoaledi Thobejane, in his 2016 study on domestic work in the Mpumalanga province, proposed that domestic work is seen as a profession for the uneducated because it does not require any training, certifications, or qualifications.⁴⁹ Additionally, the private nature of domestic work makes it difficult to be viewed as 'real work', as paid domestic work is associated with unpaid domestic work performed by a woman in the family.⁵⁰ The aim to 'professionalise' domestic work has been on the Department of Labour's agenda since 1999, however implementation of the reforms has been weak.⁵¹ From May 2002 until March 2005 the Domestic Workers Skills Development Project was implemented and domestic workers received state-subsidised training certificates for completing skills programmes or participating in learnerships.⁵² The funds allocated have, however, depleted and the programme has since collapsed. In 2014, the Skills Development Planning Unit within the Department of Labour budgeted to train 1 000 domestic workers, a substantial decrease from the 16 000 workers who completed the skills programmes during the May 2002 to March 2005 period.⁵³

Therefore, it is crucial to abolish the stereotype surrounding domestic work, not only by implementing measures to regard their work as a valid profession but by also denoting the same benefits to domestic work as a vocation that is similar to other professions.⁵⁴ The disregard for the vocation of domestic workers means that they receive fewer benefits. During apartheid, domestic workers were viewed as unworthy of receiving social protection in the workplace and the social stigma surrounding the profession, unfortunately, remains largely unchanged today.⁵⁵

48 TD Thobejane & S Khosa 'On Becoming a Domestic Worker the Case of Mpumalanga Province, South Africa' (2016) 14 *Gender and Behaviour* at 7466.

49 Thobejane & Khosa (n 48) 7475.

50 Thobejane & Khosa (n 48) 7475 & 7469.

51 Budlender (n 34) 27.

52 Budlender (n 34) 28.

53 As above.

54 Thobejane & Khosa (n 48) 7469.

55 *Mahlangu v Minister of Labour* (n 2) para 24.

6.2 The socio-economic reality of domestic workers

Many domestic workers migrate to cities for job opportunities, leaving behind their children and families. They enter the homes of their employees and are subsequently at their mercy. Oftentimes they are abused and exploited behind closed doors by employers who take advantage of their desperate situations.⁵⁶ Their desperation arises from their deplorable financial situations and from often being the sole breadwinner of the family. Workers refrain from contacting the police to report abuse or suing their employers in court. This is because, in addition to the burden of paying legal costs, the intimate nature of the relationship between domestic workers and employers may result in an end to the relationship should a legal battle arise. In effect, domestic workers cannot defend their rights without losing their jobs.⁵⁷

It is true that legislation, such as the National Minimum Wage Act 9 of 2018, has been enacted to curb issues such as the right to adequate remuneration, but the realisation of these goals is poorly regulated by the government. As a result, cases of mistreatment go largely undetected, and the implementation of legislation remains ineffective.⁵⁸ Over and above this there is still no state-mandated pension fund established for domestic workers.⁵⁹

The Women's Legal Centre Trust in *Mahlangu* submitted that cycles of generational poverty are often difficult to break. Women employed as domestic workers are also, in many cases, the sole breadwinners of the family and the family's hope for survival. Ms *Mahlangu* was one such woman.⁶⁰ Despite this, they are often treated differently than their male counterparts who work in similar professions such as gardeners or household drivers.⁶¹ The cycle of poverty continues because there is insufficient protection guaranteed to the rights of women employed as domestic workers. Thus domestic workers' section 9 and 23 constitutional rights to equality and fair labour practices do not materialise in most cases.

56 Thobejane & Khosa (n 48) 7471.

57 Thobejane & Khosa (n 48) 7470-7471; *Mahlangu v Minister of Labour* (n 2) para 2.

58 D du Toit 'Not Work Like Any Other: Towards a Framework for the Reformulation of Domestic Workers' Rights' (2011) 32 *Industrial Law Journal* at 7.

59 *Mahlangu v Minister of Labour* (n 2) para 3; Ally (n 33) 8.

60 *Mahlangu v Minister of Labour* (n 2) para 23.

61 du Toit (n 58) 3-4; Thobejane & Khosa (n 48) 7474.

7 Comment: The courts' approach to adjudication in light of transformative constitutionalism

The Constitutional Court in *Mahlangu* adopted a transformative approach to adjudication. What follows is an analysis of transformative constitutionalism, what this adjudicative approach entails, how the Court applied it in *Mahlangu*, and whether it is capable of achieving the reform necessary to transform the legacy of South Africa's oppressive past and its continuing impact on the equality and dignity of domestic workers.

7.1 Background on transformative constitutionalism

The Constitution strives to redress past injustices in order to transform South Africa into a more equitable and value-based society.⁶² This goal is outlined in the Preamble of the Constitution⁶³ and is reiterated throughout.⁶⁴ Constitutional transformation aims to equalise the economic playing field and to change the country's political-social institutions and power relationships towards a more 'democratic, participatory, and egalitarian' route.⁶⁵ It follows that 'transformation' is a long-term commitment and in South Africa's case, a non-violent effort.⁶⁶ It is a revolution of the mind and how we relate to each other under the new constitutional dispensation as opposed to a physical revolution. Thus, the ultimate goal of transformation would be to afford everyone the means and opportunities to exercise their rights in a meaningful way as well as to transform society across egalitarian lines through legal processes and institutions.⁶⁷ As such, it regards the law, and specifically transformative adjudication, as a powerful vehicle for social change.

7.1.1 Karl Klare's proposal for transformation

Karl Klare's paper on transformative constitutionalism has resonated in academic literature, the jurisprudence of the courts and civil society campaigns for social justice.⁶⁸ He draws heavily on ideas

62 J Meiring *South Africa's Constitution at Twenty-one* (2017) at 210.

63 Constitution (n 17) Preamble.

64 Constitution (n 17) secs 9, 28(6) & 29(2)(c).

65 T Humbly et al *Introduction to law and legal skills in South Africa* (2012) at 39; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* at 352.

66 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* at 150.

67 Klare (n 66) 153; Langa (n 65) 352.

68 S Liedenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) at 25.

introduced by Critical Legal Studies.⁶⁹ Critical Legal Studies is, in brief, an academic, legal, and economic movement originating in 1976. Its main goal is to explore legal systems, (such as institutions and legal education) and to support penetrating systems of unequal and oppressive societal constructs.⁷⁰ Gary Minda identifies the following objectives of Critical Legal Studies. Firstly, the need to demonstrate the indeterminacy of legal doctrines (i.e. the contradictions of law). Secondly, understanding the law's relationship to politics and how politics, sociology, and history impact particular interest groups, and how they benefit from legal decisions despite the indeterminacy of legal doctrine. Thirdly, exposing how legal analysis and legal culture legitimises its own outcomes. Lastly, it advocates for the inclusion of a new or otherwise disregarded social vision and aims to incorporate it into the current legal dispensation.⁷¹

In relation to this, Klare argues that the South African Constitution is not merely a legal document or a set of rules, but rather it is a political document committed to the social transformation of South Africa as a society.⁷² In order to realise the vision of a transformed society, he argues that we need to move away from the conservative legal culture engrained in South Africa after years under an oppressive and draconian system of apartheid. A key component in this shift will be adjudication as a mechanism of law-making and social change.⁷³

Klare advances his argument through three avenues. First, he argues that a reading of the Constitution should be post-liberal as it is explicitly committed to large-scale egalitarianism and social transformation.⁷⁴ A post-liberal constitution must be understood in terms of its aims, aspirations, and overall context. This is in contrast to a liberal reading in the sense that the Constitution envisions a collective self-determination parallel to promoting individual self-determination.⁷⁵ The post-liberal elements of the Constitution include the need for social, redistributive, and egalitarian reform which is least partly horizontal (i.e. also implemented on private bodies), allows for participatory governance, and is both multicultural and self-conscious about its historical setting and its transformative role and mission.⁷⁶ These post-liberal and transformative aspects thus require a different way of thinking about the law in order for it to be consistent with transformation.⁷⁷

69 Klare (n 66) 187.

70 G Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995) at 106.

71 Minda (n 70) 108.

72 Klare (n 66) 156-157.

73 Klare (n 66) 146.

74 Klare (n 66) 151.

75 Klare (n 66) 153.

76 Klare (n 66) 150.

77 Klare (n 66) 156.

Secondly, the impulse to interpret the law in a formalistic way must be scrutinised in comparison to critical conceptions of law and adjudication.⁷⁸ Formalistic reasoning regards rights as objective, value-free, and having a fixed meaning. They are removed from their social context and applied strictly without due consideration of the consequences flowing from such enforcement.⁷⁹ Formalistic reasoning draws a parallel with positivism often employed by the courts of the apartheid era. Legal positivism advances that the command of the sovereign is absolute and that there is a strict need to separate law and morality.⁸⁰ Legal interpretation is thus seen as a mechanical search for the legislature's intention which is applied rigidly once found.⁸¹ It follows that formal equality subscribes to the traditionally liberal notion of similarity, thereby promoting the symmetrical enforcement of equality which ignores group status, race, and social conditions with the assumption that everyone is similar.

Klare argues that pursuing the political project of transformation through law is not necessarily in conflict with professional legal practice.⁸² Adjudication is, by nature, constrained because judges work with rules, arguments and processes which limit the scope of possible judicial outcomes.⁸³ However, these constraints are not inherent, and when deconstructed it becomes apparent that they instead have a cultural and individual psychological origin.⁸⁴ Klare thus argues that there is a need for a more transparent and honest consideration for the politics of adjudication and that the mythical line between law and politics must be eroded as the two cannot be divorced from a judge's interpretive process.⁸⁵ A core issue faced by judges is balancing the idea of restraint in terms of the rule of law with the need to engage in a project of constitutionally mandated transformation.⁸⁶ He proposes that a revisited and somewhat more politicised understanding of the rule of law and adjudication is needed to mitigate this.⁸⁷

Lastly, Klare identifies South African legal culture as conservative and notes that this culture is a barrier to transformative constitutionalism.⁸⁸ Legal culture is described as 'professional sensibilities, habits of mind, and intellectual reflexes' which shape

78 Klare (n 66) 156.

79 Liedenberg (n 68) 44.

80 J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *South African Law Journal* at 183.

81 Dugard (n 80) 186.

82 Klare (n 66) 157.

83 Klare (n 66) 159.

84 Klare (n 66) 160-161.

85 Klare (n 66) 163 & 167.

86 Klare (n 66) 149.

87 Klare (n 66) 150.

88 Klare (n 66) 168 & 170.

how legal actors think and behave in a given situation.⁸⁹ He states that South African legal culture is based on a highly structured and technical interpretation of legal text and an unwillingness to exhaust legal materials, possibilities, and pliability.⁹⁰ This links with his second point that there needs to be a break away from formalistic reasoning.

7.2 The strive for substantive equality and transformation in the field of labour law

Labour law, and the reforms associated with it, aim to achieve substantive equality by taking into account the fact that employer/employee relationships are unequal by nature.⁹¹ Substantive equality, as outlined by Klare, entails equality in the lived social and economic circumstances and opportunities needed to experience human self-realisation, including the full and equal enjoyment of all rights and freedoms.⁹² The Constitutional Court has confirmed before that the wording of the equality clause in the Constitution is indicative of favouring substantive equality over formalism.⁹³ In *President RSA v Hugo*, Goldstone J emphasised that in order to achieve equal worth and freedom, we cannot insist on applying identical treatment in all circumstances.⁹⁴ Each individual case requires due consideration to the impact of discrimination in light of the Constitution's goals and surrounding contextual factors, such as the position of the complainants in society and their vulnerability and history, to understand the impact of the discrimination.⁹⁵

Sandra Liedenberg suggests that substantive equality is important because it brings to the surface the theoretical understandings and values informing particular interpretations of rights. Thus, adjudication on socio-economic rights has the potential to enrich political and legal culture over the meaning and implications of rights. As a result, a responsive jurisprudence that can combat marginalisation and various forms of social and economic deprivation can be developed.⁹⁶

The unequal relationship between employers and employees is exacerbated between domestic workers and their employers, which

89 Klare (n 66) 166.

90 Klare (n 66) 168-171.

91 du Toit (n 58) 5.

92 Klare (n 66) 154.

93 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) para 62; *S v Zuma* 1995 4 BCLR 401 (CC) para 15; *S v Makwanyane* 1995 6 BCLR 665 (CC) para 9.

94 1997 6 BCLR 708 (CC) paras 729F-G.

95 *President RSA v Hugo* (n 94) paras 729F-G & 1510E; JL Pretorius et al *Employment Equity Law* (2020) at 2-5.

96 Liedenberg (n 68) 51.

consequents an even greater need for appropriate regulation and relief afforded to the profession. The Court in *Mahlangu* evaluated the issue of domestic work despite the respondent conceding to most, if not all of the applicants' arguments. The Court did not shy away from 'doing the work' by formulating an argument and providing some guidance on the matter for future reference.

Courts should adopt this kind of approach in adjudicating matters concerning historically marginalised groups of people especially in cases where the parties are at odds because this illustrates a commitment to transformation and to investigating the real-life impact on the lives of domestic workers. The Constitution is not self-executing, it should be interpreted and applied in a transformative and progressive way.⁹⁷ It is therefore the role of the judge, and especially the Constitutional Court, to provide sound legal interpretation and to set precedent on how the judiciary can effect social change.⁹⁸

7.3 The effect of the Constitutional Court's decision in *Mahlangu*

In analysing COIDA, the Court noted that when interpreting the rights of the Bill of Rights, international law needs to be taken into account.⁹⁹ In addressing the socio-economic rights in question, the Court also took cognisance of the transformative purpose of the Constitution and investigated substantive equality by taking into account the unique circumstances of domestic work in order to achieve equal worth and freedom.¹⁰⁰ The *Harksen* test¹⁰¹ was thereafter applied with regards to the possible infringement on the workers' rights and looked at whether the differentiation served any rational governmental purpose.¹⁰²

It was found that section 1(xix)(v) of COIDA failed this test. The Court not only took cognisance of the transformative purpose of the

97 Klare (n 66) 155-156.

98 Klare (n 66) 157.

99 *Mahlangu v Minister of Labour* (n 2) para 41; Constitution (n 17) sec 39(1)(b).

100 *Mahlangu v Minister of Labour* (n 2) para 55; du Toit (n 58) 15.

101 *Harksen v Lane N.O* 1997 11 BCLR 1489 (CC). In brief, the Harksen test is as follows: Firstly, the court must discern whether the provision in question differentiates between people or categories of people. If so, it must be determined whether there is a rational connection to a legitimate governmental purpose. If no such connection exists, there is a violation of section 8(1). However, even if it does bear a rational connection, it might nevertheless amount to discrimination. Whether the differentiation amounts to unfair discrimination requires a two-stage analysis. Namely, assessing whether the discrimination is on a specified ground and whether that discrimination was unfair. Lastly, if the discrimination is found to be unfair then a determination must be made as to whether the discriminatory act or provision can be justified under the limitations clause.

102 *Mahlangu v Minister of Labour* (n 2) paras 71-72; Constitution (n 17) sec 9(1).

Constitution but investigated substantive equality on a deeper level which encompassed the intersectional and indirect discrimination of domestic workers.¹⁰³ Early on in the process of determining discrimination, the *Harksen* test was employed to test the level of differentiation faced by domestic workers when compared to other employees. The Court could have left the matter there, but opted for a deeper exploration of the social structures that still uphold inequality and that influence the experience of marginalised people. The Court, therefore, exhibited how substantive equality can be used to implement transformative constitutionalism as a project to level the economic playing field.

The Court deconstructed the *status quo*. It explored section 9(3) of the Constitution and the real impact that intersectional discrimination has on domestic workers. It identified them as marginalised people who, despite their best efforts, remain in a cycle of poverty that they cannot seem to escape.¹⁰⁴ Further, this cycle of poverty is purported by the lack of legal protection. Understanding intersectionality will hopefully achieve the progressive realisation of South Africa's transformative constitutionalist goals.¹⁰⁵ In this case, the intersectional discrimination faced by domestic workers comprises mostly of black women who continue to struggle to make ends meet.¹⁰⁶ This approach sheds light on their experiences which are often invisible.¹⁰⁷ Without this interpretive approach, the burden that domestic workers carry and their experiences of racism, sexism, gender inequality, and class stigmatisation will never be sufficiently acknowledged.¹⁰⁸

The Court thus took into account their lived experiences as black women, who are often stigmatised and mostly under-valued, and made a judgment that will affect some reparation to those who have been severely disadvantaged by the system. The Court held that the exclusion of domestic workers from the definition of 'employee' implies that their work is not 'real work',¹⁰⁹ and this connotation thus objectifies the impact of their hard labour in society and infringes on their right to human dignity.¹¹⁰

Understanding the multiple forms of discrimination of vulnerable groups is an indispensable aspect of transformative constitutionalism in present-day South Africa. It obliges judges to not only look at the

103 *Mahlangu v Minister of Labour* (n 2) para 75. The Court's investigation of substantive equality included a comparison between domestic work and other types of professions.

104 *Mahlangu v Minister of Labour* (n 2) paras 90-93.

105 *Mahlangu v Minister of Labour* (n 2) para 79.

106 *Mahlangu v Minister of Labour* (n 2) para 84.

107 *Mahlangu v Minister of Labour* (n 2) para 85.

108 *Mahlangu v Minister of Labour* (n 2) paras 85 & 90.

109 *Mahlangu v Minister of Labour* (n 2) para 108.

110 *Mahlangu v Minister of Labour* (n 2) para 112.

current situation but to also consider the historical, legal, social, and political treatment of a group of people thereby developing a legal culture of justification.¹¹¹ This means that the exercise of power should be explained and the rationale for a decision by government should be based on its logical and persuasive merits. It should not be complied with simply out of fear of punishment or out of force.¹¹²

7.4 Why transformative constitutionalism is still relevant today

Since the introduction of transformative constitutionalism, other jurisprudential theories have surfaced to combat South Africa's struggle against inequality. However, transformative constitutionalism is still relevant to this struggle. Continuing to develop this interpretive approach innovatively will result in remedies aimed at resolving the challenges faced in socio-economic rights litigation.¹¹³ This includes developing a substantive account for the structures underpinning various socio-economic rights in the Bill of Rights. Transformative constitutionalism allows judges to elaborate on the implications of these rights on historically marginalised groups.¹¹⁴

Liedenberg proposes that this approach can help to reform the legal system in a way that is more responsive to the claims of the impoverished. Of course, transformative constitutionalism is not without its limits, but disregard for the doctrine and its potential will lead to missed opportunities to improve the lives of the poor and keep the constitutional vision alive.¹¹⁵

8 Conclusion

The Constitutional Court in *Mahlangu* adopted a transformative approach to the adjudication of domestic workers' rights. It not only analysed the relevant section of COIDA but also took to analysing domestic work in itself by considering the history and the intersectional avenues of discrimination experienced by domestic workers during apartheid and today. The Court aims, with this judgment, to repair the pain and indignity suffered by domestic workers and their families.¹¹⁶ Although the judgment is certainly welcomed and encompassed the transformative goals of the Constitution, the exploitation of domestic workers is still

111 *Mahlangu v Minister of Labour* (n 2) para 95; Klare (n 66) 166.

112 Klare (n 66) 147; E Mureinik 'A Bridge to Where - Introducing the Interim Bill of Rights' (1994) 31 *South African Journal on Human Rights* at 32.

113 Liedenberg (n 68) 77.

114 Liedenberg (n 68) 51.

115 Liedenberg (n 68) 78.

116 *Mahlangu v Minister of Labour* (n 2) para 120.

commonplace in South Africa.¹¹⁷ Due to the general lack of regulation afforded to domestic work, it is highly possible that, despite the gazetted regulations and the judgment, claims for compensation will be swept under the rug and forgotten. For this reason, it is submitted that transformative constitutionalism is not merely a legal theory simply adopted by judges and politicians, but is also a cultural evolution and mindset change that should resonate in everyone's hearts. Only once South Africans themselves realise this will we relish in the Constitution's vision for a free and equal South Africa.

117 Ally (n 33) 8.

BALANCING RIGHTS AMIDST SOCIAL MEDIA SCANDALS: HOW EMPLOYERS CAN DEAL WITH EMPLOYEES' REPUTATION-DAMAGING AND/OR DEFAMATORY SOCIAL MEDIA POSTS

by Amy Pawson*



Abstract

It is unquestioned that social media is present in almost every aspect of our daily lives. Due to the widespread accessibility of posts on social media, comments posted by a person in his/her personal capacity often boils over and negatively affects his/her role as an employee. Posts have the potential to either damage the reputation of an organisation directly or indirectly (the latter being caused by an employee's mere association with the business). Defamatory posts are becoming more and more common and, consequently, social media misconduct clashes are finding their way into dispute resolutions forums. These disputes create a constant battle between the rights of an employer and the rights of an employee. Given that social media misconduct can be rather complex, it is imperative that employers are aware of the legislation governing misconduct to ensure that they are well-prepared to take preventative or swift action should the need arise.

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1 Introduction

The rise of the digital age is evident all around us and has brought with it many advances in technology. The way in which people communicate has undoubtedly transformed,¹ consequently making digital social platforms fundamental tools for communication – for both personal and business purposes.² However, this surge in the use of technology, particularly social media, has started to affect the way employees conduct themselves on online platforms. Social media posts are easily accessible, thereby blurring the lines between what employees post in their private/personal capacities (often about their employers) and the effect that this has on the employee-employer relationship.³

Although many employees are under the impression that they are permitted to say anything that they desire on social media platforms, this is rarely the case.⁴ Many moral and/or legal obligations may arise when dealing with one's social media presence. It is important for employees to know that their views expressed on online or digital platforms have a much greater impact, as opposed to non-digital conversations. This is due to, *inter alia*, digital platforms reaching a far wider audience, as well as providing a permanent record of the communication.⁵

Many trends are emerging in the ways in which employees are interacting with, and on, social media. An increasingly topical issue concerns the wide-reaching effects of employees expressing themselves on social media and then having these personal opinions affect their role as employees.⁶ Posts by employees can be categorised in two forms. Firstly, posts may be directly aimed at employers or the business and may be alleged to be defamatory. Although a certain social media post may be viewed as defamatory by the employer, it is imperative that he/she is able to prove such.⁷

1 L Clark & SJ Roberts 'Employer's use of social networking sites: A socially irresponsible practice' (2010) 95(4) *Journal of Business Ethics* at 507.

2 R Davey & RYL Dahms-Jansen 'Social media and strikes' (2012) 12(10) *Without Prejudice* at 26.

3 SP Phungula 'The clash between the employee's right to privacy and freedom of expression and social media misconduct: What justifies employee's dismissal to be a fair dismissal?' (2020) *Obiter* at 504.

4 *Sedick and Another v Krisay (Pty) Ltd* 2011 (8) BLLR 979 (CCMA) (*Sedick*) para 53; *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* 2014 (7) BALR 716 (CCMA) para 17.

5 S Nel 'Social media and employee speech: The risk of overstepping the boundaries into the firing line' (2016) 49 *Comparative and International Law Journal of Southern Africa* at 183.

6 Phungula (n 3) 505.

7 JM Burchell *The Law of Defamation in South Africa* (1985) at 35; D Iyer 'An Analytical Look into the Concept of Online Defamation in South Africa' (2018) 32(2) *Speculum Juris* at 126.

Secondly, posts may not directly refer to the employer but, nevertheless, have the capability of negatively affecting the employer, for example, by bringing the employer's name into disrepute. In the latter instance, posts are often alleged to be racist, sexist or contain some other remark that could damage the employer's reputation. A major risk for employers arises when employees make comments in their personal capacity, but due to the employee working for the employer, the association between the two tarnishes the reputation and brand image of the employer.⁸ With the increased use of digital communication, the above-mentioned categories of posts are filling social media platforms at a rapid pace. This is evident from the increase in unfair dismissal disputes based on social media that have mainly been brought before the Council for Conciliation, Mediation and Arbitration (CCMA), and a few before the Labour Court.

This article first investigates the current legislative framework concerning social media misconduct and the circumstances under which an employee may be dismissed for publishing certain posts on social media. Second, it examines the rights that are affected through social media [mis]conduct and whether a balance may be struck between the rights afforded to employers and the rights afforded to employees. Third, it critically examines how social media misconduct has been addressed by the courts and the CCMA. Last, a few practical recommendations are provided in relation to the steps that employers may take to ensure that future social media misconduct cases are dealt with in an effective (and hopefully preventative) manner.

2 Background

There is no doubt that digital technology permeates almost every aspect of daily life. The most common method of communicating via digital technology is on social media networking sites such as Facebook, Twitter, LinkedIn, and Instagram.⁹ The popularity of these platforms is brought about by the many advantages that they offer, not only within the personal lives of their users, but also within various business and employment sectors.

A general benefit of social media is its creation of a steady flow of information within the workplace and its establishment of channels of communication with clients, colleagues, and peers.¹⁰ For companies and businesses, an advantage of social media is its ability

8 Phungula (n 3) 505.

9 Iyer (n 7) 125.

10 TM Thompson & NO Bluvshstein 'Where technology and the workplace collide: An analysis of the intersection between employment law and workplace technology' (2008) *Privacy & Data Security Law Journal* at 285.

to act as an effective tool for reaching and communicating with a wider range of its target market, as well as existing clients.¹¹ However, in contrast to these benefits, social media [mis]conduct has increasingly become a material factor in employment litigation.¹² Owing to the controversial nature of social media in creating both benefits and harms, one can understand why it has been described as ‘being both a blessing and a curse [within] the working place.’¹³

When examining the potential dangers of social media, employees’ increased use of technology has led to greater levels of employee misuse, discipline for such misuse, and ultimately matters being taken to dispute resolution bodies, such as the CCMA.¹⁴ During these disputes, many employers have had to determine whether or not an employee’s posted comments (which are alleged to be offensive, racist and/or defamatory) justify the enforcement of disciplinary action or classification as dismissible offences.¹⁵

When these disputes arise, the first point of reference for employers is usually to investigate what statutory obligations are placed on them in terms of addressing the alleged misconduct of their employees on social media. The next section will therefore serve as a foundational basis in addressing defamatory social media posts by outlining the legislative framework that arises within employee/ employer disputes.

3 Legislative Framework

3.1 Labour Relations Act

A key piece of legislation regulating dismissals for employee misconduct is the Labour Relations Act (LRA).¹⁶ The LRA importantly distinguishes fair dismissals from unfair dismissals and outlines the substantive and procedural requirements for fair dismissal proceedings. Section 188 of the LRA states:

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

11 B Solis ‘Social Media is About Sociology Not Technology’ 28 August 2007 <http://www.briansolis.com/2007/08/social-media-is-about-sociology-not/> (accessed 01 May 2021).

12 RC Daugherty ‘Around the Virtual Water Cooler: Assessing, Implementing and Enforcing Company Social Media Policies in Light of Recent National Labor Relations Board Trends’ 5 August 2011 <https://www.mcbrayerfirm.com/blogs-Employment-Law-Blog,around-the-virtual-water-cooler-assessing-implementing-and-enforcing-company-social-media-policies-in-light-of-recent-national-labor-relations-board-trends> (accessed 01 May 2021).

13 Phungula (n 3) 505.

14 Thompson & Bluvshstein (n 10) 284.

15 Phungula (n 3) 505.

16 Labour Relations Act 66 of 1995.

- (a) that the reason for dismissal is a fair reason –
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.

In line with this provision, dismissals must be substantively and procedurally fair. Furthermore, a dismissal can be fair if it is based on one of three grounds namely: misconduct; incapacity; or operational requirements.¹⁷

If employees make use of abusive language, such as swearing, or remarks that instigate racism,¹⁸ religious discrimination,¹⁹ sexism²⁰ or any other discriminatory action, they will be found guilty of misconduct.²¹ This use of abusive language may occur in person or on social media platforms and the context of these abusive remarks will obviously be considered.²²

It is clear that the most plausible ground in the LRA for reputation-damaging, racist, or defamatory social media posts is that of misconduct, which involves a contravention of a rule or standard regulating conduct in, or of relevance to, the workplace.²³ It is important to note that these acts of misconduct are not only limited to social media platforms, but apply to any written communication, including email.²⁴

Schedule 8 of the LRA consists of the 'Code of Good Practice: Dismissal' (Dismissal Code).²⁵ The Dismissal Code deals with some important aspects relating to dismissal on conduct and capacity grounds. If an employer wishes to dismiss an employee for misconduct, that employer must follow the steps set out in the Dismissal Code to ensure substantive and procedural fairness in this regard. There are various guidelines to be followed in the case of dismissal for misconduct and these are set out below.²⁶

Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;

17 Labour Relations Act (n 16) sec 188(1).

18 *NUM & Another v CCMA & Others* (2010) 31 ILJ 703 (LC).

19 *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA).

20 *Rautenbach v Relyant Retail (Pty) Ltd* (2005) 8 BALR (CCMA).

21 M Budeli-Nemakonde, W Germishuys & E Manamela *Labour Law Rules* (2017) at 199.

22 Budeli-Nemakonde et al (n 21) 199.

23 Schedule 8 of the Labour Relations Act: The Code of Good Practice: Dismissal (Dismissal Code) Item 7.

24 Nel (n 5) 190.

25 Labour Relations Act (n 16) Schedule 8.

26 Dismissal Code (n 23) Item 7.

- (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- (iii) the rule or standard has been consistently applied by the employer; and
- (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.

Determining whether an employee contravened a rule or standard is a matter of fact and generally, the onus is on the employer to establish. The rule must regulate conduct in, or be relevant to the workplace.²⁷ The validity of the rule must be considered as rules that purport to regulate conduct outside of the workplace or that have little to no relevance to the employment relationship would generally be invalid.²⁸ The validity of a rule must be determined on a case-by-case basis and factors such as the nature and requirements of the employer's business should be considered.²⁹ Since the rule must be valid and reasonable, unlawful or simply capricious rules cannot form the basis of an unfair dismissal.

As can be seen from the quoted item of the Dismissal Code above, another pre-condition for a finding of dismissal is that the employee must have knowledge of the rule. However, this requirement does not mean that the employer must establish actual subjective knowledge, as it is sufficient that the employee only be reasonably expected to have knowledge of the rule.³⁰ There have been many instances where employees have been expected to know that misconduct was not acceptable, without being specifically advised of this.³¹ There are certain standards of ethics that are expected of employees, and it is not always necessary for these standards to be encompassed within the employer's employment policies.³² Furthermore, to ensure fairness standards are met, employers should apply the same standards of conduct to all employees.³³ Finally, dismissal must be the appropriate sanction for contravening this rule. The appropriateness of dismissal depends on, *inter alia*, the seriousness of the misconduct, as well as its impact on the employment relationship.³⁴

In terms of identifying which party carries the onus of proof, generally, the employee must establish the existence of the dismissal.³⁵ If the employee succeeds in doing this, the employer must

27 A van Niekerk & N Smit *Law@work* (2019) at 305.

28 van Niekerk & Smit (n 27) 305. See section 5 below.

29 van Niekerk & Smit (n 27) 306.

30 van Niekerk & Smit (n 27) 307.

31 As above.

32 Phungula (n 3) 516.

33 van Niekerk & Smit (n 27) 307; Dismissal Code (n 23) Item 3(6).

34 van Niekerk & Smit (n 27) 307; Dismissal Code (n 23) Item 3(4).

35 Labour Relations Act (n 16) sec 192.

prove that the dismissal is fair.³⁶ For a dismissal based on the ground of misconduct, the CCMA does not review the procedure adopted by the employer but rather relies on the facts that are established by the evidence led at arbitration.³⁷ In many instances, the commissioner is required to determine whether a sanction of dismissal is fair for the misconduct that has been established. Previously, controversy existed with regards to the deference, if any, that a commissioner may extend to employers' decisions regarding dismissal.³⁸ However, our Constitutional Court has held that it is the commissioner's sense of fairness, and not the employer's view, that must prevail in these instances.³⁹

3.2 Common law

Most employment relationships are regulated by employment contracts which set out the rights and obligations of the employers and employees.⁴⁰ These rights and obligations often embody principles that stem from the common law duties of employers and employees. A prominent common law duty that finds application to the current topic is that of the duty of good faith between an employer and an employee.

This duty obligates employees to act honestly, within the best interests of the organisation, and to show a commitment towards the success of the employer, even in instances where this obligation is not expressly mentioned in the contract of employment.⁴¹ The employee owes a fiduciary duty and stands in a position of confidence and trust in relation to the employer.⁴² If an employee fails to comply with this obligation, it may constitute a breach of contract⁴³ and the employer will, consequently, have contractual remedies at his/her disposal. However, labour legislation is purpose-built for employment disputes and remedies should, therefore, firstly be sought in terms of these statutes, if applicable.⁴⁴

Trust plays an important role in the employment relationship. Since business risk is based to a large extent on the trustworthiness of company employees, an accumulation of individual breaches of trust can thus have significant economic repercussions.⁴⁵ There are many

36 As above.

37 van Niekerk & Smit (n 27) 259.

38 As above.

39 *Sidumo v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC).

40 Nel (n 5) 187-188.

41 L Osman 'Social Media: A Menace or Benefit in the Workplace?' (2013) *South African Pharmaceutical Journal* at 2; van Niekerk & Smit (n 27) 93.

42 van Niekerk & Smit (n 27) 93.

43 van Niekerk & Smit (n 27) 100.

44 *Chirwa v Transnet Ltd & Others* [2008] 2 BLLR 97 (CC) para 41; Budeli-Nemakonde et al (n 21) 44.

45 *Miyambo v CCMA & Others* [2010] 10 BLLR 1017 (LAC) para 13.

ways in which the abovementioned common law duty can be violated, such as through the repudiation of the employment contract; violating management's integrity; harming the organisation's legitimate business interests; or bringing the name of the company into disrepute.⁴⁶ One manner in which an employee may bring the company name into disrepute is by expressing a negative or defamatory view about the employer, client, or customer on social media platforms. This type of behaviour, depending on the extent thereof, may not only lead to the employee possibly facing disciplinary action and/or dismissal, but also raises the crucial question: How does one balance the rights of employees with those of employers?

4 Conflicting rights

Legislative and/or statutory provisions are not the only defences raised by parties in social media disputes, as constitutional rights are also often brought to the forefront of these matters. Constitutional rights have the potential to affect labour laws in a variety of ways,⁴⁷ such as: testing the validity of legislation seeking to give effect to fundamental rights; interpreting legislation; or developing the common law.⁴⁸ Furthermore, these rights may also be used by employers when instituting action, and by employees when defending such action. The most common defences raised by employees, when faced with alleged social media misconduct are, *inter alia*, the right to freedom of expression and the right to privacy.⁴⁹ Although there are a vast number of rights that are affected by social media conduct and potential misconduct, the most prominent and often most difficult balance is that between an employee's rights to privacy and freedom of expression versus the employer's right to a good reputation.

4.1 Defamation and protecting an employer's good name

The reputation and good name of an organisation are of utmost importance to the employer. An employer's interest lies in ensuring that the business grows, expands, and is profitable and these results are often dependent on the good name and brand image of the

46 P MacDonald & P Thompson 'Social Media(tion) and the Reshaping of the Public/Private Boundaries in Employment Relations International' (2016) *Journal of Management Reviews* at 78-79.

47 van Niekerk & Smit (n 27) 41.

48 van Niekerk & Smit (n 27) 93.

49 Phungula (n 3) 506; Iyer (n 7) 127.

business.⁵⁰ Therefore, if an employer's reputation is negatively affected, it is likely to cause substantial harm to the success of the business.⁵¹ One of the most common ways in which an employer's reputation can be damaged is through an act of defamation.

Defamation involves the wrongful intentional publication of defamatory statements regarding another person and results in the violation of a person's status, good name, or reputation.⁵² Furthermore, it is known to be one of the main sources of violating one's right to dignity in South Africa.⁵³ As already mentioned, a leading cause of conflict within the workplace arena is when employees post defamatory comments about their employer(s) on social media. Since employees play an integral part in the success of an organisation, any negative remarks made on social media can seriously damage the employer's business.⁵⁴

The law of defamation seeks to achieve a balance between the right to freedom of expression and the right to a good name and reputation.⁵⁵ Although the right to a good name or reputation is recognised in our common law and not specifically mentioned in the Bill of Rights, this right is generally accepted as an independent personality right under the right to dignity in terms of section 10 of the Constitution.⁵⁶ The rights to dignity and a good name are not only limited to individuals, but may also be afforded to juristic persons.⁵⁷ Our courts have accepted that trading and non-trading corporations have a right to their good name and reputation and this can be protected by the usual remedies under the law of defamation.⁵⁸

In *National Media v Bogoshi*⁵⁹ the Supreme Court of Appeal investigated the meaning of 'publication' as an element of defamation. For an employer to be successful, they will, firstly, have to prove the existence of a defamatory publication referring to the

50 D Kumar, P Varma & S Pabboju 'Security issues in social networking,' (2013) 13 *International Journal of Scientific and Research Publications* at 120; M Gotsi & A Wilson 'Corporate Reputation: Seeking a Definition' (2001) 6 *Corporate Communications: An International Journal* at 24.

51 G Mushwana & H Bezuidenhout 'Social Media Policy in South Africa' (2014) 16 *Southern African Journal of Accountability and Auditing Research* at 64.

52 *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) para 18.

53 H Chitimira & K Lekopanye 'A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media-Related Misconduct in the South African Workplace' (2019) 15 *Revista Direito GV* at 27.

54 Phungula (n 3) 516.

55 Nel (n 5) 190.

56 J Neethling & J Potgieter *Neethling-Potgieter-Visser Law of Delict* (2014) at 330; 'Freedom of expression' in van der Merwe (ed) *Information and communications technology law* (2008) at 401.

57 *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) 462.

58 *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) para 30; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A).

59 *National Media v Bogoshi* 1998 (4) SA 1995 (SCA).

employer, and secondly, that it has been published. It was held that 'publication' is the act of making a defamatory statement or the act of conveying an imputation by conduct to a person or persons other than the person who is the subject of the defamatory statement or conduct.⁶⁰ Posts made on social media sites may also form part of 'publications.' It is also evident that an offending post must come to the knowledge of one other person, other than the defamed person or organisation. Examples of other parties who may see the post would include other employees of the employer, or even clients. In many instances, it is the customers of the employer who bring the offending post to the attention of the employer.⁶¹ Therefore, employers must be able to prove publication of the social media post by proving that at least one other person saw it. Thereafter, it must be proved that the post violated the business' good name or reputation. The employer will have to prove that their good name or standing in society has been tarnished in the 'eyes of the community'.⁶²

In *Media Workers Association of SA obo Mvemve v Kathorus Community Radio*, an applicant was dismissed for failing to apologise on social media after posting malicious remarks on Facebook regarding the employer's board of directors, whilst simultaneously claiming that the station manager was a criminal.⁶³ The Commissioner ruled that the dismissal was substantively fair because the applicant had tarnished the image of the respondent by posting unfounded allegations on Facebook without attempting to address their concerns through internal channels.⁶⁴ This case proves that tarnishing a business' name, through posting unfounded allegations without addressing such concerns internally, can lead to a substantively fair dismissal.

However, employers are not the only parties who wish to protect their constitutionally entrenched rights. Employees also desire for their rights, in terms of freedom of expression and privacy, to be upheld.

4.2 An employee's right to freedom of expression and the limitation placed thereon

Section 16 of the Constitution protects an individual's right to freedom of expression. This right embodies the principle that individuals in our society should be able to hear, form, and express

60 C Padayachee 'Employee's Right to Privacy Versus the Employer's Right to Monitor Electronic Communication in the Workplace' LLM thesis, University of KwaZulu-Natal, 2015 at 31.

61 M Potgieter *Social Media and Employment Law* (2014) at 84.

62 M Loubser & R Midgley *The Law of Delict in South Africa* (2012) at 339.

63 *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA) (*Media Workers*).

64 *Media Workers* (n 63) para 5.7.

opinions and views freely on a diverse range of matters.⁶⁵ Freedom of expression lies at the heart of our South African democracy as it recognises and protects the moral values of individuals and facilitates the search for the truth about individuals and/or society at large.⁶⁶

Section 16(1) of the Constitution provides that: '[E]veryone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas [...]'. The term 'other media' encompasses social media, which implies that everyone (including employees) has a right to make commentary on social media platforms.⁶⁷ This is reiterated by the fact that interpreting freedom of expression does not warrant a narrow reading, and would thus include posting statements and photos and sharing other users' content on social media.⁶⁸ In recent times, social media platforms have become innovative mechanisms that allow South Africans to express their views freely. This has highlighted the pivotal role that digital platforms play in safeguarding the right to freedom of expression.⁶⁹

When relating the right to freedom of expression to the employment environment, employees, in most instances, are unaware that this right does not provide an unfettered right to defame others, particularly their employers.⁷⁰ Employees' social media posts must not exceed the limitations set out in section 16(2) of the Constitution. These internal limitations clearly delineate the scope of the right and state that the right does not extend to expression that enlists propaganda of war, incites violence or advocates for hatred on the basis of race, gender, ethnicity, or religion.⁷¹

There are many factors that courts must consider when determining the boundaries of the right to freedom of expression. Judges must take cognisance of the issues involved, the context of the debate, the protagonists to the dispute or disagreement, the language used, as well as the content of the publication.⁷²

65 South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) para 7.

66 As above.

67 Phungula (n 3) 506.

68 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) para 48.

69 Iyer (n 7) 127; R Davey 'Understanding and Managing the Risks of Social Media in the Workplace' 20 July 2015 <https://www.lexology.com/library/detail.aspx?g=db5837b2-b86c-486d-9062-786c6c6a2bbe> (accessed 22 April 2021) 1.

70 V Oosthuizen 'How Far is Too Far for Employees on Social Media?' 2016 <https://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media> (accessed 22 April 2021).

71 Constitution of the Republic of South Africa, 1996 (Constitution).

72 *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Sooknunan t/a Glory Divine World Ministries* 2012 (3) All SA 322 (GSJ) (*Dutch Reformed Church*) para 17.

A Labour Court matter that dealt with these limitations is the *Edcon Limited v Cantamessa and Others* case.⁷³ The facts of the case involve an employee who worked for Edcon as a specialist buyer. She held a senior position but was not part of management.⁷⁴ While the employee was on annual leave in December of 2015, she published the following post on her Facebook account:⁷⁵

Watching Carte Blanch and listening to these f***** stupid monkeys running our country and how everyone makes excuses for that stupid man we have to call a president ... President my f***** ass!! #zumamustfall This makes me crazy ass mad.

A month later, Edcon received an email from Amanda Sibeko, who may have been a customer, complaining about the abovementioned Facebook post.⁷⁶ Sibeko exclaimed that the employee's biography stated that she worked for Edcon and, therefore, Sibeko associated the employee's racist remarks posted on social media with the organisation. Sibeko claimed that Edcon is entrenched in the black community and that racism should not be tolerated.⁷⁷

The Court held that the employee did enjoy freedom of expression; however, her right could not extend to advocating hatred based on race which constitutes incitement to cause harm.⁷⁸ Although the Court ruled that she had the freedom to criticise the government where she felt it erred in its administrative activities, she did not have the right to resort to racial slurs to vent her anger.⁷⁹ It was ruled that her conduct amounted to advocating hatred based on race which incited racial disharmony within the workplace and within the general public.⁸⁰ When noting her misconduct, the Court considered various factors. Cele J found that since she formed part of the senior personnel of Edcon, her misconduct was serious in nature and the post had the potential of seriously harming Edcon's business.⁸¹ The Court reiterated the statement made in *Custance v SA Local Government Bargaining Council*⁸² that defamatory terms that manifest deep-rooted racism have no place in a democratic society.⁸³

The right to freedom of expression may, however, not only be limited by these internal limitations but must also be balanced against other parties' rights. Therefore, in determining disputes, the employer's rights must be balanced against the employee's right to

73 *Edcon Limited v Cantamessa and Others* (2020) 2 BLLR 186 (LC) (*Edcon*).

74 *Edcon* (n 73) para 2.

75 *Edcon* (n 73) para 3.

76 *Edcon* (n 73) para 4.

77 As above.

78 *Edcon* (n 73) para 21.

79 As above.

80 As above.

81 As above.

82 *Custance v SA Local Government Bargaining Council* (2003) 24 ILJ 1387 (LC) para 28.

83 *Edcon* (n 73) para 21.

freedom of expression.⁸⁴ This is when section 36 of the Constitution comes into play, which sets out the requirements that must be applied when determining whether to limit rights contained in the Bill of Rights.⁸⁵

4.3 Right to privacy

Another right that is often raised by employees when confronted on their alleged reputation-damaging or defamatory posts, is the right to privacy. Privacy is often described as an individual condition of life that is characterised by seclusion from the public and publicity.⁸⁶ The right to privacy is recognised in the South African legal system within the provisions of section 14 of the Constitution and empowers persons to have control over their affairs.

Since social media has become a regular medium of communication for people on a worldwide scale, it has created difficulties within the workplace in ensuring that both employees' and employers' rights to privacy are protected. It must be remembered that the right to privacy is also not free from limitations. This is echoed by the words of the judge in *Bernstein v Bester*,⁸⁷ who held that:⁸⁸

[P]rivacy is acknowledged as in the truly personal realm, but as a person moves into the communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

Although the right to privacy has no inherent limitations under the Constitution, it may be limited by policies enforced by the employer which aim to curb social media related misconduct in the workplace.⁸⁹ Such policies may be constitutionally justified in instances where an employee's use of social media affects his/her performance and/or the employer's business reputation.⁹⁰

A relevant case that investigates the issue of privacy and its relation to employment-related posts is *Sedick v Another v Krisray (Pty) Ltd*.⁹¹ The matter involved the dismissal of two employees for posting derogatory comments on Facebook about a senior manager and other senior staff. When the employees raised the defence of the right to privacy, the Commissioner found that Facebook is a public domain and that most of its content is open to anyone who has the

84 Nel (n 5) 189.

85 Constitution (n 71) sec 36.

86 *Bernstein v Bester* 1996 (2) SA 751 (CC) (*Bernstein*) para 94.

87 *Bernstein* (n 86).

88 *Bernstein* (n 86) para 67.

89 Chitimira & Lekopanye (n 53) 14.

90 A Dekker 'Vices or Device: Employee Monitoring in the Workplace' (2004) 16 *South African Mercantile Journal* at 622.

91 *Sedick* (n 4).

time and inclination to search through the information.⁹² Since neither of the employees restricted their settings on their Facebook pages, their pages fell into the public domain.⁹³ Consequently, they had abandoned their right to privacy.

The factors that were considered with regards to the enquiry on the violation of privacy included the content of the post, the place where the comments were posted, to whom they had been directed, and by whom they were said.⁹⁴ The Commissioner found that the employees' behaviour amounted to gross insolence as their comments were serious, intentional, and demeaning. It was further ruled that it is not necessary to explicitly name one's employee on the social media platform, as a link may still be made to the employer if previous or current employees are still able to identify the individual referred to in the post.⁹⁵ Although the actual damage to the reputation of the company was not proved, the potential for damage was sufficient to uphold the dismissals of the employees.⁹⁶ This case highlights that it is important for employees to be aware of their privacy settings on social media platforms and to know whether or not they are, in fact, waiving their right to privacy in this regard.

Another case that involved the dismissal of an employee for destroying the name of the employer in public would be *Fredericks v Jo Barkett Fashions*.⁹⁷ The applicant had posted derogatory remarks about the general manager on her Facebook account and argued that her right to privacy was infringed when she was later dismissed.⁹⁸ Through the interpretation of Item 7 of the Dismissal Code, the Commissioner found that the applicant's actions were not justifiable, and the dismissal was fair, even though the employer had no policy regarding Facebook usage.⁹⁹ This judgment is similar to that of *Sedick v Krisray (Pty) Ltd* in terms of the right to privacy. In both instances, the commissioners took the view that an employer's failure to restrict access to his/her social media profile results in it being open and accessible to the public.¹⁰⁰

In these abovementioned two cases, the argument made by the employees concerning the infringement of their privacy rights were ruled to be unfounded. Since these employees did not restrict access to their social media, they waived their right to privacy as their posts were visible to the public.¹⁰¹ These cases set out a two-step approach

92 *Sedick* (n 4) para 50.

93 As above.

94 *Sedick* (n 4) para 57.

95 *Sedick* (n 4) para 53.

96 *Sedick* (n 4) para 57.

97 *Fredericks v Jo Barkett Fashions* 2011 JOL 27923 (CCMA) (*Fredericks*).

98 *Fredericks* (n 97) para 5.

99 *Fredericks* (n 97) para 6.3.

100 *Fredericks* (n 97) para 6.3; *Sedick* (n 4) para 50.

101 Phungula (n 3) 509.

that may be undertaken by employers, in the applicable circumstances, to disprove a violation of employees' rights to privacy. First, that defamatory posts were published, and secondly, that those defamatory comments were made on a public social media platform, without any restriction thereto.¹⁰²

The question then arises as to what the situation will be in instances where employees do restrict access to their social media accounts. In the abovementioned cases, the Commissioner found that the dismissal was fair due to, *inter alia*, the employees' waiving of their privacy rights due to their failure to limit access to their Facebook accounts. Our courts have yet to provide clarity with regards to how the right to privacy should be dealt with when posts are published on social media accounts that are restricted from the public. It could be argued that due to the restriction placed on the employee's social media account, the recipients of such posts should be specific 'friends' of the employee only and, therefore, the right to privacy may not necessarily be waived.¹⁰³ However, it is still possible for the employer to find out about these posts, even on a restricted social media page. In these instances, the employer would likely still be able to prove defamation, if the requirements thereof are met.¹⁰⁴ Although uncertainty in this regard still exists, one position is clear: an employer's access to an employee's social media account will still be justified if that employee did not restrict access to those comments.¹⁰⁵

There is no doubt that more cases regarding situations where employees restrict the access and/or privacy settings of their social media sites, prior to making defamatory statements about their employers, will soon reach our dispute resolution bodies.

5 Social media misconduct unrelated to the employer and workplace

5.1 Employee liability for off-duty conduct

Generally, employers should only be concerned about employees' conduct that takes place within the workplace. However, this is not a hard and fast rule, since employees can be held accountable for actions performed outside the workplace under certain circumstances. Conduct outside the workplace affects an employer's business if it is prejudicial to a legitimate business interest or if it undermines the relationship of confidence and trust which are vital

102 Phungula (n 3) 510.

103 As above.

104 Phungula (n 3) 510-511.

105 Phungula (n 3) 510.

components to the employment relationship.¹⁰⁶ Therefore, the rule that any misconduct should have a serious impact on the employment relationship before dismissal is justified and applies equally to ‘off the job’ conduct.¹⁰⁷

Employee liability for reputation-damaging or racist posts that do not mention the employer

It has been stated above that employers have a legitimate interest in protecting the image of their business. Posts may, directly or indirectly, damage the reputation of a business. Since employees are representatives of the business, they have a major impact on the business’s reputation.¹⁰⁸ Due to the fact that inappropriate posts made by employees can be associated with the name of the business, the employer may face backlash from customers, prospective customers, and other stakeholders as a result of an inappropriate post (even in instances where the post does not even mention the employer).¹⁰⁹

In *Dyonashe v Siyaya Skills Institute (Pty) Ltd*,¹¹⁰ the Commissioner had to investigate whether the applicant’s dismissal was fair. The employee had been dismissed for posting comments including the phrases, ‘Kill the Boer, we need to kill these ...’.¹¹¹ These posts were not directly aimed at the employer in any way, however, the respondent argued that the posts were racist and were available in the public domain. The Commissioner held that, even though the applicant neither mentioned the name of the employer nor posted the comments during working hours, there was a nexus between the employee’s conduct and his employment relationship with the respondent, which did have an influence on his suitability for employment.¹¹² Therefore, the dismissal was found to be fair.

Although the Labour Court case of *Edcon* was dealt with earlier in the context of freedom of expression, this case also dealt with an employee posting social media comments that did not directly mention the employer nor took place during working hours.¹¹³ The Labour Court looked at the steps and arguments brought forth before the matter reached its doorstep. When an internal disciplinary was held, the Chairperson found, *inter alia*, that although the employee published the post outside of working hours, Edcon was still

106 van Niekerk & Smit (n 27) 302; *City of Cape Town v South African Local Government Bargaining Council and Others* (2011) 5 BLLR 504 (LC).

107 van Niekerk & Smit (n 27) 302.

108 L Thornthwaite ‘Chilling Times: Social Media Policies, Labour Law and Employment Relations’ (2016) 54 *Asia Pacific Journal of Human Resources* at 334.

109 SA Coetzee ‘A Legal Perspective on Social Media Use and Employment: Lessons for South African Educators’ (2019) 22 *Potchefstroom Electronic Law Journal* at 7-8.

110 *Dyonashe v Siyaya Skills Institute (Pty) Ltd* [2018] BALR 280 (CCMA) (*Dyonashe*).

111 *Dyonashe* (n 110) para 7.

112 *Dyonashe* (n 110) para 46.

113 *Dutch Reformed Church* (n 72).

associated with the post as the employee's profile indicated that she was employed by Edcon.¹¹⁴ Furthermore, the Chairperson held that, regardless of whether the communication took place during or after working hours, employees are to communicate in a professional, courteous, and sensitive manner.¹¹⁵

At the CCMA, the Commissioner concluded that the dismissal was substantively unfair. It was reasoned that the post did not pertain to the employee's work at Edcon, and a reasonable internet user would not have associated the post with Edcon.¹¹⁶ Furthermore, the post did not violate Edcon's Social Media Policy as the employee used her own equipment to post the message and it was not done whilst she was at work.¹¹⁷ The Commissioner held that no convincing evidence existed that proved that the employee's post impacted Edcon negatively, financially, or otherwise.¹¹⁸

The case then progressed to the Labour Court. The Court investigated Edcon's legal entitlement to discipline the employee. As a general rule, the employer has no jurisdiction or competency to discipline an employer for non-work related conduct occurring after hours or away from the workplace.¹¹⁹ However, if misconduct cannot expressly be found in the employer's disciplinary code, such misconduct may still be of such a nature that the employer may, nonetheless, be entitled to discipline the employee.¹²⁰ The Court made reference¹²¹ to *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another* where it was held that enquiries relating to misconduct not covered in a disciplinary code involve looking into whether the employee's conduct 'had the effect of destroying or seriously damaging the relationship of employer and employee between the parties'.¹²² The possibility of a damaged reputation did exist as hundreds of Twitter users started to mention the employee's Facebook post and wanted to hear Edgars' thoughts on 'the degrading racist remarks by one of [their] buyers'. Twitter users started demanding answers from Edcon and some even threatened to stop doing business with the franchise.¹²³

Furthermore, the Labour Court held that Edcon would be able to exercise discipline over the employee's conduct if it established the

114 *Edcon* (n 73) para 8.

115 As above.

116 *Edcon* (n 73) para 10.

117 As above.

118 As above.

119 *Edcon* (n 73) para 12; *National Education, Health and Allied Workers Union obo Barnes & Department of Foreign Affairs* (2001) 22 ILJ 1292 (BCA) 1294.

120 *Edcon* (n 73) para 12.

121 As above.

122 *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another* (1993) 14 ILJ 1449 (LAC). See also *Anglo American Farms T/a Boschendal Restaurant v Konjwayo* (1992) 13 ILJ573 (LAC) 589 (G-H).

123 *Edcon* (n 73) paras 5-6.

necessary connection between the misconduct and its business. It was noted that the comments themselves did not relate to the employer-employee relationship, but a connection did exist in that the employee's Facebook page stated that she worked at Edcon. The Court held that the success of Edcon's business was largely dependent on how it marketed itself to the public, thus, having a good name was of utmost importance to Edcon.¹²⁴ The Court, therefore, found that there was a connection between the employee's conduct and the relationship she had with Edcon due to her position as a buyer of the company. It is imperative that buyers are portrayed in a positive light, and if this is not the case, they pose a risk of bringing the name of the company into disrepute.¹²⁵ There was no doubt that Edcon was exposed to the risk of reputational damage and the fact that no damage was proven by Edcon could not be a valid defence.¹²⁶ Overall, the dismissal of the employee was found to be substantively fair by the Labour Court.¹²⁷

From the above cases, it has been proven that it is not necessary for the employee to mention his/her employer directly or explicitly, as long as a nexus exists between the applicant's conduct and his/her relationship of employment with the employer. An employee can thus bring an employer's name into disrepute without even mentioning the name or posting the remarks during working hours.

6 Suggestions for employers to reduce social media misconduct

Although employers can rely on the provisions of the LRA and the Dismissal Code, it would still be beneficial for employers to take steps to ensure organisational clarity regarding permissible social media conduct. Although the implementation of social media policies or disciplinary codes is not mandatory, it would be advisable for employers to take such action as it aids in building a stronger case when proving the violation of a workplace rule or standard. Adopting these guidelines could result in the dismissal being unquestionably fair, both substantively and procedurally.¹²⁸ Furthermore, such policies could help prove the requirement that an employee knew or should reasonably have known about the relevant rule or standard,¹²⁹ as discussed above. The implementation of such policies would make it difficult for an employee to claim that he or she was not aware of such a standard or rule.

124 *Edcon* (n 73) para 16.

125 *As above*.

126 *Edcon* (n 73) para 19.

127 *Edcon* (n 73) paras 21-22.

128 *Phungula* (n 3) 517.

129 *Dismissal Code* (n 23) Item 7.

These policies should not only act as a defensive mechanism to be used before dispute resolution bodies, but can hopefully be proactive in reducing employee ignorance and creating a greater awareness with regards to what constitutes social media misconduct. Furthermore, clear, written, and detailed social media processes have been proven to prevent reputational damage and expensive legal proceedings.¹³⁰

It is important for these policies to encompass all the applicable aspects and safeguards necessary to create clear, enforceable rules and ensure that employees are aware of these provisions and enforce compliance therewith.¹³¹ Employers who do not currently have specific policies addressing social media usage may amend current policies or disciplinary codes to include provisions regarding permissible and impermissible online conduct. Alternatively, employers could create an entirely new policy that deals exclusively with social media conduct. Some of the content that should be included in such a policy would, *inter alia*, be the purpose of the policy, to whom it applies, and the differentiation between employees using social media for business interests versus employees using social media for personal use during and after working hours.¹³² Thereafter, the policy should clearly set out the disciplinary actions and sanctions that may be instituted against employees and under which circumstances these sanctions may be imposed.¹³³

It is not sufficient for employers to merely implement these policies and then become complacent. It is therefore advisable to offer training to employees on the applicable areas of law, such as employment law, privacy and the waiver of said privacy, copyrights, and the rules of the social media platform being used.¹³⁴ This training can be done in conjunction with the implementation of social media misconduct policies. However, it is important for employers to avoid being too restrictive in their policies and to ensure that freedom of expression is still permitted. Given the battle of rights discussed above, businesses must aim to create a balance between the employees' rights and the best interests and good name of the employer.

130 Mushwana & Bezuidenhout (n 51) 64.

131 Daugherty (n 12).

132 J Havenga 'How to Regulate Employee Social Media Use' 9 February 2016 <http://www.phinc.co.za/NewsResources/NewsArticle.aspx?ArticleID=1514> (accessed 02 May 2021).

133 R LaPlaca & N Winkeller 'Legal Implications of the Use of Social Media: Minimizing the Legal Risks for Employers and Employees' (2010) 5 *Journal of Business and Technology Law Proxy* at 16.

134 N Manyathi 'Dismissals for Social Media Misconduct' (2012) *De Rebus* at 7.

7 Conclusion

If employees' posts are alleged to be racist, reputation-damaging and/or defamatory by employers, and can later be proved as such, employers can definitely take action in the form of disciplinary action and/or dismissal. The legislative framework that is available to employers is the relevant misconduct provisions found within the LRA, as well as common law obligations. An employer's knowledge of the LRA is important to ensure that misconduct can actually be proven and, thereafter, that the correct steps and procedures are followed.

When instituting disciplinary action and/or dismissal, there will undoubtedly be a battle between the constitutional rights of the employee, versus the rights afforded to employers. When comments made on social media by employees have the potential to bring the name of the company into disrepute, companies generally claim their right to a good name. Employees, in most instances, defend this by claiming their rights to freedom of expression and/or privacy. When social media-related misconduct cases arise, the CCMA and the courts should consider the circumstances surrounding the disputes in order to attempt to balance the constitutional rights of the employees and the employers' business reputation rights.

Although each case depends on its own merits and the content of the post, the general approach of the courts has been to rule in favour of employers. Many commissioners or judges have found dismissals to be fair in instances where the employee has tarnished the image and good repute of the business (through the employer's proving of defamation) and when such posts have been found on a public domain, accessible to everyone. Furthermore, there are often instances where the employee does not directly mention the employer, but the employee's racist and/or reputation-damaging post can still be associated with the employer. In these instances, if the judge or commissioner finds a nexus between the employee's conduct and his/her employment relationship with the organisation, this will, most likely, negatively influence the employee's suitability for employment.

Recent times have shown an increase in these social media misconduct cases being addressed through various dispute-resolution avenues. In most cases, internal disciplinary actions are held, whereafter it is usually heard at the CCMA. A few matters have progressed to the Labour Court. With the immense utilisation of social media in modern society and the blurring of the line between people's personal and work lives, it is clear that our dispute resolution bodies have only seen the tip of the iceberg in terms of having to deal with these disputes. There is no doubt that matters surrounding social media misconduct will still reach the hands of superior courts and it

is likely that greater clarity on the issues and steps to be taken by employers will be brought about in the near future.

WHY DECOLONISATION AND NOT TRANSFORMATIVE CONSTITUTIONALISM

by Ntando Sindane*



Abstract

Paul Mudau and Sibabalo Mtonga proffer ‘Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of Legal Education in South Africa’ to contribute to the ongoing dialogue about South Africa’s LLB curriculum, and to make studied comments about the need to shift from colonial modes of knowing, thinking, and doing. Their article does well to study the strides that have been made in this discourse, as they make use of the University of Pretoria’s Curriculum Transformation Document as one example of the progress that has been made. Mudau and Mtonga conclude that adherence to transformative constitutionalism may enhance decolonisation and Africanisation, and thus lead to the gradual transformation of legal education in South Africa. This rejoinder sets the argument from a different starting point – it insists that the definitive thrust of the Decolonial Turn in South Africa presents a decided critique of the 1994 constitutional arrangement, therefore rendering transformative constitutionalism a misfit in the quest to decolonise and Africanise South African legal education. This article concludes by asserting that South African law teachers, and anyone interested in the quest to alter colonial pedagogies, should concern themselves with seeking definitional clarity, and the rest shall follow.

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1 Introduction

Conversations about decolonising South African higher education, and specifically the LLB curriculum, are long-drawn and nuanced. Paul Mudau's and Sibabalo Mtonga's '*Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of Legal Education in South Africa*'¹ is a valuable contribution to this ongoing conversation.

Mudau's and Mtonga's article is divided into three sections – the first section introduces the discussion by synoptically setting out the history of how South African universities have grappled with the question of curriculum transformation in the period post-1994. More directly, the introductory section zones in on the challenges facing the LLB curriculum and identifies the four drivers of curriculum transformation as set out in the University of Pretoria's Curriculum Transformation Document. The four drivers are; (1) responsiveness to social context, (2) epistemological diversity, (3) renewal of pedagogy and classroom practices, and (4) an institutional culture of openness and critical reflection. The second section identifies and addresses some questions related to the decolonial discourse as it relates to legal education. Chief among these questions is the need to construct workable meanings of decolonisation and Africanisation to give them authentic applicability to the discipline of legal education. The third section concludes their article.

Mudau and Mtonga introduce their discussion by noting that South Africa's transition from apartheid to democracy was marked by the adoption of a new constitution in 1996.² At the zenith of this new constitutional dispensation is the concept of transformative constitutionalism, whose foundational chassis lays on the desire to create a South African polity based on democratic values, social justice, and fundamental rights.³ The duo proceeds to unpack the history of South Africa's institutions of higher learning, asserting that the transformative constitutionalist demand was the driver of the efforts to transform, reshape, and rebuild South Africa's higher education landscape. They note the strides that have been made in

1 P Mudau & S Mtonga '*Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of Legal Education in South Africa*' (2020) 14 *Pretoria Student Law Review* at 44-57.

2 Note that for purposes of this rejoinder, 'constitution' and 'transformative constitutionalism' will be intentionally written with a small letter 'c' instead of caps. This is in line with rejoinder's central argument against the deification of the constitution. It is also drawn from a similar practice by Mogobe Ramose in MB Ramose '*Towards a post-conquest South Africa: Beyond the constitution of 1996*' (2018) 34 *South African Journal on Human Rights* at 326-341, specifically footnote 1.

3 Mudau & Mtonga (n 2) 45.

the quest to transform higher education, but also point towards existing bottlenecks:⁴

More profoundly, the stagnated transformation of higher education in general and legal education in particular, has made it difficult to overhaul the knowledge systems in the legal discipline at most South African universities which 'remain rooted in colonial and western worldviews and epistemological traditions.

From the onset, the duo set out the objective of their article as one that seeks to assert transformative constitutionalism as the bedrock of transforming the LLB curriculum:⁵

Thus, the immediate objective of this article is to extrapolate the role and significance of transformative constitutionalism in the decolonisation and Africanisation of legal education in South Africa. In a constitutionally mandated transformative context, the systematic approach to the decolonisation and Africanisation of legal education advanced in this article stems from the following four drivers of curriculum transformation ...

This rejoinder will demonstrate that the central thesis of Mudau's and Mtonga's argument is worth a critical inquisition. Mudau and Mtonga claim that the implementation and practical enactment of the objectives of transformative constitutionalism will enhance the quest to decolonise and Africanise South Africa's legal education. This rejoinder departs from Mudau's and Mtonga's claim, instead arguing that (1) there is a very real difference between decolonisation/Africanisation and transformative constitutionalism, (2) decolonial theory and South Africa's Decolonial Turn precisely rejects and criticises the post-1994 constitutional arrangement, therefore making transformative constitutionalism a misfit in the quest to decolonise and Africanise the LLB curriculum, and (3) the commitment to decolonisation means to embrace a comprehensive rethink of South Africa, including its foundational chassis, the constitution.

The regrettable trend of conflating transformative constitutionalism with decolonisation, or speaking about the two concepts interchangeably, is something that has unfortunately become habitual among various South African law academics.

To illustrate the trend of conflating transformative constitutionalism and decolonisation, it is apt to rely on the South African Law Deans Association commissioned book entitled, 'Decolonisation and Africanisation of Legal Education in South Africa'. The authors of the book's six chapters discuss ideas about decolonising South Africa's legal education, and similarly to Mudau and Mtonga, insist that transformative constitutionalism should be the basis upon which the LLB curriculum is decolonised. The book's

4 Mudau & Mtonga (n 2) 46.

5 Mudau & Mtonga (n 2) 47.

second chapter is authored by Enos Tshivase, titled 'Principles and ideas for decolonization and Africanisation of Legal Education in South Africa'. Tshivase relies on Canadian scholarship to conclude that decolonisation is a:⁶

[c]omplex and requires acknowledgement of past and ongoing wrongdoings. It also calls us to action by requiring us to do various things including dismantling assertions made regarding the majority of the population in South Africa who are generally regarded as part of the indigenous people of South Africa.

Tshivase uses the Canadian Truth and Reconciliation Commission to set out principles for decolonising South Africa's legal education arguing that this is apt because Canada's colonial history comports with that of South Africa.⁷ He further argues that decolonial principles should be drawn from the constitution of the Republic of South Africa, 1996 because, '[d]ecolonisation and Africanisation are acts of transformation'.⁸ Tshivase points in the direction of the Preamble of the constitution to suggest that the constitution supports the calls for decolonisation and Africanisation. The 'recognise the injustices of our past'⁹ clause is the operative phrase upon which Tshivase's argument is based, an odd contradiction considering that he earlier correctly read Caroline Ncube's definition of decolonisation. Ncube understands decolonisation as a call to respond to injustices of the present:¹⁰ the prevailing legacy of colonialism and apartheid which continue to impute social, economic, political, and epistemic violence on the black working-class people¹¹ of South Africa.¹² Broadly, Tshivase opines that the outcomes of a decolonised

6 E Tshivase 'Principles and Ideas for the Decolonisation and Africanisation of Legal Education' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 5.

7 Tshivase (n 7) 4.

8 Tshivase (n 7) 4.

9 Constitution of the Republic of South Africa, 1996 (Constitution) second sentence of the Preamble.

10 As this article will later show, it is not entirely wrong to suggest that transformative constitutionalism also focuses on injustices of the past. To be sure, the suggestion that is being made here is that transformative constitutionalism is overly fixated on the post-1994 polity whilst seemingly neglecting the horrors of apartheid, colonialism, and related oppression. It appreciates that the values of social justice, democracy and human dignity exist as a result of a studied reading of South Africa's past, however, these are not accompanied by a comprehensive programme of action as regards, for example, land restitution, and reparations.

11 It is crucial to note that colonialism and apartheid have had an impact on peoples other than black people. For example, there are nuances to be studied on the impact that it has had on queer persons (women specifically), as well as other oppressed and marginalised groups.

12 CB Ncube 'Decolonising Intellectual Property Law in Pursuit of Africa's Development' (2016) 8 *The WIPO Journal* at 34. This definition of decolonisation recognises the 'ongoing' oppression of black people and the prevailing legacy and continued violence on the black body, instead of a definition that suggests that the oppression of black people ended in 1994. Additionally, with the promulgation

legal pedagogy speak to restoring the dignity of Africans and to ensuring the harmonious living of all South Africans.¹³

The book's third chapter is authored by Radley Henrico with the title 'Transformative Constitutionalism and Transformative Legal Education with reference to decolonisation and Africanisation of Legal Education'. The argument advanced in Henrico's chapter is that transformative constitutionalism and Transformative Legal Education may, '[a]ct as vehicles through which the aspirations of decolonisation and Africanisation may be realized'.¹⁴ This is not a novel argument because Quinot has previously proposed Transformative Legal Education as an alternative to current legal pedagogy.¹⁵ Transformative Legal Education is drawn from existing theorising on transformative constitutionalism,¹⁶ and it means that new areas of law must be accommodated in the curriculum with the curriculum shifting paradigms to become constitution-based.¹⁷ Transformative Legal Education represents a move from the conservative legal culture of positivism and formalism in that it transcends merely teaching the content and operation of the law as objective and value-neutral to inculcate diverse methods of reasoning that include aspects of morality, policy,¹⁸ and political sciences.¹⁹

The book's fourth chapter is written by Jonathan Campbell, titled 'Decolonising Clinical Legal Education'. It argues that law clinics serve as a good starting point to understanding the colonially engineered plight of South Africa's indigent people who are largely forgotten by

the Constitution, this definition comports directly with the distinction between colonialism and coloniality canvassed by Nelson Maldonado-Torres. See N Maldonado-Torres 'On the Coloniality of Being' (2007) 21 *Cultural Studies* at 4.

13 Tshivase (n 7) 6.

14 R Henrico 'Transformative Constitutionalism and Transformative Legal Education with reference to decolonization and Africanisation of Legal Education' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 17.

15 G Quinot 'Transformative Legal Education' (2012) 129 *South African Law Journal* at 431. Note that although Henrico draws his conceptualisation of Legal Transformative Education from Quinot, Henrico's approach of conflating transformative constitutionalism with decolonisation is something that Quinot does not do.

16 Quinot (n 16) 422. On the concept of transformative constitutionalism, see K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal of Human Rights* at 146-188. See also K van Marle 'Transformative Constitutionalism as/and Critique' (2009) 20 *Stellenbosch Law Review* at 286-301.

17 Quinot (n 16) 414. This is a perspective that Modiri is diametrically opposed to, insisting that critical legal theory should be a solution to the challenges facing the LLB curriculum, and that this is more expansive than simply affirming the supremacy of the constitution. See JM Modiri 'The crises in legal education' (2014) 46 *Acta Academica* at 10.

18 A van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12 *Fundamina Journal of Legal History* at 13.

19 Quinot (n 16) 415.

the system and are usually unable to access decent legal services.²⁰ To Campbell, decolonisation of higher education means the contextualisation and consequent responsiveness to context; by this, he suggests that there is a '[n]eed to get away from the influence of the former coloniser and to focus on and be responsive to the actual context in which each higher education institution offers its services'.²¹ Campbell insists that 'the Constitution enjoins the courts to recognize the role of law in changing a society in order to make it more equitable for all'.²²

The book's fifth chapter is written by Dawie de Villiers, titled 'Residuary sections, Stare Decisis, Customary Law and the development of common law – How do these concepts affect decolonisation?' The essence of de Villiers' argument is that existing legal concepts are fit for the purpose of decolonising the curriculum and need merely be understood in a transformative way. He studies four legal concepts, namely (1) the practical implications of residuary sections, (2) the doctrine of *stare decisis*, (3) the role of customary law, and (4) the constitutional obligation for courts to develop the common law.²³ The four legal concepts are linked not to decolonisation nor Africanisation, but instead to the constitution, suggesting the outlandish view that decolonisation and transformative constitutionalism share the same meaning, aspirations, and worldview. This belief protrudes conspicuously when he remarks that the constitution 'embodies the spirit of what it means to "decolonise"'.²⁴ de Villiers further asserts that '[customary law] will continue to evolve within the context of its values and norms consistently with the Constitution'. Indeed, this is telling of de Villiers' opinion that all of the law's development should happen within the confines of the constitution, notwithstanding the fact that

20 J Campbell 'Decolonising Clinical Legal Education' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 33. This is a dominant feature in the neo-apartheid South African reality as illustrated by Tshepo Madlingozi. See also 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* at 128.

21 As above.

22 J Campbell (n 21) 35.

23 D de Villiers 'Residuary sections, Stare Decisis, Customary Law and the development of common law – How do these concepts affect decolonization' in E Tshivase, G Mpedi, & M Reddi (eds) *Decolonisation and Africanisation of Legal Education in South Africa* (2019) at 49.

24 de Villiers (n 24) 76. de Villiers further states that, 'The question on the decolonization of the law cannot be separated from the decolonization of legal education and the latter cannot be divorced from transformative constitutionalism'.

the constitution is in itself a repugnancy clause that stifles the development of African customary/indigenous law.²⁵

de Villiers concludes the chapter by insisting that South Africa became an independent republic in 1961 and that what was left to complete the decolonisation project was for it to rid its legal system of colonial (read English) influences.²⁶ To this end, he observes that '[m]uch has been achieved in decolonising the field of the law of evidence', meaning that many English law influences have been done away with, and therefore decolonisation has been achieved.²⁷ It would appear from de Villiers' account of political history that South Africa has been decolonising its law since 1961 by trying to gradually eradicate the pernicious English colonial influence on the pure Roman-Dutch common law principles and doctrines – the same law proffered and ardently enforced by racist/colonial Nationalist Party appointments to the bench.²⁸ The assumption that a court's mere departure from English law constitutes decolonisation²⁹ is just one example of wayward thinking, based on a thorough misunderstanding of decoloniality that fails to appreciate that the transition from British colonialism to apartheid did not present a break from colonialism, and thus does not constitute decolonisation.³⁰

It is against the background laid above that the argument of this rejoinder will be propounded in four sections. Following this

25 de Villiers (n 24) 65. The claim that the constitution is actually a repugnancy clause for the development of African customary and indigenous law is explained with greater depth by Emile Zitzke in 'The history and politics of contemporary common-law purism' where he generally studies the spectre of common-law purism from a critical legal realist perspective. Zitzke decisively argues against the notion that the constitution is an instrument with which to decolonise South Africa. He does so by suggesting that the constitution is a Eurocentric document that acts as a repugnancy clause towards the development of both customary law and the creation of new laws that seek to decolonise the condition of colonised and dismembered black peoples. See E Zitzke 'The history and politics of contemporary common-law purism' (2017) 23 *Fundamina Journal for Legal History* at 218.

26 de Villiers (n 24) 79.

27 de Villiers (n 24) 80.

28 See Zitzke's critique at Zitzke (n 26) 185-230. See also van der Walt (n 19) 1-47. van Marle has shown how both English law and Roman-Dutch law in particular, are responsible for the upkeep of racism within legal culture and how these laws have been integral in developing elite cultural nationalism. See also K van Marle 'The spectacle of Post-Apartheid Constitutionalism' (2007) 16 *Griffith Law Review* at 416.

29 de Villiers (n 24) 54-55

30 This sort of thinking is something that is carefully studied by Zitzke in 'The history and politics of contemporary common-law purism' where he demonstrates the pre-1994 political/ideological differences between English-leaning judges and the Afrikaans National Party leaning judges. For example, he argues that the Afrikaaner judges were largely against English law influences in South African law, and that this tended to present itself as a critique of constitutionalism. Zitzke demonstrates that this Afrikaaner anti-constitutionalism should not be confused with decolonial critiques because decoloniality does not call for common law purism but rather seeks for the dismantling of any form of purism and universality. See Zitzke (n 26) 218.

introduction, the second section defines and discerns between transformative constitutionalism and decolonisation/Africanisation. The third section explores models and conceptualisations of transformed legal curricula that embrace decolonisation without having to rely on transformative constitutionalism and the constitution. The last section concludes this rejoinder.

2 Discerning decolonisation and transformative constitutionalism

Why decolonisation and not transformative constitutionalism? The response to this question is emblematic of the object of this rejoinder. This segment of the article demonstrates that there is a valid definitional variance between decolonisation and transformative constitutionalism. It insists that the claim that the two can be concurrent, joint, and interchangeable tools to decolonise legal education in South Africa is false, regrettable, and unfortunate.

It cannot be denied that there are overlaps in certain core values that underpin both decolonisation and transformative constitutionalism.³¹ However, the epistemic and ontological starting points differ considerably. For example, decoloniality frames the starting point of decolonisation as studying the three localities of coloniality, namely the coloniality of Being, Power, and Knowledge. To be sure, the coloniality of Being has to do with how the coloniser dismembered the 'Being' of colonised bodies, using the Cartesian ontological axiom that says, 'I think, therefore I am'. The coloniser

31 For example, it could be argued that 'equality' is a value that is embodied by both the constitution and as well as decolonisation, but upon closer inspection, there are operative divergences between how decolonial theory and transformative constitutionalism conceptualise equality. Equality before the law appears to be a decolonial value, until you ask questions about the epistemic (in)justice of the law itself. Indeed, the positing of equality before the law as a decolonial value does not take into account the critique of the law, most certainly the constitution, as one that continues the colonial onslaught on the black people of South Africa. Equality before the law is a thorny issue because decoloniality posits that equality can only be attained among Beings (humans). The persisting colonial order renders the colonised as non-humans because their epistemic and ontological concerns were not taken into account when the constitution was discussed and agreed upon in the period between 1990 and 1996. The epistemic and ontological concerns of the colonised include the paying of reparations, returning stolen land without compensation, social justice, an equitable share in the country's mineral wealth, and the re-membering of the dismembered knowledge(s) of the colonised. Indeed, these are some of the ingredients that are needed to re-humanise the de-humanised. As a result, the constitutional demand of equality is as good as placing the cart before the horse, because the question of equality naturally arises only after the de-humanised and have been re-humanised. In a nutshell, there can never be equality between beings and non-beings.

inverted this axiom, effectively asserting that black people (and the subaltern) are not Beings because they do not think.³²

The dismembering of the colonised body's Being continues to prevail in legal academy, not as a mistake of history but because the academy persists to embrace the colonial logic that insists that alternative epistemologies have no space in the academy precisely because of their assumption that colonised bodies are not Beings and cannot think or produce knowledge.³³ The decolonial lens insists that prevailing coloniality relegates black (and all colonised) persons to non-Beings. Decoloniality embraces the three localities to demonstrate that the continued dehumanisation of black (colonised) people at a grand scale is seen in the reality of their social death,³⁴ rampant poverty, and related non-human dwelling.

Transformative constitutionalism, on the other hand, assumes that all persons are equal and are duly humanised by the promulgation of the constitution.³⁵ This constitutionalist assumption is borne from the equality, human dignity, and right to life demands contained in the Bill of Rights. Transformative constitutionalism assumes that the constitution and the 1994 episode present a break from colonial oppression, whereas decoloniality construes the constitutional era as the continuation of a subtler form of colonialism, aptly referred to as coloniality. Unlike scholars of transformative constitutionalism,

32 W Mignolo *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (2012) at 12. Mignolo explains that in the 16th century Spanish missionaries came into contact with people from the Global South and declared that people shall be judged (engaged with) on the basis of their (in)ability to read and write, and use alphabet. At 3, he explains that towards the 18th century and the beginning of the 19th century, the yardstick was no longer the ability to read and write in alphabets, but rather 'history'. The resultant effect of this was that those who could read/write in alphabet were said to have had a history, and those who could not read/write in alphabet had no history. To be sure, the function of relegating the people that could not read/write to 'sub-human' and declaring that their inability to read/write in alphabet also meant that they do not have a history is at the centre of the coloniality of knowledge, and it is what Mignolo refers to as the 'subalternization of knowledge'.

33 For a deepened study of the three localities of coloniality, see generally R Grosfoguel 'Colonial difference, geopolitics of knowledge, and global coloniality in the modern/colonial capitalist world-system' (2002) 25 *Review Fernand Braudel Center* at 203-224; R Grosfoguel 'Decolonizing post-colonial studies and paradigms of political-economy: Transmodernity, decolonial thinking, and global coloniality' (2011) 1 *Journal of Peripheral Cultural Production of Luso-Hispanic World* at 1-37; S Ndlovu-Gatsheni 'Perhaps decoloniality is the answer? Critical reflections on development from decolonial epistemic perspective' (2013) 43 *Africanus: Journal of Development Studies* at 1-12; S Ndlovu-Gatsheni 'Decoloniality in Africa: A continuing search for a new world order' (2015) 36 *Australasian Review of African Studies* at 22-50.

34 On the concept of social death, and in the context of decolonial theory, see, generally, I Yousuf 'Burdened by a Beast: A brief consideration of social death in South African universities' (2019) 1 *Journal of Decolonising Disciplines* at 82-94.

35 Although this claim stands, it is crucial to assert that it does not mean that it is transformative.

decolonial scholars illustrate these epistemic contradictions by differentiating between colonialism and coloniality.³⁶

Decolonisation is thus a response, not to colonialism per se, but to the coloniality that lingers in postcolonial societies after the formal cessation of imperial quests. This distinction is crucial to clarify because Mudau and Mtonga's claims deify the constitution under the unfortunately incorrect assumption that it emerges as a post-apartheid remedy that aims to undo the past in a manner similar to decolonisation.

Decoloniality construes the colonial project as ongoing. The prevailing nature of coloniality is operative. Unlike decoloniality, a prominent feature in transformative constitutionalism scholarship is the fixation with 'correcting injustices of the past', whereas decoloniality is concerned with the injustices of the present. This has the unavoidable epistemic consequence of making the decolonial and transformative constitutionalism discourses divergent ideological tools of analysis and worldview, regardless of their perceived shared aspirations.³⁷

Mathebula defines decolonisation '[a]s a deliberate, explicit and individual activity, decolonisation is part and parcel of philosophy as a science of questioning—including itself through analysis, synthesis and improvement'.³⁸

Decolonisation and Africanisation have distinct meanings. As explained earlier, the former bases its theorisation on the enquiry about the three localities of coloniality, that are Being, Power, and Knowledge. While it is possible to decolonise the curriculum by way of Africanisation, it is incorrect to assume that decolonisation and Africanisation mean the same thing. For example, Zitzke proposes a

36 N Maldonado-Torres 'On the Coloniality of Being' (2007) 21 *Cultural Studies* at 4, 'Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus, coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of people, in aspirations of self, and so many other aspects of our modern experience'.

37 Klare (n 17) 150. Karl Klare defines transformative constitutionalism as 'a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'. Klare n 17?

38 T Mathebula 'African Philosophy (of Education) and Decolonisation in Post-apartheid South African Higher Education' in C Manthalu, & Y Waghid (eds) *Education for Decoloniality and Decolonisation in Africa* (2019) at 5.

decolonial turn in the LLB curriculum, defining decolonisation as, '[a] commitment to Africanization through conceptual decolonization'.³⁹

Zitzke does not posit that decolonisation means Africanisation, instead, he proposes Africanisation as a way to enact the 'decolonial turn'.⁴⁰ Seepe defines Africanisation as follows:⁴¹

Africanisation of knowledge ... refers to a process of placing the African world view at the centre of analysis ... [and] advocates for the need to foreground African indigenous knowledge systems to address [Africa's] problems and challenges.

The centering of African knowledges, as per the operative function of Africanisation, overlaps with the decolonial demand for the reversal of epistemicide, and the othering of the knowledge systems of the colonised. It, therefore, follows that one of the goals of decolonisation is indeed Africanisation, however Africanisation in itself is not decolonisation.

The 'Othering' of the knowledge(s) of the colonised, is the essence of epistemicide that Boaventura de Sousa Santos defines as:⁴²

The energy that propels diatopical hermeneutics comes from a destabilizing image that I designate epistemicide, the murder of knowledge. Unequal exchanges among cultures have always implied the death of the knowledge of the subordinated culture, hence the death of the social groups that possessed it. In the most extreme cases, such as that of European expansion, epistemicide was one of the conditions of genocide. The loss of epistemological confidence that currently afflicts modern science has facilitated the identification of the scope and gravity of the epistemicides perpetrated by hegemonic Eurocentric modernity.

At the heart of decolonisation is thus an appreciation that post-colonial South Africa, including its laws (specifically the constitution), is a sum total of the killing and othering of the knowledge(s), intellectual traditions, and epistemic development of indigenous peoples. Following the study of the three localities of coloniality, the praxis of decolonisation rests on the need to reverse the epistemicidal legacy.

39 E Zitzke 'A decolonial critique of private law and human rights' (2018) 24 *South African Journal on Human Rights* at 494.

40 W Mignolo 'Epistemic Disobedience and the Decolonial Option: A Manifesto.' (2011) 1 *Transmodernity* at 48. The 'decolonial turn' is defined as follows: 'The decolonial turn is the opening and the freedom from the thinking and the forms of living (economies-other, political theories-other), the cleansing of the coloniality of being and of knowledge; the de-linking from the spell of the rhetoric of modernity, from its imperial imaginary articulated in the rhetoric of democracy'.

41 S Seepe 'Black perspective(s) on tertiary institutional transformation' in P Higgs, NCG Vakalisa, TV Mda, & NT Assie-Lumumba (eds) *African voices in education* (2000) at 119.

42 B Santos *Epistemologies of the South: Justice against epistemicide* (2014) at 92. See also at 152-153 where Santos argues that the knowledge(s) of the coloniser are embodied in 'modern science', and that the knowledge(s) of the colonised are dismissed as myth or ignorance.

The undoing of epistemicide seeks to create a society that embraces the pluriversal epistemic traditions of the global South. Epistemic Pluriversality is concisely defined by Arturo Escobar as ‘a world where many worlds fit’.⁴³ Escobar understands that an analysis of all the varying challenges that are facing the world today point to the anomaly of a ‘single world’. Simply put, the problem with industrialism, capitalism, modernity, neoliberalism, rationalism, patriarchy, and secularism is that they all assume that humans reside in a single world.⁴⁴ The ‘single world’ is a product of the Euro-American historical experience and worldview, exported to the many worlds in the last 600 years through colonialism, development, and globalisation.

Escobar explains that the pluriverse is a vision of the world that echoes the autopoietic dynamics and archive of earth, underscoring the indubitable fact that no living being exists independently on earth and that the world is inherently plural. Escobar explains that there is no single answer for a single question – the different cultures and traditions respond to questions differently, and all these responses are valid, genuine, and legitimate.⁴⁵

Mudau’s and Mtonga’s desire to speak of the constitution as a means to decolonise insinuates that the constitution gains decolonial legitimacy when it is invoked as a decolonial instrument.⁴⁶

The conflation of decolonisation and constitutionalism emerges prominently in a debate between Tshepo Madlingozi and Tembeka Ngcukaitobi, wherein the latter argues that the constitution was drafted with the intention to decolonise a colonised South Africa, while the former rejects this argument, presenting alternative narratives about the history of the processes that led to the final constitution. Madlingozi also strongly argues that the constitution is actually a document meant to cement the gains of colonialism and to further entrench coloniality.⁴⁷

43 A Escobar ‘Transiciones: A space for research and design for transitions to the pluriverse’ (2015) 13 *Design Philosophy Papers* at 5.

44 As above.

45 As above.

46 See, for example, Mudau & Mtonga (n 2) 48, ‘The main question in this discourse interrogates the role of transformative constitutionalism in the decolonisation and Africanisation of legal education. Subsequently, a further three faceted inquiry is crafted with the aim of developing the primary question by firstly, interrogating the definition of a ‘decolonised’ and ‘Africanised’ legal education, secondly, evaluating whether the UP Curriculum Transformation Document provides a suitable lead on how to properly design the transformative framework for the decolonisation and Africanisation of legal education in South Africa and finally, investigates the possible implications for the decolonisation and Africanisation of legal education’.

47 T Madlingozi ‘South Africa’s first black lawyers, *amaRespectables* and the birth of evolutionary constitution – a review of Tembeka Ngcukaitobi’s *The Land is ours: South Africa’s First Black Lawyers and the Birth of Constitutionalism*’ (2018) 3 *South African Journal on Human Rights* at 32

Manthalu and Waghid lean towards Madlingozi's argument as regards the essence of the South African constitution:⁴⁸

The epistemology underlying the law in South Africa leads to alienation of justice and contestation by the people of the conventional legal institutions, especially the constitution, which in principle have subordinated the law of the indigenous people into a Eurocentric one ... [t]he global economy that is at the core of global interconnectedness is founded on the "ego-centred" rationality of the fundamentalism of the market that now shapes global and African public institutions.

These debates about the legacy of the constitution, in relation to decolonisation, show that there is a definite distance between the true meaning of justice as interpreted through a decolonial prism, and as it is understood by most South African-trained law academics and practitioners (such as Mudau and Mtonga).

Transformation is the first image in the transformative constitutionalism paradox, as noted by Heyns; she posits that transformative constitutionalism presents a paradox between change and stability, arguing that transformation requires change whereas constitutionalism assumes stability — ideologically contradictory ideals which may lead to varying outcomes.⁴⁹

Scholars such as Dennis Davis, Karl Klare,⁵⁰ Karin van Marle, and many others, have done the academy a great service by giving cogent analysis, critiques, and scholarly theorisations about transformative constitutionalism, showing its importance and applicability to the South African body politic. None of these scholars have ever spoken of transformative constitutionalism and decolonisation in interchangeable terms; the furthest they have ventured is to suggest that transformative constitutionalism should not only be construed as merely a means towards transforming society, but also as a critique of existing power, and racial and socio-economic dynamics that define the new South Africa.⁵¹ This reads as an unusual interpretation of transformative constitutionalism considering that it suggests a continued critique of society,⁵² as opposed to the misplaced

48 C Manthalu & Y Waghid 'Decoloniality as a Viable Response to Educational Transformation in Africa' in C Manthalu & Y Waghid (eds) *Education for Decoloniality and Decolonisation in Africa* (2019) at 28.

49 A Heyns 'The inoperative Community of Law Students: Rethinking foundations of legal culture' (2014) 46 *Acta Academica* at 85.

50 D Davis & K Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* at 406.

51 van Marle (n 17) 288.

52 van Marle (n 17) 297. van Marle posits: '[transformative constitutionalism] must be a site of active political action and struggle, of active engagement with law; a site that entails an unsettled and unsettling approach'.

optimism⁵³ of Mudau and Mtonga about the prospects of growth and development in light of South Africa's internationally acclaimed constitution.⁵⁴

When studying South Africa's Decolonial Turn, likening decolonisation to transformative constitutionalism is inimical to the efforts of the #FeesMustFall protesting students, who called for decolonisation as a revolutionary shift from the politics of the establishment, effectively calling for the undoing of the neo-colonial compromises that led to the promulgation of the constitution of the Republic.⁵⁵

A candid reading of the demands of students shows that decolonization, *inter alia*, means embracing all notable critiques and rejections of the constitution and seeking new ideas, rooted in indigenous African thinking and reflecting contemporary African cultures, to liberate the othered black working-class people of South Africa. The voices of students are reflected by Mabasa, who points out that students were calling for a complete overhaul of the education system,⁵⁶ and sought a meaning of decolonisation that dismantles the constitutional order.⁵⁷

The period post the #FeesMustFall protests has seen a sharp increase in the criticism of South Africa's constitution. For example, Modiri makes scathing remarks about how the academy has fetishised the constitution.⁵⁸ He problematises the constitution's inability to reflect, account for, and address the deep terrors of colonial apartheid, especially as these relate to race, land, and culture.⁵⁹ He

53 van Marle (n 17) 300. In place of constitutional optimism, van Marle instead understands transformative constitutionalism to mean new thinking, which encompasses 're-imaginings, re-figurings and re-orientations'.

54 van Marle (n 17) 288. van Marle locates this constitutional optimism in liberal politics and liberal approaches to law.

55 For example, see L le Grange 'Decolonising the university curriculum' (2016) 30 *South African Journal of Higher Education* at 2 where Le Grange relays the voices of leading #FeesMustFall student activists in articulating their chosen definition of the meaning of decolonisation. Le Grange specifically quotes EFF student leader (and now member of Parliament, and a national spokesperson) Vuyani Pambo, who argues that decolonisation means a complete overhaul of the system. Pambo's definition is at odds with the definition used by Mudau and Mtonga because the latter articulates decolonisation to be something that can be achieved within the constitutional system. Pambo adds, 'We don't want to treat the symptoms, we want to decolonise the university – that is at the heart of the cause'. Pambo's statement comports with that of his comrade, Alex Hotz, who asserts that 'As a law student, [she] believe(s)sic decolonising the law faculty goes beyond the faculty and the institution. It speaks to what the law is and how it is used within society'.

56 K Mabasa 'The rebellion of the born un-frees: Fallism and the neo-colonial corporate university' (2017) 39 *Strategic Review for Southern Africa* at 101.

57 C Himonga & F Diallo 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *Potchefstroom Electronic Law Journal* at 2.

58 JM Modiri 'Conquest and Constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* at 308.

59 As above.

argues that this fetish constitutes part of ‘colonial unknowing’ which disavows, disassociates, and normalises the horror of land dispossession, white domination, and racism.⁶⁰ Dladla also problematises the triumph of liberal intellectual traditions in South Africa, arguing that these can be attributed to ‘one of the most progressive liberal democratic constitutions in the world’, yet such a constitution is not progressive for ‘[t]he indigenous people conquered in the unjust wars of colonisation’.⁶¹

3 Critical formulations outside of transformative constitutionalism

This section briefly presents three seminal works that comprehensively present decoloniality as a decisive alternative without relying on the constitution and transformative constitutionalism. These works are that of Tshepo Madlingozi,⁶² Joel Modiri, and Ntando Sindane. The operative function of this section of the rejoinder is to demonstrate to Mudau and Mtonga that it is indeed logical and intellectually sound to ponder upon transforming legal education purely by way of decolonial approaches, without having to rely on the constitution and transformative constitutionalism.

Madlingozi authors a PhD thesis titled ‘Mayibuye iAfrika?: Disjunctive inclusions and black strivings for constitution and belonging in “South Africa”’. In this thesis, Madlingozi analyses the strivings for constitution and belonging from the perspective of an African.⁶³ The central thesis of his argument is two-fold, (1) that the perennial protest by marginalised communities are impelled by the fact that the constitution does not rise to the demand of decolonisation, and (2) that the constitution’s failure to live up to decolonial demands can be understood from studying the

60 As above.

61 N Dladla ‘Contested Memory: Retrieving the Africanist (Liberatory) Conception of Non-racialism’ (2017) 64 *Theoria* at 124.

62 T Madlingozi ‘Mayibuye iAfrika?: disjunctive inclusions and black strivings for constitution and belonging in “South Africa”’ Unpublished PhD thesis, Birbeck University of London, 2018.

63 Madlingozi’s PhD thesis adequately mirrors and is a reflection of a lifetime of his scholarly interventions. These include, but are not limited to, T Madlingozi ‘On Transitional Justice Entrepreneurs and the Production of Victims’ (2010) 2 *Journal of Human Rights Practice* at 208-228; T Madlingozi ‘Post-Apartheid Social Movements and the Quest for the Elusive “New” South Africa’ (2017) 34 *Journal of Law and Society* at 77-98; 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* at 123-147; T Madlingozi ‘South Africa’s first black lawyers, *amaRespectables* and the birth of evolutionary constitution – a review of Tembeka Ngcukaitobi’s *The land is ours: South Africa’s first black lawyers and the birth of constitutionalism*’ (2018) 34 *South African Journal on Human Rights* at 517-529.

ambivalence, racial melancholia and the double-consciousness of South Africa's political elite.

The focus on political elites, whom Madlingozi accordingly labels 'exceptional natives' and '*amakholwa*', is important because they were instrumental in South Africa's constitutional dialogues between 1989-1996. The constitution thus becomes, not a product of a people coming together, but rather a pact between colonisers and native elites who assimilated and were co-opted into whiteness and the white-dominated world.

Madlingozi posits that the 'quest for post-colonial constitution-making ought to be geared towards remembering and (re)constituting the historically-colonised world on spiritual, social and material planes – the three realms of African belonging in the world.'⁶⁴ Madlingozi's PhD thesis is an extraordinary account of discourse towards re-thinking South Africa's colonial positions – most importantly, it relies on purely decolonial and African approaches, and not the constitution. This reading of Madlingozi helps us to comprehend that although the constitution is transformative, it is not decolonial.

Modiri authors a PhD thesis titled 'The Jurisprudence of Steve Biko: A study in race, law, and power in the "afterlife" of colonial apartheid'.⁶⁵ In this thesis, Modiri critically analyses the epistemic, spiritual, political, and social conditions that define South Africa's reality after the 1994 episode.⁶⁶ He specifically chooses Steve Biko's philosophy of Black Consciousness as a lens through which to observe the South African reality and to develop an alternative approach to law and jurisprudence as a response to race and racism that continues to bedevil this country post-1994.

Modiri briefly unpacks the title of his thesis by explaining that he uses 'afterlife' instead of 'aftermath' because the latter suggests that colonial apartheid is over, whereas the former decisively insists that colonial apartheid continues to prevail long after its formal death,

64 T Madlingozi (n 63) 3.

65 Modiri's PhD thesis adequately mirrors and is a reflection of a lifetime of his scholarly interventions, these include, but are not limited to, J Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* at 224-273; J Modiri 'Towards a "(post-)apartheid" critical race jurisprudence: "divining our racial themes"' (2012) 27 *Southern Public Law Journal* at 231-258; 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 Journal* at 177-201.

66 It is important to note that Mudau & Mtonga refer to Modiri without acknowledging Modiri's general rejection of transformative constitutionalism. This may allude to a misreading of Modiri, or even a complete misunderstanding of his critique of post-apartheid constitutionalism. See for example, Mudau & Mtonga (n 2) 46, 'More so, in post-apartheid South Africa, legal education "remains firmly in the grip of restricted jurisprudence", which entails having the majority of law courses which Modiri perfectly described'.

thus having an ‘afterlife’.⁶⁷ This analysis, although worded differently, comports with the earlier decolonial differentiation between coloniality and colonialism.

As a point of entry, Modiri distinguishes between the two dominant approaches to South Africa’s colonial/racist problem, the first is what he calls the legalist/constitutionalist approach,⁶⁸ and the second is what he calls the critical political/leftist approach.⁶⁹ He defines the former as follows:⁷⁰

... the liberal legalist approach to race and law is rooted in a traditionally liberal jurisprudence. Liberal jurisprudence presumes the legitimacy of a state in which we are all guaranteed equal protection before the law, and in which rights are said to facilitate individual freedom.

He then defines the latter as follows:⁷¹

... a critical political or leftist approach to race and law takes its bearing from what it conceives of as deficiencies in the liberal approach, from that which liberalism elides. A critical political or left understanding of race thus begins with a critique of liberalism – both as an ideology and as a social order – and attempts to map and expose the social powers (other than law) which produce, govern, and stratify subjects.

The distinction that Modiri makes is worth a brief comment – the separation between the legalist/constitutionalist approach and the critical political/leftist approach helps us understand that decolonisation and Africanisation fall into the latter category, whereas transformative constitutionalism falls into the former category. This is something that would be incredibly useful to nuance Mudau’s and Mtonga’s reading/thinking about questions surrounding the transformation of legal education – to be sure, they would be able to theoretically appreciate why decoloniality and transformative constitutionalism cannot be used interchangeably in the quest to transform legal education.

67 Modiri’s distinction between aftermath and afterlife is incredibly important for the argument that is being advanced in this article. Whereas decolonial scholars make the distinction between colonialism and coloniality, Modiri’s afterlife-aftermath conceptualisation gives context to decolonial theorisation and makes it attentive to South Africa’s situation. In essence, ‘aftermath’ may be an image preferred by adherents of transformative constitutionalism because it assumes that apartheid colonialism disappeared in 1994 because the constitution of 1996 was promulgated and thus ushered South Africans into a decolonised reality. Decolonial thinkers would align themselves to ‘afterlife’ because ‘life’ correctly supposes that colonial apartheid did not disappear in 1994 but rather transmuted from life to an ‘afterlife’ and thus coloniality.

68 JM Modiri ‘The Jurisprudence of Steve Biko: A study in race, law and power in the “afterlife” of colonial apartheid’ Unpublished PhD thesis, University of Pretoria, 2017 at 42.

69 Modiri (n 69) 45.

70 Modiri (n 69) 42.

71 Modiri (n 69) 45.

Sindane authors an LLM thesis titled ‘The call to decolonise higher education: Copyright law through an African lens’.⁷² In this thesis, Sindane considers questions about decolonisation of higher education broadly, and at a much more narrowed level, he focuses on the copyright law curriculum as taught in South African law faculties.⁷³ Although the introductory parts of this thesis allude to transformative constitutionalism as a valuable critique in the quest to transform legal education, he decisively opts for decoloniality as the most viable approach to curriculum transformation.

Having defined decolonisation in the context of copyright law, Sindane argues that studying the three localities of coloniality is the basis upon which copyright law can be decolonised. He then proceeds to critically deconstruct extant intellectual property law justificatory theories, the requirements for authorship, the meaning of moral rights in a decolonised articulation of copyright law, the role that copyright law can play in defeating cultural appropriation, copyright law exceptions, and others.

The hallmark of Sindane’s study rests in his departure from liberal constitutionalist approaches and instead embracing unfettered decolonial theory as an operative tool in transforming the LLB curriculum.

4 Final analysis

This rejoinder has carefully demonstrated the epistemic cleavage between decolonisation/Africanisation and transformative constitutionalism, and allows for a critique of Mudau’s and Mtonga’s central claim. It further gave examples of recent intellectual interventions in the decolonial discourse that have departed from constitutional reasoning(s).

There is no need to mask difficulties where they exist because this does not solve any epistemic, pedagogical, or intellectual problems that face law faculties today. The eagerness to conflate transformative constitutionalism with decoloniality and Africanisation does not do justice to any of these concepts; instead, it denies the academy an opportunity to deduce the epistemic nuances that all of these concepts present.

72 N Sindane ‘The call to decolonise higher education: Copyright law through an African lens’ Unpublished LLM thesis, University of South Africa, 2020 at 1-155.

73 This appears to be a theme that Sindane seeks to develop in his scholarly works. For example, in N Sindane ‘Morena Mohlomi le Badimo: Reading decolonial articulations into the intellectual property law curriculum’ (2020) 2 *Journal of Decolonising Disciplines* at 1-26, where he weaves together a narrative about the need to decolonise the curriculum by way of decolonial theory outside of liberal constitutionalist sensitivities.

The deification of the South African Constitution is something that law teachers should be reflectively attentive to,⁷⁴ because such approaches belong to conservative apartheid traditions rather than the constitutional era, especially under the transformative constitutionalism prescript of justification over authority.⁷⁵ The continued attitude of merging these ideas to mean one thing presents a misnomer and conceptual conflation that should be rejected as both ahistorical and intellectually dishonest.

In summation, it is important that law teachers and thinkers focus on seeking deeper truths and hidden meanings as they work towards decolonising the LLB curriculum – a crucial aspect of this exercise includes having a deeper appreciation of the need for definitional clarity.⁷⁶

74 Modiri (n 59) 308.

75 The constitutional era presents a shift/bridge from a culture of authority to a culture of justification. See generally E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* at 31-48.

76 Ascertaining definitional clarity is very important in the quest to bring about alternative epistemic systems. Siyabulela Tonono remarkably demonstrates this in 'Crafting a Decolonial Economic Order for Re-Afrikanisation in the Context of South' where he argues that colonialism was anchored by capitalism. He probes whether decolonisation can be achieved within a capitalist order and responds to this question by insisting that decolonisation should be understood as a 're-Afrikanisation' project. For him, 're-Afrikanisation' means to turn towards socialism with African characteristics. At a practical level, Tonono posits that decolonial re-Afrikanisation is embodied in the isiXhosa principle of '*Inkomo Yenqoma*' because of this principle's two inherent features: (1) radical inclusiveness and socialisation of the means of production, and (2) production of goods and services is based within the community and driven by the needs of the community. See generally, S Tonono 'Crafting a Decolonial Economic Order for Re-Afrikanisation in the Context of South' (2018) 48 *Africanus: Journal of Development Studies* at 1-14.

DISMANTLING RACIAL ONTOLOGY: CONSTITUTIONAL ABOLITIONISM AS A SOLUTION TO SOUTH AFRICA'S ANTI-BLACKNESS AND WHITE SUPREMACY

by Gudani Tshikota*



Abstract

The constitution of the Republic of South Africa, 1996 (the 1996 constitution) is typically represented as the 'best constitution' in public and academic discourse around the world. In this article, the aim is to argue against this notion. The thesis presented in this article is, how can this constitution be regarded as the best in the world when it has failed to make possible conditions which mark a break from the cultural, social, and political order of colonial-apartheid South Africa? This article then explores a comparative analysis of the racial ontology of conquest pre and post-democracy. The conclusion is that the racial ontology of conquest remained unabated irrespective of the claims of freedom and a 'new' South Africa was supposedly ushered in by the 1996 constitution. Consequently, the notion of regarding the 1996 constitution as the beginning of a new South Africa and the end of Black people's sufferings is outrightly rejected. The concept of constitutional abolitionism is thereafter adopted and placed as a catalyst towards a decolonised South Africa where the racial ontology of conquest would be undone. In giving a proper analysis of constitutional abolitionism as a theory of the constitution, the thought and practice of constitutional optimists and sceptics are also dissected and challenged.

* LLB, University of Pretoria. ORCID iD: 000-0001-5967-3101. I dedicate this article to Prof Joel Modiri. He introduced me to the notion of abolitionism. The interactions I had with Prof Tshepo Madlingozi and Prof Isaac Shai and their works also had a great influence in this article. Aluta!

1 Introduction

In the year 1994, South Africa became what many may call a democratic country ‘after’ more than 300 years of colonialism and subsequent apartheid.¹ In 1996, South Africa adopted a constitution² that has been regarded as a ‘savior constitution’ that ended Black people’s sufferings, thus presupposing the notion that the constitution was a breakaway from colonial-apartheid South Africa.³ This article joins the call for the reconstitution of South Africa. It presents the argument that the 1996 constitution was not the correct response to South Africa’s colonial-apartheid history since it did not undo the racial ontology (racial dehumanisation) of conquest. Consequently, anti-blackness and white supremacy persist. It does this by looking solely on racial ontology as a foundation upon which South Africa was built, the relationship between the 1996 constitution and this constitutional foundation, and the shortfalls of constitutional optimism as the dominant theory of the constitution. Lastly, this study adopts constitutional abolitionism as an alternative theoretical perspective. The concept ‘constitutional abolitionism’ was coined by Dladla in a ‘Big Debate’ episode.⁴ This notion of ‘abolition’ can be traced in the history of the Black freedom struggles, linked to the abolition of slavery and recently revived by Black studies in the United States of America and Black people organising, as a movement, to abolish prisons and the police, and further extends to the abolition of the nation-state, race, and private property.⁵ In the context of South African history, it can also be traced back to the Azanian tendency which, rather than seeking the recognition and inclusion of the indigenous conquered peoples, has called for the repudiation and abolition of South Africa itself and its replacement with Azania.⁶

1 N Mtshiselwa ‘A post-apartheid nation in chains? Relevance of Lucky Dube’s Mickey Mouse Freedom in reconfiguring forms of oppression in South Africa today’ (2014) 40 *Studia Historiae Ecclesasticae* at 58. I put the word ‘after’ in inverted commas to show that colonisation and apartheid continues – consequently, there is no ‘after’.

2 Constitution of the Republic of South Africa, 1996 (Constitution).

3 See how the constitution is described by Langa, the former Chief Justice of the South African Constitutional Court in P Langa ‘Transformative constitutionalism’ (2006) 17 *Stellenbosch Law Review* at 351. See also KE Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* at 150.

4 Big Debate South Africa ‘BIG DEBATE: Twenty Years of the Constitution (Season 7 Ep 1)’ 01 August 2016 <https://www.youtube.com/watch?v=7aGheRRkSeY> (accessed 22 April 2020).

5 Library of Congress ‘The African American Odyssey: A Quest for Full Citizenship’ <https://www.loc.gov/exhibits/african-american-odyssey/abolition.html> (accessed 22 May 2020).

6 Azania is described as a liberated polity in which title to territory and unencumbered sovereignty over it are returned to the indigenous people. See, generally, N Dladla ‘The liberation of history and the end of South Africa: some notes towards an Azanian historiography in Africa, South’ (2018) 34 *South African Human Rights Journal* at 414-440.

2 The fallacy of a saviour constitution

2.1 An introduction to the racial ontology of conquest

The introduction of the racial ontology of conquest in South Africa began in 1652.⁷ This year marked the beginning of colonisation in South Africa.⁸ Racial ontology defines white people as the primary political and social subjects of South Africa whilst Black people are cast away as sub-humans, natives of nowhere, and nonhumans.⁹ Serequeberhan opines that the enslavement of the African, [through colonialism and subsequently apartheid] resulted in the African being marked out of world history.¹⁰ Colonialism led to the destruction of the African's mode of life and everything that was African was devalued.¹¹ The African was turned into a slave and forced to be subhuman through a submissive state of being a colonial subject.¹² Although Serequeberhan refers to Africa, this article employs his ideology with reference to South Africa in particular. Through Serequeberhan's conceptualisation of racial ontology, it is evident that South Africa's colonial-apartheid past was one where Black people were seen as 'savages' or non-humans.¹³

Racial ontology can be traced throughout the constitution/creation of South Africa until what it is today.¹⁴ Modiri notes that Biko identifies 1652 as the beginning of an onslaught of unprecedented violence against the natives.¹⁵ This violence was enforced through enslavement, forced labour, and massive land disposessions together with the impairment of legal and racial status and accompanied by cultural destruction and social dehumanisation.¹⁶ In essence, 1652 sets in motion the racial ontology of conquest. The consolidation of white domination in South Africa through making Black people feel envious of, inferior to, and dependent on white people, whiteness, and European culture was the main project of colonialism and apartheid.¹⁷ Colonisation, apartheid, and slavery jointly created a figure of blackness as underserving of economic and social advancement, unintelligent and irrational, morally inferior, fungible

7 JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* at 320.

8 As above.

9 T Serequeberhan 'African Philosophy as the Practice of Resistance' (2005) 4 *Journal of Philosophy: A Cross-Disciplinary Inquiry* at 50.

10 As above.

11 Serequeberhan (n 9) 50.

12 As above.

13 As above.

14 JM Modiri 'The jurisprudence of Steve Biko: A study in Race, law and power in the aftermath of colonial-apartheid' PhD thesis, University of Pretoria, 2017 at 182.

15 As above.

16 Modiri (n 14) 182.

17 As above.

to the desires, needs, and mercies of white people, uncivil, criminal in nature, and violable.¹⁸

Machiavelli's discourse on conquest is worth deliberating on. He opines that conquest, simply put, 'is irreducible to brute force; it involves the production of appearances, of signs, and of symbols'.¹⁹ On the other hand, Seed notes that for conquest to strive, it requires the production of the legitimacy that is bound up with gestures, ceremonies, and words that compliments it.²⁰ This could have been the planting of emblems, flags and insignia; erecting crosses; measuring or uttering realistic pronouncements, assessing, and counting and mapping the population, territory, or geography.²¹ This is exactly what characterised the creation of South Africa. It involved the country's renaming, the mapping out of Black people as the primary economic and social subjects, and the grouping of Black people into small settlements or squalor. Winter sums up the discourse on conquest in the following statement:²²

Conquests inaugurate new rights and obligations; they frequently obliterate the political, legal, and social customs and conventions and consecrate new privileges and authorities. In founding a new order, the conquest sunders the temporal continuum, instituting a caesura, a new dawn that separates a 'before' from an 'after' the conquest.

South Africa was founded on the idea of dehumanising Black people.²³ It was founded on the idea that Black people were without reason and were thus disqualified as human beings.²⁴ Accordingly, the task that colonisation unilaterally assigned itself was to Christianise and civilise Black people.²⁵ Black people were made to look at themselves as undeserving of any humanity, as savages, and as 'heathens' who should conform to Christianity for them to be 'saved' or be human-like.²⁶ This resulted in African traditions and cultures being fabricated, infiltrated and, to a great extent, changed beyond recognition.²⁷ Africans' beliefs of their ancestors (Badimo/Vhafhasi) were termed demonic, primitive, and cast away to make way for Christianity through, amongst other things, missionary programs.²⁸

18 As above.

19 Y Winter 'Conquest' 21 June 2021 <https://www.politicalconcepts.org/conquest-winter/> (accessed 20 July 2021) at 5.

20 As above.

21 Winter (n 19) 13.

22 As above.

23 MB Ramose 'An African perspective on justice and race' (2001) 3 *Forum for Intellectual Philosophy* para 14.

24 As above.

25 P Hudson 'The State and the Colonial Unconscious' (2013) 2 *Social Dynamics* at 264.

26 As above.

27 DD Ndima 'The African law in the 21st century in South Africa' (2003) 36 *Comparative International Law Journal of Southern Africa* at 327.

28 L John 'The colonization of consciousness in South Africa' (1989) 18 *Economy and Society* at 284.

The spiritual life of Black people was wiped away as though it never existed, and a new form of spiritual livelihood was imposed.²⁹

Colonisers also took advantage of the pre-existing social and cultural clashes amongst Black people.³⁰ They used this to their advantage by causing tribal tension amongst Black people.³¹ The words of Kenyan Revolutionary, Jomo Kenyatta, which are commonly misascribed to Archbishop Tutu, sum up the civilisation and Christianisation of the Black people very well. Kenyatta notes that ‘when the missionaries came to Africa, they had the Bible and we had the land. They said, “Let us pray”. We closed our eyes. When we opened them, we had the Bible and they had the land’.³²

Regrettably, the racial ontology of conquest in South Africa was not confined to the imposition of ideas and beliefs – it was also violent.³³ The dehumanisation of Black people made them objects always available for any form of dispensation.³⁴ Black people were, amongst other things, forced to carry ‘dompasses’ through the Pass Laws Act of 1952, and were discarded in squalors through the Group Areas Act of 1950.³⁵ They were forced into their own prison-like lives; from Bantu Education to Bantustans, from objectifying and ridiculing Sarah Baartman for being built like an African woman, to objectifying and ridiculing Black people through comparing and labeling them as monkeys or ‘kaffirs’.³⁶ The main reason for all of this was because Black people were not considered full and complete human beings.³⁷ It is without doubt that the trauma and psychological impairment caused by the racial ontology of conquest on Black people was enormous.³⁸

The ruthless and callous murders of Black people can be traced throughout the footsteps of colonisation and apartheid.³⁹ Some of the massacres that have occurred as a result of the colonial dispensation

29 As above.

30 See, generally, J Peires ‘“Soft” believers and “hard” unbelievers in the Xhosa cattle-killing’ (1986) 27 *Journal of African History* at 443-461; and J Peires ‘The central beliefs of the Xhosa cattle-killing’ (1987) 28 *Journal of African History* at 46-63.

31 As above.

32 Skeptics ‘Did Desmond Tutu criticize African missionaries for stealing land?’ 2016 <https://skeptics.stackexchange.com/questions/8644/did-desmond-tutu-criticize-african-missionaries-for-stealing-land> (accessed 25 August 2021).

33 Modiri (n 7) 320.

34 Serequeberhan (n 9) 50.

35 JS Saul *South Africa – The Present as History from Mrs Ples to Mandela and Marikana* (2014) at 5.

36 See, generally, G Baderoon ‘The Provenance of the term “Kafir” in South Africa and the notion of Beginning’ http://www.cilt.uct.ac.za/usr/cci/publications/aria/download_issues/2004/2004_MS4.pdf (accessed 20 May 2020); and P Scully & C Crais ‘Race and Erasure: Sara Baartma and Hendrik cesars in Cape Town and London’ (2008) 47 *Journal of British Studies* at 301-323.

37 Ramose (n 23) 9.

38 John (n 28) 284.

39 Saul (n 35) 120.

include: the Sharpeville massacre on 21 March 1960, where 69 demonstrators were shot and killed by police in a pass-burning rally led by the Pan African Congress (PAC);⁴⁰ the 1973 police shooting of unarmed protesting miners;⁴¹ the June 16 protests led by students in 1976, Soweto which resulted in the death of Hector Pieterse and vicious injuries of several other learners;⁴² the Bisho massacre where 29 people were shot at and killed by Ciskei soldiers;⁴³ the Boipatong massacre where 42 Black people were brutally killed;⁴⁴ the killing fields in Kwa-Zulu Natal; and the killing fields in the Vaal township.⁴⁵ These selected incidences are a clear indication of the role that racial ontology played in the constitution/creation of South Africa with the idea being that Black people should be conversed with through violence because they are not full human beings.⁴⁶

The creation of South Africa, accompanied by white settlement, was not just a one-day event. It was both a process and a structure. This means that when the Europeans arrived in South Africa, they undertook the task of creating a South Africa that would reflect their needs, lived experiences, traditions, education, and so on.⁴⁷ However, since they were and are still the minority, they needed Black people to participate in the building of their South Africa. Hence one of their objectives was not to completely eliminate Black people but to take their land and their labour.⁴⁸ In essence, Europeans wanted Black people's labour but not their co-existence as human beings or their equals, but as sub-humans whose only worth was to serve their masters.⁴⁹ Hence, they undertook to dismantle stable communities and Black people's cultures of resistance.⁵⁰ According to Kelley, this process was identified as the destruction of the African and the 'invention of the Negro'.⁵¹ These were the bases of the racial ontology of conquest in South Africa.

40 As above.

41 Saul (n 35) 120.

42 As above.

43 Saul (n 35) 120.

44 As above.

45 As above.

46 Ramose (n 23) 19.

47 As above.

48 As above.

49 RDG Kelley 'The Rest of Us: Rethinking Settler and Native' (2017) 2 *American Quarterly* at 269; JL Comaroff 'Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions' (1998) 3 *Social Identities* at 269.

50 As above.

51 As above.

2.2 The relationship between the 1996 constitution and racial ontology

2.2.1 *The conflict between the 1996 constitution and reality*

As a golden thread throughout this article, the test for the 1996 constitution is whether it undoes the racial ontology of conquest.⁵² When South Africa attained what many termed ‘freedom’ in 1994, it was pursuant to negotiations.⁵³ In essence, the 1994 establishment of ‘freedom’ was a negotiated settlement.⁵⁴ The results of this negotiated settlement were, firstly, the establishment of ‘freedom’ in South Africa and secondly, the adoption of a constitution.⁵⁵ The PAC outlined some preconditions to the apartheid government prior to its (the PAC’s) participation in the negotiations.⁵⁶ Of these preconditions were the requirements that the land had to be returned to its rightful owners and that the negotiations had to be held outside the country and by an independent and neutral forum.⁵⁷ The point of contention was that the oppressed can never hold fair negotiations with their master and in their master’s territory because there would be unequal bargaining powers.⁵⁸ As a direct consequence, the oppressed would succumb to the master’s demands, hence furthering the argument that Black people were compromised during these negotiations.

In my view, the rejection of these pre-conditions by the apartheid government was a clear indication of what the outcome of those negotiations would be. This is because these pre-conditions were the foundation of the creation of South Africa based on racial ontology. Accordingly, in order for the true essence of freedom to be ushered, this foundation had to be abolished. The fact that the apartheid government refused to abide by these pre-conditions further shows that it went into these negotiations without any intention to compromise its sovereignty over the South African title.⁵⁹ This also means that everything that was to come out of those negotiations was to favour the master and to continue the oppression of Black people.⁶⁰ It is of utmost importance to note that the apartheid government did not benevolently opt for negotiations, rather it did so because apartheid, as a system of oppression, was no longer

52 Modiri (n 7) 315.

53 Ramose (n 23) 14.

54 As above.

55 Ramose (n 23) 14.

56 As above.

57 Ramose (n 23) 14.

58 As above.

59 Ramose (n 23) 13.

60 As above.

beneficial to it due to the state of emergency protests and the country-wide unrest.⁶¹ Accordingly, the international community started to talk against the apartheid regime in South Africa, and businesses started losing income.⁶² In essence, the reason why the apartheid government opted for negotiations was because it was no longer beneficial to it.⁶³ Therefore, the negotiations were started to give Black people political freedom whilst the economic freedom remained retained by the white minority.⁶⁴

As an emphasis, the PAC rejected these negotiations as it noted that they would not be free and fair.⁶⁵ It contended that the conditions of these negotiations should be changed to allow for transparency, independency, and fairness.⁶⁶ However, as it has already been noted, the apartheid government never intended to surrender any real power, it rejected the PAC's terms and the PAC thus withdrew from these negotiations.⁶⁷ Since the 1996 constitution was a product of these negotiations, it is only logical to conclude that it was a compromise of the liberties of Black people. That is why it failed to undo the racial ontology of conquest. Accordingly, the accolades that have been paid to this constitution are unwarranted. It is also worth noting that the African National Congress, which continues to attract criticism for its role in these negotiations, was one of the eighteen political parties which signed. The PAC, CP, and AZAPO balked at the idea of having negotiations under such conditions.⁶⁸

One of the scholars in the discipline of constitutional abolitionism, Dladla, argues that regardless of the fallacy that 1994 represents as a significant transition from an oppressive society to a democratic one, it did not mark the end of white supremacy but rather ensured its continuation and preservation from one form to another.⁶⁹ Dladla also refers to what he calls the 'right of conquest' which he argues remains affirmed by the 1996 constitution.⁷⁰ Expanding upon Dladla, the reason why the 1996 constitution is said to have affirmed the 'right of conquest' is because this constitution failed to act as a radical break away from colonial-apartheid South Africa to a decolonised South Africa by undoing the racial ontology of conquest.⁷¹

61 US Department of State Archive 'The End of Apartheid' <https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm>. (accessed 20 August 2021).

62 As above.

63 US Department (n 61).

64 As above.

65 Ramose (n 23) 13.

66 As above.

67 Ramose (n 23) 13.

68 As above.

69 N Dladla 'Towards an African critical philosophy of race: Ubuntu as a phil praxis of liberation' (2017) 6 *Journal of African Philosophy, Culture and Religions* at 39.

70 As above.

71 As above.

The attributes of a decolonised South Africa are discussed throughout this article include, but are not limited to, the conqueror no longer having a claim over South Africa's title, and the administration of justice that was miscarried by the Truth and Reconciliation Commission (TRC). It is argued that the TRC, as an institution, failed to deliver justice as mandated because it neglected the victims of apartheid crimes, and the perpetrators of apartheid crimes were not prosecuted. Although this position could be said to be retributive in nature, it should be noted that restorative justice formed a tiny minority of the large number of hearings, and it does not necessarily shield perpetrators from making amends or contributions to put their victims at a better place.⁷² Christian articulates this position when he says:⁷³

RJ does not seem to have been an issue of much debate during the day-to-day proceedings of the TRC. As explained, my research shows that the term 'restorative justice' appeared only in three public TRC hearings, which is a tiny minority of the large number of hearings. It should also be noted that the term 'restorative justice' does not appear in the legal documents that form the background to the TRC. The Interim Constitution (Act 200 of 1993), which adjudicated that there should be amnesty after apartheid, does not contain the term 'restorative justice', and neither does the Promotion of National Unity and Reconciliation Act (No. 34 of 1995), which established the TRC and defined its mandate.

It is thus incorrect to use restorative justice as a shield against the TRC's inability to hold the perpetrators of apartheid crimes liable.⁷⁴ Also, it cannot be said that the TRC was founded on the principle of restorative justice. Christian writes that '[r]estorative justice demands that the accountability of perpetrators be extended to making a contribution to the restoration of the well-being of their victims'.⁷⁵ Therefore, since the TRC did not require perpetrators to do anything in return, restorative justice cannot apply.⁷⁶ Accordingly, the TRC did not address the issue of reparation and restitution, which includes the return of land and all its fruits to Black people.

The drafting of a new, inclusive constitution should be a transparent process, with the aim of this constitution being to undo the racial ontology of conquest.⁷⁷ Zikode opines that there is no new South Africa because Black people remain in their squalor, they remain below the law, and each and every attempt of theirs to raise

72 BN Christian 'Restorative justice and the South African truth and reconciliation process' (2013) 32 *South African Journal of Philosophy* at 22-23.

73 As above.

74 Christian (n 72) 22.

75 As above.

76 As above.

77 See Ramose (n 23) 26; and JM Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of "post" apartheid constitutionalism' (2019) 7 *De Jure Law Journal* at 29.

their concerns in this democracy is met with violence.⁷⁸ However, the way the constitution is described by other judges and academics shows that the widespread and authoritative belief is that the constitution is one of the best constitutions in the world.⁷⁹ One might ask, which standards were used to come to such a conclusion when South Africa is one of the most unequal societies in the world?⁸⁰ As is revealed in the latter paragraphs, this discourse of the widespread and authoritative notion of describing the 1996 constitution as one of the best in the world is, in fact, inaccurate and misleading.

The Marikana massacre was a spit in the face of the so-called ‘freedom’ of Black people. From Bisho to Boipatong, and from the 1973 mine strike to the June 1976 protest, Tupac’s sentiments are a fitting reaction ‘I see no changes all I see is racist faces [and institutionalized and structural racism]’.⁸¹ The government of South Africa, which may be characterised as anti-black, found it easy to repeatedly open fire at unarmed Black protesters. In response to this, one may ask whether the government would have reacted in the same manner if those miners were white.⁸² If the response to this rhetorical question was in the affirmative, then why did white students in Cape Town and many other parts of the country put their bodies at the forefront so that Black students did not get shot at during the #feesmustfall protests? Additionally, why would the police’s reaction to protests led by Black people always end with rubber bullets and tear gas canisters being shot and thrown while protests led by white people are treated as photoshoots and genuine exercises of the right to gather?

The African National Congress (ANC) government which willingly participated in the CODESA negotiations knowing that the issues pertaining to the return of land and the true emancipation of Black people were not on the agenda, is said to be anti-black because it presides over white supremacy and anti-blackness in South Africa. As it is shown in this study, the government sees Black people as a people that should be dispensed with, shot at, or denied social services because they are not full humans. This shows that white supremacy remains intact – the belief that Black people cannot be conversed

78 S Zikode ‘Poor People’s Movements and the law’ 2 December 2011 <http://abahlali.org/node/8551/> (accessed 9 August 2019).

79 Langa (n 3) 151; Klare (n 3) 150.

80 K Scott ‘South Africa is the world’s most unequal country. 25 years of freedom have failed to bridge the divide’ *CNN* 10 May 2019 <https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> (accessed 18 July 2019).

81 See 2Pac ‘Changes’ <https://genius.com/2pac-changes-lyrics> (accessed 19 May 2020).

82 eNCA ‘Marikana Massacre Documentary’ 21 May 2014 <https://www.youtube.com/watch?v=sAXzs40WJ6A&bpctr=1581338558> (accessed 22 October 2019).

with because they are not full humans, or they somehow do not meet the human threshold.⁸³ Arnold summates this in noting that:⁸⁴

Since the first week of lockdown, videos and news stories have been circulated allegedly depicting the police and SANDF members brutally beating up black people for any level of lockdown deviation, while other videos have displayed white people nonchalantly enjoying their daily run or braai, seemingly unbothered by the national mandate to stay inside. In stark contrast to footage of police chasing, beating or arresting black people, white people appear to get away with little more than a stern talking to.

It has become trite in contemporary South Africa that we will hear of police brutality imposed on Black people without any accountability.⁸⁵ This coincides with the apartheid treatment of Black people where they were seen as half or incomplete humans who could not be spoken or reasoned with, so the only way to talk to them was through violence.⁸⁶ Recently, this was seen with Sizwe Mbokazi, a young man from Alexandra who was shot dead while sitting with his friends playing cards.⁸⁷ The same police officer who shot Sizwe Mbokazi then shot and killed another young lady named Samantha Mathane Radebe who was just a bystander while the police were allegedly chasing a stolen vehicle.⁸⁸ If the police officer was held accountable for the murder of Mbokazi then he would not have had the opportunity to kill Radebe, but because the Black life is very cheap in South Africa, the policeman was not held accountable.⁸⁹ It is only now with the second murder that the policeman has been charged with murder.⁹⁰

The killings of Collins Khoza, Nathaniel Julius, Mthokozisi Ntumba, and many other killings by the South African Police Service (SAPS) show that apartheid policing is very much still alive.⁹¹ This argument is summed up with the painful words of the leader of the National Union of Mineworkers (NUM), Joseph Mathunjwa, who addressed the miners before they were gruesomely gunned down.⁹² Mathunjwa

83 Serequeberhan (n 9) 50.

84 K Arnold 'Army and police violence spurs racial tensions' *Mail & Guardian* 20 April 2020 <https://mg.co.za/article/2020-04-29-army-and-police-violence-spurs-racial-tensions/> (accessed 22 August 2021).

85 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 1 *Stellenbosch Law Review* at 127.

86 As above.

87 A Nyathi 'Alex residents assured action if shooting victim killed by cop' *Eyewitness News* <https://ewn.co.za/2020/01/17/alex-residents-assured-of-action-if-shooting-victim-killed-by-cop> (accessed 30 October 2020).

88 As above.

89 Nyathi (n 87).

90 As above.

91 PT Clarke 'Police killings: How does South Africa compare?' *Mail & Guardian* 2 March 2021 <https://mg.co.za/news/2021-03-02-police-killings-how-does-south-africa-compare/> (accessed 21 April 2021).

92 eNCA (n 82).

clearly knew that the racial ontology of conquest in South Africa persisted. He knelt and said: 'My brothers, the South African government is anti-black, they will not hesitate to shoot and kill us then replace us tomorrow'.⁹³ This is exactly what happened afterward, miners were shot down and replaced soon thereafter.⁹⁴

It is my view that the 1996 constitution which was a product of the negotiated settlement, was not and could not have been the correct response to South Africa's colonial-apartheid history.⁹⁵ To further illustrate this argument, Scott notes that while democracy is said to have delivered freedom, nothing much has changed for those living in the townships.⁹⁶ Townships in South Africa remain the best example of a country that is anti-black.⁹⁷ A good example is the situation within the Alexandra township, north of Johannesburg.⁹⁸ Alexandra is one of the poorest slums in Africa and a few metres away is Sandton City, which is one of the wealthiest squares in Africa.⁹⁹ As Alexandra is engulfed with inequality, dehumanisation, poverty, violence, and many other traits resembling the persistence of colonisation and apartheid, elites in Sandton flash their expensive cars and mansions, with pets that even eat better than the children of those in the Alexandra township.¹⁰⁰ Scott notes further that while democracy is said to have delivered freedom, nothing much has changed for those living in the townships.¹⁰¹

Zikode argues in the same manner as Scott. He argues that there is no true democracy in South Africa and if there is one, then it is a spoil of wealth denied to the poor.¹⁰² The situation in *Abahlali BaseMjondolo* shows that poor people have been disregarded and discarded as non-humans.¹⁰³ *Abahlali BaseMjondolo* is a movement of shack dwellers from Durban and its members fight against unlawful evictions for better living conditions.¹⁰⁴ In 2009, the group had won in the Constitutional Court case against the Durban municipality prohibiting its members' evictions from their slums.¹⁰⁵ However, a

93 As above.

94 As above.

95 Ramose (n 23) 14.

96 Scott (n 80).

97 As above.

98 BC Simelane 'Xenophobia, crime and poverty trigger anger in Alexandra' *Mail & Guardian* 3 April 2019 <https://www.dailymaverick.co.za/article/2019-04-03-xenophobia-crime-and-poverty-trigger-anger-in-alexandra/> (accessed 22 November 2019).

99 As above.

100 As above.

101 Scott (n 80).

102 Zikode (n 78).

103 As above.

104 Zikode (n 78).

105 As above.

day after winning the court case, a group of armed men came and attacked them.¹⁰⁶ The racial ontology of conquest persists – the belief that it is acceptable to kill or converse using violence when dealing with Black people because they are non-human.¹⁰⁷ In response to this, Zikode noted that ‘when you are poor, the law does not protect you, it may protect you on paper but the truth is that the elite will still get to you’.¹⁰⁸ Zikode further stated that poor people are below the law because the people who attacked them in their slums are yet to be apprehended.¹⁰⁹

Black people are disregarded and discarded in their squalor, their human dignity is stripped off by the bucket system toilets and the sewerage leaks that surround their shacks, and they are the forgotten people where service delivery is concerned. Their voices are only heard after their bodies have endured the terror of rubber bullets and their eyes have seen the wrath of tear gas.¹¹⁰ Black people do not have access to the socio-economic rights entrenched in the constitution and this is as a result of their dehumanisation by white supremacy and the racial ontology of conquest. These are the people who sleep with one eye open, from the fear of not waking up from the easily flammable shacks in whose confines their humanity has been discarded.¹¹¹

2.2.2 Violation of the right to dignity and health

The term ‘*esidimani*’ means ‘place of dignity’.¹¹² Life Esidimani means a ‘place of dignity’, however, the patients placed there were not treated with dignity.¹¹³ In Life Esidimani, about 144 psychiatric patients lost their lives.¹¹⁴ An inquest into the processes that led to these deaths revealed that the deaths resulted from negligence, dehydration, starvation, and cold, just to mention a few.¹¹⁵ After the

106 As above.

107 Serequeberhan (n 9) 50.

108 Zikode (n 78).

109 As above.

110 I Mahlangu ‘Bucket toilets still reality for thousands’ 06 June 2018 <https://www.sowetanlive.co.za/news/south-africa/2018-06-06-bucket-toilets-still--reality-for---thousands/#:~:text=The%20bulk%20of%20bucket%20toilets,that%20exist%20in%20formal%20areas.&text=More%20than%2060000%20South%20African,the%20government%20to%20eradicate%20them> (accessed 30 October 2020).

111 Scott (n 80).

112 L Lebaki ‘Restoring Dignity in Disability in South Africa’ 01 December 2016 <https://www.hrw.org/news/2016/12/02/restoring-dignity-disability-south-africa> (accessed 22 January 2020).

113 As above.

114 C Capri ‘Intellectual disability in the Esidimani tragedy: Silent deaths’ (2018) 108 *South African Medical Journal Editorial* at 153.

115 As above.

inquest which warranted for someone to be held accountable, the National Prosecuting Authority (NPA) still declined to prosecute.¹¹⁶ Interestingly, the NPA recently announced its intentions to conduct a formal inquest into these deaths.¹¹⁷ This tragic incident clearly shows a repetition of what happened in colonial-apartheid South Africa, yet we have a constitution that guarantees the right to life and human dignity.¹¹⁸

The gross violations of human rights which occurred daily in the streets of South Africa during colonisation and apartheid were left unaccounted for because they were done on Black people.¹¹⁹ In contemporary South Africa, Black people continue to suffer due to the failure of the 1996 constitution in undoing the racial ontology of conquest.¹²⁰ The Life Esidimeni tragedy is a good example – those with money have access to one of the best healthcare in private hospitals while the impoverished are left to die in under-resourced public hospitals.¹²¹

The country's continued embrace of the name 'South Africa' does not serve as a reminder of a past South Africa has once been through, but symbolises the continuation of this 'past'.¹²² This name is a construct and artefact of the sovereignty of colonialism which was imposed by conquering powers on this land in the union of 1910.¹²³ This name symbolises the sufferings, oppression, dispossession, and the non-sovereign being of Black people as the conquered peoples of South Africa.¹²⁴ The continuation of this name shows the continuation of this symbolism.¹²⁵ The author should not be misconstrued as saying that the changing of names on its own would be enough to account for the tragedies and injustices of conquest, because it will not, just as the changing of street names comes short. However, the mere fact that this article must entertain this discourse should already reveal the failure of the constitution to break away from the racial ontology of conquest.

116 N Jordann 'Not enough evidence' to prosecute Life Esidimeni deaths: NPA' 17 September 2019 <https://www.timeslive.co.za/news/south-africa/2019-09-17-not-enough-evidence-to-prosecute-esidimeni-deaths-npa/> (accessed 22 January 2019).

117 T Kubheka 'Life Esidimeni formal inquest to begin in July, NPA announces' *Eyewitness News* 19 April 2021 <https://ewn.co.za/2021/04/19/life-esidimeni-formal-inquest-to-begin-in-july-npa-announces> (accessed 30 April 2021).

118 Constitution (n 2) secs 10-11.

119 B Magubane *The political economy of race and class in South Africa* (1979) at 1.

120 N Dladla 'The liberation of history and the end of South Africa: Some notes towards an Azanian historiography in South Africa' (2018) 34 *South African Journal on Human Rights* at 415.

121 See M Young 'Private vs Public Healthcare in South Africa' (2016) Honors thesis, Western Michigan University, 2016 at 3 where Young reveals the gap that exists between the public hospitals and private hospitals in South Africa.

122 Modiri (n 77) 29.

123 As above.

124 Modiri (n 77) 29.

125 As above.

In South Africa, as we have seen with Abahlali BaseMjondolo, Black people should not speak for themselves and should accept anything that is thrown at them.¹²⁶ Zikode correctly puts it when he states that everyone wants to talk for the poor but no one wants to talk to the poor.¹²⁷ This is happening in a country with ‘one of the best constitutions in the world’ which guarantees a right to life and human dignity and confirms that South Africa is unreceptive to blackness.¹²⁸

3 The reconstitution of South Africa

3.1 The dominant theory of the constitution

One can rarely converse about the continuation and preservation of the racial ontology of conquest in contemporary South Africa without receiving questions of implementation, how good the constitution is, how it is the best in the world, and how it is so sophisticated.¹²⁹ These are the views held by constitutional optimists. Langa in ‘Transformative constitutionalism’ discusses how the constitution can be used to transform the society by providing access to justice and transforming legal culture and the way law is taught.¹³⁰ In essence, Langa argues that the constitution, if interpreted in a transformative way, has the potential of achieving access to justice, equality, and the realisation of other socio-economic rights.¹³¹

Langa’s discourse of transformative constitutionalism subscribes to the most dominant theory of the constitution – which is constitutional optimism.¹³² The group of scholars who subscribe to constitutional optimism hold that the constitution can bring about any form of change if it is implemented properly.¹³³ Further, Langa opines that transformation can be achieved through changing the legal culture, in other words, by ensuring access to courts and making judges accountable through giving justifications for their decisions.¹³⁴ He further writes that the task of transformation should not be exclusive to the courts and the government as society should also play a role.¹³⁵ He proposes reconciliation as a fundamental step towards social transformation.¹³⁶ According to him, the failure of people to

126 Zikode (n 78).

127 As above.

128 Constitution (n 2) secs 10-11.

129 Langa (n 3) 150; Klare (n 3) 151.

130 Langa (n 3) 351.

131 As above.

132 Langa (n 3) 351; Klare (n 3) 151.

133 As above.

134 Langa (n 3) 351; Klare (n 3) 151.

135 As above.

136 Langa (n 3) 358.

reconcile will only change the legal culture and the material conditions of a society while that society remains divided and fractured by bitterness and hate.¹³⁷ He refers to the role that the TRC played, and borrows from Borraine who stated that there is a need for South Africans to have the hope that they can move beyond the past, and that requires ‘remembering and forgetting’. Borraine opines:¹³⁸

We must remember what it is that brought us here. But at the same time, we must forget the hate and anger that fuelled some of our activities if we are to avoid returning to the same cycle of violence and oppression.

The idea of moving on as though nothing happened is the reason why white supremacy and anti-blackness persists. This is the path taken by the 1996 constitution, a forward-looking approach that is ignorant of South Africa’s colonial-apartheid history. Constitutional optimists worship the constitution as the saviour that ended Black people’s sufferings and a tool capable of ensuring justice and equality, while constitutional abolitionists speak of the need for the racial economy, ontology, and epistemology of conquest to be undone before any discussions can be had on justice and equality.¹³⁹ When constitutional optimists speak of the need to forgive and move on, constitutional abolitionists speak of the need to look back at our past and account for the tragedies and injustices of conquest which continue in the present.¹⁴⁰

Klare then opines the need for adjudicators to be transformative in their adjudication.¹⁴¹ He writes about the need for the ‘best interpretation’ to be adopted by judges and lawyers, and contends that the ‘postliberal’ interpretation is the best.¹⁴² He writes that the new South Africa has a constitution that has massive egalitarian commitments which are superimposed on a formalistic legal culture lacking a strong practice of substantive contestation and discussion over the medium legal discourse.¹⁴³ He argues that in order to start transformation, we need lawyers to complement the judicial legal interpretation and method with the constitution’s fundamentally progressive aspirations.¹⁴⁴

In essence, Klare argues that the achievement of democratic and responsive social transformation may find its foundation in the law and legal practices, however, an evolution of an updated and politicised account of the rule of law is required.¹⁴⁵ Klare, as a

137 As above.

138 As above.

139 Langa (n 3) 151; Klare (n 3) 150.

140 Ramose (n 23) 14; Modiri (n 77) 29.

141 Klare (n 3) 150.

142 Klare (n 3) 151.

143 Klare (n 3) 188.

144 As above.

145 As above.

constitutional optimist, speaks of a 'new' South Africa, while Dladla, an abolitionist, argues that there is no new South Africa as it is a continuation and preservation of 'post'-apartheid.¹⁴⁶ Klare speaks of the constitution as having the capability to ensure justice if judges are to interpret it in a 'postliberal' manner, while constitutional abolitionists argue that the constitution cannot translate to reality because it did not undo the racial economy, ontology, and epistemology of conquest.

Contemporary South Africa is said to be governed by a constitution that is seen as one of the best constitutions, but white supremacy and anti-blackness persists. This problem lies not in the inability of the 1996 constitution to be interpreted or implemented properly, but the problem lies in the constitution itself and its inability to act as a radical breakaway from colonial-apartheid South Africa to a decolonised South Africa.¹⁴⁷ That is the reason why there is a need for the reconstitution of South Africa. The reconstitution of South Africa calls for the racial ontology of conquest to be undone.¹⁴⁸

Shai summarises the group of scholars of constitutional optimism. He states that one thing that brings about unanimity amongst constitutional optimists is their shared beliefs on unity in 'racial diversity', 'constitutional identity', or 'a common moral understanding of the constitution'.¹⁴⁹ Constitutional optimists share the same views with regards to the thought that the constitution can address white supremacy and anti-blackness if it is interpreted correctly or implemented efficiently.¹⁵⁰ However, constitutional abolitionists argue that the 1996 constitution is, in itself, a problem.¹⁵¹ Constitutional optimists also see the constitution as transformative and they see transformation as a tool that can bring about change.¹⁵² In contrast, constitutional abolitionists contend that transformation cannot bring about the radical change that is needed in South Africa.¹⁵³ Hence, constitutional abolitionism calls for decolonisation.

The Cambridge Dictionary defines 'transformation' as a complete change in the character or appearance of something in order for it to be improved.¹⁵⁴ Langa then says that transformation can be achieved when the social and economic situations of the disadvantaged people

146 Dladla (n 120) 415.

147 Ramose (n 23) 14; Modiri (n 77) 29.

148 Ramose (n 23).

149 I Shai 'The quest for radical transformation and the limits and limitations of the law' LL.D thesis, University of Pretoria, 2017 at 109.

150 As above.

151 Dladla (n 120) 415.

152 Langa (n 3) 151; Klare (n 3) 150.

153 Dladla (n 120) 415.

154 Cambridge Dictionary 'transformation' <https://dictionary.cambridge.org/dictionary/english/transformation> (accessed 22 April 2019).

are changed.¹⁵⁵ However, constitutional abolitionists contend that transformation does not fundamentally dismantle the foundational roots of the system but rather seeks assimilation into the system.¹⁵⁶ This is because it does not call for the racial ontology of conquest to be undone, and it is ignorant of the tragedies and injustices of conquest which remain unaccounted for. In essence, constitutional optimists argue that the system should be used to change the lives of Black people, while constitutional abolitionists argue that the system should be abolished.¹⁵⁷

Constitutional optimists disregard the lived realities of the Black people of this country. They, through their transformation discourse, turn a blind eye to the structural and systemic persistence of white supremacy and anti-blackness. This they do by being ignorant of the fact that South Africa was created based on certain foundations and further disregard the notion that in order for the injustices and tragedies of conquest to be accounted for, these foundations must be undone. This is the reason this study adopts constitutional abolitionism as an alternative theoretical perspective.

3.2 The tenets of constitutional abolitionism

It is my view that those who have inaccurately ascribed all of these accolades to the 1996 constitution would rightfully regard the notion of abolitionism as too extreme and destructive.¹⁵⁸ However, one might ask, is it possible to undo a history that was created through extreme and destructive methods with smiles, flowers, and chocolates? It can never be. Similarly, the deep implications of racism with dehumanisation in the South African racial ontology raises the ultimate question; 'is it possible to overcome racism without transcending the structural constraints of [racial ontology] as a system?'.¹⁵⁹ This is what the theoretical perspective of constitutional abolitionism is based on. Constitutional abolitionists opine that to overcome white supremacy and anti-blackness, the structural constraints of the racial ontology of conquest should be undone.¹⁶⁰

If this was storytelling, it would not suffice to pen it down because it would require us to sit before woodfires, at noon, confronting the winds of nature with our bare skins, just like our grandfathers and mothers used to. Dladla, surrounded by constitutional optimists and sceptics, is asked the question 'what does being a constitutional

155 Langa (n 3) 351.

156 Dladla (n 69) 415; Ramose (n 23) 14.

157 Langa (n 3) 351; Klare (n 3) 150.

158 As above.

159 Magubane (n 119) 3.

160 Dladla (n 69) 415; Ramose (n 23) 14.

abolitionist mean?’ He argues that constitutional abolitionists believe that the problems of the constitution are so fundamental that the constitution itself is a document that is incapable of ensuring justice.¹⁶¹ He makes an example that the mere fact that the constitution is translatable to African languages does not make it an African constitution.¹⁶² He further states that this much-celebrated constitution contains the controversial property clause, which is section 25, as a fundamental right.¹⁶³ With South Africa being a country where land was acquired through racial dehumanisation, Dladla asks, how can it be ethical to protect such a right?¹⁶⁴ Dladla emphasises that constitutional abolitionism is not the abolition of the constitution as a document per se, but the abolition of ‘succession of the conqueror’s constitutions purporting to be “our” law’.¹⁶⁵

The historical overview of the notion of ‘abolition’ and its recent revival in the US has already been noted above. In the South African context, abolitionist thinking draws from and is closely related to the enterprise of Azanian critical philosophy.¹⁶⁶ The Azanian critical philosophy is explained by Dladla and it follows Ramose’s critique of the constitution which builds on the works of Lembede, Sobukwe, and Biko.¹⁶⁷ Azanian critical philosophy is essentially the ideology that this article has presented throughout. From the PAC’s ideologies to Ramose, Serequeberhan, Modiri, and others.¹⁶⁸ Azanian critical philosophy describes present-day theoretical and practical activity that was founded on the historical activities and thinking of movements like the PAC, the Black Consciousness Movement of Azania (BCMA), Azanian Racial Organisation (AZAPO) and Others, and ‘thinker-actors’ that were their products.¹⁶⁹ Dladla put it so well when he states, ‘this approach to philosophy is one that originates in the experience of the struggle against colonial (and then neo-colonial) domination in Africa’.¹⁷⁰

Modiri, who is one of the proponents of constitutional abolitionism, breaks down the different types of theories of the constitution.¹⁷¹ The theory of constitutional optimism has already been discussed.¹⁷² The second theory is one he calls ‘critical

161 Big Debate South Africa (n 4).

162 As above.

163 As above.

164 As above.

165 Dladla (n 69) 416.

166 As above.

167 Dladla (n 69) 416.

168 As above.

169 Dladla (n 69) 416.

170 As above.

171 JM Modiri ‘Introduction to special issue: Conquest, constitutionalism and democratic contestations’ (2018) 34 *South African Journal on Human Rights* at 296.

172 Modiri (n 171) 315.

scepticism' and he states that this is a group of scholars who find problems in the grand narratives of post-1994 constitutionalism, exposes the shortcomings of the law, the TRC, liberalism, enlightened reason, and so forth.¹⁷³

Constitutional sceptics will also not be afforded the centre stage because they hold a view that is totally opposite to the argument presented throughout this study. These are a group of scholars who still believe that the constitution is the right tool to address the colonial-apartheid history of South Africa, but they caution its over-celebration or worship. On the other hand, constitutional abolitionists reject the notion that the 1996 constitution was the correct response to South Africa's colonial-apartheid history.¹⁷⁴

Unlike the first two groups of scholars, the third group of scholars, which is the one that this article adopts and discusses throughout is that of 'the constitutional abolitionists' who have discovered the problem in South Africa and have the solution. The 1996 constitution, as the succeeding constitution of the constitutions of South Africa, which are; the 1913 Land Act; the 1948 declaration of apartheid; the 1960 constitution; and the 1983 constitution,¹⁷⁵ was supposed to act as a radical breakaway from colonial-apartheid South Africa to a decolonised South Africa.¹⁷⁶

The solution that constitutional abolitionists give is that there is a need for the reconstitution of South Africa so that the constitutional foundation of colonial-apartheid South Africa can be abolished. Constitutional abolitionists challenge the historical, cultural, and philosophical bases of the South African constitution from the view of occluded ontologies and epistemologies.¹⁷⁷

On the question of whether these scholars' views do overlap at times, Modiri argues that it is not always easy to differentiate them but provides a helpful contrast.¹⁷⁸ He states that constitutional optimists represent the idea of faithfulness towards transformative social change and within constitutional frameworks.¹⁷⁹ He notes that critical sceptics, on the other hand, are cautious of 'faithfulness' as a mode of relating to the law, while constitutional abolitionists reject the social vision underpinning the post-1994 constitutionalism based on more far-reaching conceptions of history and justice.¹⁸⁰

173 Modiri (n 171) 296.

174 As above.

175 Natives Land Act 27 of 1913; The Republic of South Africa Act, 1961; The Republic of South Africa Constitution Act 110 of 1983.

176 Library of Congress (n 5).

177 Modiri (n 171) 296.

178 As above.

179 As above.

180 As above.

Constitutional abolitionism reveals the problems and challenges that arise from the notion of creating a 'new' South Africa based on the 1996 constitution.¹⁸¹ These problems are, amongst other things, the persistence of the constitutional foundation of colonial-apartheid South Africa that is presented throughout this study.¹⁸² South Africa was created based on white supremacy and anti-blackness. With the adoption of the 1996 constitution, constitutional abolitionists argue that first on its agenda was supposed to be undoing this racial ontology.

Madlingozi argues that the adoption of the constitution, which Ramaphosa, the main negotiator of the ANC at the negotiations (called the 'birthday' of South Africa) led to the adoption of a constitution that did not look backward.¹⁸³ Consequently, the 1996 constitution cannot redress past injustices because it only looks onward with the aim of assimilating Black people without any recourse or restitution.¹⁸⁴ A fundamental question which constitutional abolitionists ask is thus, how could we expect constitutional jurisprudence and a constitutional text to allow for the reharmonisation of Black and white people while their social relations have not gone through a process of economic, psychic, racial, and spatial decolonisation?¹⁸⁵

The call for the reconstitution of South Africa emanates from the failure of the constitution to account for the tragedies and injustices of conquest.¹⁸⁶ The failure of the constitution to look back and address the constitutional foundation of colonial-apartheid South Africa has led to these foundations still in existence in contemporary South Africa. We saw this in Marikana, with Life Esidimeni, with the apartheid policing resulting in the death of Andris Tatane, and the situation in Abahali BaseMjondolo.¹⁸⁷

The abolition of the constitutional foundations of South Africa can be achieved through striving towards a decolonised South Africa. As noted above, a decolonised South Africa is one where white people are no longer seen as the primary racial and social subjects of South Africa whilst Black people are cast away as the natives of nowhere and as nonhumans.¹⁸⁸ It is one where the racial economy, ontology, and epistemology of conquest is undone. It entails the adoption of a new

181 MB Ramose 'Towards a post-conquest South Africa: beyond the constitution of 1996' (2018) 34 *South African Journal on Human Rights* at 327.

182 As above.

183 Madlingozi (n 85) 127.

184 As above.

185 Modiri (n 77) 29.

186 Ramose (n 23) 327.

187 Simelane (n 98); Zikode (n 78).

188 Ramose (n 23).

constitution that is not a result of closed doors negotiations and sunset clauses.¹⁸⁹ This constitution would have to address the injustices and tragedies of conquest – everyone must be represented during its drafting and the processes must be transparent. Of utmost importance, this new constitution must have the human right to subsistence in its Bill of Rights, and such rights should be legally enforceable.¹⁹⁰ In doing so, this new constitution would be reckoning with past injustices through the administration of substantive equality.¹⁹¹

With regard to constitutional abolitionists' view on the return of land, they reject the notion that there should be the amendment of section 25 of the constitution to allow for land expropriation because this would not address the problem.¹⁹² The problem is not with certain sections of the constitution or the failure of the constitution to be implemented efficiently.¹⁹³ Constitutional abolitionists articulate it very well when they say that the problem is that this constitution is incapable of producing justice because it is fundamentally the problem.¹⁹⁴ Its failure to dismantle the racial ontology of conquest means that it maintains and protects it.

What is more, the crimes that were committed during colonial-apartheid South Africa cannot just go unaccounted for. The reason why there is still violence imposed on Black bodies without any remorse, and the reason why Black people are still met with apartheid policing as we saw in Marikana, the murder of Andris Tatane, the murder of Collins Chabane and Nathaniel Julius, the #FeesMustFall protests, and many other incidences exposing the inability of the 1996 constitution to address the colonial-apartheid history of South Africa is because contemporary South Africa is behaving based on what it was created on, which is the racial ontology of conquest.¹⁹⁵

The reconstitution of South Africa embraces justice as one of its fundamental pillars because it remains aware of the fact that many of the constitutional foundations of colonial-apartheid still exist merely because justice was not served.¹⁹⁶ The miscarriage of justice by the TRC is noted by Madlingozi when he states, 'There is neither truth nor

189 South African Constitutional Hill 'Negotiating our Freedom' <https://ourconstitution.constitutionhill.org.za/south-african-constitution/negotiating-our-freedom/> (accessed 11 September 2021).

190 MB Ramose, TGT Maphala & TE Makhabane 'Lasting constitutional changes in South Africa' (1991) 2 *Quest* at 27.

191 As above.

192 Ramose (n 23) 18.

193 Dladla (n 69) 415.

194 As above.

195 Serequeberhan (n 9) 50.

196 T Madlingozi 'There is neither truth nor reconciliation in so called "South Africa" 29 June 2020 <https://thefunambulist.net/magazine/reparations/there-is-neither-truth-nor-reconciliation-in-so-called-south-africa-a-conversation-with-tshepo-madlingozi> (accessed 22 January 2020).

reconciliation in South Africa'.¹⁹⁷ Madlingozi argues that little, if any, the truth was revealed in these hearings, and victims of these inhumane crimes were neglected.¹⁹⁸ How then can we speak about reconciliation? The reconstitution of South Africa also means that the TRC was not the correct forum to address the issue of these violent and inhumane crimes as crimes were supposed to be prosecuted and not heard in hearings.¹⁹⁹

Dladla reveals that 'South Africa' is the fundamental problem for Black people being conquered in the unjust wars of colonisation.²⁰⁰ In essence, Dladla reveals how the constitution of South Africa from 1910 still exists and continues with the 1996 constitution.²⁰¹ Constitutional abolitionists' main argument is that the failure of the 1996 constitution to act as a radical breakaway from colonial-apartheid South Africa, to a decolonised South Africa is the reason why white supremacy and anti-blackness persist. Consequently, the 1996 constitution should not be worshipped or celebrated as a saviour constitution because it presides over the preservation and continuation of Black people's economic inferiority, dehumanisation, and epistemicide.

In my view, constitutional abolitionists would advocate for the need to conscientise Black people. More than 350 years of trauma, violence, dehumanisation, and indoctrination or 'white-washing' must have had a great impact on the psychological, spiritual, and social well-being of Black people.²⁰² It is my view that there is therefore a need for conscientisation through rewriting the history, tradition, laws, cultures, and livelihoods of Black people from their perspectives, and not just portraying them as victims but also as victors.²⁰³ This would also entail a project of rebuilding South Africa in the image of the conquered while dismantling the conqueror's South Africa.²⁰⁴

4 Conclusion

The creation of South Africa based on racial ontology can be traced throughout the footsteps of colonisation and apartheid in South Africa. The central tenet of this theory is that Black people are not full humans and should therefore be the objects of the economic, social, cultural, and legal subjects of South Africa, who are white

197 As above.

198 As above.

199 As above.

200 Dladla (n 120) 415.

201 As above.

202 Serequeberhan (n 9) 50.

203 Modiri (n 77) 29.

204 As above.

people. This idea was used to justify the Christianisation of Black people, their enslavement, their oppression, and their relegation to the lowest form of biological and social life. When South Africa attained what many termed ‘democracy’, the racial ontology of conquest was not abolished. Consequently, white supremacy and anti-blackness persist. This study calls for the abolition of the racial ontology of conquest. It adopts the principles of constitutional abolitionism. Constitutional abolitionists simply contend that there is a need for a decolonised South Africa, and such can only be achieved through the abolition of the racial ontology of conquest. The abolition of the racial ontology of conquest can be achieved through the adoption of a constitution that is not subject to sunset clauses, one that breaks away from the constitutional foundations of colonial-apartheid South Africa, and one that accounts for the tragedies and injustices of conquest. Throughout this article, it is evident that the 1996 constitution has failed to live up to its expectations. Unlike this constitution, this article would like to believe that it has lived up to its expectations. Either way, it would be very difficult to find an appropriate ending to a writing of this kind, but what better way than to finish it with a slogan the PAC cherishes so much.

Izwe lethu-iAfrika!²⁰⁵

205 This is an isiZulu phrase, directly translated means ‘Africa, our land’. It is a PAC slogan which was used to affirm its claim over the South African territory.

A CRITIQUE OF THE AVAILABLE DEBT RELIEF MEASURES AFFORDED TO NINA DEBTORS IN THE WAKE OF TRANSFORMATIVE CONSTITUTIONALISM AND INTERNATIONAL TRENDS

by Zakariya Adam*



Abstract

Insolvency law is well-established throughout the world and while there are measures in place for dealing with debtors who find themselves in varied circumstances, the issue of relief measures afforded to no-income, no-asset (NINA) debtors has posed quite an issue for many countries, South Africa particularly. When approaching bona fide NINA debtors, the concepts of equality and justice come into play with consideration to the socio-economic circumstances of many in South Africa, our woeful past, and the current ideals of transformative constitutionalism. This paper delves further into this issue and conclusively recommends that legislation be developed in line with other countries such as New Zealand and Kenya

* BCom Law (finalist), University of Pretoria. ORCID iD: 0000-0002-8574-8952. I would like to thank my brother Mohamed Faez and dear friends Malcom Mangunda and Luke Schwulst for their thorough input throughout this process. Further, I would like to thank the entire PSLR team, especially Khalipha Shange and Phenyio Sekati for their relentless efforts and patience. As one of my first contributions to the field of law, I hope the reader finds this insightful and enlightening. I hereby note that all shortcomings are that of my own. I would like to dedicate this to my mother and father. In the name of Allah (SWT), the most beneficent, the most merciful.

1 Introduction

Despite the overarching international trends aimed at assisting over-indebted debtors, South Africa still finds itself bound by an archaic approach to insolvency in that it is largely creditor-oriented.¹ Through the utilisation of this system, many honest yet unfortunate individuals find themselves unfairly discriminated against, one such category of individuals being that of the so-called ‘no income no assets’ debtors (NINA debtors). Such a category of debtors is comprised of individuals who, upon being declared insolvent, have neither income nor assets to distribute amongst their creditors.² South African insolvency law strives to maximise returns for creditors, whereas the international trend seems to be directed towards affording relief measures to debtors to eventually enable a discharge from said debt.³ One would attest to the South African system being seemingly ironic, particularly because of the socio-economic context in the wake of such conditions created by apartheid legislation.

In this paper, the current plight of NINA debtors amidst the COVID-19 pandemic and their available relief measures will be discussed in context of unfair discrimination and inequality in the wake of transformative constitutionalism. Following this, the discussion surrounding the international trends in this regard will be delved into. Finally, concluding remarks and reform recommendations are offered. Special note needs to be made of the fact that in this paper, the debtors discussed are *bona fide* debtors and not those individuals who seek to manipulate the judicial system for their personal gain.

2 The current plight of NINA debtors amidst COVID-19

Currently, NINA debtors in South Africa are comprised of working-class individuals, either in the formal or informal sector, who struggle financially to make ends meet. Prior to COVID-19, South Africa was experiencing an economic downturn and unemployment was substantially high with it sitting at 29.1% by the end of the third quarter in 2019.⁴ Nevertheless, COVID-19 and lockdown restrictions

1 H Coetzee & M Roestoff ‘Consumer debt relief in South-Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand’ (2013) 22 *International Insolvency Review* at 1.

2 M Roestoff & H Coetzee ‘Debt relief for South African NINA debtors and what can be learned from the European approach’ (2017) 50 *Comparative and International Law Journal of Southern Africa* at 252.

3 Roestoff & Coetzee (n 2) 251.

4 StatsSA ‘Unemployment rises slightly in the third quarter of 2019’ 29 October 2019 http://www.statssa.gov.za/?p=12689&gclid=Cj0KCQjw6s2IBhCnARIsAP8RfAh7rlxQvY4oUKRJ1Rw8vJoUmH9A0UJChqenNwNN98NOBA_48Nl1LREaAvhaEALw_wcB (accessed 16 April 2021).

burdened the country even further and essentially led to the rate of unemployment increasing to 32.5% in the first three months of 2021.⁵ Naturally, the number of people borrowing money to pay off debts and maintain their standard of living increased, further supported by the already low borrowing rate (the rate which affects the amount of interest owed annually on money borrowed) of 7%.⁶ A 'lower cost of borrowing' encourages the consumer to utilise more credit as it seems to be a more worthwhile transaction for those in need of and usually utilise credit. Debt Buster's 2020 Quarter 3 Index revealed that those who earned less than R5 000 per month on average had to subsequently utilise 56% of that net income for debt repayments.⁷ Additionally, StatsSA reported that from a pool of 2 688 respondents, 15.4% had attested to losing their source of income by the sixth week of lockdown and were subsequently left with no income at all.⁸ From this, the current circumstance of the working-class individual is determined and in this next wave, NINA debtors are acknowledged and pre-empted, not necessarily due to their own maleficence but rather by being initially financially insecure amidst a time of economic turmoil.

3 Available debt relief measures

Three debt relief measures are provided in principle to over-indebted debtors in South Africa.⁹ They are sequestration in terms of the Insolvency Act,¹⁰ debt review in terms of section 86 of the National Credit Act,¹¹ and administration proceedings in terms of the Magistrate's Court Act.¹² Debt review and administration proceedings are in essence repayment plans and do not provide a debtor with eventual discharge from debt.¹³ With that said, these two statutory relief measures do, at some point, require that debtors dispose of their assets or income.¹⁴ These procedures also impose access requirements, in the form of disposable income, which satisfy the related sequestration expenses.¹⁵ However, your typical NINA debtor

5 Trading Economics 'South African Unemployment Rate' <https://tradingeconomics.com/south-africa/unemployment-rate> (accessed 16 April 2021).

6 CEIC 'South Africa Bank Lending Rate' <https://www.ceicdata.com/en/indicator/south-africa/bank-lending-rate> (accessed 16 April 2021).

7 Staff Writer 'SA Consumers are Borrowing Money to Pay Back Their Debt' *BusinessTech* 02 November 2020 <https://businesstech.co.za/news/finance/445250/sa-consumers-are-borrowing-money-to-pay-back-their-debt/> (accessed 16 April 2021).

8 Staff Writer (n 7).

9 Coetzee & Roestoff (n 1) 9.

10 Insolvency Act 24 of 1936.

11 National Credit Act 34 of 2005.

12 Magistrate's Court Act 32 of 1994.

13 Roestoff & Coetzee (n 2) 254.

14 Roestoff & Coetzee (n 2) 255.

15 Roestoff & Coetzee (n 2) 254.

would not be able to afford such fees. NINA debtors, therefore, find themselves expressly excluded from such typical relief measures.

Sequestration is viewed as South Africa's primary debt relief measure and is the only one that affords eventual discharge.¹⁶ However, it should be noted that this is not its purpose in principle, but rather a consequence thereof. It is, essentially, an asset liquidation procedure that still prioritises the creditor's repayment over the debtor's well-being – again contrary to international trends which seem to be directed towards debtor-relief measures.¹⁷ Sequestration still poses formidable access requirements in that sequestration costs would need to be covered and an evident benefit to creditors must also be derived.¹⁸ Sequestration is also a costly affair since, firstly, the High Court would be involved as this is an affair which would affect a natural person's status and, secondly, since the procedure is involved and cumbersome as it is designed for large estates.¹⁹ Once again, the express exclusion of NINA debtors is evident from the inclusion of assets or disposable income to the requirements necessary to access sequestration proceedings.

Consequently, and quite ironically, NINA debtors also have the option to enter voluntary negotiations with their creditors.²⁰ This would, however, be seemingly futile as a NINA debtor would (by the very premise that they are a NINA debtor) not have access to disposable income to furnish the creditor with at any point. There would also be clear power disparities in such a negotiation and NINA debtors would be left no better than when they entered these negotiations as the only option which is, in principle, appropriate for such a debtor is debt discharge or a fresh start. Therefore, the unfortunate reality of the current insolvency system procedures is that it purports the notion that one may be 'too poor to go bankrupt'.²¹

4 Unfair discrimination and substantive equality

The Constitution of the Republic of South Africa serves as host to the Bill of Rights and is the cornerstone to the principles of equality in the country.²² Section 8 of the Bill of Rights establishes that the executive, judicial, and legislative arms of government are bound by said Bill and that they have the express duty to promote, respect, protect, and fulfil the rights provisioned therein.²³ Such rights may

16 As above.

17 Roestoff & Coetzee (n 2) 254.

18 As above.

19 As above.

20 Coetzee & Roestoff (n 1) 3.

21 Coetzee & Roestoff (n 1) 2.

22 Constitution of the Republic of South Africa, 1996 (Constitution).

also, however, be limited internally or by section 36 of the Bill.²⁴ Of particular importance is the right to equality protected under section 9 of the Constitution which sets out that everyone has the right to benefit from the law,²⁵ that no one may be discriminated against unfairly,²⁶ and that legislation should strive to protect society's most vulnerable members.²⁷

Equality, as a principle, is highly controversial in that the circumstances of individuals may differ substantially, and the treatment of such individuals remains subjective. In a logical sense, however, individuals in similar circumstances should be treated as such. In the context of South African insolvency law, the treatment of debtors who have defaulted would rarely vary.²⁸ However, the distinguishing factor is that these debtors may have varying amounts available to repay their creditors.²⁹ Such similarities and distinguishing factors are raised and noted in determining whether insolvent debtors with varied repayment capacities would be treated differently.³⁰

As insolvency law relates to the economic status of individuals within society, it becomes increasingly important to acknowledge the differences in South Africa's dual economy portrayed by the formal and informal sectors.³¹ In respect of this, differing socio-economic classes are attributed to each sector in that the formal sector (or secondary and tertiary sectors) bear more wealth as it functions as part of the industrial and professional portion of the economy. Contrastingly, the informal, or primary sector of the economy, is primarily made up of hawkers, uncontracted workers, and manual labourers.³² NINA debtors, as noted in section two of this paper, form the primary constituency of this economy as they are either the portion of South Africa's unemployed or make up the informal or primary sector of the economy, and are expressly excluded from any viable measure of debt relief.³³

Transformative constitutionalism is essentially the most overt legal catalyst to the promotion of equality in South Africa. It is premised on achieving substantive equality which is described as equality in social and economic life and is arguably the most

23 Constitution (n 21) sec 8.

24 Constitution (n 21) sec 36.

25 Constitution (n 21) sec 9(1).

26 Constitution (n 21) sec 9(4).

27 Constitution (n 21) sec 9(2).

28 Coetzee & Roestoff (n 1) 39.

29 As above.

30 H Coetzee 'Is the Unequal Treatment of Debtors in Natural Person Insolvency Law Justifiable?: A South African Exposition' (2016) 25 *International Insolvency Review* at 41.

31 Coetzee & Roestoff (n 1) 5.

32 Coetzee (n 30) 41.

33 As above.

appropriate way to address the inequalities faced by NINA debtors.³⁴ Substantive equality recognises that inequality is not only the cause of the different treatment of persons but more often emerges from 'systemic group-based inequalities that shape relations of dominance and subordination and material disparities between groups'.³⁵ In noting this, substantive equality in relation to transformative constitutionalism seeks to acknowledge the economic and social realities faced by classes of individuals to strive towards the surreal ideal of equality. The premise of this concept is that no one should be unfairly discriminated against or disenfranchised purely because of inherent disadvantages completely out of their control.³⁶

The case of *Harksen v Lane*³⁷ was decided with regards to the interim Constitution, wherein the Constitutional Court established a three-step approach when investigating an alleged violation of the right to equality.³⁸ These steps contained the focal points on whether or not a provision discriminated between people or classes of people, whether such discrimination amounted to unfair discrimination and, whether such discrimination could be justified under the limitations clause should the discrimination be found to be unfair.³⁹ In her paper, Coetzee goes forward to analyse the state of NINA debtors in the context of this test and concludes that the current insolvency law, under the conditions outlined in this test, is unconstitutional not only because the system is clearly exclusionary towards a specific class of debtors, but also because it only provides one method of debt relief wherein discharge is resultant.⁴⁰

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁴¹ serves as a cornerstone to transformation within our democracy.⁴¹ The Act gives effect to the right of equality as entrenched in the Constitution.⁴² The following quote from the Preamble of the PEPUDA is pertinent to this discussion:⁴³

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

34 Roestoff & Coetzee (n 2) 274.

35 Coetzee (n 30) 41.

36 Roestoff & Coetzee (n 2) 274.

37 2008 (1) SA 300 (CC) para 40.

38 *Harksen v Lane* (n 37) para 53.

39 Constitution (n 21) sec 36; *Harksen v Lane* (n 37) para 53.

40 Coetzee (n 30) 47.

41 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

42 Constitution (n 21) sec 3(1).

43 PEPUDA (n 41) Preamble.

This quote corresponds to the rather direct conversation in acknowledging the realities of NINA debtors. As noted above, such debtors belonged to the class of *bona fide* individuals who are denoted as the ‘marginalised’ or ‘the working class of the primary or informal economies’.⁴⁴ In South Africa, that is often a synonym for people of colour and/or black people. NINA debtors are not exclusive to South Africa and for the very fact that their constraints are internationally recognised, it would be elementary to attribute this dilemma in its entirety to colonialism.⁴⁵ However, in a South African context, the past constantly plays a role in the present. The negligent treatment of such a broad class of society, who happen to hold the majority of previously disadvantaged individuals, is a stark reminder of the woeful discriminatory practices of our society.⁴⁶ South Africa’s insolvency system is thus counter-productive owing to its discrimination against groups of people who already find themselves discriminated against in every context of their lives. Furthermore, the remedial measures offered starkly contradict the provisions of PEPUDA in that only one such measure offers eventual discharge of debt.⁴⁷

5 International trends

Insolvency law is a crucial constituent of all international, judicial, and economic systems.⁴⁸ This section aims to outline the international trends and systems of insolvency law with the intention of contrasting these standards to the systems and reform measures held in South African systems. Three systems will be delved into, each within a specific context. The systems to be analysed are, firstly, that of the United States of America as its economy is founded on the principle of freedom of choice. Secondly, the New Zealand system will be analysed as it is regarded as the first country to expressly accommodate NINA debtors in legislation. Lastly, the Kenyan system will be analysed due to it serving as an example close to home and puts forward the answer to ‘what could be’, in the African context.

The United States of America establishes what is referred to as a ‘straight-discharge approach,’ therein enabling any debtor to make a fresh start.⁴⁹ Federal insolvency law regulates the United States in this regard and sets out specific provisions in Chapter 7 of the Bankruptcy Code⁵⁰ which outline that should a debtor surrender their

44 Coetzee (n 30) 41.

45 Coetzee (n 30) 48.

46 Roestoff & Coetzee (n 2) 274.

47 Coetzee (n 30) 53.

48 Roestoff & Coetzee (n 2) 253.

49 Roestoff & Coetzee (n 2) 260.

50 United States Bankruptcy Code, Ch 7.

assets swiftly, this surrender will automatically enable a discharge from all pre-insolvency debt.⁵¹ Other legislative mechanisms prescribed are in the form of repayment plans, namely the 'hardship-discharge', which enables debtors to have their debt discharge where they are unable to complete their payment plan.⁵² While such legislation does not expressly accommodate NINA debtors, it is evident that NINA debtors would qualify for a Chapter 7 discharge should they possess no assets or income.⁵³ This debtor-oriented approach is somewhat fitting to the economy of the United States, which prides itself on freedom of choice and its ever-consistent approach to economic progress.⁵⁴

What is known as the so-called 'No Asset Procedure' is outlined in Part 5 of the New Zealand Insolvency Act.⁵⁵ Such a procedure is purported with humanitarian, economic, and practical justifications.⁵⁶ In establishing this procedure, New Zealand seems to be the only country that has exercised resolve in addressing this neglected class of debtors upon insolvency.⁵⁷ This procedure lasts for 12 months and has, understandably, quite a strict entry criterion.⁵⁸ Upon application to the assignee, the debtor needs to satisfy that they do not possess any realisable assets or income to furnish the debt in question.⁵⁹ Further, the debtor must owe an amount between NZ\$1 000 and NZ\$40 000 and must not have been previously admitted to this procedure or been adjudicated bankrupt.⁶⁰ Furthermore, a debtor will be disqualified from these proceedings should they have concealed assets with the intent to defraud creditors or where they have conducted themselves in an offensive manner, have been adjudicated bankrupt, incurred debts while being aware of their inability to pay said debts, and, lastly, where one of the creditors intends on applying for the adjudication of the debtor as bankrupt.⁶¹ This will likely be materially better than the no-asset procedure.⁶² This is because once a debtor is admitted to this procedure, their creditors are impacted by an effective moratorium which ceases all debt enforcement.⁶³ This does not apply to maintenance orders and student loans.⁶⁴ Succeeding this, a debtor is, firstly, liable to notify

51 As above.

52 As above.

53 Roestoff & Coetzee (n 2) 260.

54 As above.

55 Insolvency Act 2006 No 55 (New Zealand Insolvency Act); Coetzee & Roestoff (n 1) 27.

56 Coetzee & Roestoff (n 1) 27.

57 As above.

58 Coetzee & Roestoff (n 1) 32.

59 New Zealand Insolvency Act (n 55) sec 363(1).

60 Coetzee & Roestoff (n 1) 29.

61 As above.

62 As above.

63 Coetzee & Roestoff (n 1) 30.

64 As above.

the assignee of circumstantial changes which may enable them to reimburse their creditors and, secondly, a debtor may not enter into a credit agreement for more than NZ\$1 000 and should they do so, such an offence is punishable by imprisonment, a fine, or both.⁶⁵ Termination of the procedure results in a termination of the moratorium.⁶⁶ Such termination may occur for a variety of reasons which include the fraudulent concealment of assets, and wrongful admittance to the procedure, to name a few.⁶⁷ Should the procedure not be terminated in an alternative manner, the debtor will be discharged from the procedure after 12 months from admittance, upon the assignee's approval.⁶⁸ Upon such discharge, all the debtor's debts (including charges and penalties) will be unenforceable.⁶⁹

Kenya's no asset procedure holds a stark similarity to that of New Zealand, in that it is also based on a debtor filing an application that includes a detailed scope of the debtor's financial standing.⁷⁰ The official receiver of said application must ensure that the debtor's total debt is between KSh100 000 and KSh400 000 and must be satisfied that the debtor does not have any realisable assets to satisfy their debts, has not been previously admitted to the procedure, and has not been previously declared bankrupt.⁷¹ The Official Receiver will then proceed to inform all the current creditors of the debtor's assets and liabilities.⁷² Similar to the New Zealand procedure, restrictions are placed on the debtor with regard to new debt once an application has been filed.⁷³ Upon admission of the debtor to the procedure, their debts become unenforceable unless the procedure is terminated in an alternate manner.⁷⁴ However, should it not be terminated, the procedure will terminate automatically after twelve months and all of the debtor's prior debts will be unenforceable.⁷⁵ Considering that Kenya's new set of insolvency legislation was enacted in 2015, it suffices to note that this system does have been prospect to operate within the African, and more specifically, within the South African context.⁷⁶ However, it will be of keen interest to the South African legislature to pay specific attention to the unfolding of these Kenyan procedures, particularly in the wake of the tumultuous economic times of COVID-19, wherein now more than

65 New Zealand Insolvency Act (n 55) sec 169(3); Coetzee & Roestoff (n 1) 31.

66 New Zealand Insolvency Act (n 55) sec 372; Coetzee & Roestoff (n 1) 31.

67 New Zealand Insolvency Act (n 55) sec 27; Coetzee & Roestoff (n 1) 31.

68 New Zealand Insolvency Act (n 55) sec 377(1); Coetzee & Roestoff (n 1) 33.

69 New Zealand Insolvency Act (n 55) sec 375; Coetzee & Roestoff (n 1) 33.

70 Z Mabe 'Alternatives to Bankruptcy in South Africa That Provides for a Discharge of Debts: Lessons from Kenya' (2019) 22 *Potchefstroom Electronic Law Journal* at 19.

71 Insolvency Act 18 of 2015 (Kenyan Insolvency Act) sec 345; Mabe (n 70) 2.

72 Kenyan Insolvency Act (n 71) sec 347; Mabe (n 70) 19.

73 Kenyan Insolvency Act (n 71) Division 15; Mabe (n 70) 19.

74 Mabe (n 70) 19.

75 As above.

76 Mabe (n 70) 26.

ever, debtors find themselves without assets, income, and an overall means to satisfy their debts. Special attention must be afforded to the impact that such discharge measures will have on creditors and the lending economy at large.⁷⁷ This, in essence, will be the make-or-break factor for its adoption in countries such as South Africa.

6 Reform

November 2017 saw the Portfolio Committee on Trade and Industry publish the Draft National Credit Amendment Bill.⁷⁸ This was accompanied by a Memorandum on the objects of the National Credit Amendment Bill in 2018.⁷⁹ Although this Bill is, essentially, a limited debt-intervention process, it is also indicative of the concerted effort made towards addressing the needs of vulnerable debtors and consumers within the country.⁸⁰ It seeks to afford relief to debtors who may be excluded from the current relief measures by extinguishing all or part of the obligations of certain classes of debtors.⁸¹ Essentially, the specific action taken through this amendment is to introduce ‘capped debt intervention’ within the National Credit Amendment Bill⁸² to provide statutory recourse to vulnerable consumers who are typically excluded from the previously mentioned relief measures.⁸³ This attempt made by the government to address the needs of a class unfairly discriminated against was long overdue particularly with reference to the international standards, as discussed above. As it stands, many countries are adopting a ‘fresh start’ approach toward NINA debtors.⁸⁴ In the introduction of this paper, the irony of the current relief measures (or lack thereof) was alluded to. This attempt by the government, while warranted and necessary, is much needed and somewhat late, particularly after the stifling economic conditions society finds itself in during the pandemic.

Not only would such discharge systems offer relief to unfairly discriminated debtors, but they would also offer comprehensive and effective rehabilitation that could afford the overall progression of the South African economy, much like that of the United States of America.⁸⁵ To afford NINA debtors (who comprise of mainly individuals who were previously disadvantaged) the opportunity to

77 As above.

78 H Coetzee ‘An opportunity for No Income No Asset debtors to get out of check? – An evaluation of the proposed debt intervention measure’ (2018) 81 *THRHR* at 597; Mabe (n 70) 3; Draft National Credit Amendment Bill, 2018.

79 National Credit Amendment Bill, 2018.

80 Coetzee (n 78) 593; Mabe (n 70) 3.

81 As above.

82 National Credit Act 34 of 2005.

83 Coetzee (n 78) 593.

84 Roestoff & Coetzee (n 2) 251.

85 Roestoff & Coetzee (n 2) 272.

effectively rid themselves of deadweight debt would be a step toward transformation and equal opportunity in South Africa.

South Africa often aims to purport transformative constitutionalism through the promulgation of progressive legislation.⁸⁶ The promulgation of any legislation aiming to alleviate the burden borne by those downtrodden by society is a metaphorical step in the right direction. In this paper, the actual constituency of the reform policy is less appreciated as opposed to the actual effort made.

Nevertheless, the simple notion that reform is needed in this field of the law is exclaimed. The legislature has ample international examples at its disposal and with such examples, the concept of discharge from debt, and facilitating a shortened but effective rehabilitation periods, are noted.⁸⁷ Not only have these systems worked positively in tandem with the relevant economic systems, but they have also been adopted and promulgated elsewhere.⁸⁸ South Africa, with its perplexing dual economy, should waste no time in adopting measures similar to those put in place by New Zealand and Kenya. This should be done with the intention to ensure a transformative and compassionate socio-economic environment affording a true opportunity for some sort of promotion of the downtrodden of society to thrive amidst trying economic times.

7 Concluding remarks

This paper sought to critique the judicial nature of the current debt relief measures put in place for NINA debtors in South Africa. After an in-depth analysis of the current relief measures and the operation thereof with relation to the current plight of the socio-economic class and COVID-19, it was concluded that these relief measures are unconstitutional in that they unfairly discriminate against a socio-economic class of society.⁸⁹

Such unfair discrimination violates basic constitutional values and principles which South African society strives towards through the promotion of the Bill of Rights and transformative constitutionalism.⁹⁰ Ironically, countries abroad have adopted methods of debt relief that would be seemingly more fitting in a South African context. These countries include New Zealand and Kenya which purport systems wherein debt rehabilitation is swift, and discharge is imminent to a well-intentioned, qualifying debtor.⁹¹

86 Coetzee (n 78) 597.

87 Coetzee (n 78) 604.

88 Mabe (n 70) 2.

89 Coetzee & Roestoff (n 1) 4.

90 Coetzee (n 30) 41.

91 Coetzee & Roestoff (n 1) 9; Mabe (n 70) 5.

As a final note, South Africa has made a concerted effort and needs to adopt progressive measures toward addressing the plight of NINA debtors.⁹² While such attempts are noteworthy, they may be said to have arrived a little late but still have enough time to be effective as the world economy finds itself impaled on the crippling backbone of credit.

92 Coetzee (n 78) 593.

THE ROLE OF UBUNTU IN THE LAW OF CONTRACT

by Pooja Pundit*



Abstract

*The history of South African law is quite unique. It has aspirations of transformative constitutionalism, yet the law is deeply rooted in the common law. Of particular interest are the roles of two principles in the South African law namely; *pacta sunt servanda*, which is one of the principles found in the common law of contract; and *ubuntu*, which is a unique African principle of humanness. The law of contract and the Constitution exist side-by-side, however, this is not without conflict. The article will provide a gentle walk through the principles in the law of contract, the *Mohamed's v Southern Sun* case, and will finally comment on the applicability of the principle of *ubuntu* versus that of the principle of *pacta sunt servanda*.*

1 Introduction

The law of contract may, *prima facie*, appear to be very simple. The underlying principle of the law of contract is the sanctity of contracts (*pacta sunt servanda*). *Pacta sunt servanda* holds that contracts that are seriously entered into must be honoured by the respective parties.¹ These agreements are, however, to the exclusion of those against public policy as such agreements remain unenforceable.² Public policy is value-laden and involves policy considerations such as

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1 M Pillay 'The impact of *pacta sunt servanda* in the law of contract' LLM dissertation, University of Pretoria, 2015 at 2.

2 Pillay (n 1) 2.

fairness, justice, and equity.³ Public policy and the common law demand that contractual relationships between parties are both equitable and just, whilst the principle of *pacta sunt servanda* preserves the very content of the contract. This principle speaks to the parties' moral obligation to uphold and honour their intentions which are crystallised in the contract. If a party does not uphold the duties and obligations of the contract, *pacta sunt servanda* can be used to enforce the aggrieved party's rights in terms of the contract.⁴

The evolution of two competing principles in the law of contract, *pacta sunt servanda* and ubuntu, is perfectly encapsulated in the case *Mohamed's v Southern Sun*.⁵ This article will delve into the cornerstones of contract law and will consider its underlying principles through a three-stage analysis of the case and its established judicial precedent. First, the analysis will consider whether an illiberal contractual clause is, on its own, contrary to public policy. Second, the relaxation of the *pacta sunt servanda* principle will be considered against the freedom to contract, and third, the value of ubuntu will be considered as a tool to developing the common law.

2 Legal framework

2.1 Essential elements in the law of contract

The principles of South African contract law stem from the common law. The common law functions alongside the Constitution as section 2 of the final Constitution requires that *all* law, including the common law, adapt and conform to the Constitution in order for it to remain valid.⁶ Fundamental values that are entrenched in the law of contract include the freedom of contract, the sanctity of contract, good faith, and lastly, the privity of contract.⁷

In South Africa, a more modern concept of contract law has emerged. Excluding lease and purchase and sale agreements, agreements need not be in a particular format to meet the technical definition of a contract. This modern concept of contract law has developed because of the principle of the freedom of contract.⁸ In layman's terms, the freedom of contract entails that contractual parties may agree on any terms and conditions which are lawful and

3 M Kruger 'The Role of Public Policy in the Law of Contract, Revisited' (2011) 128 *South African Law Journal* at 712.

4 Pillay (n 1) 2.

5 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* (183/17) [2017] ZASCA 176 (*Mohamed's v Southern Sun*).

6 Constitution of the Republic of South Africa, 1996 (Constitution) sec 2.

7 Pillay (n 1) 5.

8 Hutchison & Pretorius *The Law of Contract in South Africa* (2017) at 21.

possible to perform. If the contracting parties have the required contractual capacity, they are free to choose the contents of the contract and are ‘free from external control’.⁹ It is thus evident that all valid contracts are based on the freedom to contract and consensus – where parties agree to the terms and conditions, and contracts are conducted in good faith.

Central to the freedom to contract is that people are free to choose when, with whom, and on what terms and/or conditions to enter a contract, thereby bestowing ‘party autonomy’.¹⁰ The creation of a contract is undertaken through one’s will and intent exercisable outside of the state’s imposition. In the *Barkhuizen*¹¹ case, the Court held that ‘freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy’.¹² The consequences of the freedom of contract maximize the parties’ liberty. If the parties freely and voluntarily entered into a contract, the courts will not be concerned about the substantive contents of the contract and will only analyse public policy, fairness, and public interest considerations should a need arise for the courts to enforce the contract.¹³ The courts will also assume this role where legal uncertainties arise as this element is fundamental to the functioning of a free-market economy.¹⁴

Contracting parties cannot push for the courts to enforce provisions in contracts that are *contra bonos mores* and unfair.¹⁵ Slightly eluding, the freedom of contract ensures that judges have enough flexibility to promote justice.¹⁶ That being said, the quest for autonomy in freedom of contract or a pure form of certainty in contractual provisions can be achieved at the expense of justice.¹⁷ It is thus, for this reason, that the principle of freedom of contract is considered alongside that of *pacta sunt servanda*.

2.2 Pacta sunt servanda

The law of contract is concerned with preserving the contents of the contract as well as ensuring fairness in contractual dealings. These fundamental values compete with one another and Hutchison states that finding the perfect balance between these values ‘is one of the most intractable problems facing modern contract law’.¹⁸

9 Hutchison & Pretorius (n 8) 22.

10 Hutchison & Pretorius (n 8) 21.

11 *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) (*Barkhuizen*).

12 *Barkhuizen* (n 11) para 150.

13 Pillay (n 1) 6.

14 As above.

15 Hutchison & Pretorius (n 8) 22.

16 As above.

17 Pillay (n 1) 13.

18 Hutchison & Pretorius (n 8) 22.

One of the main cornerstones of the law of contract is '*pacta sunt servanda*'. This principle translates from Latin to mean 'agreements must be kept'. The object of the sanctity of contract is to ensure that the obligations and the performance agreed to by contractual parties are adhered to, and that parties respect the agreement entered into voluntarily and with specified intentions.¹⁹ This principle promotes the idea that contracts that are freely and voluntarily entered into must be honoured by the respective parties, and on this basis, these contracts may be enforced by the courts.²⁰ In *Wells v South African Aluminite Company*,²¹ the Court held that public policy requires that people with the capacity to understand and appreciate the value of contracting have 'the utmost liberty' and that their contracts shall be 'held sacred' and enforced by the courts if entered into freely and voluntarily.²² The difference between the freedom of contract and *pacta sunt servanda* is perfectly set out in *Mohamed's v Southern Sun*, where the parties enter into an agreement that gives effect to their right of freedom of contract with accompanying obligations which give effect to the common law principle of *pacta sunt servanda*.²³

In support of *pacta sunt servanda*, Ngcobo J explained in a majority judgment that *pacta sunt servanda* is 'a profoundly moral principle, on which the coherence of any society relies'.²⁴ Ngcobo J iterated that *pacta sunt servanda* promotes values such as freedom and dignity, where self-autonomy lies central.²⁵ Ngcobo J emphasised that the general rule of enforcing agreements cannot be applied to those that are 'immoral or contrary to public policy', precluding unfair provisions.²⁶ Here, it is evident that where a contract is understood to be contrary to the moral convictions of society, the respective cornerstones of the freedom of contract and *pacta sunt servanda* become overruled by public policy.²⁷

In restraint of trade agreements, *pacta sunt servanda* has been a highly valued principle and has even been considered above the freedom to trade as set forward in *Magna Alloys v Ellis*.²⁸ The Court iterated that it is in the public's interest for the respected parties to honour their agreements.²⁹ Further, even where an agreement can be

19 N Kubheka 'Pacta Sunt Servanda- which approach to follow?' (2019) 19(1) *Without Prejudice* at 37.

20 Hutchison & Pretorius (n 8) 21.

21 *Wells v South African Aluminite Company* 1927 AD 69.

22 Pillay (n 1) 7.

23 *Mohamed's v Southern Sun* (n 5) para 24.

24 *Barkhuizen* (n 11) para 87.

25 *Barkhuizen* (n 11) para 57.

26 *Barkhuizen* (n 11) para 87.

27 Van der Merwe et al *Contract General Principles* (2012) at 140.

28 *Magna Alloys v Ellis* 1984 4 SA 874 (A) (*Magna Alloys*).

29 K Calitz 'Restraint of trade agreements in employment contracts: Time for *pacta sunt servanda* to bow out?' (2011) 22 *Stellenbosch Law Review* at 51.

perceived as unfair to a respective party, this will normally not be a ground to challenge the validity of a contract.³⁰

For a restraint of trade clause to be contrary to public interests, it must enforce an unreasonable restraint against the interest protected.³¹ Therefore, the onus to prove that an agreement is unreasonable and contrary to public policy rests with the contracting party who wishes to escape the restraint of trade clause.³² This reversed burden of proof is due to the primacy and value placed on *pacta sunt servanda*, thus preserving the contents and sanctity of contracts.³³

In *Magna Alloys* the Appellate Division held that a restraint of trade agreement is proper and enforceable similar to any ordinary contract, provided that it is consistent with public policy.³⁴ This case revolutionised contract law in South Africa as restraint of trade agreements are now valid and enforceable unless the employee can prove that the provisions in the restraint of trade agreement are unfair, unreasonable, and contrary to public policy.³⁵ On the other hand, in *Den Braven v Pillay* Wallis J stated that '*pacta sunt servanda* is the economic life-blood of a civilised country', placing utmost importance on this principle in line with *Magna Alloys*.³⁶ As presented, it is unequivocal that Wallis J and Davis J did not see eye-to-eye regarding the observance of *pacta sunt servanda*. In layman's terms, Davis J viewed *pacta sunt servanda* as a rumination of a *laissez-faire* approach where individuals had the utmost freedom of contract whereas Wallis J held that restraint of trade agreements must be treated the same as any ordinary contract.³⁷

It is unequivocal that there is uncertainty regarding restraint of trade principles. Ultimately, although a restraint of trade agreement can be perceived to be unfair to a party (employee), at the end of the day, both parties entered the contract freely, voluntarily, and with the required capacity to perform according to the provisions of the contract, rendering it enforceable in a court of law.

2.3 Public policy, good faith, and equity

The notion of good faith or *bona fides* played a large role in the development of our law of contract and has sustained equitable morale in civil law. The role of *bona fides* in modern contract law is

30 As above.

31 Calitz (n 29) 52.

32 As above.

33 Calitz (n 29) 52.

34 *Magna Alloys* (n) 893.

35 Calitz (n 29) 52.

36 Calitz (n 29) 58.

37 As above.

debatable. Good faith is seen as a ‘counterweight’ principle to the freedom of contract and is applied as a mechanism to develop a system of fairness in contract law.³⁸

The crux of the *bona fide* principle is that contractual dealings must take place in an honest fashion and in good faith. Judicial precedent has widened the meaning and scope of *bona fide* to include values such as reasonableness, fairness, justice, and equity.³⁹ Sijde explains that the principle of *bona fides* merged into an ‘umbrella defence of public policy’, meaning that public policy is acquainted with contractual relationships as well as *pacta sunt servanda*.⁴⁰ One may observe that good faith can be used as a scapegoat for a contracting party who wishes to abandon or escape the contract. The principle of *bona fide* supports that even though the freedom of contract enables parties to determine the terms of their contract, this freedom cannot assume that a court of law will enforce a contract *contras bonos mores*.⁴¹

In order to determine what is reasonable, the court will look at relevant social factors which will evolve over time.⁴² The court will have to make a value-based judgment to establish what is fair.⁴³ Another imperative case in the law of contract is *Brisley v Drotzky*, where this Supreme Court of Appeal held that good faith was not the factor that helped courts set aside a valid agreement because ‘it was not a “free floating” basis to interfere with an agreement reached voluntarily’.⁴⁴ Here, it is evident that the Court balanced the two principles of *bona fide* and *pacta sunt servanda* to reach common ground.⁴⁵

Cameron JA acknowledged that public policy stems from the Constitution, and was said to be ‘comfortable’ with the majority decision since the cornerstone of the freedom of contract and contractual autonomy promotes the fundamental value of dignity.⁴⁶ Moreover, Cameron JA states that a balance between the freedom of contract and social justice must be grounded because ‘this is the essence that the Constitution requires’.⁴⁷ The role of the *bona fide* principle in South African contract law is a basic principle upon which the law of contract informs its substantive rules. The Court was emphatic that the principle of good faith is not a stand-alone principle

38 Hutchison & Pretorius (n 8) 26.

39 Hutchison & Pretorius (n 8) 28.

40 E van der Sijde ‘The role of good faith in the law of contract’ LLM dissertation, University of Pretoria, 2012 at 1.

41 Sijde (n 40) 2.

42 Sijde (n 40) 19.

43 As above.

44 *Brisley v Drotzky* (432/2000) [2002] ZASCA 35 paras 14-15.

45 Sijde (n 40) 19.

46 Pillay (n 1) 8.

47 As above.

to advance or ‘attack’ contractual decorum. At most, the principle of good faith is merely an underlying value.⁴⁸

Recently, the Constitutional Court in the *Beadica* case⁴⁹ pronounced on the debate between public policy and the enforcement of contractual terms which might yield unfairness. Theron J held that parties may not ‘escape’ obligations of a contract if the enforcement thereof would yield to be unfair since the values of the Constitution do not provide for interference by the courts in contractual relationships.⁵⁰ Instead, constitutional norms are considerations in the ‘balancing exercise’ for one to determine if the contractual clause is contrary to public policy.⁵¹ Theron J was emphatic that abstract values of good faith, fairness, and ubuntu do not have autonomy and independent standing compared to contractual requirements. It is only where the enforcement of a contractual clause is unjust to the extent that it is contrary to public policy that a court may refuse the enforcement.⁵²

2.4 Ubuntu

South Africa is a country with a unique and deep past that requires a teleological approach to the interpretation of the Constitution. At the foundation of our democracy lies values such as good faith, dignity, equality, and ubuntu.⁵³ Section 39(2) of the Constitution enables the courts to develop the common law and align it with the values set out in the Bill of Rights, with section 8(3)(a) outlining that a court must apply or, if necessary, develop the common law. In light of this, however, the following question arises – how does ubuntu relate to *pacta sunt servanda* and contract law in general?

Mokoro J outlined the concept of ubuntu as ‘*ubuntu ngumuntu ngabantu*’ which is translated to mean ‘a human being is a human being through other human beings’.⁵⁴ Prominence is placed on the principle of ubuntu because it provides for transformation, deconstruction, and change.⁵⁵

48 D Hutchison ‘Non-variation clauses: Any escape from the Shifren straitjacket?’ (2001) 118 *South African Law Journal* at 744; D Hutchison ‘Good Faith in Contract: A Uniquely South African Perspective’ (2019) 1 *Journal of Commonwealth Law* at 237.

49 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) (*Beadica*).

50 *Beadica* (n 49) para 144.

51 *Beadica* (n 49) para 71.

52 *Beadica* (n 49) para 72.

53 Kubheka (n 19) 36.

54 Y. Mokgoro ‘Ubuntu and the Law in South Africa’ (1998) 4 *Buffalo Human Rights Law Review* at 15.

55 Hutchison (n 48) 242.

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd*⁵⁶ (*Everfresh*) is the case that defined the African value of ubuntu in contract law. Ubuntu was designated the role of developing the law of contract to be consistent with fundamental constitutional values and morals. The Court noted that ubuntu.⁵⁷

... emphasises the communal nature of society and carries in it the ideas of humanness, social justice and fairness, and envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.

The notion of fairness, social justice, and equity are implicit in the African value of ubuntu. Although ubuntu is an umbrella principle that preserves social justice, it does not have a sense of legal certainty and the practical application of the principle of ubuntu may be ambiguous.⁵⁸ As mentioned above, courts have iterated that there is no precise remedy to solving a conundrum between good faith and *pacta sunt servanda*. Each conundrum must be presented and solved on a case-by-case basis using the tools of interpretation and sources such as legislation and case law. The law of contract is subject to constitutional scrutiny and courts have the duty to develop the common law to ensure its compliance with the underlying values of the Constitution. This was emphasised in *Barkhuizen v Napier* where it was held that courts are required to promote the spirit of the Bill of Rights when developing the law of contract.⁵⁹

2.5 The role of the Constitution in contract law

The Constitution is the supreme law of the land and any law or conduct that is contrary to the Constitution is invalid to the extent of such contradiction.⁶⁰ The supremacy clause of the Constitution sets out that all law is subordinate to the Constitution. This section will delve into the application of the Constitution to contractual matters between private parties.

In terms of the direct application of the Bill of Rights to the law of contract, if a provision in a contract appears to violate a fundamental constitutional right, the respective party may 'attack' this provision on the ground that it possibly violates said right.⁶¹ In this case, there is no need to reference a common law rule.⁶² However, in terms of an indirect application of the Bill of Rights, if there is a probable violation of a fundamental constitutional right in

56 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd* 2012 (1) SA 256 (CC) (*Everfresh*).

57 *Everfresh* (n 56) para 71.

58 Sijde (n 40) 36.

59 *Barkhuizen* (n 11) para 35.

60 Constitution (n 6) sec 2.

61 *Hutchison & Pretorius* (n 8) 35.

62 As above.

a contract, one must look at its effect in the law of contract.⁶³ A party who, for example, challenges a provision in the contract may argue that the term violated a fundamental constitutional right, rendering that term against public policy and common law rules.⁶⁴

According to *K v Minister of Safety and Security*,⁶⁵ the very purpose of section 39(2) is to ensure that common law values are consistent with fundamental constitutional values.⁶⁶ Values such as good faith, public policy, and reasonableness are rooted in the law of contract which stems from the common law.⁶⁷ These values are flexible in the sense that they may be interpreted to be in line with the fundamental values of the Constitution, such as ubuntu.⁶⁸

Ubuntu is the golden thread that runs through our Constitution. In the *Barkhuizen* case, the majority judgment in the Constitutional Court preferred an indirect application of the Constitution with regards to contractual matters, specifically when applying section 39(2).⁶⁹ Ngcobo J explained that the correct approach to establishing whether a provision in the contract is against public policy is to consider the fundamental values of our Constitution (such as ubuntu).⁷⁰ Thus, a contract that is contrary to the values in the Constitution will be against public policy and will therefore be unenforceable.⁷¹

This approach allows for *pacta sunt servanda* to function simultaneously, thus giving the court the power to disallow the enforcement of contractual provisions that are inconsistent with fundamental constitutional values – even where the parties may have agreed to them.⁷² In a similar judgment, *Den Braven v Pillay*, Wallis AJ held that in terms of a contractual relationship, the freedom to choose a trade, occupation, or profession applies indirectly.⁷³

The fundamental values of the Constitution are dignity, ubuntu, and equality.⁷⁴ These values have a phenomenal impact on the law of contract. The Bill of Rights is directly applied with regards to the state's conduct and indirectly applied in the sphere of private law.⁷⁵ Accordingly, it is required that the law of contract be developed to promote the fundamental values of our Constitution.⁷⁶

63 As above.

64 As above.

65 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

66 *K v Minister of Safety and Security* (n 56) para 17.

67 Hutchison & Pretorius (n 8) 35.

68 Hutchison & Pretorius (n 8) 36.

69 *Barkhuizen* (n 11) para 35.

70 *Barkhuizen* (n 11) paras 29-30.

71 *Barkhuizen* (n 11) para 29.

72 *Barkhuizen* (n 11) par 30.

73 *Den Braven v Pillay* 2008 (6) SA 229 (D) para 30.

74 Hutchison & Pretorius (n 8) 36.

75 As above.

76 Pillay (n 1) 10.

It is thus clear that in our constitutional democracy, the golden thread of ubuntu must counterbalance the common law of contract to bring about its consistency with the Constitution.

2.6 Freedom of contract and the impact of the Constitution

Cameron JA, in *Brisley v Drotsky*,⁷⁷ referred to section 39(2) of the Constitution to associate the law of contract with fundamental constitutional values such as freedom, equality, and justice, as well as the common law principle of the freedom of contract. Concurring with this judgment, the freedom of contract principle was held to be a constitutional value in *Afrox Healthcare v Strydom*.⁷⁸ The Supreme Court of Appeal recognised the golden thread of the Constitution in section 27(1)(a) (the right to health care services), which must be considered in regulating the legality of a specific clause that excluded the negligence of nurses.⁷⁹ The principle of public policy was used to examine whether an exclusionary clause of this nature was plausible. The Court held that public interest has primacy value and declared the exemption clause invalid and unenforceable.⁸⁰ Thus, exclusionary clauses that protect hospitals from liability due to the fault of their staff members may be pronounced invalid.⁸¹

Similarly, the enforcement of exclusionary clauses was limited in *Johannesburg Country Club v Stott*.⁸² An exemption clause in the contract excluded the liability of negligence causing the death of a person.⁸³ The Supreme Court of Appeal held that this exemption clause offended the right to life protected in section 11, as well as considerations of public policy, and the common law rule of the 'sanctity of life'.⁸⁴ This decision is indicative of the application by our courts of the golden thread of ubuntu in the sphere of law. It establishes the importance of not recognising terms that are not aligned with public policy and good and fair moral values. In this instance, public policy rightfully prevailed over the common law contract principles. The respective judges delivered value-based judgments using policy considerations.⁸⁵ The Court did not allow the enforcement of the exemption clause even though the parties entered the contract freely and voluntarily, and accordingly, the *pacta sunt*

77 *Brisley v Drotsky* (n 44) paras 88-95.

78 *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) paras 17-24.

79 *Afrox Healthcare v Strydom* (n 79) para 17.

80 As above.

81 D McQuoid-Mason 'Hospital exclusion clauses limiting liability for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act?' (2012) 5(2) South African Journal of Bioethics and Law at 65.

82 *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA).

83 *Johannesburg Country Club v Stott* (n 84) para 12.

84 As above.

85 Pillay (n 1) 13.

servanda principle was trounced by what was held to offend public policy considerations.

It is safe to say that the freedom of contract and human dignity can be linked together as human dignity, by its nature, requires individuals to make responsible decisions over their lives.⁸⁶ In support of this, Ngcobo J iterated that ‘self-autonomy’ is the essence of freedom and is an imperative part of dignity.⁸⁷ The extent that a contract was freely and voluntarily concluded is an important factor because it plays a role in determining the weight given to values of freedom and dignity.⁸⁸ However, Cameron JA affirmed in *Brisley* that an ‘obscene excess’ of autonomy must be forsaken as it may impede the fundamental right of human dignity.⁸⁹ As mentioned above, a rigid application of the freedom of contract principle may result in unfair contractual provisions, which are unenforceable in a court of law.⁹⁰

In the *Barkhuizen* case, the Court was presented with a 90-day time clause in an insurance contract which was declared an unreasonable limitation of section 34 of the Constitution, which is the right to access courts.⁹¹ This case was ground-breaking because it was the first time that the Constitutional Court had ‘direct engagement’ with the common law of contract.⁹² Ngcobo J referred to Cameron JA’s remarks in *Brisley v Drotzky* where he acknowledged that the Constitution itself honours the common law principle of *pacta sunt servanda*, requiring contractual parties to honour their word according to the contract.⁹³ Pillay comments that in this case, the Constitutional Court reaffirmed that *pacta sunt servanda* which is linked to the freedom of contract, is a concrete principle.⁹⁴ Even though contractual principles are recognised by the Constitution, a ‘court should decline the enforcement’ should the enforcement of these clauses or the contract itself be contrary to public policy, unreasonable or, unfair.⁹⁵

As presented in the *Barkhuizen* and *Brisley* cases, Cameron AJ and Ngcobo J have brought closure on the conundrum concerning common law principles in the law of contract and the Constitution. These principles can be clearly understood considering our constitutional democracy. *Pacta sunt servanda* and the freedom of contract are considered concrete principles, however, these principles must be

86 Pillay (n 1) 12; Constitution (n 6) sec 10.

87 *Barkhuizen* (n 11) para 57.

88 Pillay (n 1) 11.

89 *Brisley v Drotzky* (n 44) paras 94-95.

90 Pillay (n 1) 11.

91 *Barkhuizen* (n 11) para 57.

92 Pillay (n 1) 13.

93 As above.

94 As above.

95 *Barkhuizen* (n 11) para 70.

married with the underpinning values in our Constitution.⁹⁶ Should a contractual clause result in unfairness and unreasonableness to the extent that its enforcement will be against public policy, the courts will not give effect to that clause.

3 Conflicting values in the law of contract and the impact of *Mohamed's v Southern Sun*

3.1 Conflicting values in the law of contract

It is important to shed light on the instances where the cornerstones in the law of contract conflict or are in competition with one another. The freedom of contract and the sanctity of contract are principles that must not be applied too stringently, rigorously, or in isolation.⁹⁷ Public policy and the underlying values of our Constitution must always be kept in mind in the law of contract to ensure that holistic judgments are made in the interest of justice. To ignore public policy considerations would be detrimental and may render challenges before our courts fatal.

The freedom of contract and *pacta sunt servanda* function together, and together with them follow the theory of economic liberalism.⁹⁸ Contracts that are freely and voluntarily entered into by respective contractual parties can be enforced by the courts provided that parties have the capacity to contract, thus promoting a free-market economy and ensuring legal certainty.⁹⁹ The underlying complications of fairness and good faith in a contract, however, suggest a matter of social control over private interests in contract law.¹⁰⁰ It is unequivocal that the 'pursuit of individual freedom of contract' or legal certainty might come at the expense of social justice, and vice versa.¹⁰¹

*Sasfin v Beukes*¹⁰² declared that the power to establish when a clause or contract is contrary to public policy must be 'exercised sparingly' and only in cases where it is clear that there is uncertainty regarding the validity of the contract.¹⁰³ It is important to note that this case cleared up the ambiguity on the following: one cannot conclude that a contract or clause is contrary to public policy simply

96 Pillay (n 1) 13.

97 Pillay (n 1) 8.

98 Hutchison & Pretorius (n 8) 22.

99 Pillay (n 1) 6.

100 Hutchison & Pretorius (n 8) 22.

101 As above.

102 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD).

103 Hutchison & Pretorius (n 8) 22.

because it offends one's individual or personal 'sense of propriety and fairness'.¹⁰⁴

When a court enforces an unreasonable and harsh contract or contractual provision, it is at the expense of an individual's sense of what justice should entail.¹⁰⁵ On the other hand, when a court allows parties to escape their obligations and liability to perform under what was expected to be a binding contract, this is at the expense of legal and commercial certainty.¹⁰⁶ The more one enforces strict rules (such as the strict application of the freedom of contract and *pacta sunt servanda*), the smaller the ambit is for 'judicial manoeuvring' in terms of justice.¹⁰⁷ If the standards are more flexible (such as ubuntu and good faith), legal certainty is, however, compromised.¹⁰⁸ In order to balance these values, there is a need for a *quid pro quo* or an equal exchange between 'two desirable goals'.¹⁰⁹ An equilibrium must be found using value-based judgment that might differ on a case-by-case basis with consideration to changing laws and ideas.¹¹⁰

3.2 *Mohamed's v Southern Sun*

Mohamed's Leisure Holdings (Pty) Ltd (Mohamed's), the appellant, sought an order for the eviction of Southern Sun Hotel Interests (Pty) Ltd (Southern Sun), the respondent, based on a breach of a clause in the lease agreement.¹¹¹ The respondent defaulted on rent which entitled the appellant to cancel the agreement and evict the respondent.¹¹² An important material term in the agreement was that should Southern Sun fail to pay the rent on the specified date, Mohamed's was entitled to cancel the agreement and take full possession of the property.¹¹³ Notably, the respondent had been occupying the property and had worked in the hotel business for an uninterrupted period of 35 years.¹¹⁴

Throughout the lease period, Southern Sun was prompt with rent payments.¹¹⁵ Nevertheless, on 07 June 2014, Southern Sun failed to

104 *Sasfin v Beukes* (n 103) para 5.

105 Pillay (n 1) 33.

106 As above.

107 *Hutchison & Pretorius* (n 8) 22; *Hutchison* (n 48) 236-244; *Brisley v Drotzky* (n 44). Here, the Court cited *Hutchison* with approval. See also FDJ Brand 'The role of good faith, equity and fairness in the South African law of contract: A further installment' (2016) 27 *Stellenbosch Law Review* at 238; and M Wallis 'Commercial Certainty and Constitutionalism: Are They Compatible' (2016) 133 *South African Law Journal* at 560.

108 As above.

109 As above.

110 As above.

111 *Mohamed's v Southern Sun* (n 5) para 5.

112 *Mohamed's v Southern Sun* (n 5) para 6.

113 *Mohamed's v Southern Sun* (n 5) para 5.

114 As above.

115 *Mohamed's v Southern Sun* (n 5) para 7.

pay its rent.¹¹⁶ On 20 June 2014, Mohamed's sent a written letter to Southern Sun, where it was given five days to remedy the breach and warned that should Southern Sun default payment in the future, a notice to remedy the breach will not be sent, the agreement will be cancelled, and Southern Sun would have to vacate the property immediately.¹¹⁷ Southern Sun's bank, Nedbank, disclosed that owing to an internal problem regarding its processors, the payment was only processed for 01 June 2014.¹¹⁸ Three months following the error made by Nedbank, Southern Sun monitored its bank statements to ensure that payments were made accordingly.¹¹⁹ On 6 October 2014, the rent was debited from Southern Sun's account, but at the fault of Nedbank, the rent was credited to a wrong account and not Mohamed's account.¹²⁰ As a result of the clause being breached, Mohamed's sent a notice of cancellation of the agreement on 20 October 2014, giving Southern Sun until 31 October 2014 to vacate the property.¹²¹ Repeatedly, Nedbank accepted accountability for the deferment of payment 'due to a processing error' and finally made the payment on 21 October 2014.¹²²

Southern Sun paid the amount with interest to Mohamed's indicating good faith.¹²³ In response to the notice of cancellation and eviction from Mohamed's, Southern Sun's attorney argued that the cancellation of the agreement was unreasonable because the breach was an error made by Nedbank and that this unreasonableness was clearly against public policy.¹²⁴ The appellant contended that the High Court was obliged to enforce the contract since it was established that the respondent committed 'a material breach'.¹²⁵ The appellant relied on the common law contract principle, *pacta sunt servanda*.

3.3 Findings of the Court

The Supreme Court of Appeal (SCA) noted that the High Court concluded that Mohamed's had the power to cancel the lease agreement using the ground of default or non-payment of the rent due in October.¹²⁶ The High Court found that this clause did not cause a strain on the respondent because the respondent had agreed to pay according to these terms and had complied with these terms for 35

116 As above.

117 As above.

118 As above.

119 *Mohamed's v Southern Sun* (n 5) para 8.

120 As above.

121 *Mohamed's v Southern Sun* (n 5) para 8.

122 As above.

123 *Mohamed's v Southern Sun* (n 5) para 8.

124 As above.

125 *Mohamed's v Southern Sun* (n 5) para 10.

126 *Mohamed's v Southern Sun* (n 5) para 9.

years. The issue, to be determined by the High Court, was whether (considering all the relevant circumstances of this case) enforcing the 'cancellation' clause would be unreasonable and against public policy.¹²⁷

In order to address the above concern, one must consider the impact that the relevant factors have on the case. This calls for a weighing up of the two principles of *pacta sunt servanda* and the golden thread of the Constitution. The SCA declared that since the respondent breached the agreement (a material breach), the appellant is clearly entitled to cancel the lease agreement.¹²⁸ It must be mentioned that although the appellant was entitled to cancel the agreement after the initial breach in June, it chose not to.¹²⁹ Henceforth, the appellant warned the respondent that a breach in the future could result in a cancellation of the agreement and waited a further 12 days for remedial action before cancelling the lease agreement.¹³⁰ The appellant's counsel explained that:¹³¹

If the courts were to embark on the course of action, claimed by the respondent it would be imposing its own sense of fairness and make the contracts for the parties.

In response, the respondent disputed the appellant's power to cancel the lease agreement due to the defaulted rent payment in October.¹³² It argued further that the cancellation clause should be interpreted to mean that parties 'ought to act in good faith'.¹³³ This resembles the common law principle of *bona* good faith, where contractual parties are expected to conduct themselves in an honest and fair fashion. As mentioned above, the respondent iterated that the principle of good faith allows this clause to be 'flexible' in order to acclimatise to unexpected instances beyond the control of the parties involved.¹³⁴

It was argued that the enforcement of the cancellation clause manifests an unreasonable outcome that is contrary to public policy. Furthermore, the respondent claimed that the clause was unreasonable because it purported compliance regardless of the uncontrollable and unexpected circumstances that prevented compliance.¹³⁵ As mentioned above, public policy is based on good faith, fairness, ubuntu, and social justice between parties. The respondent held that according to these principles, the courts are bound to promote the spirit, purports, and the objects of the Bill of

127 *Mohamed's v Southern Sun* (n 5) para 8.

128 *Mohamed's v Southern Sun* (n 5) para 11.

129 As above.

130 As above.

131 As above.

132 *Mohamed's v Southern Sun* (n 5) para 12.

133 As above.

134 *Mohamed's v Southern Sun* (n 5) para 12.

135 As above.

Rights according to section 39(2).¹³⁶ The crux of the respondent's argument 'is that the principle of *pacta sunt servanda* is not a sacred cow that should trump all other considerations'.¹³⁷ Meaning, that *pacta sunt servanda* is not the only consideration regarding the law of contract and that the golden thread of the Constitution must prevail in these circumstances.

The main points of the respondent's argument were the overall lease period spanning over 35 years, the uncontrollable and unexpected circumstances that caused the breach, and the efforts by *Southern Sun* to 'purge the default'.¹³⁸ It was asserted by the respondent that the cancellation clause should rather be interpreted where the parties act in good faith and the clause is flexible enough to adapt to instances where parties are hindered from complying with the clause.¹³⁹ The respondent reasoned that to give effect to the cancellation clause would be unreasonable, unfair, and contrary to public policy.¹⁴⁰ Given the period of the lease, the bank's in-house system, and the attempts made by the respondent to enforce the cancellation clause, the respondent argued that the attitude of the appellant was contrary to the good faith principle.¹⁴¹

It is quite clear that at the heart of *Mohamed's v Southern Sun* is the battle between common law contract principles and the golden thread of the Constitution. One must remember that the Court has the power to declare whether contracts are contrary to public policy and will do so only in precise cases where one can see that the implementation of this contract would result in an 'indiscriminate use of power'.¹⁴² Furthermore, when parties freely and voluntarily contract, the privity of contract and *pacta sunt servanda* hold that contractual obligations are to be honoured. These are intrinsic to the freedom of contract where parties may agree on any terms that are possible and lawful in a contract. The enforcement of a contract is underpinned by the 'weighty considerations of commercial reliance and social certainty'.¹⁴³

The Constitutional Court judgment in the *Barkhuizen* case was essential to the respondent's argument. Ngcobo J mentioned the importance of considering the circumstances that caused the breach

136 *Mohamed's v Southern Sun* (n 5) para 12.

137 As above.

138 *Mohamed's v Southern Sun* (n 5) para 13.

139 As above.

140 *Mohamed's v Southern Sun* (n 5) para 13.

141 As above.

142 STBB 'Is a hard-hitting contractual term constitutionally unfair and hence unenforceable?' https://www.stbb.co.za/wp-content/uploads/stbb_plu01-2018_s1.pdf (accessed 15 February 2020) at 3.

143 STBB (n 143) 3.

or prevented the compliance. The respondent referred to Ngcobo J's statement:¹⁴⁴

Once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply.

The respondent also questioned the substantive fairness of the cancellation clause, which had to be tested against the doctrine of public policy test set out in *Barkhuizen*.¹⁴⁵ There is a subjective stage to the public policy test, where the contract or the clause must be objectively and subjectively reasonable for it to be valid and enforceable.¹⁴⁶

In support of its argument, the respondent relied on the *Everfresh* case. The minority judgment of the *Everfresh* case was referred to by the respondent to shed light on the importance of good faith and the impact that good faith has on the Constitution.¹⁴⁷ It was determined in *Everfresh* that the values embraced by ubuntu are relevant in determining the objects of the Constitution. The developments in contract law were shaped by the colonial era and it was about time that our country places a 'higher value on negotiating in good faith'.¹⁴⁸

Lastly, the respondent held that the prejudice suffered by Southern Sun was 'far greater' than that of Mohamed's.¹⁴⁹ The appellant was said to be 'ignoring' the fact that the respondent was the lessee for 35 years and employed 91 permanent and secondary staff.¹⁵⁰ Evicting the respondent would taint its reputation in the hospitality industry and cause job losses. The respondent concluded that *pacta sunt servanda* should be relaxed, considering the relevant circumstances.

To decide whether the cancellation clause manifests to be unfair or unreasonable, the court must look at the extent that it is against public policy.¹⁵¹ The objective terms of the agreement must be viewed considering the circumstances faced by the parties involved. This calls for a 'balancing and weighing-up' of the two competing principles; *pacta sunt servanda* and the golden thread of the Constitution.¹⁵² The Court referred to *Sasfin v Beukes* where it declared that the power to pronounce a contract contrary to public

144 *Barkhuizen* (n 11) para 58.

145 *Mohamed's v Southern Sun* (n 5) para 13.

146 STBB (n 143) 3.

147 *Mohamed's v Southern Sun* (n 5) para 17.

148 *Everfresh* (n 56) para 23.

149 *Mohamed's v Southern Sun* (n 5) para 19.

150 As above.

151 *Mohamed's v Southern Sun* (n 5) para 21.

152 As above.

policy must be used sparingly.¹⁵³ The privity and sanctity of contract entails that contents of the contract must be honoured and preserved if parties had freely and voluntarily entered the contract. *Wells v South African Alumenite Company* was referenced by the Court to evaluate the principle of *pacta sunt servanda*. The Court applied the judgment of *Barkhuizen* to decide if applying the principle of *pacta sunt servanda* would be against public policy and the golden thread of the Constitution and found the following:¹⁵⁴

- (1) The provisions of the contract are prima facie NOT against public policy.
- (2) The bargaining position of the parties are equal.
- (3) The parties could have negotiated a provision into the contract, where the appellant could have warned the respondent to remedy the breach before the contract was cancelled.
- (4) The performance on time was not impossible. The respondent could have planned with precaution to keep up to date with paying on time or found an alternative way to pay the appellant.

Henceforth, after considering all the relevant factors and applying the Constitutional Court's decision in *Barkhuizen*, it was not contrary to public policy to enforce this contract and uphold the principle of *pacta sunt servanda*.

The Court iterated that the respondent was aware of the material terms and the cancellation clause of the contract.¹⁵⁵ Additionally, the Court noted that the facts of the matter clearly indicate that the appellant was patient with the respondent's multiple failures to abide by the provisions in the lease agreement.¹⁵⁶ As demonstrated above, the Court in *Magna Alloys v Ellis* established that even though a contract or a provision in a contract can be perceived to be contrary to public policy, it might not be a ground for invalidity.¹⁵⁷ The SCA mentioned that even if a term in a contract is unfair or may operate harshly, this does not require it to conclude that the contract is contrary to public policy. This was especially applicable in this case as there was no evidence to conclude that the respondent's constitutional rights were infringed.¹⁵⁸ The reason that the Court did not use section 39(2) to develop the common law of contract was that it was 'impermissible' for the court to develop the common law to invalidate a provision of the contract.¹⁵⁹ The golden thread of the Constitution that consists of ubuntu, good faith, and fairness *would* have been used as a tool to unjustly and unscrupulously render the contract void.

¹⁵³ As above.

¹⁵⁴ *Mohamed's v Southern Sun* (n 5) para 28.

¹⁵⁵ As above.

¹⁵⁶ *Mohamed's v Southern Sun* (n 5) para 29.

¹⁵⁷ Calitz (n 29) 58.

¹⁵⁸ *Mohamed's v Southern Sun* (n 5) para 30.

¹⁵⁹ As above.

In application of the values of good faith and ubuntu in the law of contract, the *Potgieter v Potgieter*¹⁶⁰ case is valuable. *In casu*, the importance of legal certainty was stressed by the Supreme Court of Appeal due to the abstract nature of the values of good faith and ubuntu. This means that should judges decide matters based on what they hold to be fair, the principle of legal certainty may be jeopardised.¹⁶¹

The SCA held that the outcome of this case can be said to be ‘unpalatable’ for the respondent, but that the respondent must face the consequences of its agent’s failure to perform in time.¹⁶² In this case, the respondent and appellant agreed to renegotiate in *bona fide* and to conclude further agreements.¹⁶³ The SCA held that it would be ‘untenable’ to relax *pacta sunt servanda* because that would result in the Court making the agreement for the parties.¹⁶⁴ The Court included a notice period of three months for Southern Sun to leave the property by 31 March 2018.¹⁶⁵

4 The impact of *Mohamed’s v Southern Sun* on the law of contract

The Constitutional Court is willing to develop the common law by deviating from strictly applying the principle of *pacta sunt servanda* to improve our judicial precedent and law. The obstacles, however, appear with our legal practitioners who do not appropriately plead the question of public policy before the lower courts.¹⁶⁶ The central point of *Mohamed’s v Southern Sun* is that the enforcement of a contract may be unfair and contrary to the golden thread of the Constitution (ubuntu), but upon a thorough inspection of the relevant facts of the matter using guidance set by case law, this may prove otherwise. This renders the ‘defence’ of public policy considerations partially effective, thereby giving credence to fairness, justice, and equity to all in the circumstances of each matter.

A lesson learnt from this matter is that the courts aim to ensure a consistent application of the freedom to contract and are cognisant of the fact that injustice might prevail from the application of this doctrine. It may be perceived that constitutional muster might not prevail after all. This judgment supports party autonomy and notes that parties may freely and voluntarily enter into a contract. It can, however, be necessary to trump the improper exercise of the freedom

160 *Potgieter v Potgieter* (2011) JOL 27892 (SCA).

161 *Potgieter v Potgieter* (n 161) para 34.

162 *Mohamed’s v Southern Sun* (n 5) para 32.

163 As above.

164 *Mohamed’s v Southern Sun* (n 5) para 32.

165 As above.

166 Kubheka (n 19) 37.

to contract should it be contrary to public policy. Enforcing a contract that seems to be harmless may breach a constitutional value and should this value be unreasonably impacted; this clause will not be enforceable. Here, the clause was not contrary to public policy at face value.

The resolution of contractual disputes which relate to the balancing of *pacta sunt servanda* and ubuntu lies in our courts following the principles and judicial precedents set and adopted to date. These principles have been tailored and modified to handle the unfair enforcement of contractual terms.¹⁶⁷ This was perfectly illustrated in *Mohamed's v Southern Sun* where the Court considered *Barkhuizen* and *Brisley* when navigating towards a balanced and informed decision. Courts can refuse to enforce a contractual term based on unfairness if the term is found to be contrary to public policy. It is, however, the duty of the courts to be cautious in not hastily concluding that the enforcement of a term will result in an opposition to public policy simply because it offends considerations of fairness.¹⁶⁸

The courts also have the duty to exercise their power and discretion to refuse the enforcement of contract terms carefully and only in circumstances where it manifests to being 'exceptionally unfair'.¹⁶⁹ The SCA decision mirrors the conservatism of the bench in *Brisley v Drotzky*.¹⁷⁰ This judgment binds lower courts until the Constitutional Court brings about certainty in this grey area of the law. The SCA in *Mohamed's v Southern Sun* used this approach to balance the common law of contract and the golden thread of the Constitution. The SCA considered the employees of Southern Sun and the functioning of the hospitality industry, thus a notice period of three months was given for them to vacate the property.

5 Conclusion

Mohamed's v Southern Sun has set the precedent that when determining whether the enforcement of a provision in a contract would result in unfairness, courts must investigate whether the parties were aware of the breach or could have prevented it in the main. It is paramount to investigate the possible prejudice that each party will suffer should the contractual clause be enforced.

167 R Sharrock 'Unfair enforcement of a contract and the constitutional norm of Ubuntu: *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ)' (2018) 39(1) *Obiter* at 228.

168 As above.

169 Sharrock (n 168) 229.

170 Hutchison (n 48) 247. See also *Roazar CC v Falls Supermarket CC* (2018) 1 All SA 438 (SCA) where the Court gave a unanimous judgment with consideration of the contrasting principles of freedom of contract and fairness.

Mohamed's v Southern Sun confirms that the enforcement of a valid contract clause may not be against public policy if one can justify its enforcement in a commercial context. One must look at whether the creditor has a 'sound commercial reason' for enforcing the provision.¹⁷¹

Mohamed's v Southern Sun is an important case in the law of contract in South Africa because it perfectly encapsulates the underlying principles, cornerstones, and judicial precedent. *Mohamed's v Southern Sun* has established that having a degree of trust in a party is not sufficient to guarantee performance and this case has shown how the law of contract plays an important role for society to operate efficiently and to hold parties accountable. *Mohamed's v Southern Sun* demonstrates how parties to a contract can invoke the assistance of the law to enforce a contract, using *pacta sunt servanda*.

The supremacy of the Constitution has, without a doubt, impacted the common law of contract. The combined academic literature of Pillay, Calitz, and Sharrock, and the judicial precedent demonstrates a holistic understanding of the law of contract. The incorporation of ubuntu in the common law of contract serves as a mechanism of social justice, but on the other hand, must be used scathingly as evidenced by *Mohamed's v Southern Sun*. The crux of the moral conundrum, which is the competition between *pacta sunt servanda* and the golden thread of the Constitution, played out in *Mohamed's v Southern Sun* where the Court used the judicial precedent set in *Barkhuizen* to fairly balance the principles to conclude on the matter.

171 As above.

A COMPARATIVE ANALYSIS OF THE MANDATORY RULE DOCTRINE AND ITS APPLICATION IN THE SOUTH AFRICAN LABOUR COURT

by Elisa Rinaldi*



Abstract

Inherent in any employment relationship is the imbalance of bargaining power between the parties to the employment contract. On a globalised scale, this imbalance is exacerbated where employees are often reliant on the provisions within their contract to ensure they are adequately protected. Party autonomy enables the parties to choose the legal system that will govern these provisions and the employment relationship as a whole. The doctrine of mandatory rules purports to make applicable those 'laws of a strictly positive, imperative nature' so as to guarantee the protection of employees' interests where party autonomy serves to conceal the power imbalance within the employment relationship. The Labour Court has, however, often misunderstood and neglected to consider the application of private international law rules, which are inclusive of the mandatory rule doctrine. The aim of this article is, therefore, to critically analyse the doctrine and question whether, from a comparative perspective, South African labour law can be considered as fitting within this framework as developed within the European Union and the United States, so as to ensure its protective elements are applied in the appropriate instances.

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1 Introduction

Globalisation and shifts in employment marked by yet another industrial revolution have increased the mobility of labour.¹ Whilst employees such as airline pilots and the crewmembers of ships are frequently working in different jurisdictions, some may find themselves working overseas for differing durations.² Multinational companies often send their employees overseas for a fixed period. For instance, someone may be employed for a specified period at the London office of an entity incorporated in South Africa.³ The International Labour Organisation (ILO), with a focus on the gig-economy, has further highlighted the growth of online platforms that hire employees from anywhere in the world to work remotely on casual jobs that are offered by a platform that may hail from a different jurisdiction entirely.⁴ This growth of employment with international features uncovers the various private international law rules necessary for adjudicating a cross-border employment dispute.

Case law in South Africa has highlighted the lack of academic material surrounding private international law, particularly in the realm of labour law.⁵ The contention lies in the approach taken by the Labour Court in deducing the territorial scope of the statutes that empower the Court with jurisdiction – leading to misapplication or, oftentimes, complete neglect of the rules of private international law. Met with a dispute containing international features, the Labour Court has resorted to utilising methods of statutory interpretation that requires the Court to investigate whom Parliament is presumed to have been legislating for.⁶

In interpreting the various employment statutes and finding no express territorial provision, the Labour Appeal Court in *Astral Operations v Parry*⁷ found that the statute finds application exclusively within South Africa's borders. Adhering to the presumption against extraterritoriality, Parliament was held to have intended to only legislate for employees who work in South Africa.⁸ The corollary is that the Labour Court may then only assume jurisdiction if an employee's workplace is within the Republic, thus

1 K Schweb *The fourth industrial revolution* (2016) at 10.

2 L Merrett 'The extra-territorial reach of employment legislation' (2010) 39 *Industrial Law Journal* at 355.

3 *Monare v South African Tourism and Others* (2016) 37 ILJ 394 (LAC) para 7.

4 MA Cherry 'Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy' (2019) *International Labour Organisation Conditions of Work Series and Employment Series* at 1.

5 *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) (*Parry*) para 30.

6 S Dutson 'The territorial application of statutes' (1996) 22 *Monash University Law Review* at 78.

7 *Astral Operations Ltd v Parry* (2008) 29 ILJ 2668 (LAC) (*Astral Operations*) paras 2-3.

8 *Astral Operations* (n 7) para 21.

leaving many who work outside South Africa at the mercy of employers who, in trying to avoid South Africa's protective employment legislation, may, for instance, simply post their employees outside the country to a subsidiary.⁹ By electing to disengage with the rules of private international law, the Labour Court fails to consider the precarious position those employees working abroad may often find themselves in.¹⁰

The challenges generated by judgments such as *Astral Operations* may arguably be solved through the application of private international law. While the problems raised confront several aspects of private international law, the focus here lies on the doctrine of mandatory rules. Where a provision or statute is considered mandatory it, in effect, has extra-territorial application. Finding South African labour law as mandatory would dispute the conclusion drawn in *Astral Operations* and subsequent case law,¹¹ thereby better reflecting the instances in which a claimant may fall within the scope of the relevant statute and be adequately protected. Yet, while much has been written on the historical context and nature of mandatory rules, the suitability of South African labour law as mandatory in nature and the question of when the Labour Court may apply this doctrine remains largely unanswered.

The aim is, therefore, to critically analyse the doctrine and question whether, from a comparative perspective, South African labour law can be considered as fitting within this framework as developed within the European Union (EU) and the United States. The European Union and the United States offer avenues in which the doctrine may be applied – in instances where protection of the weaker party is necessitated – as well as offering an established perspective into the doctrine, particularly in the EU where a formal, standardised framework has been developed.

While an analysis of the doctrine of mandatory rules invites a technical argument into its application, the argument extends to considerations of state interventions within the labour market of a particular territory. If corporations are accountable to the employees they engage within a territory, they should be equally responsible for their employees who engage in production elsewhere.¹² Considering

9 K Calitz 'The jurisdiction of the Labour Court in international employment contracts in respect of workplaces outside South Africa' (2011) 32 *Obiter* at 687.

10 For instance, in *Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry & Others* (1995) 16 ILJ 51 (A) the territorial limits placed on the statute granting the Court with jurisdiction left the employees who were working on an oil rig with no remedy as no court had jurisdiction within those waters.

11 *Schenker South Africa (Pty) Ltd v Robineau and Others* (2019) 40 ILJ 213 (LC); *MECS Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2013) 35 ILJ 747 (LC).

12 G Mundlak 'De-territorializing labor law' (2009) 3 *Law & Ethics of Human Rights* at 211.

that the purpose underlying the application of labour law is to balance out the inequality that is inherent within an employment relationship, dismissing the responsibility of corporations where that relationship extends beyond a state's borders is intrinsically unequal.¹³ That said, where a doctrine such as that of mandatory rules is still in a state of infancy, as it is within South Africa, understanding when and how it may be applied is central to having its purposes fulfilled.

2 Party autonomy and choice of law

A fundamental hindrance to the application of private international law is that the Labour Court, with its jurisdiction firmly held within the Labour Relations Act,¹⁴ cannot proclaim on foreign law.¹⁵ The result of this is that, where the choice of law in an international employment contract is unequivocally a foreign law, the Labour Court will not be able to give an effective judgment and will, thus, have to forfeit its jurisdiction. The prerequisite that South African law must be applicable to the dispute for the Labour Court to be competent in its adjudication gives reason as to why the Court often relies on interpreting statutes on the basis that foreign elements have no bearing on their applicability. The problem, however, lies in the conclusion that these statutes are only applicable to employees who work within the geographical boundaries of the South African Republic.

Where it might be appreciated that the Labour Court has avoided unnecessary litigation by ensuring that no claimant may evoke South African statutory employment rights without working within the Republic, such appreciation must be understood as placing employees in an even more precarious position. A common feature of almost every employment relationship is the imbalance of information.¹⁶ An employer, especially one that engages employees in multiple jurisdictions, will be more familiar with the various legal systems it potentially engages.¹⁷ In having this knowledge, an employer may employ employees to work abroad and sign employment contracts with a South African choice of law clause without consequence.¹⁸ An employee, on the other hand, likely without the knowledge of territoriality and its implications, will see a South African choice of

13 As above.

14 Labour Relations Act 66 of 1995 (LRA).

15 *Parry* (n 5) para 55.

16 U Grusic 'The territorial scope of employment legislation and choice of law' (2012) 75 *Modern Law Review* at 749.

17 As above.

18 While not an express choice, the employer in *Astral Operations*, (n 8), at para 2 made a commitment to follow a retrenchment procedure if South African law was applicable and argued that it was not applicable when enforcing the payment of severance pay following possible retrenchment.

law clause and assume they will be protected by that law.¹⁹ This is not only an injustice to the employee but further an unconscionable limitation on party autonomy in the instances that the parties did reach a genuine consensus on the issue of choice of law. This runs counter to the developments of international commercial practice and, while it remains beyond the scope of this article, it must be mentioned that this further generates legal uncertainty and unpredictability in the scope of cross-border employment.

That said, one of the cornerstones of private international law is party autonomy. In short, party autonomy enables parties to agree on the proper law or *lex causae*.²⁰ It is recognised in legal systems all over the world and its universal acceptance can be seen in various international instruments.²¹ Its recognition is typically due to the certainty it brings to the choice of law enquiry. Having made a choice, parties relieve a court of the often unpredictable task of localising the contract to a particular legal system.²² Essentially, contracting parties are free to choose the legal system that will apply to all or even just parts of the contract.²³

It would be erroneous, however, to consider party autonomy as unfettered and, in the same token, to believe that both contracting parties always contract with the same level of bargaining power and freely choose the terms incorporated within. The mere existence of standardised contracts makes this position dubious. More so, employment remains one of those concerns where the bargaining power is known to be unequal. As Davies and Freedland hold, ‘labour law is chiefly concerned with [the] elementary phenomenon of social power. And – this is important – it is concerned with social power irrespective of the share which the law itself has in establishing it’.²⁴ It thus remains imperative to ensure regulation of these facets of inequality to minimise their impact. Under the guise of private international law, limiting party autonomy is one such form of regulation ensured by the forum state.²⁵

19 Grusic (n 16) 749.

20 The law that is to govern the contract. See C Kandiyero ‘Party autonomy in Brazilian and South African private international law of contract’ LLM Dissertation, 2015, University of Johannesburg at 1.

21 Kandiyero (n 20) 1. See also both the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention); and Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) which recognise the principle of party autonomy. CF Forsyth *Private international law* (2012) at 320.

22 When different legal systems apply to different parts of the contract, this is known as the scission principle. See Forsyth (n 22) 392 for a discussion on the scission principle in the case of immovables.

24 P Davies & M Freedland *Kahn-Freund’s labour and the law* (1984) at 14.

25 P Nygh *Autonomy in international contracts* (1999) at 46.

The most prominent dictum on party autonomy is found in the case of *Vita Food Products Inc v Unus Shipping*.²⁶ Here, Lord Wright held that while a choice of law clause should be honoured, it should be done so only to the extent that it is *bona fide*, legal, and not against public policy.²⁷ Hence, party autonomy is not absolute. It may be limited in various ways and numerous practices have been accepted by legal systems worldwide. The doctrine of mandatory rules is a common and widely accepted practice in overriding the choice of law. A focus on statutory interpretation, however, devoid of any considerations of private international law prompts the Labour Court to overlook the possibility of applying the doctrine of mandatory rules to disputes where the subjective or objective proper law is foreign law.²⁸ This results in the Labour Court forfeiting jurisdiction in instances where it is not necessary to do so. More critically, it further strips an employee of protection in instances where the mandatory nature of the forum's statutory provisions, and the subsequent connections that dispute has to the forum, necessitates their protection.

It is appreciated, however, that where misunderstanding of private international law principles and rules persist, statutory interpretation may continue to be a method that the Labour Court relies on in determining whether an employee falls within the scope of a statutory employment right or provision. The rest of this paper is thus dedicated to canvassing the doctrine of mandatory rules, what the doctrine entails, and how and when it should be applied so as to ensure adequate protection of employees as weaker contracting parties.

3 The nature and extent of mandatory rules

3.1 Historical context

The nature of mandatory rules may be traced back to the writings of Friedrich Karl von Savigny who argued that the effects of multilateralism needed to be limited so as to give respect to the laws that he characterised as 'laws of a strictly positive, imperative nature'.²⁹ The exception to party autonomy has been debated for centuries, yet problems as to the proper application of this exception persist. While the application of conflict rules is common practice today, states have routinely sought to regulate private relationships,

26 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7 para 7.

27 *Vita Food Products Inc v Unus Shipping Co Ltd* (n 26) para 6.

28 A subjective choice of law is one chosen by the parties whereas an objective choice is made when considering all the factors surrounding the contract – it may be said to be connected to a particular legal system which is to apply.

29 Nygh (n 25) 199.

leading to the intervention of economic and political domains that form part of a community with distinct public interests.³⁰ Mandatory rules have thus been elevated as imperative for not only ensuring the interests of private individuals, but also furthering the economic, political, and social interests of the state.³¹

Having an overriding nature, mandatory rules must accordingly be separated from multilateral choice of law rules. While a statute may determine its territorial reach and, at that, its international application, it does not determine that a statute is mandatory in the sense as described above. Its application may still be affected by the choice of law process, where parties have made an express choice, thereby excluding a foreign statute or a statute of the forum.³² The corollary is that unilateralism will usually suggest the mandatory nature of a statute. Not all statutes, however, will be considered mandatory in an international sense.³³

3.2 Domestic and international mandatory rules

Notwithstanding the position where a statute clearly and with utmost certainty demands applicability irrespective of choice of law,³⁴ there are a number of statutes that are considered mandatory but only insofar as they are applicable as the *lex causae*.³⁵ These may be termed domestic mandatory rules.³⁶ This refers to statutes that become directly applicable if and when the choice of law is the law of the forum. A *locus classicus* example is section 1 of the Intestate Succession Act that grants certain rights to a surviving spouse.³⁷ These rights, while peremptory, may be excluded by simply making the *lex causae* a law other than the law of the forum.³⁸ Therefore, the rules have no international mandatory application and will only find applicability over domestic contracts or international contracts that have determined such law to be applicable. They have no overriding effect.

30 As above.

31 KAS Schafer *Application of mandatory rules in the private international law of contracts* (2010) at 4.

32 Nygh (n 25) 202.

33 Schafer (n 31) 11.

34 Forsyth, (n 22), calls these 'directly applicable statutes' which have the effect of overriding the choice of law process. An example is section 47 of the Electronic Communications and Transactions Act 25 of 2002 which states that 'the protection provided to consumers ... applies irrespective of the legal system applicable to the agreement in question'.

35 Forsyth (n 22) 13. *Lex causae* may be synonymously understood as choice of law.

36 Nygh, (n 25), coins these as domestic mandatory rules, but they have further been termed 'localising rules' or 'dispositions imperative' as found in Article 3 of the French Civil Code.

37 Intestate Succession Act 81 of 1987 sec 1. These refer to the rights that a surviving spouse has to the intestate estate of the deceased. For instance, the right to claim a child's share of the intestate estate under certain conditions.

38 Nygh (n 25) 200.

An international mandatory rule may be explained through the definition as found in the Rome I Regulation.³⁹ Article 9(1) holds that overriding mandatory provisions are provisions the respect for which is 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 apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.⁴⁰

Without questioning the significance of what might constitute a mandatory rule as per this definition, it is evident that a difference exists between international and domestic mandatory rules. Here it specifies that mandatory rules are rules that must apply irrespective of the chosen legal system. This differs from domestic mandatory rules which, while peremptory, only apply when they form part of the *lex causae*.

This distinction, while nuanced, bears importance. A statute being peremptory is a necessary condition for it to have an international mandatory effect – that is, having an overriding effect on the choice of law process.⁴¹ However, that on its own is not a sufficient criterion for it to be declared an international mandatory rule.⁴² The statute must go further and be of a specific nature, underpinned by a particular purpose, for it to justifiably override the choice of law process.⁴³

3.3 Purpose of mandatory rules and their relationship to public policy

As already alluded to, the rationale behind mandatory rules is firmly rooted in public interest, that being both the interests of the state as well as the private interests that the state wishes to protect.⁴⁴ These have been described as laws that regulate markets and the economy, protection of the interests relating to land, and the protection of monies and securities, the environment, and labour.⁴⁵ Protection of private interests is inclusive of protecting those parties economically weaker to a contract. This encompasses consumers, insured parties, and employees.⁴⁶

39 Rome I (n 21).

40 Rome I (n 21) Art 9(1).

41 J Mitchell 'To override, and when? A comparative evaluation of the doctrine of mandatory rules in South African private international law to override and when' (2013) 130 *The South African Law Journal* at 768.

42 As above.

43 A Chong 'The public policy and mandatory rules of third countries in international contracts' (2006) 2 *Journal of Private International Law* at 6.

44 Nygh (n 25) 203.

45 As above.

46 Nygh (n 25) 204.

Beyond this rather ambiguous understanding of what mandatory rules purport to do, there is no regulating framework within South Africa with which to work with. Essentially, any rule may be mandatory where the legislation deems it so.⁴⁷ The general difficulty, thus, lies in identifying a mandatory rule as the intention of the legislation and this matter is not always directly expressed.⁴⁸ However, public interest is often expressed in a state's public policy. Mandatory rules, therefore, maintain a close relationship to public policy and, as such, have been considered an expression thereof.⁴⁹ Public policy demands that a court reject the application of a chosen law when such law offends the 'fundamental values of the forum'.⁵⁰ As Mayer puts it, mandatory rules of law are a matter of public policy and reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.⁵¹

While the view that mandatory rules are a reflection of public policy might assist in determining whether a rule is mandatory in nature, the proximity at which these two notions exist should not designate them to be one in the same thing. Public policy has an inherent negative effect on the choice of law process, rejecting outright the application of the chosen law.⁵² The primary and, arguably, the only aim of public policy is to protect the fundamental values of the forum and does so by refusing the application of a law that offends this.⁵³ Mandatory rules, on the other hand, are not considered law-rejecting but rather law-selecting.⁵⁴ Once a mandatory rule has been identified and selected, the rule must apply. There is no outright rejection of the choice of law, instead, another law is given priority due to its imperative nature.⁵⁵ This is usually, and as is the emphasis here, the law of the forum.⁵⁶ As Nygh argues, rejection of the chosen law on the grounds of public policy will usually direct the forum to apply another rule from that same legal system and only when this is not available does the law of the forum become applicable.⁵⁷

47 M Wojewoda 'Mandatory rules in private international law: With special reference to the mandatory system under the Rome Convention on the Law Applicable to Contractual Obligations' (2000) 7 *Maastricht Journal of European and Comparative Law* at 189.

48 Wojewoda (n 47) 206.

49 Nygh (n 25) 206.

50 Wojewoda (n 47) 192.

51 P Mayer 'Mandatory rules of law in international arbitration' (1986) 2 *International Arbitration* at 274.

52 Nygh (n 25) 206.

53 Wojewoda (n 47) 193.

54 As above.

55 Nygh (n 25) 193.

56 As above.

57 Nygh (n 25) 193.

Other differences that exist further exemplify the purpose behind mandatory rules. For instance, public policy is considered a discretionary ground whereby a court is usually in the position to determine whether or not a foreign law is offensive to the values of the forum state.⁵⁸ Mandatory rules are, however, so pertinent that they demand applicability and denote a compulsory, rather than permissible, nature.⁵⁹ The chosen law might, for instance, be acceptable but is overridden for the simple fact that the law of the forum purports to offer more protection to the vulnerable party than does the *lex causae*. Thus, public policy as a limitation on party autonomy will not find application under these circumstances.

4 The mandatory nature of labour law

The history, nature, and purpose of mandatory rules have been the focus of many academic writings and as such, it is not difficult to pinpoint a commonality amongst them. Some opinions may differ slightly and there is no singular concrete definition of mandatory rules that exists on a global scale. However, mandatory rules may, nonetheless, be understood as rules that are so important to a given state, so fundamental to the precepts and functioning of such legal system, and imperative to the economic and political structure thereof, that they must be applied in circumstances that find themselves under the authority of such rules.⁶⁰

As mentioned, the difficulty thus lies in determining which laws fall under this classification. While mandatory rules have been considered in the Labour Court before,⁶¹ their development and acceptance has been slow and taken to in a piecemeal fashion. One reason for this is the enduring application of the presumption against extra-territoriality. With a strong opinion in the Labour Court that South Africa's employment statutes do not possess extra-territorial application, the processes under private international law that are inclusive of the mandatory rule doctrine are frustrated and ultimately overlooked. However, in finding that South African employment statutes are mandatory, it is argued that the Labour Court must abandon its sovereign stance on the application of its employment statutes and 'replace' it with the search for the underlying substantive social, economic, and political relations.⁶²

In doing so, the Labour Court may anticipate applying the doctrine over instances where the employment relationship reflects a power

58 Wojewoda (n 47) 193.

59 As above.

60 Nygh (n 25) 199.

61 Parry (n 5) para 46.

62 Mundlak (n 12) 205.

imbalance that necessitates extending protection to the weaker contracting party.⁶³ This further generates a truer reflection of the employment relationship in cross-border disputes since the elements of the relationship, the place of performance (payment and dismissal to name a few), and their localisation may vary from case to case.⁶⁴ To reject this approach in favour of upholding employment as having an intrinsic territorial component is, moreover, incongruent to the developments of international commercial dealings where regulatory mechanisms that govern cross-border employment relationships are rooted in private international law rules, methods, and principles.⁶⁵ This must, nevertheless, account for the public law component inherent within labour law.

4.1 The public and private dichotomy

Labour law is a hybrid of private and public law.⁶⁶ It is a component of private law because a private relationship between an employee and their employer is established by contract and the parties are free to (with exceptions) exercise autonomy over such contracts.⁶⁷ These exceptions allude to the public law component as the autonomous and private nature of an employment relationship limited by the regulatory instruments of the state.⁶⁸ These instruments place restrictions on the employment relationship in so far as they create mechanisms that act as a countervailing force to the unequal bargaining power that is inherent therein.⁶⁹ This duality is expressed both on a domestic and international level. International norms have been enacted primarily through the standards set by the International Labour Organisation that emphasise both collective bargaining and cooperation between employees and their employers as well as calling for individual nation-states to enact protective legislation in line with its standards.⁷⁰

In terms of mandatory rules, a distinction is sometimes made between international mandatory rules of a public and private law nature.⁷¹ Public law norms are considered imperative but the choice

63 See Cherry, (n 4) at 24, where it was argued that choice of law clauses are almost entirely dictated by employers.

64 Y Nishitani 'Protection of weaker parties and mandatory rules' (2007) 50 *Japanese Annual of International Law* at 52.

65 These include, but are not limited to, Rome I (n 22); the Inter-American Convention on the Law Applicable to International Contracts (CIDIP-V) (1994) (Mexico City Convention); the Act on General Rules for Applicable Laws Act No. 78 of 2006; and the Australian Fair Work Act No. 28, 2009 that allow for extra-territorial application of employment law under certain circumstances.

66 Parry (n 5) para 48.

67 As above.

68 Parry (n 5) para 49.

69 Davies & Freedland (n 24) 18.

70 Parry (n 5) para 50.

71 Schäfer (n 31) 13.

of law process, a facet of private international law, is, as the name suggests, an application of private law provisions.⁷² This is in harmony with the principle of sovereignty, which highlights that states cannot enforce their public laws abroad.⁷³ The territorial implications assigned to South Africa's employment statutes might then find justification. An encroachment of one state's labour norms onto another could be unwarranted especially when considering public law as an extension of a state's socio-political position.⁷⁴ There are, however, differing opinions on the matter.⁷⁵ The private and public dichotomy is not so clear cut. Labour law existing within both areas exemplifies this.

International employment contracts blur the distinction further. Working outside their places of residence, employees are reliant almost exclusively on the protective provisions incorporated within their employment contracts. The regulatory mechanisms offered by states is largely dependent on an express choice of law clause being made and in the absence of such, the conflict rules of the state with jurisdiction may vary and in any case be manipulated so as to avoid a certain legal system.⁷⁶ International regulatory mechanisms are entirely voluntary and as such may not be of assistance to a given employee. At the same time, collective bargaining, a component of the private nature of labour law, is frustrated at an international level with employers being less likely to be willing to participate and oversight of this being insufficient.⁷⁷ Accordingly, when discussing mandatory rules as a doctrine that may offer an avenue of protection over possible injustice, the public and private contradiction should be overlooked at least in the ambit of labour law. As the Swiss Code on Private International Law holds, 'any reference to foreign law encompasses all provisions applicable to the case according to that law and the sole fact that some of them may be characterized as public law cannot make them inapplicable'.⁷⁸

5 Approaches to mandatory rules

Having a public law component does mean, however, that labour law possesses an intrinsic mandatory nature.⁷⁹ This, however, must be qualified, as the importance here lies in South Africa's employment

72 Wojewoda (n 47) 194.

73 As above.

74 Wojewoda (n 47) 194.

75 As above.

76 Calitz (n 9) 684.

77 Directorate-General for Internal Policies: Employment and Social Affairs (2011) European Commission: Brussels at 12.

78 Switzerland's Federal Code on Private International Law 1987 (CPIL) Art 13.

79 Parry (n 5).

statutes bearing an *international* mandatory nature so that they may justifiably limit a party's choice of law by overriding it.

That being said, it remains necessary to delve into an analysis of the elements of labour law that emphasise an international mandatory characteristic and the approaches that justify their application. This is because even where the conclusion results in South Africa's employment statutes possessing an international mandatory nature, there is still the question of when the courts should seek to limit a party's choice. It cannot be at every instance of an international employment contract where a foreign choice of law clause exists that the Labour Court override such a choice in favour of the law of the forum. Accordingly, approaches to the application of international mandatory rules must be considered.

5.1 The European Union

The approach taken by the EU has been mentioned briefly above and may accordingly be found within the Regulation on the Law Applicable to Contractual Obligations, otherwise known as Rome I. Article 9(1) of this Regulation holds that where a provision is crucial for the safeguarding of the political, economic, and social forums, and there exists a significant public interest in the application of such provision, it may justifiably override the choice of law and be applied.⁸⁰

Accordingly, the approach taken by the EU stresses state interest and close connection.⁸¹ Emphasis should, thus, be put on the word 'crucial' as it appears in Article 9(1).⁸² May labour provisions must be considered crucial and if so, what is it about labour law that bears prominence in the mandatory rules enquiry within the EU? The first enquiry should question the purpose of labour law. It has already been noted that labour law seeks to balance out the unequal bargaining power between an employee and his employer.⁸³ This is simple enough, however, it should bear weight especially in consideration of party autonomy and the limitation thereof. Party autonomy extends a veneer of equivalence that serves to conceal the unequal power balance between the contracting parties.⁸⁴ The Regulation recognises this by not only promoting the application of mandatory rules, but further expressing protection to employees in Article 8 that not only holds that provisions offering more protection may not be derogated

80 Rome I (n 21) Art 9(1).

81 Mitchell (n 41) 770.

82 Mitchell (n 41) 762.

83 Davies & Freedland (n 24) 18.

84 As above.

from, but further includes specific objective conflict rules that favour the weaker party.⁸⁵

In terms of overriding mandatory provisions, Grusic opines that labour provisions should be considered internationally mandatory only in so far as they impact the labour market of the forum.⁸⁶ This is because there is a personal scope that the state is seeking to regulate.⁸⁷ Thus, where provisions are aiming at the misuse of managerial power, they should not have an overriding effect.⁸⁸ Provisions that have a personal scope to them are, according to Grusic, those that regulate labour standards such as working hours, anti-discrimination, and minimum wage, to name but a few.⁸⁹

Grusic supports his claim through an analysis of the Posted Workers Directive (PWD) of the EU.⁹⁰ Article 3(1) of the Directive holds that Member States (of the EU) must apply the standards therein regardless of what the choice of law might be, where workers have been posted to their territory.⁹¹ The overriding effect of these provisions has been considered by the European Court of Justice (ECJ) as so fundamental that even domestic legislation of a Member State, that claims to be internationally mandatory, cannot override or exclude a provision found within Article 3(1).⁹² The ECJ further found Article 3(1) of the Directive to be an implementation of the mandatory rule doctrine in Article 9(1) of Rome I.⁹³ What this means is that any provision of a forum statute pertaining to any of the matters listed under Article 3(1) will be considered as overridingly mandatory.⁹⁴ Where they fall outside these matters, the provision must satisfy the test in Article 9(1) that the provisions are crucial for the safeguarding of the forum's political, economic, and social organisation and that there is a significant public interest in the application of those provisions to justify their application.⁹⁵

85 LM van Bochove 'Overriding mandatory rules as a vehicle for weaker party protection in European private international law' (2014) 7 *Erasmus Law Review* at 147.

86 Grusic (n 16) 746.

87 As above.

88 Grusic (n 16) 746.

89 As above.

90 European Parliament, Council of the European Union 'Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services' (PWD).

91 Grusic (n 16) 743.

92 *Commission v Luxembourg* Case C-319/06 [2008] ECR I-4232.

93 Grusic (n 16) 744.

94 PWD (n 90). The listed matters include: maximum work periods and minimum rest periods, minimum paid annual leave, minimum rates of pay and overtime, the conditions of hiring workers from temporary employment agencies, health safety and hygiene at work, protective measures for pregnant women and women who have children, and equality of treatment among men and women.

95 As above.

The conclusion drawn by Grusic bears weight, however other approaches that emphasise the protection of the weaker party are notable too. These do not rely on the provision's relationship with the labour market but rather promote a preference for the legal system that offers more protection.⁹⁶ In *Unamar v Navigation Maritime Bulgare*, the Court of Justice of the European Communities (EUECJ) implied the overriding mandatory nature of provisions that offer more protection.⁹⁷ This case involved the application of a Belgian statute that was held to be an implementation of the EU Directive on self-employed commercial agents.⁹⁸ A choice of law clause held Bulgarian law to be applicable, however, the Commercial Tribunal in Belgium held the Belgian statute on Commercial Agency Agreements to be applicable as an overriding mandatory rule.⁹⁹

Eventually, the case was heard in the EUECJ that professed it was up to the forum court to decide whether its law was of an international mandatory nature, implying that statutes that purport to not only implement EU Directives but also go beyond the scope of protection offered, might be considered as such.¹⁰⁰ What this judgment does is reflect the favourability principle in Article 8(1) of Rome I that grants an employee those protective provisions that would have been applicable in the absence of choice.¹⁰¹ The stark difference, however, is that the EUECJ in *Unamar v National Maritime Bulgare* did not provide definitive answers and left open considerable freedom for courts to use their discretion. Article 8(1), on the other hand, maintains the principle of close connection.¹⁰²

5.2 The United States of America

Since statutes do not often specify their mandatory nature, courts apply their discretion to discern this.¹⁰³ Due to this, their approach is often supplemented by American doctrines of governmental interest analysis.¹⁰⁴ This approach emphasises the policies underlying statutes and the interest that each legal system concerned has in applying them.¹⁰⁵ This is outlined in section 187(2)(b) of the American Restatement (Second) Conflicts of Laws where it holds that the forum

96 van Bochove (n 85) 152.

97 *United Antwerp Maritime Agencies NV v Navigation Maritime Bulgare* (Case C-184/12) [2013] EUECJ (*Unamar*) para 20.

98 As above.

99 van Bochove (n 85) 149.

100 *Unamar* (n 97) para 50.

101 M Czerwinski 'The law applicable to employment contracts under the Rome I-Regulation' (2015) 5 *Adam Mickiewicz University Law Review* at 152.

102 van Bochove (n 85) 156.

103 Nygh (n 25) 208.

104 As above.

105 Mitchell (n 41) 771; TG Guedj 'The theory of the *Lois de Police*, a functional trend in continental private international law – a comparative analysis with modern American theories' (1991) 39 *American Journal of Comparative Law* at 661.

may override a choice of law when application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.¹⁰⁶

Interest analysis was heavily influenced by American academic, Brainerd Currie. Currie offered the interest analysis framework as an alternative to conflict rules that he argued, created false conflicts between presumed state interests.¹⁰⁷ According to Currie's theory, the first step involves deducing the potentially applicable rules and the policies that underline them.¹⁰⁸ To deduce underlying policy one only has to look at the purpose behind the enactment of a particular rule and the problems it seeks to address.¹⁰⁹ The second step requires determining if a state has an interest in the application of its rule. A state has an interest if its policy is furthered by the implementation of that rule and not necessarily because it has an interest in the subject matter at hand or because the rule is potentially applicable.¹¹⁰

The policy concerned must likewise be of a fundamental nature. Guidance as to what a fundamental policy is may be found in the commentary to the Restatement that exemplified policies that are 'designed to protect a person against the oppressive use of superior bargaining power'¹¹¹ as fundamental. Arguably then, according to the US approach, are provisions that aim at protecting the weaker party overridingly mandatory as they reflect fundamental policies of the state. These fundamental policies must, nevertheless, be policies that would have been applicable in the absence of choice.

The US approach must be qualified. While section 187(2)(b) may be classified as an application of the mandatory rule doctrine, the interest analysis framework, of which the Restatement embodies, is more closely reflective of the principles underlying public policy.¹¹² The approach outlined in the Restatement has been classified as an indeterminate approach to the choice of law process that non-arbitrarily and predictably chooses the applicable legal system while preserving protection for consumers and employees by recognizing

106 Restatement (Second) of Conflict of Laws (1971) (Restatement) sec 187(2)(b).

107 JR Ratner 'Using Currie's Interest Analysis to Resolve Conflicts between State Regulation and the Sherman Act' (1989) 30 *William and Mary Law Review* at 729.

108 Guedj (n 105) 686.

109 Ratner (n 107) 729.

110 As above.

111 RJ Weintraub *Commentary on the Conflict of Laws* (2010) at 517.

112 PJ Borcher 'Categorical exemptions to party autonomy in private international law' (2007) 82 *Tulane Law Review* at 16.

overriding public policies of an interested state when those policies are fundamental in an international sense.¹¹³

Bar this distinction, the two approaches analysed seek to limit party autonomy in relatively the same way. 'Fundamental' may be understood to have the same exceptional application as those 'crucial' policies applied in the EU. Accordingly, both Rome I and the Restatement look towards the application of overriding provisions as exceptional to the choice of law process. When it comes to the protection of weaker contracting parties, the US approach is certainly clearer in its regard for the policies possessing an international mandatory nature than is the approach in the EU. However, both would arguably maintain that these provisions cannot supplement a chosen legal system that aims at serving the same purpose as the forum's rule.¹¹⁴

6 Mandatory rules in South African labour law

The first point of departure when considering the mandatory nature of South Africa's labour legislation must be the Constitution. Having elevated labour rights as constitutionally imperative, they form part of the country's public policy.¹¹⁵ The statutes themselves reinforce this position. To this end, reference is only made to the Labour Relations Act (LRA),¹¹⁶ Basic Conditions of Employment Act (BCEA),¹¹⁷ and Employment Equity Act (EEA)¹¹⁸ as they are significant in providing the rights and duties that the constitutional provision relating to fair labour practices envision.¹¹⁹ The purposes of these statutes further illustrate their constitutional importance. Both the LRA and BCEA aim at fulfilling section 23 of the Constitution as well as the Republic's commitments to the obligations set out by the ILO.¹²⁰ The EEA goes even further and specifies its aim as promoting the constitutional right to equality by eliminating discrimination in the workplace.¹²¹ Accordingly, if the chosen legal system acts against these purposes it may be rejected on the grounds of public policy.¹²²

113 Ratner (n 107) 708.

114 H Buxbaum 'Mandatory rules in civil litigation: status of the doctrine post-globalisation' (2008) 18 *Article by Maurer Faculty* at 36.

115 K Calitz 'Globalisation, the Development of Constitutionalism and the Individual Employee' (2007) 10 *Potchefstroom Electronic Law Journal* at 7.

116 LRA (n 14).

117 Basic Conditions of Employment Act 77 of 1997 (BCEA).

118 Employee Equity Act 55 of 1998 (EEA).

119 Constitution of the Republic of South Africa, 1996 (Constitution) sec 23.

120 LRA (n 116) sec 1; BCEA (n 117) sec 1.

121 The aim of the EEA, (n 118), specifies that it, in recognition of the injustices faced during apartheid, aims to, *inter alia*, promote equality and anti-discrimination in the workplace.

122 Calitz (n 115) 7.

Mandatory rules have been discussed above as an expression of a state's public policy, albeit it with the former being so imperative as to demand its application. One may comfortably conclude then that South Africa's labour law is of a mandatory nature. This is in further consideration of the fact that the nature of labour law, as being closely linked to a state's socio-economic position, commands it to be mandatory. However, the impact here must not only be that it possesses a mandatory characteristic, but that such characteristic demands it to override the choice of law process. It must go beyond mere public policy and not reject the chosen law, but displace it in favour of the law of the forum. That said, the international mandatory nature of labour law in South Africa has been considered before, deriving influence from the Rome I Regulation.

In *Parry v Astral Operations*, the Labour Court made mention of the constitutionalism of labour rights in South Africa, holding that it strengthens the protective elements of this ambit of the law.¹²³ Party autonomy must, thus, exist within the limits of the Constitution. These limits are regulated by the employment statutes and so, there may be room to argue that the application of the LRA, for instance, may be justified as overriding a foreign choice of law. In *Parry*, the Court further justified the limitation of party autonomy by referring to the Rome Convention (the predecessor to Rome I). Emphasis was made on the protection the Convention offers to employees by not allowing parties to deprive them of the mandatory rules that would be applicable in the absence of choice.¹²⁴ Further holding that the Republic is not bound by the Convention, the Court rightly maintained that it was time to consider it as it would be in accordance with section 39(1)(b) of the Constitution, that which directs a court to consider international law.¹²⁵ The approach taken by this court is unequivocally one that favours protection to the weaker contracting party, arguing that a choice of foreign law cannot avoid the protection of South Africa's labour law.¹²⁶

A similar approach was seen in *August Läßle (South Africa) v Jarret* where the Labour Court held that external companies cannot avoid South Africa's labour laws by contractually claiming that persons posted to their subsidiaries are not employees when the LRA clearly defines them as such, arguing further that it would seriously disadvantage the South African citizens who work for these companies.¹²⁷ The protection offered to employees was thus justified as treating labour law in South Africa as overridingly mandatory. The

123 *Parry* (n 5) para 53.

124 *Parry* (n 5) para 70.

125 Constitution (n 119) sec 39.

126 *Parry* (n 5) para 72.

127 *August Läßle (South Africa) v Jarret & others* (2003) 12 BLLR 1194 (LC) (*August Läßle*) para 46.

same is seen in *Kleinhans v Parmalat SA* where jurisdiction (and accordingly choice of law) was assumed in favour of the Republic because failure to do so would put the applicant at risk of losing his constitutional right of access to courts.¹²⁸ Here the dispute concerned, *inter alia*, the identity of the true employer as Kleinhans was seconded to Parmalat Mozambique (PM). PM was not a party to the dispute brought in by the South African Labour Court.¹²⁹ Two contracts were drafted, a three-year contract concluded in South Africa and a one year contract concluded in Mozambique. The Court argued that by declining jurisdiction, the applicant could face proceedings in Mozambique against Parmalat Mozambique over the one-year contract. Kleinhans would, accordingly, be without any right of recourse over the three-year contract if the Court were to decline jurisdiction and he were to be unsuccessful in Mozambique.¹³⁰

The justification here was undoubtedly the significance of the Constitution and the necessity it carries in having its provisions (as well as its underlying values) fulfilled. The right of access to courts is not inherently a labour right, however, it is clearly evident that the Labour Court is willing and arguably obligated to protect the constitutional rights of employees as weaker contractual parties.¹³¹

It may, thus, be fair to conclude that labour rights that are embodied within the various employment statutes in the Republic are overridingly mandatory insofar as they purport to protect employees from the inherently unequal bargaining power they hold against their employers. The approach is embodied both in the EU and the US where recognition is given to the need to protect weaker contracting parties and should be welcomed in the South African Labour Courts. As Mundlak notes, the erosion of state power to control the market and society has challenged the democratic legitimacy of labour law, but in alternative norm-making venues, such as at the sector level or in multinational companies, no alternative democratic fora have been established.¹³²

Accordingly, there is a real risk of creating and sustaining a gap in the protection that an employee, who works on a globalised scale, is entitled to when labour laws are considered strictly territorial. However, while the approaches in the EU and US are qualified in some way, the use of mandatory rules in the South African Labour Court is somewhat arbitrary in that it manifests as an unquestioned imposition of constitutional values over the choice of law process – as seen in the brief discussion of the abovementioned cases. This may be attributed to the conflicting jurisprudence arising out of cross-border

128 *Kleinhans v Parmalat SA (Pty) Ltd* (2002) 23 ILJ 1418 (LC) (*Kleinhans*) para 47.

129 As above.

130 *Kleinhans* (n 128) 47.

131 Calitz (n 115) 11.

132 Mundlak (n 12) 192.

employment disputes in the Labour Court that have obscured the application of private international law rules and principles at the detriment of employees.¹³³

7 When should the South African Labour Court apply the doctrine of mandatory rules?

The implication here is not that constitutional rights and statutes enacted in accordance with them are not internationally mandatory or are not justified in overriding the choice of law process. The importance here is that while they may possess an international mandatory characteristic, there must be an approach that expressly warrants their application. Seeing as labour rights are constitutionally imperative, it would seemingly imply that at every instance where they are called into question, the Labour Court will apply South African law regardless of choice. As seen in the approaches both in the EU and the US, this cannot be the case. As Rome I maintains, the application of overriding mandatory rules must be exceptional and justified by a close connection with the forum. Similarly, in the US, overriding a choice of law is rationalised by the law of the forum being the law applicable in the absence of choice.

Evidently, the few times the Labour Court has approached the application of mandatory rules has been at the instance of offering protection to the employee. Protective rules, however, should only be classified as internationally mandatory when they pursue a public interest amidst the protection of the private interests concerned.¹³⁴ While the US approaches protective rules as a justifiable reason to override a chosen law (as seen in the Commentary to the Restatement), the EU is far more restrictive. In South Africa, the protection of fundamental rights is a public interest. Accordingly, where the statutes aim at protecting these rights, there should be no doubt that the rule is internationally mandatory.¹³⁵ There is, furthermore, no question that the South African forum has an interest in the application of these rights – there is an underlying value of constitutionalism within the jurisprudence of South African law.¹³⁶ Being the supreme law, it may be interpreted in a similar light to the

133 See for instance, U Grusic 'Recognition and enforcement of judgments in employment matters in EU private international law' (2016) 12 *Journal of Private International Law* at 531 where it is argued that while employers are equally deserving of statutory protection, they rarely ever sue employees because they have a number of other avenues at their disposal; for instance, salary deductions, internal disciplinary procedures, and dismissal to name but a few.

134 Schafer (n 31) 311.

135 Parry (n 5) para 35.

136 C Fombad & E Kibet 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* at 348.

Directives found within the EU. Looking towards the US, where a chosen law would be contrary to these fundamental constitutional values, there is justification in overriding it. It would be a mistake to overlook the overriding nature of the EEA, for instance, which opposes discrimination, considering the socio-political importance the South African Republic bears in upholding equality.¹³⁷

What of something like unfair dismissal, a provision which is not innately associated with a constitutional right? When considering the mandatory nature of a rule, it has been noted that the underlying policies behind such a rule must be considered.¹³⁸ These policies will reflect the state's political and economic interest in having the rule apply. Unfair dismissal in the EU has been noted as not having an international mandatory characteristic as it does not directly affect the labour market and reflects private, rather than public, interests. In South Africa, the inclusivity of this provision arose out of the Republic's dedication to the ILO.¹³⁹ This is illustrated by the wording within Chapter VIII of the LRA¹⁴⁰ as it draws significantly from the ILO Convention 158.¹⁴¹ The policies underlying the rule might very well then justify the state's interest in having it applied as the state is undoubtedly interested in ensuring its international obligations are fulfilled, such as the purpose of making a commitment to them. The Labour Court should, when faced with the possible application of mandatory rules, question whether there is a fundamental public interest in having the rule apply. If constitutionally associated, the interest is a given. If not, the investigation must go further and question the purposes behind the enactment of the provision in the first place.

However, when speaking of international mandatory rules, the effect is the extension of the rules' scope of application.¹⁴² While it may be easy enough to substantiate the Republic's interest in having a labour provision applied by canvassing the protection that it is constitutionally mandated to uphold, there still remains the question of when this protection should be extended. While the approaches in the EU and the US differ slightly, there exists in both a connection to the forum rule that further reinforces the state's interest in having the rule apply.

A close connection may manifest within the choice of law enquiry in the consideration of conflict rules that allocate a connection

137 E Mureinik 'Bridge to where? Introduction to the Interim Bill of Rights' (1994) 10 *African Journal on Human Rights* at 32.

138 Schafer (n 31) 18.

139 A van Niekerk et al *Law@work* (2018) at 237.

140 Chapter VIII of the LRA, (n 116), deals specifically with unfair dismissals.

141 International Labour Organisation Termination of Employment Convention, 1982 (No. 158).

142 Schafer (n 31) 311.

between the contract and a particular legal system in the absence of choice. The doctrine of mandatory rules remains a component of the choice of law enquiry. Accordingly, a close connection must be maintained and must also go further by considering conflict rules that reflect both the public interests of the forum and the interest of the contracting parties in the application or non-application of a rule.¹⁴³ In Rome I, the important connecting factors are the habitual place of work or where that is inapplicable, the place where the business that engaged the employee is situated.¹⁴⁴ Another connecting factor that is not inclusive in Rome I, but is submitted here for consideration, is the domicile or residence of the employee. If public interests are contemplated and the impact of the labour market is included in such contemplation, as it is in the EU, then a connection that arises from the South African domicile or residence of one of the parties should be noted as a sufficient connection.

Domicile and residence are personal connecting factors that create relationships between a person and a territory, tying them to a territorial legal system.¹⁴⁵ Where an employee is domiciled in South Africa, they will inevitably fall back on the Republic in the case of unemployment, thus affecting both the economy and the labour market.¹⁴⁶ It is reasonable to conclude then, that the forum will have an interest where the employee is domiciled or resident in the South African Republic and that a sufficient connection exists to justify an intrusion of the forum's law over the choice of law process. In the instance that the employee is not domiciled or resident in South Africa, but the company that employed them is, the connection may still be relevant. It should, however, be qualified that in such an instance, the necessity in applying the forum's mandatory rules arises in an attempt to restrain South African companies from evading the protective legislation of the forum by posting employees to their subsidiaries.¹⁴⁷

With the approach in the Labour Court emphasising the protection of the weaker party as the basis for the application of overriding mandatory rules, it means that at the very instant that the chosen foreign law offers such protection and inadvertently fulfils any constitutional objective, the forum should not apply its own laws.¹⁴⁸ Even where the law of the forum offers more protection than the chosen law, it is not enough to justify an intrusion. While the EU ECJ in *Unamar* implied a preferential approach in applying the legal system that offers the most protection, it should be submitted that

143 Schafer (n 31) 306.

144 Rome I (n 21) Art 8(2)-(3).

145 M Uddin 'Domicile as a personal connecting factor: An assessment of judicial decision' (2018) 1 *International Journal of Global Community* at 294.

146 Uddin (n 145) 293.

147 *August Läßle* (n 127) para 46.

148 Nygh (n 25) 205.

where the chosen law offers enough protection and does not frustrate the socio-political and economic standards of the forum, there is no reason to override it.

On this note, however, a final remark should be made on the BCEA. It has been mentioned that international mandatory rules are a direct application of unilateralism. Some statutes, however, expressly or implicitly render themselves directly applicable.¹⁴⁹ Accordingly, in direct contrast to the position held in the Labour Court,¹⁵⁰ it is held here that the BCEA is one such statute. The implication of section 5 that holds that the 'Act takes precedence over *any* agreement'¹⁵¹ may be interpreted to include international contracts. If that is an overstatement, there is still room to argue that a local employer would not be able to avoid the BCEA by choosing a foreign law to govern the contract and employing individuals to work abroad in their subsidiaries.¹⁵²

8 Conclusion

The scope of mandatory rules is vast, however, the development of this doctrine in South Africa has been rather slow. The attempt has been to canvas how the Labour Court may apply the doctrine when approached with an international employment contract. The conclusion drawn is that the three employment statutes discussed, that seek to regulate the employment relationship, possess a mandatory characteristic with the exception of the BCEA being implicitly unilateral. They are mandatory in an international sense due to their intrinsic link with the fundamental values and rights embedded within the Constitution. This may be furthered by arguing that the Constitution itself accentuates the application of these statutes as mandatory under section 39(2) which highlights the necessity of interpreting statutes in line with the Bill of Rights.¹⁵³ Not only that, but the same section stresses the development of the common law consistently with the Bill of Rights.¹⁵⁴ Accordingly, the use of mandatory rules to ensure the protection of fundamental rights, predominantly rights that protect employees, is constitutionally sound.¹⁵⁵

The concern is, therefore, not so much whether the statutes and their provisions mentioned herein may be considered as international

149 Forsyth (n 22) 15.

150 In *Astral Operations*, (n 8), the Court specifically rejected the extra-territorial reach of the BCEA.

151 BCEA (n 117) sec 5 [own emphasis].

152 Forsyth (n 22) 15.

153 Constitution (n 119) sec 39(2).

154 As above.

155 Calitz (n 115) 9.

mandatory rules, but rather when it would be appropriate to limit party autonomy through the use of this doctrine. Ultimately, any rule may be mandatory if the legislature deems it to be and courts, being inclined to use their discretion to discern whether a rule is mandatory, may very well be inclined to apply their own laws when there is a connection to the contract that might justify them doing so.¹⁵⁶ As articulated, a connection is but one precondition to having the doctrine apply and the connection itself must be one that encompasses the interests of the forum state and the parties concerned. The contract having been concluded in the forum with jurisdiction, for instance, is not enough.

The mandatory rule enquiry, therefore, requires judges to play an active role in establishing the preconditions that justify limiting party autonomy. In the Labour Court, it also requires them to reject territoriality as a foregone conclusion to international employment contracts. Having established the mandatory nature of the Republic's employment statutes, there should be significant doubt placed on the ruling that the statutes have no extraterritorial reach. Under certain prerequisites that have been outlined, these statutes certainly find application in disputes with foreign elements. Accordingly, private international law principles should find application in the Labour Court when adjudicating over an international employment contract. Even where foreign law is seemingly present within a dispute, the Labour Court has the opportunity to nonetheless impute the law of the forum and maintain its jurisdiction when it is necessary for the protection of its own interests and the interests of the parties.

156 van Bochove (n 85) 156.

THE IMPOSITION OF COMMON LAW IN THE INTERPRETATION AND APPLICATION OF CUSTOMARY LAW AND CUSTOMARY MARRIAGES

*by Celinhlanhla Magubane**



Abstract

South Africa has, over the past few years, seen the development of its jurisprudence in respect of the interpretation and application of African customary law under the new constitutional dispensation as it now also forms an integral part of South African law. Our courts are, in terms of the Constitution, required to apply African customary law when it is applicable, but like any other law, it is also subject to the Constitution. It is also submitted that due to the repercussions of the past, African customary law and laws regulating customary marriages are yet to reach their proper development, and this slow development is also caused by inconsistencies and the imposition of common law in the interpretation and application of African customary law and laws regulating customary marriages. Furthermore, African customary law should not be hinged on what colonisation bequeathed us, as the interpretation of our customary law through the prisms of common law frustrates the development of customary law – which has for a long time been prevented from developing securely alongside common law.

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1 Introduction

There has been development in the jurisprudence of African customary law within South Africa over the past few years. African customary law is an integral part of South African law and our courts are directed to apply it when it is applicable, however, like any other law it is subject to the Constitution.¹ Furthermore, it is an original and distinct independent source of norms within our legal system which feeds into, nourishes, and fuses with the rest of South African law.² It is not formally classified and easily ascertainable and by its very nature evolves alongside the evolution of the people who live by its norms. As their patterns in lives change, so does the law.³ It is therefore expected that the law's development and interpretation ought to be based in the context of social evolution, legislative deliberation, and academic writings.

The Constitution aims to give recognition to African customary law and marriages solemnised customarily which were previously denied the necessary space to evolve but were instead fossilised and stonewalled.⁴ Moreover, the Constitution also aims to facilitate the preservation and evolution of African customary law as a legal system that conforms to its provisions.⁵ The Constitution is highly commended for the changes and transformation it has brought to the development and building of a united South Africa, however, the after-effects of the past are still evident even today.⁶ Inference can be drawn from the jurisprudence of our courts in the resolution of customary law disputes, where the courts appear to import common law values in addressing customary law issues.⁷

Hlophe JP⁸ stated in the matter between *Mabuza v Mbatha* that:⁹

If one accepts that African customary law is recognised in terms of the Constitution and relevant legislation to give effect to the Constitution, such as the Recognition of Customary Marriages Act No 120 of 1998, there is no reason as to why the courts should be slow at developing African customary law. Unfortunately, one still finds dicta referring to the notorious repugnancy clause as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the constitution is the supreme law of the

1 Constitution of the Republic of South Africa, 1996 (Constitution) sec 211(3).

2 *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) (*Alexkor*) paras 51-58.

3 *Mbungela and Another v Mkabi and Others* 2020 (1) All SA 42 (SCA) para 17.

4 *Pilane v Pilane* 2013 4 BCLR 431 (CC) para 35.

5 *Pilane* (n 4) para 35.

6 N Ntlama 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' (2012) 15(1) *Potchefstroom Electronic Law Review Journal* at 2.

7 Ntlama (n 6) 2.

8 *Mabuza v Mbatha* 2003 (4) SA 218 (*Mabuza*) para 30.

9 As above.

Republic. Thus, any custom which is inconsistent with the constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African customary Law should not be opposed to the principles of public policy or natural justice. To say that is fundamentally flawed as it reduces African law which is practised by the vast majority in this country to foreign law in Africa.

Furthermore, the application of African customary law is made obligatory by the provisions of the Constitution. In terms of section 211(3) of the Constitution, all courts must apply customary law subject to three conditions: (1) when the law is applicable; (2) subject to the Constitution; and (3) subject to any law that specifically addresses customary law.¹⁰

2 The application of African customary law through common law values

The repercussions of the past are still perceptible as they have resulted in the marginalisation of customary law by the common law which is a theme that permeates the history of colonialism in Africa and has led to African customary law being unreformed.¹¹ African customary law was recognised for its economic benefits and these benefits accrued to white settlers when Africans were placed under the European-sanctioned Native Administration Act.¹² The Act absorbed Africans under the formal system of colonial justice and allowed traditional leaders to handle civil and/or traditional disputes between black and indigenous people instead of through the government courts. This contributed to the marginalisation of customary law and furthered the conflict between customary law and common law.¹³ The promulgation of the Black Administration Act of 1927 further exacerbated this conflict. Its purpose was to provide for a separate court system for Africans and for the limited recognition of indigenous law.¹⁴ In addition, the promulgation of the aforesaid Act was not only effected with black or African people's interest at heart but was also done to secure authority through colonial administration in order to govern indigenous people through traditional authorities.¹⁵ This not only contributed to the distortion of African customary law, but it also caused the present difficulty in its application and

10 Constitution (n 1) secs 39(2)-(3).

11 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) (*Bhe*) para 43.

12 Native Administrative Act 38 of 1927.

13 N Ntlama "Equality" misplaced in the development of the customary law of succession; lessons from *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC)' (2009) 2 *Stellenbosch Law Review* at 333.

14 Black Administration Act 38 of 1927.

15 GJ van Niekerk 'The Interactions of Indigenous Law and Western Law in South Africa: Historical and Comparative Perspective' PhD thesis, University of South Africa, 1995 at 72.

interpretation. This is because African customary law was relegated to the background, robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, and the validity of it was assessed based on common law principles and ideas of justice.¹⁶

African customary law was also negatively affected by the mere fact that it was prevented from evolving and adapting to meet changing circumstances within many communities.¹⁷ It was recorded and enforced by those who neither practised it nor were bound by it. In addition, those who were bound by customary law had no power to adapt it.¹⁸

Throughout the years, customary law was recognised as part of the state law, however, it has never been considered equal to common law.¹⁹ Western laws and the common law, in general, have always been regarded as 'dominant law' and customary law as the inferior law.²⁰ This means that western legal principles and underpinnings are still seen as the dominant system with the implied basis that any development must take place under this system.²¹

Even under this new constitutional dispensation, there are still cases where the application and interpretation of customary law are undertaken through the lens of common law. In the *Alexkor* case, the Constitutional Court stated that the application of customary law must be determined by reference to the Constitution and not common law.²² Furthermore, the Court reaffirmed that African customary law is afforded the same status as the common law in sections 39(2) and (3) of the Constitution which provides that:²³

... (2) When interpreting any legislation, and when developing the common law, or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights;

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The Constitution also provides, in section 211(3), for the application of African customary law provided that it is consistent with the provisions of the Constitution. Therefore, this new constitutional dispensation is expected to promote and restore the dignity of African customary law.

16 *Bhe* (n 11) paras 43 & 90.

17 *Bhe* (n 11) para 20.

18 As above.

19 P Coertzen 'Constitution, Charter and Religions in South Africa' 14(1) *African Human Rights Law Journal* (2014) at 138.

20 Coertzen (n 19) 138.

21 As above.

22 *Alexkor* (n 2) para 57.

23 Constitution (n 1) sec 39(2).

African customary law has reached a stage where its continued relevance is dependent on it being better developed. However, it is yet to reach its proper development due to inconsistencies in its interpretation and uncertainty in its application which, to some degree, is drawn from our courts. An inference can be drawn from section 173 of the Constitution which stipulates that the Constitutional Court, Supreme Court of Appeal, and High Courts have the inherent power to protect and regulate their own processes and to develop the common law, taking into account the interests of justice.²⁴ Notably, the aforementioned provision of the Constitution is silent on the development of African customary law and our courts are only conferred inherent power to protect the common law. Another inference can also be drawn from the jurisprudence of our courts in the resolution of customary law disputes whereby the courts import common law values in addressing customary law issues.²⁵

In *Bhe v Khayelitsha Magistrate*, the Constitutional Court dealt with a matter between two extra-marital daughters who failed to qualify as heirs in the intestate of their deceased father.²⁶ Under the system created by section 23 of the Black Administration Act, minor children did not qualify to be heirs and the intestate fell to be distributed in accordance with African law and custom.²⁷ Additionally, in accordance with the male primogeniture rule, only the elder legitimate son could inherit the deceased's estate to the exclusion of other siblings. The Court, in addressing the aforesaid rule, imported common law values as endorsed in the Intestate Succession Act,²⁸ to resolve the question of succession in African customary law.²⁹ Furthermore, the Intestate Succession Act is still seen as an imposition of western ideologies.³⁰ The Court, in developing the male primogeniture rule, should have acquired assistance from cultural experts in respect of whether men and women could enjoy equal ownership in respect of the joint estate under customary law. This would have ensured that the values that African customary law aims to protect are not lost.

In most cases, African customary law may, at first glance, conflict with the Bill of Rights. The male primogeniture rule is noted as one such example for its lack of sensitivity to gender equality by excluding women and children.³¹ The Court stated that the common law

24 Constitution (n 1) sec 173.

25 *Bhe* (n 11) paras 43 & 90.

26 *Bhe* (n 11) paras 1 & 7.

27 As above.

28 Intestate Succession Act 81 of 1987.

29 *Bhe* (n 11) paras 1-7.

30 K Maunatlala & C Maimela 'The Implementation of Customary Law of Succession and Common Law of Succession Respectively: With a Specific Focus on the Eradication of the Male Primogeniture Rule' (2020) 53 *De Jure* at 9.

31 *Bhe* (n 11) paras 1-7.

principles provided in the Intestate Succession Act are the basic mechanisms for determining the content of the regime that would ensure that all children, including extramarital children, women in monogamous unions, and unmarried women would not be discriminated against.³² This approach is not in line with the role that African customary law has to play. It has limited the development of the principles of equality and non-discrimination within the framework of customary law. Again, the application of African customary law must be determined by reference not to common law rights analyses, but to the Constitution.³³ Moreover, customary law ought to be treated, interpreted, and applied as an integral part of South African law that is only subject to the Constitution. This was also echoed by Ngcobo J when he stated that African customary law, particularly the rule of male primogeniture, in this case, should be developed in line with the Bill of Rights.³⁴

In the matter between *Shilubana v Nwamitwa*, issues concerning a traditional community's authority to develop its customs and traditions were brought before the Court.³⁵ A woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender.³⁶ The Constitutional Court then was called on to decide whether the community has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the enactment of the final Constitution.³⁷ Ntlama³⁸ noted the similarities between the *Bhe* case and *Shilubana* case, in that the *Bhe* case dealt with the right to succession in terms of family and private law relationships and *Shilubana* dealt with the important role of the functioning of traditional authorities which is governmental in character:³⁹

Subsequent to that African customary law empowers traditional leaders to carry out functions of a public law nature, which is quite distinct from succession in a private law relationship. In addition, traditional leaders are given a constitutional role to be involved in the administration of customary law, to engage in rule-making and law enforcement and dispute resolution. This also means that the administration of African customary law lies in the hands of traditional leaders and further that the chiefs employ traditional authority to administer the affairs of the community and extended family groups.

32 As above.

33 *Bhe* (n 11) para 211.

34 As above.

35 *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) (*Shilubana*) para 1.

36 *Shilubana* (n 35) para 1.

37 As above.

38 Ntlama (n 13) 354.

39 Ntlama (n 13) 350 & 354.

The Court confirmed the ‘election’ of Ms Shilubana and noted that the leader did not take into consideration the status of chieftom but instead destroyed the ‘cardinal rule of customary law’ of patrilineage as it was intended to preserve the family and cultural identity of the community.⁴⁰ The Court further provided that although past customs are cardinal in African customary law, they merely constitute one integral factor to be contemplated with other integral factors where a cultural pattern is apparent from traditional practice, and where there is no further evidence that modern development has occurred or is still occurring, past practice will suffice in establishing such a rule.⁴¹

However, where the modern custom of the community intimates that development has taken place, past practice alone is insufficient and cannot, on its own, confirm a right with certainty.⁴² The Court then stated that traditional authorities have the power to consider the constitution when determining matters of traditional leadership and that the conduct of the royal family in appointing Ms Shilubana as *hosi* of the Valoyi clan amounted to a development of African customary law.⁴³ Furthermore, when delivering this judgment, the Constitutional Court sought to interpret the customary laws pertaining to the succession of women to traditional leadership in a manner that would bring it in line with section 9 of the Constitution.⁴⁴ Although this is commendable, the Constitutional Court also had an obligation to give directions in respect of the development of inter-generational customary law succession. In addition, the Constitutional Court also did not discharge its obligation to develop customary law in accordance with section 39(2) of the Constitution as it accepted the development of customary law by the community to arrive at the decision that Shilubana was the legitimate *hosi*. Therefore, section 39(2) was not properly deliberated by the Court as considerations such as the rule of male primogeniture in the context of succession to chieftaincy was not considered against the values of the Constitution, particularly that of equality. Ntlama also argues that:⁴⁵

Another problem that may be caused by the Constitutional Court judgment in the matter of *Shilubana* is its uncertainty regarding the sociological approach to chieftaincy. The Constitutional Court held that neither the sons nor the daughters of Ms Shilubana would succeed her, but that a child born of the male Nwamitwa bloodline would succeed her instead. This uncertainty has the potential to create a pool of candidates, which may arise either by their own efforts or by those of a

40 Ntlama (n 13) 354.

41 *Shilubana* (n 35) para 56.

42 As above.

43 *Shilubana* (n 35) para 56.

44 As above.

45 Ntlama (n 13) 355.

powerful group, where there is no definite successor determined by customary law. This does not prevent Ms Shilubana's own daughters from being discriminated against in the near future for no other reason than by being born of a woman within the Nwamitwa bloodline. It also has the potential for the creation of factionalism and competition where strong individuals could manipulate the flexibility and vagueness embedded in the development of the customary rules of succession. This competition would enable the rich and powerful, as shown in *Shilubana*, to use the gap as a strategy to empower themselves at the expense of upholding South Africa's cultural heritage.

It is thus opined that the sociological approach in respect of chieftaincy was not properly addressed so as to avoid the potential creation of factionalism and competition. In addition, the Court's disallowing of the children of Shilubana to succeed her was a feeble attempt on the Court to strike a balance between the competing interests such as the right to equality and the right to practise culture.⁴⁶ In striking the balance between these two interests, the Court was misdirected by its assumed need to afford protection to the right to equality and did so to the detriment of the right to culture, the practice of customary traditions and customs, and the development of African customary law.⁴⁷

3 The promulgation of the Recognition of Customary Marriages Act and its impact on the development of African customary law

The Recognition of Customary Marriages Act provides that customary law consists of customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those people.⁴⁸ The element of the statutory definition of customary law is the customs of indigenous African people. The term 'custom' refers to the traditions, practices (rituals), and the rules for living that are adhered to by members of the community.⁴⁹ The customs of an indigenous community are well-known by every member of the community as they are passed down from generation to generation by older members of the group.⁵⁰ Customs commonly transform into customary law over time especially when they are endorsed by the group's belief in its indispensability and desirability, and through the recognition of the judicial decisions handed down by

46 I Madondo *The Role of Traditional Courts in the Justice System* (2007) at 61.

47 Madondo (n 46) 62.

48 Recognition of Customary Marriages Act 120 of 1998 (RCMA).

49 M Gluckman *Order and Rebellion in Tribal Africa* (1963) at 198.

50 *Alexkor* (n 2) paras 52-53.

authorities.⁵¹ This, therefore, proposes the notion that custom and customary law are interrelated.

The Recognition of Customary Marriages Act brought about changes in respect of the legal position of customary marriages in South African law. In the matter between *Gumede v President of the Republic of South Africa and Others*, Moseneke DCJ stated that the aforementioned Act represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages that were entered into in accordance with the law and culture of indigenous people of this country.⁵² In a nutshell, the Recognition of Customary Marriages Act provides that a customary marriage is, for all purposes of South African law, recognised as a valid marriage.

In the matter of *K v P*, the High Court stated that although the legislature's intention in enacting the Recognition of Customary Marriages Act was undoubtedly noble in recognising customary marriages previously ignored, the ideals proposed by the Act have still not yet been realised.⁵³ It is therefore submitted that the problem areas and shortcomings of the Recognition of Customary Marriages Act stem from the fact that African customary law has, in the past, been marginalised and, presently, the marginalisation of African customary law is perpetuated by its indirect application through common law values. In addition, Osman opines that the Recognition of Customary Marriages Act incorporates large amounts of common law, such as the Matrimonial Property Act and Divorce Act, to regulate customary law marriages.⁵⁴ Moreover, this incorporation of common law into African customary law has led to it being seen as 'common law African customary marriages'.⁵⁵

Furthermore, the requirements of a valid customary marriage which are found in section 3 of the Recognition of Customary Marriages Act provides that for a customary marriage entered into after the commencement of this Act to be valid, the prospective spouses above the age of 18 years must consent to be married to each other under customary law and that the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁵⁶ Section 3(1)(b) of the said Act has resulted in a plethora of cases in courts. Many of these cases arise due to the fact that our courts have not been consistent in the way disputes arising out of this subsection

51 LJ Pospisil *Anthropology of Law: A Comparative Theory* (1971) at 169-170.

52 *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (*Gumede*) paras 17-21.

53 *K v P* (GSJ) (09/41473) ZAGPHC 93 para 11.

54 F Osman 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 66 *Potchefstroom Electronic Law Journal* at 7.

55 Osman (n 54) 7.

56 RCMA (n 48) sec 3.

are addressed. The said sub-section stipulates that a marriage must be negotiated and entered into or celebrated in accordance with customary law.⁵⁷

Furthermore, the misinterpretation and inconsistencies therein come in respect of a lack of proper understanding of what section 3(1)(b) means to lawyers and courts versus what the provision means to ordinary persons who are not schooled in law. It may be argued that these inconsistencies emanate from the fact that African customary law is as diverse as the number of different ethnic groups present in this beautiful country.⁵⁸ Although Africans share very similar customs, rituals, and overall cultural values, there are some subtle differences that, for example, pertain exclusively to the Ngunis, Basotho, Bapedi, VhaVenda, and the Vatsonga.⁵⁹ This is due to the pluralistic nature of African societies.⁶⁰ However, this should not be used as a scapegoat in respect of the misinterpretation of the Recognition of African Customary Marriages Act.

To address the inconsistencies of the aforesaid subsection and what it entails, a clear understanding of what constitutes a customary marriage must be established in line with the values and underpinnings found in African traditions and societies. Across all ethnic groups and even in pre-colonial African society, a customary marriage in true African tradition is a cultural process that entails the performance of certain rituals and as such, one cannot merely dispense with the need for the ancestors to recognise and bless the marriage.⁶¹

In addition, a customary marriage in African traditions is not an event but a process that comprises a chain of events.⁶² In *Mabena v Letsoalo*, the High Court (Transvaal Provisional Division) opined that a customary marriage is not purely a matter between the bride and the bridegroom, but is also a group concern realising a relationship between two groups of relatives.⁶³ In addition, the Court noted that because African societies are communal in nature, the parties' marriage relationship had a collective and communal substance.⁶⁴ Furthermore, procreation and survival were important goals of this type of marriage and indispensable for the well-being of the larger

57 RCMA (n 48) sec 3(1)(b).

58 *Southon v Moropane* (14295/10) [2012] ZAGPJHC 146 (*Southon*) para 35.

59 As above.

60 As above.

61 van Niekerk (n 15) 115.

62 IP Maithufi & JC Bekker 'Recognition of Customary Marriages Act 1998 and its Impact on Family Law in South Africa' (2002) 35 *The Comparative and International Law Journal* at 182.

63 *Mabena v Letsoalo* 1998 (2) SA 1068 (T) (*Mabena*).

64 *Mabena* (n 63)

group as opposed to a western setting where its principles stem from western individualism.⁶⁵ In respect of western individualism, the betterment concentrates on the immediate of the family unit, and the primary focus is on the immediate family itself. Additionally, in the *Gumede case*, the Court opined that in our pre-colonial past, customary marriage was always a bond between families and not individual spouses.⁶⁶

Furthermore, the basic formalities which lead to a customary marriage are:⁶⁷

- (a) The two parties man and woman have agreed to marry each other;
- (b) A letter is sent to the woman's family and/or emissaries are sent by the man's family to the woman's family to indicate interest in the possible marriage;
- (c) A date is set for a meeting of the parties' relatives will be convened where lobolo is negotiated and the negotiated lobolo or part thereof is handed over to the woman's family and the two families will then agree on the formalities;
- (d) However, in the Zulu culture there are other pre-marital ceremonies like *Umabo* and *Umembeso* that takes place before the actual wedding;
- (e) After those pre-marital ceremonies, a date for the wedding is set on which the woman will then be handed over to the man's family which handing over may include but not necessarily be accompanied by celebration.

Even though *ilobolo* is not mentioned as one of the requirements for a valid customary marriage, it plays a significant role in the conclusion of a customary marriage. Section 3(1)(b) stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law.⁶⁸ Therefore, during the negotiation stage, there will always be negotiations and an agreement concerning the payment of *ilobolo*, which may be paid in part or in full.⁶⁹ In *Southon v Moropane*, the Supreme Court of Appeal stated that the agreement to marry in customary law is predicated upon *ilobolo* in its various manifestations and that the agreement to pay *ilobolo* underpins the customary marriage.⁷⁰

It is common cause that there is always a form of a small celebration conducted after the payment or part payment of *ilobolo* in African cultures. These small celebrations should not be construed

65 T Metz 'How the West was One: The Western as Individualist, the African as Communitarian' (2014) 47(11) *Educational Philosophy and Theory* at 4.

66 *Gumede* (n 52) para 18.

67 *Motsoatsoa v Roro* 2011 2 All SA 324 (GSJ) para 17.

68 RCMA (n 48) sec 3(1)(b).

69 NM Ngema 'The Enforcement of the Payment of Lobolo and its Impact on Children's Rights in South Africa' (2013) 16 *Potchefstroom Electronic Law Journal* at 406.

70 *Southon* (n 58) para 40.

as celebrating the conclusion of a customary union. These celebrations are normally conducted in the interest of ubuntu with the purpose of celebrating the first meeting of the two families and the prospective marriage that is to take place soon thereafter.⁷¹ It is also important to note that after the payment of *ilobolo*, there are other pre-marital ceremonies that take place. Interestingly, in European cultures, *ilobolo* would otherwise be considered as a dowry, however, with the difference being that the payment would be from the bride's family to the groom's family.⁷²

Other crucial elements of a customary marriage are celebration and the handing over of the bride by her family to her new family, namely that of the groom. Section 3(1)(b) of the Act stipulates that the marriage must be negotiated and entered into or celebrated in accordance with customary law. The celebration of the traditional marriage is also known as '*Umgcagco*' in isiZulu.⁷³ When the traditional marriage has been concluded, people who observed the celebration say words like '*Ugcagcile*' the bride and '*Ugcagcelwe*' as the groom's family gained a daughter through the marriage.⁷⁴ From her family, the bride is invariably handed over to the groom at his family's residence. In addition, *Umgcagco* symbolises that the bride has been formally introduced and/or handed over to the ancestors as a new member of the husband's family and has also obtained the ancestors' blessing and acceptance of the new member of the family.⁷⁵

Moreover, in respect of the celebration of the customary marriage, it is important to reiterate that African customary law and its customs are not static but dynamic.⁷⁶ It is therefore subject to constant development and interpretation in the context of social evolution, legislative deliberation, and additional interpretation.⁷⁷ It is not a written set of laws but known to the community practicing it and passing it on from generation to generation, which throughout history has evolved and developed to meet the change in needs of the community.⁷⁸ This capacity to change requires the court to investigate the customs, cultures, rituals, and usages of a particular ethnic group to determine whether a marriage was celebrated and concluded in terms of customary law. This is the case particularly

71 S Van Niekerk & S Masumpa 'Customary Law Marriages and "Izibizo" – Is the Tradition Becoming Extortion' 26 May 2021 <https://www.mondaq.com/south-africa/family-law/1072684/customary-marriages-and-izibizo-is-the-tradition-becoming-extortion> (accessed 12 September 2021).

72 DD Nsereko 'The Nature and Function of Marriage Gifts in Customary African Marriages' (1975) 23 *The American Journal of Comparative Law* at 686.

73 N Nxumalo *Inqolobane Yesizwe (the Storehouse of the Nation)* (1980) at 118.

74 As above

75 As above.

76 *Bhe* (n 11) para 153.

77 *Alexkor* (n 2) para 57.

78 As above.

because the Recognition of Customary Marriages Act defines customary law as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the cultures of those people.

The importance of the pre-marital ceremonies and their significance in the conclusion of customary marriages is yet to be argued and/or stressed either by litigants, courts, or academics, but the importance of observing them can also assist in the determination of what constitutes a valid customary marriage. Furthermore, the performance of pre-marital ceremonies may assist in this determination but the failure to complete these ceremonies cannot result in the marriage being declared invalid.

The Court stated in *Motsoatsoa v Roro* that the handing over of the bride (*go gorosa ngwetsi* (Tswana)/ *ukusiwa ko makoti e mzini e hamba noduli* (Xhosa) is not only about the celebration with the attendants, feast, and rituals. It encompasses the most important aspect associated with the married state namely *go laya/ukuyala/ukulaya*.⁷⁹ There is no English equivalent of this word or process but loosely translated, it implies 'coaching' which includes educating and counselling both the bride and the groom on their rights, duties, and obligations which a married state imposes on them.⁸⁰ This is the most important and final step in the chain of events which happens in the presence of both the bride and the groom's families.⁸¹ One can even describe this as the official seal, in the African context, of the customary marriage.⁸² Furthermore, not only is the handing over an important requirement for the validity of a customary marriage, it is inevitably the final step that the parties need to take before they are regarded as married in terms of customary law.⁸³

4 The abandonment of celebration/handover as crucial elements that validate invalid customary marriages

The greatest challenge for the development of customary law also arises from the inconsistencies in the way it has been applied and interpreted. These inconsistencies are caused by the fact that not much attention is given to understanding the importance and significance of the crucial elements of African customary law, particularly traditional marriages. In the matter of *MM v MN*, the High Court stated that in determining the requirement of section 3(1)(b) of

79 *Motsoatsoa v Roro* (n 67) para 19.

80 *As above*.

81 *Motsoatsoa v Roro* (n 67) para 19.

82 *As above*.

83 *Southon* (n 58) paras 39-40.

the Recognition of Customary Marriages Act, regard must be given to the relevant customary practices of a community and that such practices will be an addition to the requirements of section 3(1)(a).⁸⁴

It has also been argued that customary law is a dynamic, flexible system that continuously evolves within the context of its values and norms to meet the changing needs of the people who live by its norms.⁸⁵ The system, therefore, requires its content to be determined with reference to both the history and the present practice of the community concerned.⁸⁶ Furthermore, although various African cultures generally observe similar customs and rituals, it is not unusual to find variations in their local practice because of the pluralistic nature of African societies.⁸⁷ It is argued that for this purpose, the drafters of legislation may have left it open for the various communities to give context to section 3(1)(b) in accordance with their lived experiences.⁸⁸ It is therefore submitted that because of the pluralistic nature of African customary law, our courts should look at approaching *amicus curiae* who are practically knowledgeable with customs and who are cultural experts and not simply academics. The use of knowledgeable cultural experts in cases will enable courts to address arguments concerning the evolvement of customary law as they will be able to give evidence as to how customary law has evolved.

Moreover, our courts should investigate and understand the significance of the rituals that are conducted during the handover and celebration of the traditional marriage. Extending invitations to cultural experts and investigating the importance and/or significance thereof will assist the courts in understanding the importance and determination of living customary law and further aid in finding solutions that may assist courts in making informed decisions.

5 Recently decided cases addressing section (3)(1)(b) of the Recognition of Customary Marriages Act.

5.1 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46

In this matter, the Supreme Court of Appeal had to decide whether the conclusion of the *lobolo* negotiations and handing over of the bride ensued in satisfaction of the requirement that the marriage be

84 *MM v MN* 2010 (4) SA 286 (GNP) para 17.

85 *Mbungela* (n 3) para 17.

86 As above.

87 *LS v RL* 2019 (1) ALL SA 569 para 85.

88 As above.

negotiated and entered into or celebrated in accordance with customary law in terms of section 3(1)(b) of the Recognition of Customary Marriages Act.⁸⁹ The respondent contended that a valid customary marriage was concluded between her and the late Mr Tsambo. The appellant argued that no customary law marriage had been concluded between her and the deceased and argued that at best for the deceased, the necessary customs, rituals, and procedures required for the conclusion of a customary marriage may have begun but were not proceeded with or completed.⁹⁰

Similarly, the Court opined that the requirements of a valid customary marriage had been met even though the official handover was not conducted.⁹¹ I submit that the aforementioned Court was correct to note that the respondent and the deceased had intended to marry customarily and further that they regarded themselves as a married couple as evidenced by their continued cohabitation and the respondent's registration of the deceased as a beneficiary and spouse on her medical aid scheme.⁹² However, this should not be construed as having complied with section 3(1)(b) particularly, the 'handover' requirement.

The appellant correctly argued that the handing-over ceremony was not conducted. The Court should not have overlooked the issue of the ceremony not being conducted. The rituals serve as the introduction of the bride to the groom's ancestors as a new member of the husband's family and are significant in obtaining the ancestors' blessing and acceptance.⁹³ In *Moropane v Southon*, the Supreme Court of Appeal was legally correct to hold that handing over is a crucial requirement for a customary marriage.⁹⁴ The waiver of such a requirement cannot be assumed. However, the courts may then be justified if the decision to recognise a marriage was taken solely on the intentions of the parties.

5.2 *Mbungela & Another v Mkabi & Others* (820/2018) [2019] ZASCA 134

This matter also dealt with the requirements of a valid customary marriage, particularly section 3(1)(b) where the bride was not handed over and the *lobolo* was not paid in full. The practice of *ilobolo* has been referred to by many as the bridal-price, or bridewealth.⁹⁵ However, these concepts are not the true meaning of what this

89 *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (*Tsambo*) paras 3-7.

90 *Tsambo* (n 89) paras 3-7.

91 *Tsambo* (n 89) para 30.

92 As above.

93 Nxumalo (n 73) 118.

94 *Southon* (n 58) para 35.

95 D Posel & S Rudwick 'Marriage and ilobolo [Bridewealth] in contemporary Zulu society' (2012) 57(2) *African Studies Review* at 51.

practice is and stands for. *Ilobolo* has been warped by common law to be synonymous with ‘buying a wife’, which is misleading.⁹⁶ It is worth noting that *lobolo* forges a relational bond among African families, it creates friendship, and it is also a way of facilitating a relationship between two families.⁹⁷ Through the negotiation of *lobolo*, families are brought together and united. In addition, the transfer of *lobolo* creates a web of affiliations that stretches across generations.⁹⁸ It is also the language that the ancestors understand and bless.⁹⁹ Ngema also argues that people who adhere to the custom of *lobolo* view it as a significant custom that connects them with their ancestral spirits.¹⁰⁰

Moreover, in the *Mbungela* matter, during the *lobolo* negotiations, no mention was made of a handing over or a bridal transfer ceremony, which is not an absolute requirement to complete a customary marriage in Mr Mkabi’s own culture.¹⁰¹ He stated that according to his own understanding, *lobolo* may suffice in Swati culture, depending on the negotiations. Moreover, he was never informed that the marriage would be complete only when the entire *lobolo* amount was paid.¹⁰² There was no demand for the balance of R3 000 which he intended to pay in due course despite his understanding that *lobola* is never paid in full.¹⁰³ The Supreme Court of Appeal opined that the handing over of a bride is meant to mark the beginning of a couple’s customary marriage and to introduce the bride to the groom’s family.¹⁰⁴ However, it is not necessarily a key determinant of a valid customary marriage.¹⁰⁵ The Court further stated that it cannot be placed above the couple’s clear volition and intent where their families, who come from different ethnic groups, were involved in and acknowledged the formalisation of their marital partnership.¹⁰⁶

What is notable about the two aforementioned matters is that the Court had denounced handing over the bride as being an essential requirement where parties had intended to get married and where they recognised themselves as having been married. Notably, the intention of the parties as opposed to what the provision requires is considered over statutory requirements because if the orders were to

96 S Sibisi ‘The Juristic Nature of iLobolo Agreements in Modern South Africa’ (2021) 42 *Obiter* at 59.

97 J Shope ‘“Lobolo is here to stay”: Rural black woman & the contradictory meanings of lobolo in post-apartheid South Africa’ (2006) 20 *Agenda* at 66.

98 As above.

99 South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Report on Customary Marriages* (1998) at 49.

100 Ngema (n 69) 406.

101 *Mbungela* (n 3) para 6.

102 As above.

103 *Mbungela* (n 3) para 7.

104 *Mbungela* (n 3) para 30.

105 As above.

106 As above.

be granted as per the requirements of the Recognition of Customary Marriages Act, it may result in marriages being nullified.

6 The urban and rural division

In *Bhe v Khayelitsha Magistrate*, the Constitutional Court noted that modern urban communities and families are structured and organised differently and no longer purely along traditional lines,¹⁰⁷ and further that the rules had become increasingly out of step with the real values and circumstances of the societies they were meant to serve and particularly the people who live in urban areas.¹⁰⁸ However, Bekker and van der Merwe¹⁰⁹ noted that despite whatever social changes have occurred, placing the emphasis on urban and rural areas is a cause for concern as there are several continuous urban networks/communities where people have not entirely adapted to an urban lifestyle.¹¹⁰ Furthermore, even if people have moved to urban areas and have been exposed to western influences, it does not change and/or devalue the significance of ancestral rituals.

7 Conclusion and recommendations

The development of African customary law jurisprudence is dependent on its proper interpretation uninfluenced by what colonisation has bequeathed us. The interpretation of our customary law through the prisms of common law has frustrated the development of customary law, which has, unlike the common law, been downtrodden and stifled in its development.

In the case of traditional marriages, it is imperative that for a court to have a clear picture in respect of what constitutes a valid traditional marriage, it should investigate the elements of a customary marriage using African values and underpinnings and should make use of cultural experts to determine whether the rituals are observed as a social practice or out of a sense of obligation. If a ritual is a social practice, it binds no one and should not be developed. If, however, a ritual is observed out of a sense of obligation, it may then mean that it is a norm that cannot be deviated from without consequences.¹¹¹ The task of the courts would then be to test the norm against the Constitution for consistency and thereafter develop it to comply with constitutional muster.

¹⁰⁷ *Bhe* (n 11) para 80.

¹⁰⁸ As above.

¹⁰⁹ JC Bekker & IA van der Merwe 'Proof and Ascertainment of Customary Law' (2011) 26 *Southern African Public Law* at 124.

¹¹⁰ Bekker & van der Merwe (n 109) 124-125.

¹¹¹ TA Manthwa 'The Interplay between Proving Living Customary Law and Upholding the Constitution' (2019) 3 *Stellenbosch Law Review* at 468.

BROKEN & UNEQUAL: THE SOUTH AFRICAN EDUCATION SYSTEM AND THE ATTAINMENT OF THE RIGHT TO BASIC EDUCATION THROUGH LITIGATION

by Simon Mateus* & Khalipha Shange**



Abstract

In 1994, South Africa transitioned into a new democratic and constitutional society. Since then, the South African Constitution necessitates the transformation of the public basic education system. A new public education system aimed at addressing the malaise of the past. To this end, South African jurisprudence recognises the right to basic education as a right that must be (i) equally accessible to all and (ii) immediately realisable without delay. However, the new education system has not completely succeeded in eliminating the legacy of apartheid, and there are residual differences and polarisation on various grounds, such as race and/or class. Accordingly, this article concedes that a critical survey of South African jurisprudence on the realisation of the right to basic education reveals that there are problems in the delivery of the right to basic education in South Africa. This is particularly the case in relation to black and/or poor South African pupils in the public education system. As such, the article intends to show that litigation (or the threat thereto), plays a fundamental role in the realisation and fulfilment of the right to basic education in South Africa.

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‘Things have changed, and things have not changed in South Africa.’¹

1 Introduction

In this article, the authors address concerns on the fulfilment of the right to basic education in South Africa. In particular, their article investigates the origins of the discrepancies existent in the South African education system. To do this, the article will consider the South African education system in three different periods: pre-apartheid, apartheid, and post-apartheid. In addition, the article will compare the international standard, setting out the right to education as an immediately realisable right against the standard in the South African Constitution. The authors concede that the South African Constitution and jurisprudence are aligned with international standards, however, because of the various stakeholders involved in the implementation of the right to basic education, its implementation may be derailed. Finally, the article identifies public litigation as a possible solution to the latter problem.

2 History of education law and the impact of pre-democratic education systems

Dating back to colonial ages, the education of different racial groups in South Africa was separated along the lines of race.² From as early as 1905, White South Africans were introduced to formal and well-funded universal schooling processes whereas Africans and other people of colour were mainly educated in missionary schools and churches.³ However, these missionary schools and churches increasingly became inadequate, especially due to a lack of funds.⁴ After the Unification Act was signed in 1910 in exchange for state funds, the missionary schools started to adopt the state curriculum which ultimately led to the transfer of control of the black education system from missionary schools to the state when the Afrikaner Nationalist Party came into power in 1948.⁵

1 A van Blerk ‘Critical Legal Studies in South Africa’ (1996) 113 *South African Law Journal* 87.

2 For a five-tier exposition of this difference see JD Jansen ‘Curriculum as a political phenomenon: Historical reflections on Black South African Education’ (1990) 59(2) *The Journal of Negro Education* at 195-206, who outlines five different phases in the education system from 1658 to the apartheid era.

3 L Chisholm ‘Apartheid Education Legacies and new Directions in Post-Apartheid South Africa’ (2012) 8 *Storia delle donne* at 84-85.

4 As above.

5 As above. See also C Churr ‘A child’s right to a basic education: A comparative study’ unpublished LLD thesis, University of South Africa, 2012 at 87 <http://uir.unisa.ac.za/handle/10500/8592> (accessed 18 March 2021); see also S Hlatshwayo *Education and Independence – Education in South Africa 1658-1988* (2001) at 35.

Under the rule of the Nationalist Party, the Bantu Education Act⁶ was introduced and used to facilitate the continued under-funding and the poor quality of education for the African child.⁷ When the Act came into effect in 1953, it was mandated with two main objectives.⁸ Firstly, it was aimed at introducing a system of mass education for Africans. The obligation for the administration of education for Africans was taken away from the four provincial governments and placed under the control of the Native Affairs Department.⁹ Secondly, the Bantu Education Act was designed to deregulate African education in churches and missionaries which were, for a large part, responsible for educating Africans.¹⁰

In 1994, with the dawn of democracy, the government committed to ensuring the full realisation of the right to basic education to all persons in South Africa. As a result of the pre-democratic systems that were in place, 'the post-apartheid government inherited a deeply divided and highly unequal education system'.¹¹ To counter this, the government implemented new legal frameworks which desegregated schools and introduced procedures that would equalise the distribution of funds and educational expenditures across the education system.¹²

Although there have been some changes to the education system since 1994, the post-apartheid education system is still highly unequal.¹³ Spauld describes the education system as 'a tale of two systems'.¹⁴ Spauld makes a comparison between the poorest public schools and the most well-off schools and his investigation reveals that there is a general correlation between wealth and performance.¹⁵

According to the Trends in International Mathematics and Science Study (TIMSS) 2011 scores for the Senior Phase, the poorest of schools

6 Bantu Education Act 47 of 1953.

7 Churr (n 5) 107.

8 Churr (n 5) 108.

9 As above.

10 As above.

11 N Spauld 'Education in SA: A tale of two systems' *PoliticsWeb* 31 August 2012 <http://www.politicsweb.co.za/news-and-analysis/education-in-sa-a-tale-of-two-systems> (accessed 8 February 2021). Nic Spauld demonstrates that even with the attempt to significantly reduce the inequalities in racial spending in the education system in 1994, the amount of money invested in each white pupil was at least two and a half times higher than that invested in a black pupil in an urban area and five times larger than that of a black pupil in the most impoverished homelands.

12 Spauld (n 11).

13 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) (*Hoërskool Ermelo*) para 46.

14 Spauld (n 11). See L Arendse 'Beyond Rivonia: Transformative constitutionalism and the public education system' (2014) 29(1) *Southern African Public Law* at 160-174.

15 Spauld (n 11).

(quintile 1) scored 280 points. That is about 55 points below the national average score.

On the contrary, well-off schools (quintile 5) scored slightly above 440 points and the wealthiest schools (independent schools) scored 480 points.¹⁶ This predicament has not changed much in recent years. In 2020, the Department of Basic Education revealed the 2019 TIMSS results, which indicated that the achievement gap between fee-paying and non-fee-paying schools is 75 points for Grade 9 Mathematics.¹⁷ The same indicators apply for Sciences, with a gap of 107 points between fee-paying and non fee-paying schools.¹⁸

This comparison indicates that the equalisation in the distribution of funds in the education system has not resulted in the equalisation of outcomes. The quality of education in the poorest schools still ranks worst in the education system.¹⁹ More concerning is the fact that former Model C schools only account for approximately 10% of all public schools and that independent schools account for less than 5% of all schools in South Africa,²⁰ meaning that the greater majority of schools are poor public schools.

Veriava and Coomans accentuate that the legacy of the apartheid education system is manifested through the ‘minimum level of resources, lack of qualified [educators], high teacher-pupil ratios, lack of adequate libraries and laboratories as well as a shortage of classrooms at [poor public] schools’.²¹ The same cannot be said about most of the former Model C schools which are highly equipped with modern technologies, well-resourced libraries and laboratories, and well-qualified educators.²² This disparity is a result of the education policies of the apartheid regime.²³ In *Hoërskool Ermelo*, the Constitutional Court succinctly noted that:²⁴

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It

16 See Spuull (n 11), this study shows that wealth and good educational outputs go hand in hand.

17 Human Sciences Research Council ‘Highlights of South African Grade 5 and 9 Results in Mathematics and Science’ (2020) *Department of Basic Education* at 16 https://www.education.gov.za/Portals/0/Documents/Reports/TIMSS2019/TIMSS2019_Release%20Presentation_DBE_8Dec2020_final.pdf?ver=2020-12-08-123418-627 (accessed 12 February 2021).

18 Human Sciences Research Council (n 17) 40.

19 L Arendse ‘The South African Constitution’s empty promise of “radical transformation”: unequal access to quality education for black and/or poor learners in the public basic education system’ (2019) 23 *Law, Democracy and Development* at 100-147.

20 Chisholm (n 3) 81-103.

21 Arendse (n 14) 160.

22 F Veriava & APM Coomans ‘The right to education’ in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) at 60.

23 Arendse (n 14) 160.

24 *Hoërskool Ermelo* (n 13) para 45.

authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. *Access to private or public education was no exception.* While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us.

From this, it is clear that the apartheid government aimed to reduce Africans to unskilled citizens who can only perform menial jobs to ensure the entrenchment of White domination through the introduction of Bantu education.²⁵ On this note, it is unsurprising that this racist and paternalistic undertaking by the apartheid government sought to inculcate subservientness and marginalisation of the African masses.²⁶ In this regard, the education of African people is seen as the responsibility of White people.²⁷ Presently, the African community is still reeling from institutional Bantu education misconceptions that a White teacher is more superior to a Black teacher who possesses the same credentials and qualifications.²⁸ This assertion confirms that the inequalities created by Bantu education have extended beyond the educational sector and have infiltrated the workspace amongst others.

Accordingly, it remains important that we consider the measures implemented to curb these [persistent] inequalities. Recently, as a result of the coronavirus (COVID-19) pandemic, the Human Rights Watch conducted a study to assess the impact of the pandemic on the right to education. The report on this study concluded that the closure of schools due to the pandemic 'exacerbated previously existing inequalities, and that children who were already most at risk of being excluded from a quality education have been most affected'.²⁹

25 Churr (n 5) 109.

26 MA Gallo 'Bantu Education, and its Living Educational Socioeconomic Legacy in Apartheid and in Post-Apartheid South Africa' unpublished thesis, Fordham University, 2020 at 18. https://research.library.fordham.edu/international_senior/43 (accessed 19 April 2021).

27 As above.

28 Gallo (n 26) 11.

29 Human Rights Watch 'Impact of Covid-19 on Children's Education in Africa: Submission to The African Committee of Experts on the Rights and Welfare of the Child' 31 August-10 September 2020 https://www.hrw.org/sites/default/files/media_2020/08/Discussion%20Paper%20-%20Covid%20for%20ACERWC.pdf (accessed 12 February 2021).

3 The international framework regulating the right to basic education and its relationship to South Africa's Constitution

The South African Constitution is considered to be supportive of international law standards.³⁰ Section 39(1)(b) provides that the interpretation of the Bill of Rights *must* take international law into consideration.³¹ Conversely, various instruments, internationally, regionally, and domestically promote the right to education as a fundamental right that shall be both free and compulsory at primary level and that shall be progressively realisable at secondary and tertiary levels.³² These frameworks also assist in positioning the right to education in the context of human rights and further assist in the interpretation of legislation. In South Africa, the Constitution provides context to the right to basic and further education.³³

While the South African Constitution does not provide a definition for 'basic education' with the term not having achieved a definite meaning in South African jurisprudence, it is imperative to consider the fact that the South African Schools Act³⁴ provides us with a starting point in our continued effort to define the term 'basic education'. The Schools Act provides that education is compulsory from grade 1 to grade 9 and between the age of 7 and 15 depending on whichever comes first.³⁵ In its recent judgment of *Moko v Acting Principal of Malusi Secondary School and Others*,³⁶ the Constitutional Court held that given the historical context of the right to basic education in South Africa and the need to foster transformation, the right to basic education must not be narrowly interpreted so as to be limited to the age of 15 or grade 9. In effect, the Court went on to extend that the right to basic education culminates in grade 12.³⁷

30 D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* at 311.

31 Constitution of the Republic of South Africa, 1996 (Constitution) sec 39(1)(b).

32 Universal Declaration on Human Rights, 1948 Art 26; International Covenant on Economic, Social and Cultural Rights, 1966 Art 13; Convention on the Rights of the Child, 1990 Art 28; African Convention on the Rights and Welfare of the Child, 1990 Art 11.

33 Constitution (n 31) sec 29.

34 South African Schools Act 108 of 1996 (School's Act).

35 Schools Act (n 34) sec 3(1) states that: 'Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first'. See also C Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2012) 16 *Law, Democracy and Development* at 173.

36 (CCT 297/20) [2020] ZACC 30.

37 *Moko v Acting Principal of Malusi Secondary School and Others* (n 35) paras 31-32.

Mtwesi suggests that to better understand the content of the right to basic education, we ought to be directed by the Preamble of the Constitution, which sets out the purpose of the Constitution. It provides that the mission ahead is to:³⁸

Heal the division of the past and establish a society based on democratic values, social justice and fundamental rights ... [and] improve the quality of life of all citizens and free the potential of each person.

In *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*, Nkabinde J held that the right to basic education under section 29(1)(a) of the Constitution is immediately realisable as it is not subject to internal qualifiers such as ‘progressive realisation’ or ‘within available resources’ which are otherwise contained in qualified socio-economic rights in the Bill of Rights.³⁹ Accordingly, this right may only be limited in accordance with the provisions highlighted in section 36 of the Constitution. Nonetheless, the same cannot be said about the right to further education in section 29(1)(b) as the state is obligated to ensure that the right is ‘progressively available and accessible’.⁴⁰

Similarly, Chenwi postulates that the right to basic education, including adult basic education, may be distinguished from other socio-economic rights in the Constitution.⁴¹ Chenwi argues that whereas other socio-economic rights such as ‘the rights of access to housing and health care services, and the rights to food, water, and social security are qualified to the extent that they are made subject to the adoption of “reasonable legislative and other measures”; “progressive realisation” and “within the state’s available resources”, the right to basic education, including adult basic education, is not subject to the same constraints’.⁴² The right is therefore only subject to the constraints set out in section 36 of the Constitution.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides comprehensive detail on the content of the

38 A Mtwesi ‘The Right to Basic Education’ (2013) *Helen Suzman Foundation Briefs* <https://hsf.org.za/publications/hsf-briefs/the-right-to-basic-education> (accessed 12 February 2021).

39 *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) (*Juma Masjid*) paras 36-38; A Skelton ‘How far will the courts go in ensuring the right to a basic education?’ (2012) 27(2) *Southern African Public Law* at 396.

40 *Juma Masjid* (n 39<XREF>) para 37; See Skelton (n 39<XREF>) who notes that this decision must be distinguished from that of *Ermelo* where the court used the words ‘progressive realisation’ in the context of the right to basic education in a pupil’s language of choice. She notes that the progressive realisation indicated therein is not about the right to basic education in general, but about the accessibility of education in the language of the learner’s choice.

41 L Chenwi ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) *De Jure* at 39.

42 As above.

right to education. This Convention is arguably the most important international instrument which confers the right to education on everyone. In January of 2015, after a long delay, South Africa finally ratified the ICESCR but made a declaration to the effect that:⁴³

the Government of the Republic of South Africa will give *progressive effect* to the right to education, as provided for in Article 13 (2)(a) and Article 14, *within* the framework of its National Education Policy and *available resources* (own emphasis).

This declaration is very concerning as it subjects the right to ‘primary’ education to progressive realisation and the availability of resources.⁴⁴ The provision, therefore, denies the immediate realisation of the right. Accordingly, the declaration goes against the interpretation of the right to basic education as defined in the *Juma Masjid* case where the court left no doubt that it does not subscribe to such a restrictive interpretation of the right to basic education, but rather supports an interpretation which makes the right realisable without delay.⁴⁵

4 Strategic litigation and the right to basic education

The Committee on Economic, Social and Cultural Rights in its General Comment no. 13 states that the realisation of the right to education is four-fold, based on the ‘4 A-scheme’ developed by Katarina Tomasevski, the United Nations Special Rapporteur on the Right to Education from 1998 to 2004. This scheme is comprised of four elements, namely Availability, Accessibility, Acceptability, and Adaptability.

Availability denotes the idea that operative educational institutions and programmes ought to be available in adequate numbers within the jurisdiction of a State Party.⁴⁶ Accessibility necessitates that educational institutions and programmes be accessible to every person, without discrimination of any kind.⁴⁷

43 Right to Education ‘South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights’ 19 January 2015 <https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights> (accessed 19 March 2021).

44 This is concerning, primarily because the right to primary education envisaged in Article 13(2)(a) of the ICESCR forms part of the right to basic education in section 29(1) of the Constitution of the Republic of South Africa.

45 *Juma Masjid* (n 39).

46 CESCR General Comment 13: The right to education (Article 13) para 6(a).

47 General Comment 13 (n 45) para 6(b). See also A Skelton ‘The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical examination of recent education case law’ (2013) 46 (1) *De Jure Law Journal* 5 who discusses that ‘Accessibility’ has three overlapping dimensions: Non-discrimination, physical accessibility and economic accessibility.

Acceptability brings into play the issues surrounding the form and substance of education (the quality thereof), including curricula and teaching methods,⁴⁸ while Adaptability dictates that education must be flexible enough to adapt to the demands of changing societies and communities and must respond to the needs of pupils 'within their diverse social and cultural settings'.⁴⁹

Skelton argues that there are sufficient grounds to believe that there are challenges in the delivery of basic education in South Africa⁵⁰. She posits that litigation or the threat of litigation may assist in the realisation of the right to basic education.⁵¹ To clearly demonstrate this point, it is important to consider a few cases which reveal the role of litigation in the delivery of the right to basic education.

In *Centre for Child Law v Government of the Eastern Cape Province* several schools in the Eastern Cape had struggled to get the provincial department to attend to the challenges regarding infrastructure backlogs.⁵² The schools were in poor condition with issues including dilapidated mud buildings, a lack of running water and sanitation, and inadequate seats and desks for the number of attending pupils.⁵³ The Legal Resource Centre and the Centre for Child Law took up the matter on grounds of public interest.⁵⁴ Both the Minister and the provincial MEC for Education were joined in the matter as respondents. The matter was resolved with a Memorandum of Understanding which pledged that the Department would attend to the matters raised. In addition, the parties had agreed that should there be a material breach of the agreement, the parties can, after giving two weeks' notice, go back to court for an enforcement order to force compliance.⁵⁵ Skelton suggests that whilst litigation is often perceived as adversarial, it may lead to an appropriate exchange with the executive which, as a consequence, leads to improved access to the right to basic education.⁵⁶

In *Section27 v Minister of Education*,⁵⁷ the applicant sought a declaratory order that pronounced the Departments' failure to deliver textbooks to schools in Limpopo as an infringement on the

48 General Comment 13 (n 46) para 6(c).

49 General Comment 13 (n 46) para 6(d).

50 Skelton (n 47) 1-23.

51 Skelton (n 47) 2.

52 *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/10.

53 *Centre for Child Law v Government of the Eastern Cape Province* (n 51); Skelton (n 47) 7.

54 Constitution (n 31) sec 38.

55 See discussion on Skelton (n 47<XREF>) 7-8.

56 Skelton (n 47) 8; D Isaacs 'Realising the Right to Education in South Africa: Lessons from the United States of America' (2010) 2 *South African Journal on Human Rights* at 356 &374-379.

57 2013 (2) SA 40 (GNP).

right to basic education, equality and dignity. The applicant equally sought an order directing the Department to urgently make the textbooks available and to deliver them to said schools by a certain date. The court recognised and held that the right to basic education is immediately realisable and that textbooks are an essential part of the right. It further went on to express that the failure to deliver the necessary textbooks constituted a violation of the right to basic education which is indispensable to the holistic quest for transformation.⁵⁸

Although the term ‘transformative constitutionalism’ is not expressly mentioned in the Constitution, the transformative character of the Constitution can be implied from the text of certain provisions in the Constitution.⁵⁹ In *Minister of Finance v Van Heerden*, the Constitutional Court held that we ought to follow a substantive approach to equality as this approach is rooted in a ‘transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved’.⁶⁰ Similarly, in view of the inequalities in the education system, Arendse posits that transformative constitutionalism advances a ‘substantive approach to equality which acknowledges that there are levels and forms of social differentiation and systematic underprivilege that persist as a result of the racist policies of the previous regime’.⁶¹ Arendse argues that more focus should be placed on transforming the public education system and integrating it into a single system of education, where all learners are able to thrive under the same conditions, with the same quality of education.⁶² In order to show the persistent disparities in the education system in contemporary times, it is noted that schools across South Africa were shut down due to the COVID-19 pandemic in 2020. During this period, many learners in public schools were deprived of the right to education as the implementation of online learning is not feasible in most public schools.⁶³ Most of these public schools are former Black schools, thus affecting more people of colour, than their White counterparts.⁶⁴

58 See discussion by Skelton (n 47) 10.

59 See secs 7(2), 8(1), 9, and all provisions concerning socio-economic rights. See also P Langa ‘Transformative Constitutionalism’ (2006) *Prestige lecture delivered at Stellenbosch University* (9 October); D Moseneke ‘The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) 18 *South African Journal of Human Rights* at 309-315.

60 *Minister of Finance v Van Heerden* 2004 (6) SA 121(CC).

61 Arendse (n 14); *Minister of Finance v Van Heerden* (n 60) para 142.

62 Arendse (n 14).

63 Human Rights Watch (n 29).

64 As above.

5 The role of stakeholders in the realisation of the right to basic education

The South African Schools Act provides that representatives of parents, learners and educators must all have a say in a learner's right to basic education.⁶⁵ This is done through the School Governing Body (SGB),⁶⁶ which is empowered to consider issues on language policies, admission policies, religious policies, the school code of conduct, and other policies such as learner pregnancy policies.⁶⁷ However, when exercising its powers in policy making, the SGB is subject to making policies that are in line with the Constitution and the Schools Act.⁶⁸

The involvement of the SGB in the fulfilment of the right to basic education is an illustration of participatory democracy.⁶⁹ In fact, the Constitutional Court has cited SGBs as an illustration of 'grassroots democracy', because they permit people who are directly affected by the right to basic education to be involved in the fulfilment of the right.⁷⁰ As a result, SGBs are somewhat permitted to function with a considerable amount of independence from the Provincial Department of Education as they have their own legal status and capacity, separate from that of state departments.⁷¹

In *Ermelo*, the Constitutional Court accentuated that the SGB has powers to enact its own policies.⁷² However, these policies must comply with the norms and standards set out by the Constitution,⁷³ the Schools Act and any other provincial legislation,⁷⁴ with due regard to what is 'fair, practicable, and what enhances historical redress'.⁷⁵ The Court found that the Head of Department had no powers, based on the merits of the facts, to dissolve the SGB of its functions regarding the determination of a language policy, and handed them over to an interim committee.⁷⁶ This solidifies the inherent and independent powers of the SGB as regards a school's legislative or policy measures. As such, we must always be wary that because of this

65 Schools Act (n 34 <XREF>).

66 S Mansfield-Barry & L Stwayi 'School Governance' in F Veriava et al (eds) *Basic Education Rights Handbook – Education Rights in South Africa* (2017) at 80-81.

67 EM Serfontein & E de Waal 'The effectiveness of legal remedies in education: A school governing body perspective' (2013) *De Jure* at 51.

68 Mansfield-Barry & Stwayi (n 66) 78.

69 See Schools Act (n 33) sec 8. See also S Fredman 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' *Constitutional Court Review* at 174.

70 Mansfield-Barry & Stwayi (n 66) 78.

71 E Bray 'Autonomy in school education in South Africa: a legal perspective' (2000) *Autonomy in education* at 256.

72 *Hoërskool Ermelo* (n 13) para 59.

73 Constitution (n 31) sec 29(2).

74 *Hoërskool Ermelo* (n 13) para 59.

75 *Hoërskool Ermelo* (n 13) para 61.

76 As above.

position, the SGB possesses excessive⁷⁷ powers in the governance of schools, and in some instances, this power may be used (even unwittingly) to hinder the right to access education. Hence *in casu*, the Court cautioned against the SGB's decisions on the language policy which was not equitable nor justified.⁷⁸

In fact, in an effort to 'limit' the powers of the SGB, the Constitutional Court in its 2013 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*⁷⁹ case stated that the SGBs admission powers are subject to the intervention of the provincial education department in terms of the Schools Act, where reasonably necessary.⁸⁰ In view of the court's decisions in *Ermelo and Rivonia*, the Court held:⁸¹

[although in circumstances] where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it even where the functionary is of the view that the policies offend the Schools Act or the Constitution ... this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.

Therefore, although the SGB is responsible for the creation and adoption of policies that govern its schools, South African jurisprudence is clear in outlining that any policies adopted by the SGB, including a school's code of conduct, must conform with the Constitution of the Republic of South Africa.⁸² For example, in *Pillay*,⁸³ the facts demonstrate that if a school's code of conduct is in contradiction with a pupil's 'religious beliefs or cultural practices', the school is obligated, as per the Constitution, to take positive steps

77 The word 'excessive' is used not to mean that the powers of the SGB are unrestricted – but that the SGB possesses powers that are more than necessary, hence they may hinder the access to the right to basic education.

78 Similarly, in an attempt to redress the hinderances perpetuated by the SGB, the Constitutional Court in *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC) para 53, an appeal case dealing with an admission policy, held that the Head of Department had the power to admit a learner who had been refused admission to the school to give effect to the principle of the best interest of the learner. In effect, the Court found that the Supreme Court of Appeal erred in concluding that the Head of Department could only exercise the Regulation 13(1) power 'in accordance with the [school's admission] policy'.

79 2013 (6) SA 582 (CC).

80 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (n 78) para 43.

81 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (n 78) para 49.

82 Constitution (n 31) sec 2.

83 *MEC for Education, KZN v Pillay* 2008 (1) SA 474 (CC).

to make reasonable accommodation for the pupil concerned instead of unjustly limiting the pupil's right to access to education.⁸⁴

More so, the case study on Pretoria Girls High School (PGHS),⁸⁵ demonstrates that it is imperative for all SGBs, when enacting rules, policies, or codes of conduct, to give due regard to the religious, cultural, and racial diversity of the school populations they serve, and only then may they 'develop rules – after proper consultation with these different groupings – that are inclusive, and which accommodate and reflect this diversity'.⁸⁶

To this end, any failure on the part of the SGB or the Department of Basic Education in ensuring that positive measures are taken to curb hindrances on the right to access basic and quality education may lead to public litigation or the threat thereof. In such cases, litigation or the threat to litigation serves as a tool to obligate the SGB or the Department to take measures necessary in ensuring that the right to education is realised.

Some scholars are concerned with the use of litigation to achieve education rights.⁸⁷ On the one hand, concerns are raised regarding the incapacity of the courts to effectively assess the amount of funds that the State ought to allocate to the achievement of the right to basic education.⁸⁸ On the other hand, it is argued that courts may be reluctant to make orders that effectively bind the State in cases where a multiplicity of issues are at stake as 'the court may not be completely apprised of all the competing demands on the public purse'. In response to these concerns, some scholars have indicated that the court should make use of information provided by public interest litigators such as *amicus curiae*. This will, in turn, make litigation (or the threat thereof) a proper engine in the delivery of the right to basic education.⁸⁹

84 As above. This was further affirmed by the High Court in *Organisasie vir Godsdiensle-Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ) (OGOD) paras 89-90 where the court stated that 'neither the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others'. See also *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C) as well as *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

85 The SGB of PGHS had enacted a policy (Rule 6.4) on hair, which required students to straighten their hair and in effect, banning afros, which is the natural way that Black people's hair grows.

86 Mansfield-Barry & Stwayi (n 66).

87 G Rosenberg *The Hollow Hope: Can Courts Bring About Social Justice?* (2008); M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); A Nolan *Children's Socio-Economic Rights, Democracy and the Courts* (2011).

88 A Skelton 'Leveraging funds for school infrastructure: The South African Mud Schools Case Study' (2014) *International Journal of Educational Development* at 61-62.

89 F Veriava 'Basic Education Provisioning' in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017) at 220.

6 An assessment of the case law pertaining to provisioning for education

According to Veriava, education provisioning denotes the provision of numerous 'educational inputs' that are required to provide learners with quality education.⁹⁰ Veriava defines 'educational inputs' as the resources used to educate learners, including but not limited to textbooks;⁹¹ teachers;⁹² buildings and furniture or the appropriate infrastructure;⁹³ transport,⁹⁴ and stationary.⁹⁵ These inputs make up a 'basket of entitlements' with which the State is obligated to provide in order to facilitate the right to basic education'.⁹⁶ To date, many historically disadvantaged public schools in South Africa still suffer from poor quality education. This is because there is still a lack of educational inputs that must be provided by the State in facilitating the full and proper realisation of the right to basic education.⁹⁷ Accordingly, to curb the challenges faced by historically disadvantaged public schools, civil society organisations with an interest in the provisioning of the right to basic education, have for almost a decade now led campaigns for better quality education in historically disadvantaged public schools across the country, including, but not limited to litigating on the subject matter at hand.⁹⁸

In *Juma Musjid* the court confirmed that the State must always ensure the immediate realisation of the right to basic education by making available the necessary educational inputs that make the right to basic education fully realisable without delay.⁹⁹ With this in mind, in the case of *Minister of Basic Education and Others v Basic Education for All and Others*,¹⁰⁰ the Supreme Court of Appeal delivered a judgment relating to the incomplete delivery of textbooks to learners at certain schools in Limpopo.¹⁰¹ The court declared that every learner has the right to a basic education which includes the entitlement that every learner at a public school must be provided

90 As above.

91 N Stein 'Textbooks' in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017).

92 S Sephton 'Post Provisioning' in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017).

93 L Dragga Basic 'Infrastructure and Equipment' in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017).

94 S Joseph & J Carpenter 'Scholar Transport' in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017).

95 Veriava (n 89) 220-221.

96 Veriava (n 89) 221.

97 As above.

98 See Skelton (n 47) 1-23; See also generally throughout F Veriava *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (2019).

99 *Juma Musjid* (n 39).

100 2016 (4) SA 63 (SCA).

101 *Minister of Basic Education and Others v Basic Education for All and Others* (n 100).

with every prescribed textbook for their grade, prior to the commencement of the academic year.¹⁰²

In the *Madzodzo* decision regarding the provisioning of school furniture, the court held that the State's failure to provide 'adequate age - and grade-appropriate' furniture to learners at schools amounted to a violation of the right to basic education.¹⁰³ The court enunciates that the provision of school infrastructure is important to the subject of education provisioning as it facilitates the proper and full realisation of the right to basic education.¹⁰⁴ In the court's own words:¹⁰⁵

The state's obligation to provide 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. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right to basic education.* (own emphasis).

Moreover, in the case of *Tripartite Steering Committee and Another v Minister of Basic Education and Others*, the court found that the right to basic education 'included a direct entitlement right to be provided with transport to and from school at government expense, for those learners who live a distance from school and who cannot afford the cost of transport'.¹⁰⁶ Plaskett J noted Kollapen J, stating that:¹⁰⁷

The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and transport to and from school at State expense in appropriate cases. Put differently, in instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education.

The content of the right to basic education was said to be inclusive of the right to sufficient human resources (teachers) to effect teaching and learning as noted in the case of *Centre for Child Law & Others v Minister of Basic Education & Others*.¹⁰⁸ In that case, the Legal

102 *Minister of Basic Education and Others v Basic Education for All and Others* (n 100) paras 52-53.

103 *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) (*Madzodzo*).

104 As above.

105 *Madzodzo* (n 103) para 20.

106 *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

107 *Tripartite Steering Committee v Minister of Basic Education* (n 106) paras 18-19.

108 2013(3) SA 183 (ECG).

Resource Centre argued that the Department of Education is under an obligation not only to fill teaching posts but also to provide schools with non-teaching personnel such as cleaners and administrators to effectively realise the right to basic education. This was included in the settlement agreement between the parties which was confirmed through an order by the court.¹⁰⁹ In other words, the court has, somewhat less explicitly, suggested that teaching and non-teaching posts in schools are further entitlements in respect of the right to basic education.¹¹⁰

From an assessment of the case law discussed above, Veriava notes that numerous principles have come to the fore, including that the right to basic education is a right that is immediately realisable as a first-generation right, and that it requires the State to take all measures necessary to ensure its full realisation.¹¹¹ Moreover, the courts have seemingly adopted a content-based approach to the interpretation of the right to basic education in order to elaborate on the components that make up the 'basket of entitlements' due to all beneficiaries of the right thereof.¹¹² However, no clear or objective test for determining the content of the right thereof is apparent from the jurisprudence of the courts.¹¹³

The courts have also held that the State cannot hide behind budgetary constraints when it has failed to fulfil the right to basic education as there is an implicit duty on it to budget appropriately to meet the demands necessitated by the right.¹¹⁴ Accordingly, these judgments indicate the courts' endorsement of a substantive approach to socio-economic rights adjudication.¹¹⁵ Skelton argues that the 'lack of planning, inability to carry out plans and the lack of resources are not, legally speaking, permissible defences to the violation of a child's right to a basic education'.¹¹⁶ Therefore, the State is not merely under a negative obligation to not interfere with the realisation and enjoyment of the right to basic education, but has

109 As above.

110 F Veriava 'The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism' (2016) 32 (2) *South African Journal on Human Rights* at 16.

111 As above.

112 As above.

113 See discussion by F Veriava & A Skelton 'The right to basic education: a comparative study of the United States, India and Brazil' (2019) *South African Journal on Human Rights*. For a discussion of the absence of a clear test, see Veriava (n 110) 321 & 336.

114 *Minister of Basic Education and Others v Basic Education for All and Others* (n 100) para 43. See discussion on Veriava (n 89) 232.

115 Veriava (n 110).

116 As above.

positive obligations to ensure that the right is indeed achieved by all.¹¹⁷ This view is supported by the interpretation of section 3 of the Schools Act which notes that the State must ensure that there are sufficient placements for all learners who fall within the compulsory phase of the education system to receive a quality education.¹¹⁸ Furthermore, in terms of section 5A of the Schools Act, the Minister of Basic Education is duty-bound to provide norms and standards for school infrastructure, school-learner admission capacity, and amongst others, the provision of learning and teaching support material, including textbooks and workbooks.¹¹⁹

7 Conclusion

‘[T]oday, while schools may not discriminate on racial grounds and must admit learners of all [racial groups], huge inequalities still exist between schools that [are] historically “White” and schools that are historically “Black”’.¹²⁰ Nonetheless, some progress has been made in the fight to give effect to the immediate realisation of the right to basic education by numerous civil society organisations through litigation and the threat of litigation. The Constitutional Court in *Juma Musjid* stated that the right to basic education as enunciated in section 29 of the Constitution is immediately realisable, without any internal limitations such as ‘progressive realisation’ and ‘within available resources.’ This interpretation strengthens the objective of transformation as ‘the right to education remains amongst the centrepieces of transformative constitutionalism’.¹²¹

117 *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

118 Veriava (n 89) 226.

119 As above.

120 See L Nevondwe & M Matotoka ‘Promoting and protecting the right of access to basic education in South Africa’ (2013) 57 *The Thinker: Education* at 9.

121 Nevondwe & Matotoka (n 120) 12.

AN OVERVIEW OF THE REGULATION OF CRYPTOCURRENCY IN SOUTH AFRICA

by Zakariya Adam*



Abstract

The increasing popularity of cryptocurrencies has raised many questions with regard to their regulation. Issues such as taxation and its role in criminal activities are of central importance to the way in which cryptocurrency will continue to develop and occupy space in society. In this paper, such regulatory aspects are explored, and South Africa's response is addressed. With cryptocurrency growing worldwide at increasing rates, regulators are left having to respond quickly to this aspect of financial technology and while some have banned its use outright, others have taken the stance to embrace the use of cryptocurrencies to ensure it has a space for use in the future of the financial world.

* BCom Law (finalist), University of Pretoria. ORCID iD: 0000-0002-8574-8952. I would like to thank my brother Mohamed Faez and dear friends Malcom Mangunda and Luke Schwulst for their thorough input throughout this process. Further, I would like to thank the entire PSLR team, especially Khalipha Shange and Phenyio Sekati for their relentless efforts and patience. As one of my first contributions to the field of law, I hope the reader finds this insightful and enlightening. I hereby note that all shortcomings are that of my own. I would like to dedicate this to my mother and father. In the name of Allah (SWT), the most beneficent, the most merciful.

1 Introduction

‘If you don’t stand for something, you’ll fall for anything.’- Malcolm X

The COVID-19 pandemic transformed the way in which the world utilises technology. To this end, it is interesting to note that the ancillary tools which were once used for everyday practice, so as to enhance both professional and personal life experiences, have been elevated to become necessities amid the viral outbreak. To elaborate on this train of thought, technology and digitalisation have since taken centre stage in the midst of this pandemic. As part of the increase in the use of virtual technologies, the surge of interest in financial technology (FinTech) has arguably been one of the most notable progressions over the previous year.

FinTech is not a new concept in South Africa. There are many pieces of legislation that regulate the financial services market within the ambit of South African banks and other financial service providers. Amongst others, these include the Financial Markets Act 19 of 2012,¹ the Financial Intelligence Centre Act 38 of 2001,² and the National Payment System Act 78 of 1998.³ Notwithstanding the aforementioned, at this point, cryptocurrency (as a type of FinTech), does not have any affiliation with traditional authorities such as banking institutions. In addition to this, regulatory bodies have drafted minimal legislation to assist in the regulation of cryptocurrency. Due to the growing interest in cryptocurrency, this upregulation could prove problematic.

At the point of constructing this article, cryptocurrency as a store of value is considered to be at an all-time high. It is entering mainstream markets with an addition such as Coinbase⁴ to the Nasdaq stock exchange and consumer interest is seemingly widespread amidst the backdrop of an otherwise ailing worldwide economy.⁵ South Africa has not been left behind in this worldwide phenomenon with an estimated R6.5 billion being in circulation in the South African crypto market.⁶

Interestingly, the surge in cryptocurrency can be seen as a double-edged sword mainly because the surge has advanced prosperity opportunities for both international and domestic economies. On the other hand, this surge presents many legal and regulatory questions.

1 Financial Markets Act 19 of 2012.

2 Financial Intelligence Centre Act 38 of 2001 (FICA).

3 National Payment System Act 78 of 1998.

4 Coinbase Global Incorporated is an American cryptocurrency exchange platform.

5 NH Hamukuaya ‘The Developments of Cryptocurrencies as a Payment Method in South Africa’ (2021) *Potchefstroom Electronic Law Journal* at 44.

6 Staff Writer ‘SARS is coming after these 3 tax streams’ *BusinessTech* 07 May 2021 <https://businesstech.co.za/news/banking/488741/sars-is-coming-after-these-3-tax-streams/> (accessed 10 May 2021).

This research undertakes to define and classify cryptocurrency through the exploration of international trends and the taxation of cryptocurrencies. Thereafter, recommendations as to the regulatory framework of such technologies in South Africa will be made in conclusion.

2 Defining and classifying cryptocurrency

Cryptocurrencies emanate from cryptography, digital media, and commerce respectively. The combination of digital media and commerce is not a foreign concept in modern society, with the utilisation of digital payment systems and banking applications being examples of such combinations. Cryptography, broadly defined as ‘the science of secret communications’, differentiates cryptocurrencies from other types of E-Commerce.⁷ In this case, cryptography affords the consumer a specific type of anonymity known as pseudonymity which essentially enables a unit the ability to be recognised through numerical sequences as opposed to exposing the consumer’s physical identity.⁸

Furthermore, what can be regarded as the distinguishing factor of cryptocurrency from other types of FinTech is the premise upon which cryptocurrency is based.⁹ For clarification purposes, it is said that cryptocurrency is acquired through solving complex mathematical coding problems or puzzles.¹⁰ The individual who manages to successfully solve the mathematical puzzle (the successful miner) may then claim this unit.¹¹ A note of a transaction or ‘block’ is then created following each transaction associated with the said unit.¹² As a consequence, a ‘blockchain’ is established which is, in essence, the public transaction ledger that records each transaction.¹³ This method of recording transactions provides certainty in pseudonymous possession.¹⁴ This cryptocurrency is then afforded value depending on which category of virtual currency it falls under in terms of what it may be exchanged for.¹⁵ Each cryptocurrency also has a limit as to the amount that can be mined in totality.¹⁶ For example, by the year

7 E Reddy & V Lawack ‘An Overview of the Regulatory Developments in South Africa Regarding the Use of Cryptocurrencies’ (2019) 31 *South African Mercantile Law Journal* at 4.

8 Reddy & Lawack (n 7) 14.

9 Reddy & Lawack (n 7) 2.

10 Reddy & Lawack (n 7) 5.

11 Reddy & Lawack (n 7) 11.

12 As above.

13 Reddy & Lawack (n 7) 12.

14 Reddy & Lawack (n 7) 13.

15 Reddy & Lawack (n 7) 12.

16 Reddy & Lawack (n 7) 21.

2140, all Bitcoins will have been mined as it is only possible for 21 million Bitcoins to be mined.¹⁷

Cryptocurrencies are classified under the larger umbrella of FinTech and are denoted as virtual currencies.¹⁸ There are a variety of categories thereunder that relate to the centralisation, convertibility with regards to fiat currency, and the directional flow of said currency. This research primarily focuses on decentralised, bi-directional, and convertible virtual currency. This means that the cryptocurrency referred to in this research can be bought and sold in accordance with floating exchange rates.¹⁹ Furthermore, with regards to its decentralisation, such cryptocurrencies are said to be distributed, open-source, math-based peer-to-peer currency that has no central administering authority, and no central monitoring or oversight.²⁰ Such examples are that of Bitcoin, Ethereum, and Ripple. For the specific purpose of this research, it is to be noted that Bitcoin is not the only type of cryptocurrency. This is a common misconception wherein individuals consider Bitcoin as the entirety of cryptocurrency. It is merely a type of cryptocurrency much like the South African Rand or Japanese Yen is merely just a type of fiat currency. Cryptocurrencies that are not Bitcoin are referred to as altcoins.²¹

The classification of cryptocurrencies is crucial in terms of the associated regulatory measures.²² While this store of value is often referred to as 'currency', it is pertinent to note that it is not in fact a form of currency. In South Africa, the central bank, or the South African Reserve Bank (SARB) holds the sole authority to issue legal tenders.²³ Therefore, cryptocurrency is not a legal tender as one of its defining characteristics is that of its decentralisation.

While some companies such as Takealot and Pick 'n Pay have in the past allowed for cryptocurrency to be used in a contract of exchange,²⁴ it is much more common, at least in present times, for cryptocurrency to be utilised as a commodity or store of value asset.

17 Statista 'Maximum and current supply of various cryptocurrencies worldwide as of August 18, 2021' August 2021 <https://www.statista.com/statistics/802775/world-wide-cryptocurrency-maximum-supply/> (accessed 08 September 2021).

18 B Mukwehwa 'Rethinking the regulation of virtual currency in South Africa' LLM Thesis, University of Pretoria, 2019 at 4.

19 Mukwehwa (n 18) 8.

20 Mukwehwa (n 18) 10.

21 Hamukuaya (n 5) 15.

22 The Intergovernmental Fintech Working Group Position Paper on Crypto Assets (2020) at 8 (IFWG Position Paper).

23 Reddy & Lawack (n 7) 2.

24 Reddy & Lawack (n 7) 16.

The term ‘crypto asset’ is then coined. The Intergovernmental FinTech Working Group (IFWG)²⁵ has defined crypto assets that have been adopted by regulatory authorities as:²⁶

a digital representation of value that is not issued by a central bank, but is traded, transferred, and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology.

Crypto assets may be purchased from a variety of crypto-asset service providers (CASPs), which may include either trading platforms or crypto-asset vending machines.²⁷

Finally, for a consolidated understanding of cryptocurrency, one must understand the key role players associated in a basic crypto transaction. Inventors are the initial party associated with a cryptocurrency. They are tasked with seeing the currency through the phase of its initial coin offering (ICO) which is essentially the capital raising portion of its lifespan.²⁸ Inventors may often choose to remain unknown, as in the case of Bitcoin.²⁹ The next crucial role players are the miners involved in solving the complex mathematical puzzles to essentially ‘unlock’ crypto assets and add them to the blockchain. A miner may either keep the coin or exchange it with a user, who is someone who attains the coin for practical use, either in the form of an investment or as a medium of exchange for goods or services.³⁰ Lastly, a wallet provider is a key role player in the world of crypto assets. Cryptocurrency may only be stored in virtual wallets, which undertakes to simplify the processes involved in transacting cryptocurrency.³¹ However, a user may act simultaneously as their own wallet provider should they possess the technical know-how.

Therefore, cryptocurrency (which is, in fact, not an official currency) is succinctly defined as a pseudonymous digital store of value that originates from the solving of complex mathematical problems and transactions thereof are recorded on a ledger referred to as the blockchain.³²

25 The government task force comprised parties from various regulatory bodies whose purpose is to put forward suggestions and positions on the regulation of cryptocurrencies in the economic landscape of South Africa.

26 IFWG Position Paper (n 22) 9.

27 Reddy & Lawack (n 7) 23.

28 Mukwehwa (n 18) 10.

29 Hamukuaya (n 5) 12.

30 Reddy & Lawack (n 7) 11.

31 IFWG Position Paper (n 22) 10.

32 A Nieman ‘A Few South African Cents Worth on Bitcoin’ (2015) 18(5) *Potchefstroom Electronic Law Journal* at 1986.

3 Cryptocurrency and taxation

Pseudonymity consistently poses an inconvenience to the regulation of crypto assets as it requires further administrative effort from the regulator to essentially determine the identity of the user from the numerical sequence of the asset.³³ Taxation is no different. The issue of identifying and verifying users of crypto assets has presented the South African Revenue Services (SARS) with hindrances of being able to adequately tax crypto transactions, due to the anonymities.³⁴ While there are CASPs such as Luno and VALR in South Africa which do require some sort of verification, there are still many traders who utilise platforms that do not require any form of verification.³⁵ The amount of attention afforded to the digital identities of taxpayers has significantly increased so as to ensure taxpayer compliance with taxation legislation.³⁶ It must be further noted that little to no certainty is afforded to both tax authorities and users currently in the execution of such practices. Nevertheless, efforts to tax crypto assets are achieving some success as many countries are experiencing positive feedback in response to the proposal to draft crypto taxation legislation. In the BRICS countries, for example, India and Russia have recently endeavoured to establish such legislation to develop their regulatory response to cryptocurrency, particularly in terms of taxation.³⁷

SARS has not been coy in its attempts to collect revenue from cryptocurrency. In 2018, it declared that even though cryptocurrency is not a legal tender, it may be regarded as assets of an intangible nature for tax purposes.³⁸ From this, aggressive action was taken to ensure that taxpayers knew about the fact that should such income not be declared, they may be penalised by up to 200% of the amount owed plus interest, in accordance with section 223 of the Tax Administration Act.³⁹ Interestingly enough, taxation legislation has made significant strides in incorporating cryptocurrency into its scope of application. The legislature has made concessions for cryptocurrencies in both the Value Added Tax Act 89 of 1991 (VAT

33 As above.

34 Reddy & Lawack (n 7) 22.

35 IFWG Position Paper (n 22) 16.

36 L Sadhaseevan 'The Regulation of Cryptocurrencies in the Context of South Africa's Financial Sector' (2019) LLM Thesis, University of KwaZulu-Natal at 36.

37 J Scheepers 'Analysis of cryptocurrency verification challenges faced by the South African Revenue Service and Tax Authorities in other BRICS countries and whether SARS' power to gather information relating to cryptocurrency transactions are on par with those of other BRICS countries' LLM Thesis, University of Cape Town, 2019 at 5.

38 Baker McKenzie 'Blockchain and Cryptocurrency in Africa' February 2019 https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report_blockchainandcryptocurrencyreg_feb2019.pdf (accessed 10 May 2021).

39 Tax Administration Act 28 of 2011 sec 223; Staff Writer (n 6).

Act)⁴⁰ and the Income Tax Act 58 of 1962 (ITA).⁴¹ The VAT Act adds cryptocurrencies to the definition of ‘financial services’ in section 2 which enables its exemption from value-added tax.⁴² In the ITA, the addition of cryptocurrencies will be incorporated in the definition of ‘financial instrument’ and section 20A⁴³ has also been amended to include ‘the acquisition or disposal of any cryptocurrency’ which essentially enables ring-fencing of any losses accrued from acquiring or disposing of cryptocurrencies.⁴⁴

Many traders and investors often feel that due to the pseudonymity and relative timeframe in which crypto assets have been a commodity, they do not have to pay tax.⁴⁵ This is untrue and SARS has taken steps to tax crypto assets which may be classified under either income tax or capital gains tax. SARS’ budget allocation has been raised in the 2021 fiscal year by R3 billion.⁴⁶ In utilising these additional resources, SARS has made it clear that it aims to prioritise digital finances, assets, and income streams. It aims to invest heavily in technological resources so that it may be able to monitor financial transactions and identify transactions moving into and out of crypto platforms.⁴⁷

The onus lies on the taxpayer to declare any income or capital gains derived from crypto assets.⁴⁸ There are three manners in which funds are raised from crypto assets. These are through mining, the exchange for goods and services, and trade in/with cryptocurrencies.⁴⁹ All these streams are taxable and should be declared according to the relevant taxation legislation.⁵⁰ It is also a misconception that only upon the physical exchange of crypto assets for fiat currency can such income from crypto-assets become taxable.⁵¹ Inadvertently, even if a trader makes a trade between two types of cryptocurrencies, such as through trading Bitcoin for Ethereum, any profits derived would be taxable according to regulations put forward by SARS.⁵² Currently, SARS is working tirelessly to ensure that cryptocurrency and crypto assets are taxed in accordance with the relevant legislation. This could be a vast and fruitful stream of income for tax collectors and may impact the South African fiscus in a way unforeseen by many.

40 Value Added Tax Act 89 of 1991 (VAT Act).

41 Income Tax Act 58 of 1962 clause 2(1)(c).

42 VAT Act (n 40) sec 2.

43 Income Tax Act (n 41) sec 20A.

44 Baker McKenzie (n 38).

45 Staff Writer (n 6).

46 As above.

47 As above.

48 Staff Writer (n 6).

49 Reddy & Lawack (n 7) 22.

50 Mukwehwa (n 18) 24.

51 Staff Writer (n 6).

52 As above.

4 Risks associated with cryptocurrency

The IFWG noted a variety of risks in the establishment of a cryptocurrency monetary system in its 2020 position paper.⁵³ These risks are vast and pose some rather pertinent questions, particularly if cryptocurrency can be considered as a store of value for the future.⁵⁴ This part of the research undertakes to highlight some of the most crucial risks against the possible future use of cryptocurrency in the financial markets, with a specific focus on consumer protection, cybersecurity, and miscellaneous regulatory aspects.

4.1 Consumer protection and market conduct

Consumer protection and market conduct remain at the top of the IFWG's list in relation to the risks associated with cryptocurrency.⁵⁵ This concern deals directly with the subsequent section of regulation and will be delved into further at that point. Succinctly, the issue raised is that current international and domestic regulation is unable to keep up with the pace at which cryptocurrency is gaining popularity.⁵⁶ Tax evasion, illegal cross-border transactions, fraud, and theft in vain of the pseudonymity provided by the crypto market serve as threats to the very sanctity of South Africa's consumer protection mechanisms.⁵⁷ Consumers leave themselves vulnerable and service providers can manipulate the market freely due to the lack of established law in this regard. Information asymmetries are common within FinTech; however, this seems to be more apparent in cryptocurrency due to its pseudonymous and independent nature.⁵⁸ While decentralisation can afford power and autonomy to the average consumer, it also poses risks to such individuals in that there is no legislation to safeguard them from possible instances of fraud. South Africa established the Twin Peaks Model⁵⁹ after the 2007/2008 global financial crisis to regulate the sanctity of financial institutions. This, in tandem with the Consumer Protection Act 68 of 2008,⁶⁰ provides little insight into the possible regulation of the crypto market specifically and the prevention of the abuse of the average consumer generally. At this point, little to no movement has been made in addressing consumer protection or market conduct shortcomings. However, this is attributable to the assertion that cryptocurrency has

53 IFWG Position Paper (n 22) 15.

54 Nieman (n 32) 1982.

55 As above.

56 IFWG Position Paper (n 22) 15.

57 As above.

58 Financial Regulatory Reform Steering Committee 'Implementing a twin peaks model of financial regulation in South Africa' (2013) (FRRS Committee) at 25.

59 As above.

60 Consumer Protection Act 68 of 2008 (CPA).

been in mainstream circulation and that there has been no litigation in South Africa concerning the shortcomings of cryptocurrency.⁶¹

4.2 Cybercrimes and fraud

It has been established that there has not been any noteworthy litigation relating to cryptocurrency.⁶² Nonetheless, this does not mean that there have been no cases of cryptocurrency attracting unwanted attention from law enforcement. As previously mentioned, the intended premise of pseudonymity affords the consumer with a variety of opportunities in its provision of autonomy, but it also opens the door for abuse and manipulation.⁶³ Cybercrime is a common threat to most in today's society and crypto traders, experts or not, are no less vulnerable.

In 2014, Japanese-based Mt Gox filed for bankruptcy after it reported that Bitcoins to the value of \$473 million were stolen.⁶⁴ This is not a once-off event as various CASPs have reported instances of phishing, hacking, and malware attacks.⁶⁵ Even in South Africa, the Directorate for Priority Crime Investigations (HAWKS) is investigating the theft of Bitcoin from an estimated 27 500 South Africans, Australians, and Americans in the wake of an online Ponzi scheme.⁶⁶

As with any aspect of society, crime is a given. Nonetheless, should cybercrime with regards to crypto assets not be curtailed, this might pose a rather large point of contention in the possible progression of cryptocurrency as a legitimate monetary system.⁶⁷

4.3 Money laundering and financing of terrorism

Pseudonymity is a recurring theme in the crypto market and a premise upon which this market prides itself. There are currently no regulatory requirements for identification upon purchasing cryptocurrency from CASPs.⁶⁸ This creates a conducive environment for money laundering and terrorism financing through the utilisation of illegal cross-border

61 Baker McKenzie (n 38) .

62 As above.

63 Reddy & Lawack (n 7) 21.

64 As above.

65 Reddy and Lawack (n 7) 21. Such examples include Bitcoin Savings & Trust, Bitcoin Gold, BitKRX, My Big Coin and Cryptocurrency Clipboard hijackings with a notable example being the recent routing attacks on Bitcoin. See M Apostolaki, A Zohar & L Vanbever 'Hijacking Bitcoin: Routing Attacks on Cryptocurrencies' (2017) *IEEE Symposium on Security and Privacy* at 375-376.

66 As above.

67 Sadhaseevan (n 36) 85.

68 Reddy & Lawack (n 7) 3.

flows.⁶⁹ Such transactions would be difficult to trace, particularly considering that cryptocurrency is a global commodity.⁷⁰

Money laundering involves three distinct steps.⁷¹ These steps are that of placement, wherein the ‘dirty’ money is introduced into the financial system; layering, wherein the money is then moved between different accounts, financial products, countries, and currencies making it difficult to trace; and integration, wherein the funds are returned to the criminal under a legal guise representing legitimate earnings.⁷² Cryptocurrency is utilised mostly in the layering step of money laundering.⁷³ As noted earlier, pseudonymity denotes the blockchain as being something inherently complicated. This increases the burden on law enforcement when it comes to tracing these funds.⁷⁴ Furthermore, cryptocurrencies are also relatively easy to transfer internationally. In essence, due to pseudonymity and the resultant complications in identifying users, cryptocurrencies are an additional (and perhaps more effective) medium through which money launderers may disguise the trail of the conversion of ‘dirty’ money to that of legitimate funds.

Certain CASPs have implemented identification and verification procedures even though it is not a regulatory requirement. The only regulatory requirement set out in legislation at this point that may contest the principle of pseudonymity is the obligation of CASPs to report any suspicious transactions in terms of section 29 of the Financial Intelligence Centre Act.⁷⁵

4.4 Environmental impact

Crypto mining hardware and software is costly.⁷⁶ Additionally, the cost of mining includes substantial expenditure on energy consumption.⁷⁷ Bitcoin mining alone consumes vast amounts of electricity annually and its estimated annualised electricity consumption at the beginning of 2020 was 71.07 terawatt-hours.⁷⁸ To

69 As above.

70 As above.

71 G Forgang ‘Money Laundering Through Cryptocurrencies’ (2019) 40 *Economic Crime Forensics Capstones* at 12.

72 Forgang (n 71) 10.

73 As above.

74 As above.

75 FICA (n 2) sec 29.

76 Reddy & Lawack (n 7) 11. The cost for a start-up mining operation (hardware and software, excluding other operational components) can amount to anywhere between R5 000 to R50 000.

77 Reddy & Lawack (n 7) 12.

78 W Daniel ‘Bitcoin energy jumped 80% since the beginning of 2020, according to a new study’ *Business Insider* 13 March 2021 <https://www.businessinsider.co.za/bitcoin-energy-consumption-cambridge-study-cryptocurrencies-bitcoin-mining-climate-change-2021-3#:~:text=Bitcoin's%20energy%20consumption%20has%20jumped,2020%20was%2071.07%20terawatt%2Dhours> (accessed 10 May 2021).

put this into perspective, the average American household consumes about 10.65 kilowatt-hours annually.⁷⁹ The amount of electricity used to mine Bitcoin in 2020 was thus approximately 70 billion times more compared to the electricity used by the average American household.

This evidently incurs vast financial amounts, but it also exacerbates an immense environmental burden. With the current notion that the future of fossil fuels seems to be scarce and less reliable as time goes by, a clear acknowledgement is considered with regards to the future of crypto mining and its extensive environmental requirements.⁸⁰

Furthermore, the issue of whether cryptocurrency is sustainable then comes to the fore. Little to no research has been done to conclude whether alternative or renewable sources of energy would be sufficient to mine cryptocurrency. This aspect of cryptocurrency brings about some concerns and assumptions. These include that should crypto assets not be mined sufficiently; they would eventually cease to exist in the broader scheme of society or may prove less than fruitful as a realistic alternative to fiat currency due to its inadequate supply.⁸¹

5 Regulation

The most pressing issue regarding the regulatory framework surrounding cryptocurrencies is that they are firstly a global phenomenon and secondly, that they are so complex that they take on many forms and could be classified under a variety of economic functions. Apart from the few directives elaborated on with regards to taxation and certain criminal acts, there is little regulation on cryptocurrencies. Nevertheless, cryptocurrency seems to be here to stay and as it stands there are very few regulatory measures in place, which in turn exempts the financial instrument from many consequences.⁸² For example, there is currently no explicit regulation in place addressing consumer protection.⁸³ This brings about a plethora of equity-based issues in the wake of South Africa's overall mission of equal producer-consumer bargaining power. While the Consumer Protection Act⁸⁴ may apply to transactions, in this case, complications are established due to the globalised nature of

79 US Energy Information Administration 'How much electricity does an American home use?' <https://www.eia.gov/tools/faqs/faq.php?id=97&t=3> (accessed 10 May 2021).

80 Reddy & Lawack (n 7) 12.

81 IFWG Position Paper (n 22) 21.

82 S Govender 'Officially on the Road to Crypto-Asset Regulation' 22 July 2021 <https://www.polity.org.za/article/officially-on-the-road-to-crypto-asset-regulation-2021-06-22> (accessed 12 September 2021).

83 Govender (n 82).

84 CPA (n 60) sec 1.

cryptocurrencies. Beyond mainstream CASPs like VALR and Luno, South African users may face issues in addressing grievances with less established CASPs.⁸⁵ Exacerbating this risk for South Africans, many countries have taken the stance of 'wait and see what others do' in their attempts to regulate crypto assets. Some have even taken steps to ban any interaction with cryptocurrency.⁸⁶

This section of the research is essentially the crux of the issue at hand and serves to provide clarity as to the reality of cryptocurrency possibly being a steadfast force in the South African economic landscape. In this instance, there is a two-fold analysis relating to the regulatory approach. Firstly, what has been done and secondly, what is planned and recommended to be done, while working in tandem with the aforementioned risks.

5.1 What actions have been taken to regulate cryptocurrency?

Existing financial regulatory legislation has taken little to no steps to regulate cryptocurrency. After the global financial crisis in 2008, South Africa enacted the Financial Sector Regulation Act (FSRA)⁸⁷ which essentially introduced what is called the Twin Peaks model.⁸⁸ This is the seminal financial regulatory framework in South Africa. This model established two focus areas that are deemed most appropriate to ensure economic well-being in society. These broad areas were that of the prudential regulator's objective to maintain the safety and soundness of regulated financial institutions, and the market conduct regulator's objective to safeguard the consumers of financial services and to promote confidence in the South African financial system.⁸⁹ Furthermore, this agenda was taken on in a macroprudential and micro-prudential effort to ensure overall prosperity in the financial sector. It remains to be seen whether such a model will regulate cryptocurrency. At this point, there has been no litigation with regard to cryptocurrency.⁹⁰ Beyond this, there have been a few mainstream financial service providers to offer customised cryptocurrencies (which due to the nature of cryptocurrency, is possible) which again leaves the question of the applicability of the FSRA open-ended.⁹¹

As previously analysed in this research, the relevant taxation Acts have made some strides but beyond that, less may be said. Upon the issue of cryptocurrency being classified as E-money and it possibly

85 Reddy & Lawack (n 7) 50.

86 Sadhaseevan (n 36) 79.

87 Financial Sector Regulation Act 9 of 2017 (Financial Sector Regulation Act).

88 Mukwehwa (n 18) 22.

89 FRRS Committee (n 58) 65.

90 Baker McKenzie (n 38).

91 Mukwehwa (n 18) 28.

being used as a form of payment, the National Payment System Department made it clear that in accordance with the Banks Act 90 of 1994,⁹² E-money is issued by a bank.⁹³ Therefore, cryptocurrency cannot be classified as E-money in any way.⁹⁴

The Financial Intelligence Centre Act is one of the most pertinent pieces of legislation regulating the financial sector. The Act was recently amended by the Financial Intelligence Centre Amendment Act 1 of 2017.⁹⁵ Section 29 of FICA sets out that any business or involved party that knows or suspects that the business has received or is about to receive the proceeds of unlawful activities; a transaction to which the business is a party involves proceeds of unlawful activity or property relating to the financing of terrorist activities; the business has been used or is about to be used for money-laundering purposes; or the financing of terrorism, should report such to the Financial Intelligence Centre.⁹⁶ It has been widely noted that with reference to the aforementioned provisions in mind, they may be said to apply to crypto and virtual currencies. However, this has not necessarily been enforced, neither has it even been officially noted.

Apart from taxation legislation, South Africa has seemingly adopted the ‘wait and see’ method. This may have drastic impacts on the future of the industry but may yet be averted by what one may hope will be done in the near future.

5.2 What is planned and recommended

In its recently published paper, the IFWG put forward a myriad of regulatory policy recommendations relating to a variety of aspects affected by crypto regulation. Many of those revolved around specific pieces of legislation. Some of the most key recommendations put forward will be noted below.

Earlier in this research, some key risks associated with cryptocurrency were alluded to. When regulation is included in the overall discussion, it is done to determine ways in which to mitigate such risks. There has been little movement achieved in realising the mitigation of said risks. The IFWG has put forward many recommendations which address the lack of security. Such recommendations primarily deal with cybercrime and the reporting of financial developments to regulatory authorities.⁹⁷ However, there are very few ironclad or secure movements in safeguarding individuals

92 Banks Act 90 of 1994 sec 17.

93 Nieman (n 32) 1984.

94 Mukwehwa (n 18) 19.

95 Financial Intelligence Centre Amendment Act 1 of 2017.

96 Mukwehwa (n 18) 20.

97 FRRS Committee (n 58) 11.

from the dangers of cryptocurrencies, let alone creating a financial environment conducive to their use. South African consumer protection law has been developed heavily and quite adequately over the last few decades but, unfortunately, no specific mention has been made of cryptocurrencies. This exemption opens room for service providers to take advantage of crypto market participants.

One of the key notes made by the IFWG concerns the inclusion of cryptocurrency as a financial service. In recommendation of its position paper, the IFWG made it a prerogative to include crypto assets in section 3(1)(a) of the Financial Sector Regulation Act 9 of 2017⁹⁸ and under licensing activities in the Conduct of Financial Institutions Bill 2020.⁹⁹ This would then bring cryptocurrencies into the ambit of this legislation and afford jurisdiction to the legislature to proceed with further legislative developments. The underlying theme of including the regulation of cryptocurrency into existing legislation has been established in South African legislation. This clearly denotes the overall intention to regulate cryptocurrencies.

The issue regarding the regulation of cryptocurrency payments is a question on the minds of many individuals.¹⁰⁰ While this is less of a priority in the grander scheme of regulating cryptocurrency (as the current focus is on crypto assets), the SARB noted in its 2018 review of the National Payment Systems Act 78 of 1998¹⁰¹ that digital currency may become a common and possibly the most common form of payment in the near future.¹⁰² This would have a ripple effect on the exclusivity of commercial banks and would be a genuine shift in the overall scope of commercial (and even civil) society. Some entities, such as Takealot and Pick 'n Pay, as previously mentioned, have allowed for the exchange of cryptocurrencies for goods in the recent past.¹⁰³ There are a significant number of intricacies that need to be addressed before cryptocurrency would be able to be seen as a mainstream form of payment. The most pertinent of which is whether it may be able to derive its own value and not merely be a form of exchange for fiat currency.

Succinctly, little to no movement has been taken to safeguard individuals from the dangers associated with cryptocurrency, as well as promote its use for a positive, innovative social impact.

98 Financial Sector Regulation Act (n 87) sec 3(1)(a).

99 Conduct of Financial Institutions Bill, 2020; IFWG Position Paper (n 10) 23.

100 Hamukuaya (n 5) 15.

101 National Payment System Act (n 4).

102 Nieman (n 32) 1993.

103 Reddy & Lawack (n 7) 16.

6 International trends

The regulation of cryptocurrency is something that countries are addressing globally. Crypto assets are a truly global commodity and, as previously mentioned, countries around the world are seeming to pull at threads in their attempts to regulate this aspect of FinTech. Some countries have taken steps to regulate crypto assets while others have merely adopted a 'wait and see' approach.¹⁰⁴ This section of the research will acknowledge some of the developments in regulation adopted by foreign countries. There is no specific rationale for the choice of these countries in terms of comparison but rather that they are countries that have taken noteworthy steps toward regulating cryptocurrency.

There are many countries internationally, such as China, Tanzania, and Thailand, which have objected to or banned any practices associated with cryptocurrency.¹⁰⁵ The reason for banning crypto assets primarily has to do with their central banks objecting to its use due to it competing with its fiat currency.¹⁰⁶ At this point, these countries deem cryptocurrency juvenile for its adoption into the mainstream economy.¹⁰⁷ Furthermore, such countries also objected because they believed such a global payment method endangers their own endeavours toward a sustainable payment method exclusive to their country and operating with the prerogative of promoting economic well-being within such a country.

Countries such as the United States and Japan have, however, been more welcoming towards the regulation of cryptocurrency. The United States Internal Revenue Services (IRS)¹⁰⁸ has taken quite aggressive steps towards classifying crypto assets as property so that they may be taxed as such.¹⁰⁹ This is quite controversial, particularly as experts in the field of property law are still experiencing rigorous debate as to whether incorporeal items can be classified as 'things'.¹¹⁰ Japan has been the first country to officially legislate the regulation of cryptocurrency with the promulgation of the Virtual Currency Act, 2017.¹¹¹ This legislation, unfortunately, allows for little reference and has been relatively uneventful.

Global legislation in relation to cryptocurrency is extremely infantile. There have been minimal developments and some countries

104 Sadhaseevan (n 36) 67.

105 Baker McKenzie (n 38); Sadhaseevan (n 36) 11.

106 As above.

107 As above.

108 The federal taxation authority in the United States of America.

109 Reddy & Lawack (n 7) 3; United States Internal Revenue Service Notice 2014-21, 2014-16 I.R.B 938.

110 G Muller et al *General Principles of South African Property Law* (2019) at 25.

111 Virtual Currency Act, 2017.

such as Nigeria have even decided not to try to regulate such aspects of FinTech.¹¹² To say the least, it does seem to be ‘every country for themselves’ which is ironic because, for a stable and equitable system to be promulgated, international cooperation is of utmost importance.

Learning from the steps taken by others, South Africa (having already expressed the intention to provide some sort of regulation for cryptocurrency) should take heed to the actions of countries like the United States of America and Japan that have taken significant steps to wholly regulate crypto assets to proactively combat any issues which may arise in the future.

7 Recommendations

The state of cryptocurrency is uncertain, underregulated, and wholly underdeveloped. It is unlikely that the ‘wait and see’ approach will prevail amidst cut-throat economic times. The issue of jurisdiction must, firstly, be addressed and as previously mentioned, steps should be taken to bring cryptocurrencies into the ambit of the FSRA.¹¹³

Financial regulators should adopt a proactive attitude towards addressing the shortcomings in the crypto market. While the IFWG poses many technical policy recommendations, it should be noted that the overall deduction of this paper is that far too little has been done to ensure a secure regulatory framework for cryptocurrency to operate in a progressive manner succeeding its initial boom. Welcoming a secure regulatory framework that embodies consumer protection, security, and the overall well-being of the South African financial landscape is needed. In this case, the primary points of departure should be in consumer protection, cybersecurity, and overall financial regulation.

8 Conclusion

This paper sought to illuminate the realities of the current state of cryptocurrency in South Africa. Upon elaborating on the developments of taxation and the regulation of cryptocurrency in South Africa, it became clear that more needs to be done to properly regulate cryptocurrencies. It is crucial for the South African legislature to be proactive in these regulatory endeavours to avert the associated risks. Consumer protection, cybersecurity, and overall financial market regulation are the points of departure for the legislature, and should this be executed in a timely and efficient

112 Baker McKenzie (n 38).

113 FRRS Committee (n 58) 59.

manner, cryptocurrency may well occupy crucial space within financial technology in South Africa.

SCHOOL OF COURT: THE DEVELOPMENT OF THE RIGHT TO BASIC EDUCATION THROUGH LITIGATION IN SOUTH AFRICAN COURTS

by Abena Osei-Fofie* & Nicholas Herd**



Abstract

Education is a means to an end and a ‘good’ in-and-of-itself; but not everyone has equal access to it, if at all. South Africa’s history and extant legacy of colonial-apartheid has left in its wake structural barriers which continue to deny access to basic education for many, both young and old. Although there have been admirable reform efforts to engender system-wide improvements to access to and the quality of basic education through governance and the provisioning of resources, there are glaring shortfalls in making basic education ‘immediately realisable’ to ensure our constitutional vision of a transformed South Africa. Over time, non-governmental efforts aimed at realising basic education have turned to the courts to compel the state to make more equitable and qualitatively better provisions. In the historical and present circumstantial and structural status quo of basic education in South Africa, this paper explores the efficacy of such litigation efforts as well as litigation as a device to improve governance and access to basic education in our country.

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1 Introduction

‘Education is the most powerful weapon which you can use to change the world ... The power of education extends beyond the development of skills we need for economic success. It can contribute to nation-building and reconciliation ... A good head and a good heart are always a formidable combination.’ These words by Nelson Mandela show the importance of education in uplifting our society and in the holistic development of people.

The obstacle South Africa confronts is the lack of access to quality education by all, and the issue we address is whether litigation is an effective means to achieve such access in the absence of political will and given structural barriers.

We first chart the South African disparate colonial-apartheid history and outline its enduring impact on education across the country. Second, we detail what the right to education means as enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution), international law, and as interpreted by the courts. Thereafter, we discuss the role-players in the education sector, their powers, functions, and responsibilities, and how (often litigious) disputes arise despite a framework designed to ensure mutual cooperation. Last, by analysing case law, we illustrate the largely inadequate provisioning of education resources by the state, resulting in continued, if not aggravated, deprivation of the right to education; and examine the arguably successful litigation efforts by civil society organisations to ensure that the right to basic education is realised.

2 Essential context: The history of education and the historical development of education law to present

Colonialism, and indeed colonial apartheid, exacted its exigencies through structures of domination. Economically, the otherisation was profit-driven, with the exploitation of indigenous peoples as ‘cheap labour’ proving a lucrative enterprise;¹ spatially, the ideological bent of racial superiority produced legislation which sustained mass relocations of people in segregation efforts;² and politically, people

1 J Brickhill & Y van Leeve ‘Transformative Constitutionalism – Guiding light or empty slogan?’ in A Price and M Bishop (eds) *A transformative Justice: Essays in Honour of Pius Langa* (2015) at 143, 144 & 149.

2 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 121-124.

of colour were methodically disenfranchised and denied equal agency in governmental affairs.³

Racialised education systems underlie all of the aforementioned policies of conquest and exploitation, preserving white supremacy throughout South Africa's colonial history by deliberately denying people of colour empowerment through learning.⁴ This dates back to 1652 with the arrival of Dutch settlers at the Cape.⁵ South Africa has, since then, rolled out five different systems of education, from religio-settler instruction to the apartheid Bantu education policy.⁶

The Bantu education policy and its precursors imposed a separate and unequal system of education, the aftermath of which remains extant today.⁷ According to race, children were segregated, provided with separate facilities, and imparted with starkly different skills and knowledge.⁸ It is no surprise, given the racial *animus* driving these policy choices, that the black child suffered: taught qualitatively poorer curricula; socialised and impressed upon (arguably indoctrinated) only to be menial or industrial labourers; relegated to learn in under-developed or dilapidated infrastructure; and impeded by inherent structural and physical barriers to accessing higher education.⁹

The legacies of such a pervasive and unequal history have resulted in an inequitable present.¹⁰ In fact, the post-1994 South African

3 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC) paras 106-111; *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 64; *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17. There are, of course, a multitude of other ways in which the white supremacy predominant in systems, cultures, and knowledge bases under colonial apartheid tentacularly embedded itself into the fabric of our society, allowing it to survive into the democratic era.

4 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) (*Hoërskool Ermelo*) para 46. See also J Jansen 'Curriculum as a political phenomenon: Historical reflections on black South African education' (1990) 59(2) *The Journal of Negro Education* at 199.

5 L Chisholm 'Apartheid education legacies and new directions in post-apartheid South Africa' (2012) 8 *Storia del donne* at 84.

6 Jansen (n 4) 196-200.

7 Chisholm (n 5) 86. The regions affected by the disparate resource allocation still suffer the lowest quality education and worst performances outcomes.

8 Jansen (n 4) 196-200.

9 Jansen (n 4) 196-200; Nevondwe & Matotoka 'Promoting and protecting the right of access to basic education in South Africa' (2013) 57 *The Thinker* at 9; A Skelton ONR 420 (Education Law) (University of Pretoria) Lecture Notes (2020) (Skelton Lecture Notes).

10 Chisholm (n 5) 84. See also *Hoërskool Ermelo* (n 4) paras 45-46 (Moseneke J (as he then was) refers to these legacies as 'scars'). This is despite fundamental normative shifts in the corresponding legal and educational topography, namely the advent of the constitutional dispensation in 1994. For example, the democratic era has witnessed the introduction of the South African Schools Act 84 of 1996 (Schools Act), the National Education Policy Act 27 of 1996, and additional norms and standards. See also S Woolman & B Fleisch *The Constitution in the Class room: Law and education in South Africa 1994-2008* (2009) at 1; and

education system can be seen as a vector of inequality instead of a transformative cure.¹¹ schooling resources are generally sequestered in the same institutions which were well supported prior to 1994 and have the capital to self-sustain since schools that cater for the middle class and racially diverse students (e.g. former ‘Model C’ schools), are well-resourced compared to the under-resourced previously disadvantaged schools which serve primarily black students;¹² whilst poorer schools continue to be the site of learning for the vast majority of black learners who remain trapped by locality and circumstance borne of historical subjugation, largely unable to access anything but under-provisioned education.¹³ Girls are also at higher risk in the education system owing to issues such as teen pregnancy and gender-based violence resulting in poor performance or in them dropping out from school.¹⁴

Measured domestically or internationally,¹⁵ poor academic performance and the correlative sub-standard quality of education are prevalent.¹⁶ There is empirical evidence of a correlation between poverty and under-resourcing of schools and depressed pass rates.¹⁷ Thus, the South African education system remains plagued by apartheid and colonialism, with access to and quality of education still varying along racial and gendered lines.¹⁸ For this, Spaul has

10 De Vos ‘Basic education: Democratic South Africa has failed the children’ 3 December 2015 <https://www.dailymaverick.co.za/opinionista/2015-12-03-basic-education-democratic-south-africa-has-failed-the-children/> (accessed 27 September 2020).

11 Education efforts in South Africa also suffer from provisioning inadequacy, namely; insufficient infrastructure maintenance and consequent collapse, general (and particularly human) resource deficits, as well as a lack of skills and understanding on the part of educators. See below.

12 N Spaul ‘Schooling in South Africa: how low-quality education becomes a poverty trap’ in De Lannoy et al (eds) *South African child gauge* (2015) at 37-38; L Arendse ‘The South African Constitution’s empty promise of “radical transformation”: Unequal access to quality education for black and/or poor learners in the public education system’ (2019) 3 *Law, Democracy and Development* at 3.

13 Arendse (n 12) 2-5; Spaul (n 12) at 37-39.

14 Chisholm (n 5) 98.

15 N Spaul ‘Education in SA: A tale of two systems’ 31 August 2012 <https://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 26 September 2020).

16 Chisholm (n 5) 98; A Skelton ‘The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical examination of recent education law’ (2013) 46 *De Jure* at 4.

17 Spaul (n 15).

18 Arendse (n 12) 2-5; *Hoërskool Ermelo* (n 4) para 46. Gendered educational barriers (to success) take the form of, *inter alia*: patriarchal familial bars on enrolment in schools that are cultural and normative (prohibitions), as well as merely practical (i.e. traditional gender roles dictate how children are socialised and raised, and so less than an enforced prohibition, girls are often expected to remain at home to attend to the household and family needs instead of being raised to expect to be educated); gender-based violence; and teenage pregnancy.

even coined the phrase ‘the tale of two systems’.¹⁹

3 The right to basic education: Legal framework

3.1 South African domestic, international, and regional law frameworks

South Africa is a party to several binding and non-binding (‘soft’ law) international instruments that provide for the right to education.²⁰

The United Nations Declaration of Human Rights (UNDHR) makes universally free the rights to ‘elementary’ and ‘fundamental’ education, and further stipulates that elementary education is ‘compulsory’.²¹ Following in the UNDHR’s footsteps is the International Covenant on Economic, Social and Cultural Rights (ICESCR) which traces the right to education in Articles 13 and 14.²² According to the United Nations Committee on Economic, Social and Cultural Rights (CESCR), Article 13 constitutes the ‘most wide-ranging and comprehensive article on the right to education in international human rights law’ and can therefore be considered a mainstay for universal rights to education.²³ Article 13(2) grades access and availability to the right to education similar to the UNDHR:²⁴ free (accessible) and immediately available education at the primary stage; progressively accessible and available education at the

See also D Bhana ‘Girls are not free – In and out of the South African school’ (2012) 32 *International Journal of Educational Development* at 352-358; and Chisholm (n 5) 98.

19 Spaul (n 15).

20 C Simbo ‘Defining the term basic education in the South African Constitution: An international law approach’ 2012 *Law Democracy and Development* at 173; Nevondwe & Matotoka (n 9) 9. ‘Soft’ law consists of ‘guidelines, declarations and recommendations by international bodies. These are not ‘binding’ laws, but they are persuasive guides to interpreting and applying rights’. See also C McConnachie et al ‘The Constitution and the right to a basic education’ in F Veriava et al *Basic Education Rights Handbook* (2017) at 18-22.

21 Universal Declaration of Human Rights, 1948, 217A(III) Art 26(1). Art 26(2) provides that ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms’. See also L Arendse ‘The obligation to provide free basic education in South Africa: An international law perspective’ (2011) 14(6) *PER/PELJ* at 98-99.

22 International Covenant on Economic, Social and Cultural Rights (03 January 1976) UN Treaty Series (993) 3 (ICESCR). South Africa ratified the ICESCR in January 2015. See McConnachie et al (n 20) 18.

23 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 13: The Right to Education (Article 13) (CESCR General Comment No. 13). It is contended that the ICESCR follows in the UNDHR’s footsteps because it is, for the most part at Article 13, a reiteration of the terms of the UNDHR. Both provide for the right to education and both grade the accessibility and availability of the right against the stage and importance of the education.

24 Arendse (n 12) 98-99.

secondary stage; and qualified progressively available tertiary education.²⁵

The United Nations Convention on the Rights of the Child (UNCRC) requires the progressive realisation of education, on the basis of equal opportunity, as follows:²⁶ primary education as compulsory and free;²⁷ available and accessible secondary education that is free or coupled with financial assistance where needed;²⁸ and accessible higher education per capacity.²⁹ Thus, whilst the UNCRC is arguably more regressive than the ICESCR in subjecting the right to education at all stages to the valve of 'progressive realisation',³⁰ the UNCRC claws back access and availability through other terms such as the recognisance and provisioning for indigent learners.

Africa's regional version of the UNCRC is the African Charter on the Rights and Welfare of the Child (ACRWC) which commits all state parties, through Article 11, to the provisioning of the right to education in similar detail to the UNCRC.³¹ The ACRWC singles out women, disadvantaged children, and the need to improve school attendance and reduce drop-out rates.³²

The above international law is relevant to South African domestic law because: (1) customary international law binds the Republic on the international plane and influences domestic agenda setting, including policy and legislative arrangements; (2) customary international law is law in the Republic (save to the degree inconsistent with the Constitution or an Act of Parliament),³³ and domestic legislation must be interpreted consistently with

25 ICESCR (n 22) Art 13(2); R Damina & E Durojaye 'Four years following South Africa's declaration upon the ratification of the ICESCR and jurisprudence on the right to basic education: A step in the right direction?' (2019) 23 *Law Democracy and Development* at 270; Skelton Lecture Notes (n 9).

26 See Arendse (n 12) 98-99.

27 United Nations Convention on the Rights of the Child (20 November 1989) UN Treaty Series (1577) 3 (UNCRC) (Ratified by South Africa: 16 June 1995) Art 28(1)(a).

28 UNCRC (n 27) Art 28(1)(b).

29 UNCRC (n 27) Art 28(1)(c).

30 This as opposed to the standard of 'immediate realisation' applicable to primary education under the ICESCR.

31 African Charter on the Rights and Welfare of the Child (29 November 1999) OAU Doc. CAB/LEG/24.9/49 (ACRWC) (Ratified by South Africa: 2000) Art 11. See also Centre for Human Rights 'South Africa's reporting to AU body is an opportunity to advance children's rights: Statement on South Africa's second report submitted under the African Charter on the Rights and Welfare of the Child' 19 November 2020 <https://www.chr.up.ac.za/latest-news/83-news-chr/1102-south-africa-s-reporting-to-au-body-is-an-opportunity-to-advance-children-s-rights-statement-on-south-africa-s-second-report-submitted-under-the-african-charter-on-the-rights-and-welfare-of-the-child> (accessed 27 September 2020).

32 ACRWC (n 31) Art 11(3)(d).

33 Constitution of the Republic of South Africa, 1996 (Constitution) sec 232; J Dugard *International law: A South African perspective* (2016) at 49-68.

international law where reasonably possible;³⁴ and (3) international law must be considered when courts interpret rights in the Bill of Rights.³⁵ International law relating to education, therefore, has a discernible role in the South African domestic dispensation.³⁶

3.2 South African constitutional law framework

The South African Constitution entrenches the right to education at section 29³⁷ with this right encompassing the following: the right to education, including basic and further education;³⁸ the right of instruction at public establishments (in one's choice of an official South African language insofar as reasonably practicable);³⁹ the right to establish and operate independent education institutions subject to certain constitutional conditions;⁴⁰ and adult basic education.⁴¹

The right to education under section 29 has negative and positive dimensions.⁴² The right requires fulfilment by the state (i.e. generates positive obligations for provisioning) and has been held to be 'immediately realisable' as opposed to being an obligation that the state can discharge progressively over time.⁴³ Therefore, the state must encourage and provide for education through the implementation of an education system that reacts to the needs of our country.⁴⁴ The upshot is that government is required to meet the

34 Constitution (n 33) sec 233; Dugard (n 33) 62; McConnachie et al (n 20) 18.

35 Constitution (n 33) sec 39(1)(b); Dugard (n 33) 62-63; McConnachie et al (n 20) 18; Arendse (n 21) 100. In *S v Makwanyane*, the Constitutional Court interpreted 'international law' (in the context of the interim Constitution) broadly to include both directly binding and non-binding sources. See *S v Makwanyane* 1995 (3) SA 391 (CC) paras 35 & 413-414.

36 The international educational frameworks examined above reflect the '4 As' of education namely, availability, accessibility, acceptability, and adaptability. See CESCR General Comment No 13 (n 23); and F Coomans 'Identifying the key elements of the right to education: A focus on its core content' (2007) *CRIN* at 3.

37 S Woolman & M Bishop 'Education' in S Woolman et al (eds) *Constitutional Law of South Africa* (2013) Ch 57.

38 Constitution (n 33) sec 29(1); Woolman & Bishop (n 37) Ch 57; Arendse (n 21) 97-98.

39 See *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC); *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* 2020 (1) SA 368 (CC); and Woolman & Bishop (n 37) Ch 8, 42, 46, 56, 57 & 59-76.

40 Woolman & Bishop (n 37) Ch 57 & 76-95.

41 Constitution (n 33) sec 29(1).

42 In the negative sense, this means that the state and its agents must not interfere with or deprive the existing enjoyment of, access to, or exercises of the right; and in the positive sense, the state must construct, develop, and supply. See Woolman & Bishop (n 37) Ch 57.9-32; Arendse (n 21) 110-111; and Nevondwe & Matotoka (n 9) 13.

43 T Boezaart *Child law in South Africa* (2017) at 519; A Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *SAPL* at 403; T Mtsweni 'The fourth industrial revolution: a case for educational transformation' (2020) 2 *PSLR* at 321.

44 L Nevondwe & M Matotoka 'Promoting and protecting the right of access to basic education in South Africa' (2013) 57 *The Thinker* at 9.

operational and maintenance costs in provisioning for and facilitating (at least basic) education in South Africa.⁴⁵

3.3 Transformative constitutionalism

‘Transformative constitutionalism’ is an elusive concept used to describe both ends and means.⁴⁶ Under the conceptualisation, the South African constitution is a project not yet complete – that will possibly never be complete – in an effort to continuously improve the normative and material conditions in the South African society to ensure substantive equality.⁴⁷ It has been conceived as a bridge to nowhere in particular, but with an eternal goal in sight.⁴⁸

The imperative of ‘transformation’ involves revisioning, which includes restructuring the South African state in all its instantiations;⁴⁹ the re-distribution of resources in restitutive efforts to settle our pre-1994 moral and material ‘debts’;⁵⁰ and the re-vamping of paradigms, attitudes, and institutional cultures in politics and the law.⁵¹ It enjoins the legislative, executive, and judicial branches to act in service of aspirations of a more just, equal, and free existence for each South African.⁵²

Substantive equality is an essential ingredient in transformative constitutionalism, especially in consideration of socio-economic rights.⁵³ Substantive equality is the equality of outcomes and conditions, as it recognises that there are patterns of systemic advantage and disadvantage based on, amongst other things, class, gender, and race.⁵⁴ It is obvious that one of the primary means of achieving transformation is through generating material conditions

45 Woolman & Bishop (n 37) Ch 57.9-32; Arendse (n 21) 110-111; Nevondwe & Matotoka (n 9) 13.

46 P Langa ‘Transformative constitutionalism’ (2006) 3 *Stellenbosch Law Review* at 351; Brickhill & van Leeve (n 1) 142.

47 Langa (n 46) 352. See also C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* at 253.

48 Langa (n 46) 352-354; Brickhill & van Leeve (n 1) 152.

49 Langa (n 46) 352; Brickhill & van Leeve (n 1) 143.

50 And, arguably, any debts arising post-1994. See Albertyn (n 21) 253; C Albertyn & B Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) *SAJHR* at 249; and Brickhill & van Leeve (n 1) 152.

51 K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* at 150, 151, 155 & 166. For example, in legal and institutional culture, there needs to be a shift from an approach of ‘authority’ (merely asserting power) to ‘justification’ (the exercise of public power must be justified; not eschewing accountability; exercising power in an open, transparent, responsive, and responsible manner; and evidencing this through substantiating with reasons and engaging in dialectical dialogue). See also Langa (n 46) 353; Brickhill & van Leeve (n 1) 152; and E Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* at 32.

52 Langa (n 46) 358.

53 Langa (n 46) 352.

54 *Minister of Finance v van Heerden* 2004 6 SA 121 (CC) para 142; Langa (n 48) fn 9.

for the development of individuals and communities.⁵⁵ Implicit in this, is the erasure of the ring-fencing that has guarded, and continues to guard, colonial shareholding in the South African enterprise. These fences (or fault-lines) can be normative and doctrinal,⁵⁶ or physical and structural, or both.⁵⁷

As a postulation of constitutional law, transformative constitutionalism operates as a normative device in policy-making and legislating, in the implementation and enforcement of prescripts and – whether in ‘lawfare’ and public interest litigation or ‘ordinary’ case – in adjudication by the courts of law.⁵⁸ The courts have become an epicentre of policy-change in South Africa under the 1996 Constitution, with Davis referring to the veiled political battles which play out in the courtrooms as ‘lawfare’.⁵⁹ There are, however, debates raging about whether the judiciary is going too far in its interventions and, equally, whether it goes far enough.

Under transformative constitutionalism, judges ought to adopt a substantive approach to deciding cases. Moseneke has coined this ‘transformative adjudication’.⁶⁰ In adopting this approach, judges must acknowledge their personal preferences and prejudices, disable them, and prevent them from entering the decisional equation of case adjudication.⁶¹ The courts must acknowledge the conditions in which the law subsists and must be context-sensitive. The courts are obliged to take account of the policy and moral contents and implications of law and make human decisions to solve human problems,⁶² therein eschewing formalist techniques.⁶³

Transformative adjudication, as the name suggests, is a mode of interpretation in pursuance of transformative constitutionalism.⁶⁴ Its aim is to have judges appreciate the scope, nature, and implications of injustices of the past in present cases and to have those judges

55 Albertyn (n 47) 257.

56 Albertyn (n 47) 254.

57 Kriegler J in *Fedsure* captures the physical and spatial discrepancies pertaining to life in post-apartheid South Africa where a lack of development or maintenance of infrastructure, economic marginalisation, and overcrowding were and remain symptoms of underlying, more systemic oppression by a malicious, and now arguably indifferent, state. See *Fedsure* (n 2); and Albertyn (n 47) 254-255.

58 Langa (n 46) 352; D Moseneke ‘The fourth Bram Fischer memorial lecture: Transformative adjudication’ (2002) *SAHRJ* at 309.

59 D Davis & M le Roux *Lawfare - Judging Politics in South Africa* (2019).

60 See, generally, Moseneke (n 58).

61 Langa (n 46) 353.

62 Moseneke (n 58) 310, 316 & 317; Langa (n 46) 353; Brickhill & van Leeve (n 1) 152 & 164.

63 Brickhill & van Leeve (n 1) 161; Moseneke (n 58) 317.

64 Moseneke (n 58) 310, 316 & 317.

advance interpretations that are accommodative and remedial;⁶⁵ and which serve to redress historical injustices.⁶⁶

Judges in South Africa have always been ‘social engineers’,⁶⁷ but now more so than ever under transformative constitutionalism and the injunction to promote the Bill of Rights.⁶⁸

3.4 Realising education in South Africa ‘immediately’ under section 29(1)

Unlike other socio-economic rights entrenched in the South African Constitution,⁶⁹ the right to basic education, including basic adult education, contained in section 29(1), is not subject to ‘progressive realisation’.⁷⁰

This position was confirmed by the Constitutional Court in *Juma Musjid*.⁷¹ *Juma Musjid* was the first judgment in which the Constitutional Court gave a comprehensible interpretation of section 29(1)(a).⁷² Despite the fact that, constitutionally, education in South

65 See, generally, Moseneke (n 58); and Langa (n 46).

66 Moseneke (n 58) 318. An example of an area where extensive and honest redress is sorely needed, is basic education. See also Brickhill & van Leeve (n 1) 151.

67 C Hoexter ‘Judicial policy revisited: Transformative adjudication in administrative law’ (2008) 24 *SAJHR* at 283.

68 Section 39(1) of the Constitution, (n 33), demands, *inter alia*, that courts ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’; section 39(2) of the Constitution demands that courts, tribunals and forums ‘must promote the spirit, purport and objects of the Bill of Rights’. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 35.

69 These rights generally have internal limitations for the finite nature and scarcity of resources and afford government a margin of appreciation – as recognised by the Court in *Bato Star* (n 68) para 35. A typical formula is: ‘which the state, through reasonable measures, must make progressively available and accessible’. See Constitution (n 33) sec 29(1)(b). See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 32; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 34; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) paras 52-56; Brickhill & van Leeve (n 1) 150; and Mtsweni (n 43) 333.

70 Mtsweni (n 43) 333.

71 *Governing Body of Juma Musjid Primary School v Essay NO and Others (Centre for Child Law and another as amici curiae)* 2011 (8) BCLR 761 (CC) (*Juma Musjid*) para 37 (‘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’). The state must, therefore, take reasonable and justiciable measures to ensure ready access and availability of the right.

72 *Juma Musjid* (n 71) para 37.

Africa is not compulsory,⁷³ nor necessarily an entitlement to be availed universally for free,⁷⁴ the right must be made accessible.

In *Juma Masjid*, Nkabinde J made it clear that the right to basic education is immediately realisable. This is because the right has no internal qualifications subjecting it to being ‘progressively realised’ within ‘available resources’ or subject to ‘legislative measures’.⁷⁵ Thus, aside from a law of general application passing muster under section 36(1) limiting the right and buying government time and latitude in resource allocation and planning, the right is ‘not one to be made available gradually to people over time’.⁷⁶

4 Policy-making and governance disputes

4.1 The structure of the South African education system: Governance outline

South Africa has adopted a democratic or subsidiary approach to education, whereby general, normative frameworks are developed at a national level with day-to-day (executive and administrative) school governance and management devolved to the provincial administrations and schools themselves.⁷⁷ The tiered, subsidiary structure is designed to decentralise authority to allow those affected

73 The Schools Act, (n 10), however makes it compulsory. See section 3(1) which renders school attendance compulsory from age seven to fifteen or up until Grade 9. Mtsweni criticises the quantitative approach under the Schools Act and *Juma Masjid*, arguing that it impedes ensuring quality education. See Mtsweni (n 43) 327; Chisholm (n 5) 92; and 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) 46(1) *De Jure* at 1.

74 Levying fees is arguably not an unjustifiable limitation on the right to education provided that the fees charged are reasonable (i.e., proportionate) and, consequently and in general, that learners are not excluded owing to their financial status. See Woolman & Bishop (n <XREF>) Ch 57.24-29; and I Oosthuizen & J Beckman ‘A history of educational law in South Africa: An introductory treatment’ (1998) 3 *Australia & New Zealand Journal of Law & Education* at 67.

75 Woolman & Bishop (n 37) Ch 57.24-29.

76 Woolman & Bishop (n 37) Ch 57.10; Mtsweni (n 43) 333 (‘The right is not contingent on the availability of resources for its realization. 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’). It is concerning that the government made a declaration that it would only realise education within the framework of national education policies and available resources in what appears to be an attempt by government to avoid its responsibilities under section 29 of the Constitution and Article 13 of the ICESCR. Having regard for the holding in *Juma Masjid*, it is unlikely that the government’s position, derogating from the right, would survive scrutiny if challenged. See also McConnachie (n 20) 18.

77 The structure and functioning of the relationships are crystalised in the Schools Act. Generally speaking, the Minister of Basic Education prescribes standards nationally; the MEC’s and HoD’s in the provincial spheres broadly implement those standards by developing policy and devising arrangements within their provinces; School Governing Bodies (SGB’s) make school policies and exercise oversight; and

by decisions to have more meaningful participation in decision-making themselves or through their proximate representatives,⁷⁸ providing for increased ‘grassroots’ and ‘democratic’ participation and,⁷⁹ hopefully, enhanced decision-making.⁸⁰

Inherent to the structure is a tension between the tiers of decision-making and governance.⁸¹ School Governing Bodies (SGBs) possess wide policy powers,⁸² but provincial and national governments set standards and make arrangements (effectively, make policy) for education whereas SGBs are autonomous and responsible entities, governing the school and tending to its affairs.⁸³ Despite the autonomous status of SGBs, they remain organs of state and are not free of executive control.⁸⁴ The most immediate control mechanism placed on SGBs are HoDs, who are empowered to go as far as to intervene in policy matters and even withdraw the functions of SGBs.⁸⁵ Whilst there is often latitude for each authority to exercise their respective powers within this tiered framework without conflict, the inherent subject matter and functional co-extensiveness of their roles do result in disputes arising from time to time.⁸⁶

4.2 Structure of the South African education system: Disputes in the courts

The Constitutional Court’s decision in *Hoërskool Ermelo* concerned the constitutional right to be taught in an official language of one’s choice,⁸⁷ and the power of the Head of Department of Education (HoD) to withdraw the function of a school governing body to

77 School Principals are charged with day-to-day operational matters. See S Mansfield-Barry & L Stwayi ‘School Governance’ in F Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 76.

10 Mansfield-Barry & Stwayi (n 77) 80; Woolman & Fleisch (n 10) 5; E Serfontein & E de Waal ‘The effectiveness of legal remedies in education: A school governing body perspective’ (2013) 46 *De Jure* at 45. See also M Murcott & W van der Westhuizen ‘The ebb and flow of the application of the principle of subsidiarity – critical reflections of *Motau* and *My Vote Counts*’ (2015) 7 *Constitutional Court Review* at 43.

79 *Hoërskool Ermelo* (n 4) 57.

80 SGB’s consist of: The School Principal (*ex officio*), educators, non-educators, parents, and learners.

81 *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) (*Welkom*) para 49; *Hoërskool Ermelo* (n 4) para 56.

82 School Governing Bodies (SGB’s) have extensive internal prescriptive powers – compared by the Constitutional Court to mini-legislatures – in that they are competent to make policies on, *inter alia*, admission, school discipline, language, culture, religion, schools fees, and pregnancy. See also *Welkom* (n 81) para 63; and Mansfield-Barry and Stwayi (n 77) 78.

83 *Welkom* (n 81) para 63; Mansfield-Barry & Stwayi (n 77) 78.

84 *Hoërskool Ermelo* (n 4) paras 77-78 & 81; *Welkom* (n 81) para 143.

85 Mansfield-Barry & Stwayi (n 77) 78.

86 Serfontein & de Waal (n 78) 54 & 57.

87 Constitution (n 33) sec 29(2). Disclaimer: A version of this summary (of *Hoërskool Ermelo*) was authored and submitted by Nicholas Herd to AfricanLII as work

determine the school's language policy.⁸⁸ English-medium schools in the region of Ermelo were full, whilst Hoërskool Ermelo had the physical capacity to accommodate more learners.⁸⁹ Following the Hoërskool Ermelo Governing Body's refusal to amend its language policy to provide for teaching in both Afrikaans and English in order to accommodate non-Afrikaans speaking learners in need, the HoD withdrew the Governing Body's function to determine the school's language policy.⁹⁰ Through the appointment of an interim committee, the HoD caused Hoërskool Ermelo's language policy to be amended to provide for teaching in both Afrikaans and English, thereby allowing the enrolment of the non-Afrikaans speaking learners.⁹¹

The Court ruled that whilst the state (under the Schools Act) grants the authority to SGBs to determine the language policies of public schools, the state continues to carry obligations under section 29(2) of the Constitution, namely the obligation to ensure effective access to teaching in the language of choice.⁹² SGBs are entrusted with a public resource (the school and its assets) which must be managed not only in the interests of current learners, but also in the interests of the community and in light of the values of the Constitution.⁹³ Measures taken by SGBs and the state must be aligned to what is reasonably achievable and responsive to the need for historical redress.⁹⁴

In order for the state to fulfil its obligations under section 29(2) of the Constitution, it must be able to intervene where SGBs exercise their power unreasonably and at odds with the constitutional promises to receive basic education and for learners to be taught in a language of their choice.⁹⁵ However, the Court found that the HoD's decisions to withdraw the Governing Body's function to determine the school language policy and appoint the interim committee were technically invalid because the decisions were taken contrary to the prerequisites and procedural fairness requirements under the Schools Act.⁹⁶ Thus, the Court struck a balance between competing considerations: SGB autonomy, oversight and intervention by government, and fundamentally, the accrued and outstanding rights of learners to basic education. On outcomes, the following can be

product. The summary is intended to be hosted on a mobile application for Members of Parliament (RSA).

88 Schools Act (n 10) sec 22.

89 *Hoërskool Ermelo* (n 4) paras 7-11.

90 *Hoërskool Ermelo* (n 4) para 21.

91 *Hoërskool Ermelo* (n 4) paras 21-26.

92 *Hoërskool Ermelo* (n 4) paras 43 and 101.

93 *Hoërskool Ermelo* (n 4) para 80.

94 *Hoërskool Ermelo* (n 4) para 81.

95 *Hoërskool Ermelo* (n 4) para 68.

96 *Hoërskool Ermelo* (n 4) paras 83-92. The sections in the Schools Act and approach of the Court are sensitive to the political devolution power and autonomy of SGBs as outlined above.

distilled from the case: SGBs are not free from state intervention, the state must intervene to safeguard rights, and the interests of learners placed in precarious positions are paramount.

In *Rivonia Primary School*, the Constitutional Court determined that whilst SGBs may not unfairly discriminate through admission policies, admission policies are flexible instruments to be devised by SGBs (which includes a determination of school capacity), subject to ultimate control over admissions being exercised by the HoD.⁹⁷ The Court also treated and applied the obligation to co-operate and resolve disputes extra-curially, and approach the courts as a last resort.⁹⁸ The difficulty in *Rivonia Primary School* was the broader inequality faced in schooling. The school, a former Model C school, declined to admit a Grade 1 learner, citing excess capacity despite, comparatively, 25% of schools nationwide admitting learners in excess of capacity.⁹⁹ From this broader view, Arendse criticises the judgment as overly textual and formalistic, failing to take account of the true situation of the school in the broader educational context.¹⁰⁰

In *FEDSAS*,¹⁰¹ the Constitutional Court was approached with challenges to regulations issued by the Gauteng MEC for Education.¹⁰² The Court held that the regulations barring the free access to information by prospective schools served the legitimate purpose of preventing them from unfairly discriminating against prospective learners, and were thus valid.¹⁰³ In keeping with *Rivonia Primary School*, the Court reiterated that SGBs are not ultimate power-holders, and accordingly lack absolute control over the determination of admission policies. To this end, the Court reiterated the oversight and intervention powers reposing in the HoD which serve as a check and balance on self-serving decision-making by SGBs.¹⁰⁴ Lastly, and although the Court did not traverse in detail the challenge to the default feeder zones of 5km radius because it instead invalidated the zone-setting decision on procedural grounds,¹⁰⁵ the Court did

97 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) (*Rivonia Primary School*) para 53.

98 *Rivonia Primary School* (n 97) paras 69-78.

99 L Arendse 'Beyond Rivonia: transformative constitutionalism and the public education system' (2014) 29 *Southern African Public Law* at 159.

100 Arendse (n 99)168.

101 *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC) (*FEDSAS*).

102 The first challenge was with regards to Regulation 3(7) which barred prospective schools from seeking confidential records of learners from previous (current) schools. The second related to rules made by the MEC under Regulation 4(2) which established default feeder zones of 5km radius from the prospective school, requiring priority be accorded to learners within the 5km zone. Lastly, the third challenge regarded Regulations 5(8) and 8 which, respectively, empowered the district head to place learners unplaced by the end of admission periods and to declare the capacities of schools across the district.

103 *FEDSAS* (n 101) paras 30-33.

104 *FEDSAS* (n 101) paras 40-48.

105 *FEDSAS* (n 101) para 39.

acknowledge that the contention that the 5km zones had the effect of entrenching the apartheid geography and locking students out of schools on racial lines had merit.¹⁰⁶

In *Welkom*,¹⁰⁷ Khampepe J (Moseneke DCJ and van der Westhuizen J concurring) dismissed the appeal, finding that the HoD's decision to direct the school principals to re-admit learners who had been excluded under school pregnancy policies (for falling pregnant) was unlawful;¹⁰⁸ but simultaneously ordered that the policies be revised for a *prima facie* want of constitutionality, in that the exclusion of learners for pregnancy for periods of one year facially violated their rights to 'human dignity, to freedom from unfair discrimination, and to receive a basic education'.¹⁰⁹ As a corollary, Khampepe J held that although SGBs have a role akin to a mini legislative authority, they cannot devise exclusionary pregnancy policies.¹¹⁰ Khampepe J again reiterated the duty to co-operate incumbent upon role players in the education sector.¹¹¹ Froneman J and Skweyiya J wrote separately (also joined by Moseneke DCJ and van der Westhuizen J) to emphasise the need to place the best interests of learners at the forefront of educational decision-making, especially in the application of policies;¹¹² and that redress and interventions to achieve such decisional objectives, if interim or otherwise, must be taken through co-operation.¹¹³ Zondo J held,¹¹⁴ in dissent, that the exclusions under the policies were unlawful in that they amounted to suspensions or expulsions under the Schools Act, and accordingly, the HoD was obliged to intervene to ameliorate the injury caused by the policy application.¹¹⁵

The following principles or guidelines can be distilled from the above: (1) education authorities have an unequivocal obligation to meaningfully engage and resolve disputes in terms of a duty to co-

106 *FEDSAS* (n 101) para 38.

107 *Welkom* (n 81); M Bishop & J Brickhill 'Constitutional Law' (2013) 3 *Juta Quarterly Review Constitutional Law* at 1. The Court split three ways with no majority, although the appeal was dismissed in that the order secured a majority of five to four.

108 This was because, although the HoD had supervisory authority, the HoD had to exercise its powers in terms of the Schools Act.

109 Bishop & Brickhill (n 107). The revision was ordered to be in consultation with the HoD. The order was also arguably in line with ACRWC which requires, at Art 11(6), that States 'shall take appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability'. Translation: children who become pregnant should not be excluded on account of their pregnancy and their education should be able to resume as soon as possible after giving birth.

110 Bishop & Brickhill (n 107).

111 Bishop & Brickhill (n 107).

112 Bishop & Brickhill (n 107).

113 Bishop & Brickhill (n 107).

114 Bishop & Brickhill (n 107). Zondo J was joined by Mogoeng CJ, Jafta J, and Nkabinde J.

115 Bishop & Brickhill (n 107).

operate and consult before resorting to the courts for recourse; (2) the authorities within the education system – namely, the Minister, MECs, HoDs, SGBs, and school principals – occupy mutually adjunctive positions, and do not carry out their functions in isolation; (3) whilst SGBs serve as mini-legislatures within their respective governance settings, their powers are subject to procedurally fair and reasonable intervention by the relevant state officials under the Schools Act and in terms of the State’s duties at constitutional law; constitutional constraints, namely non-infringement of the Bill of Rights through direct or indirect exclusion and unfair discrimination racial or other grounds; and, lastly, (4) in taking decisions, the best interests of learners must be prioritised within the broader educational context encompassing history, geography, resource allocation, and access amongst other things.

Unfortunately, the authorities in education governance will likely continue to approach courts in instances where the power-sharing cooperative built into the Schools Act fails to resolve tensions produced by power struggles. It is hoped that the courts, unlike the arguably narrow and restricted decisionism displayed in *Rivonia Primary School*, will instead appreciate their legitimate role in the separation of powers under transformative constitutionalism and seek to remedy historical injustices in contemporary cases.¹¹⁶

5 Case law examination: Provisioning for education

There is an overt need for redress within the South African educational sector: former Model C school outputs are markedly better than poverty-stricken, disadvantaged schools,¹¹⁷ and there is, as noted above, a strong, deleterious relationship between low performance and the disadvantage factor.¹¹⁸ Disadvantage can be ascribed to:¹¹⁹ the extant history of apartheid’s formalised inequality and subjugation in education,¹²⁰ as well as subsequent inadequate maintenance and construction of infrastructure, a lack of transport, non-delivery of learning material, human resource deficits, etc; and absent or abdicated management, oversight, and long-term planning from government at all levels.¹²¹

116 Arendse (n 99) 163; Moseneke (n 58) 314; Mtsweni (n 43) 327.

117 Spaul (n 15).

118 Spaul (n 15).

119 F Veriava ‘Basic education provisioning’ in F Veriava et al *Basic Education Rights Handbook* (2017) at 220; Spaul (n 15).

120 *Juma Masjid* (n 71) para 42.

121 F Veriava ‘The Limpopo textbook litigation – A case study into the possibilities of a transformative constitutionalism’ (2016) 32 *SAJHR* at 336.

Education is an empowering right with transformative potential – the potential to lift individuals and entire communities out of abject poverty and into the economy.¹²² However, education is only empowering when accessible. Infrastructure, textbooks, and other baseline resources form the threshold for access to education.¹²³ In many ways, accessing education is similar to a water well – it is only good for as much water as one can draw out of it; if the well is too far to reach, runs dry, is not maintained, or is not dug at all, it is inadequate.¹²⁴

Persistent inadequacy in the provisioning for basic education, despite the right to basic education being immediately realisable under the Constitution, has led to interventions by civil society becoming more common, if not the motive force for provisioning in many instances.¹²⁵ So too have the courts had to fashion remedies to address violations of the right to basic education at the coalface of the separation of powers.¹²⁶

In *Minister of Basic Education v Basic Education for All (BEFA)*, the Supreme Court of Appeal (SCA) confirmed important aspects of the right to education relating to provisioning:¹²⁷ (1) textbooks prescribed for learners are a guarantee under section 29(1) of the Constitution, and as a corollary, the government is duty-bound to provide them before the commencement of the academic year concerned,¹²⁸ (2) and that delivery to some, but not others, fails the standard inherent in the duty to provide.¹²⁹ Whilst the SCA maintained comity with the Constitutional Court (in *Juma Masjid*) by rejecting budgetary constraint defences and maintaining that the right is immediately realisable,¹³⁰ and whereas the SCA effectively endorsed a substantive approach to adjudicating education provisioning cases,¹³¹ according to Veriava,¹³² it critically failed to devise an objective test for determining the content of the right.¹³³

122 *Juma Masjid* (n 71) para 41; CESCR General Comment No 13 (n 23) para 1; Mtsweni (n 43) 323 & 325.

123 *Juma Masjid* (n 71) para 43; F Veriava ONR 420 (Education Law) (University of Pretoria) Lecture Notes on Educational Provisioning (2020) (Veriava Lecture Notes); Mtsweni (n 43) 331.

124 See A Skelton 'Leveraging funds for school infrastructure: The South African 'mud schools' (2014) *International Journal of Educational Development* at 39 on how the state of schools often reflects the socio-economic situation of learners and the community.

125 Veriava (n 119) 321-322.

126 Veriava (n 119) 321-322; Mtsweni (n 43) 334-338.

127 2016 (1) All SA 369 (SCA) (*BEFA*) para 8-11.

128 Veriava (n 119) 322.

129 *BEFA* (n 127) paras 50-52.

130 *BEFA* (n 127) paras 36-37.

131 This is because the Court assessed the impact and results of the incomplete delivery of textbooks rather than the government's policies on the matter.

132 Veriava (n 119) 322.

133 As above.

In *Madzozo* the government's systemic failure to provide desks and chairs for Eastern Cape schools was an issue.¹³⁴ The High Court applied the standard that government must take all reasonable measures to provide for the right.¹³⁵ The Court determined that the constitutional right to basic education is a right to 'a range of educational resources',¹³⁶ and that the lack of sufficient and appropriate desks and chairs violates this right.¹³⁷ The Court, therefore, rejected the reasonableness approach argued by the government, dismissed the budgetary constraints arguments raised in defence, and applied the immediately realisation principle, requiring the government to proactively budget and deliver the desks and chairs within a 90 day period.¹³⁸ Subsequent failures to comply with the Court's order directing delivery within 90 days eventually resulted in a settlement (made an order of court), the establishment of a task team, and regular ministerial reporting on the terms of a structural order.¹³⁹

In *Tripartite*, the Eastern Cape High Court had to determine whether the right to basic education entitles learners who would not be able to attend school owing to prohibitive distance and cost factors to free transport.¹⁴⁰ The Court held that the right does include such entitlement as it would otherwise be meaningless if learners were unable to be present at and receive their education at school.¹⁴¹ The Court ordered the government to provide such transport and required reporting on progress in adopting a policy to this effect.

Educators can also be considered 'provisions' encompassed by the right to basic education.¹⁴² The issue of educator position or 'post provisioning' was central in *Centre for Child Law v Minister of Basic Education*, and subsequent enforcement litigation.¹⁴³ Post provisioning entails a process in which a provincial department of education declares the amount of government-paid teaching posts that will be allocated to a public school on an annual basis.¹⁴⁴ After the Provincial Department of Education failed to declare its post provisioning, the Centre for Child Law and seven SGBs sought an order

134 *Madzozo v Minister of Basic Education* 2014 (3) SA 183 (ECG).

135 Veriava (n 121) 21.

136 As above. Resources such as schools, classrooms, teachers, teaching materials, and appropriate facilities for learners.

137 Veriava (n 119) 322.

138 *Madzozo* (n 134) paras 17 & 40.

139 Veriava (n 121) 21.

140 *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) (*Tripartite*) para 2.

141 *Tripartite* (n 140) para 17.

142 S Sephton 'Post provisioning' in F Veriava et al *Basic Education Rights Handbook* (2017) at 249. Government, arguably artificially, creates shortages of teachers in schools by misallocating them, resulting in an imbalance, i.e. some schools are at surplus demand, and other schools are correspondingly under-staffed.

143 *Centre for Child Law v Minister of Basic Education* 2013(3) SA 183 (ECG) para 2.

144 Sephton (n 142) 249.

compelling the government to declare and implement non-teacher and teacher posts.¹⁴⁵ As a result of these cases, the legal position on short-term post-provisioning is that teachers may be appointed temporarily for the short-term, but permanently thereafter to ensure access to education by keeping posts filled.¹⁴⁶ The High Court also established that ancillary support staff needed to be appointed to fulfil the right to basic education.¹⁴⁷ The government, however, did not comply with the settlement agreement nor did it reimburse the schools for the payment of the staff's salaries who were meant to be paid by the government.¹⁴⁸ Eventually, the government's assets were attached due to non-payment, and this punitive order compelled the government to reimburse the schools.¹⁴⁹

In *Linkside I*, to pre-empt Departmental non-compliance which plagued the litigation in *Centre for Child Law v Minister of Basic Education*,¹⁵⁰ an order was sought (and granted) deeming appointments to have been made 'if the department failed to appoint recommended teachers to the posts after a specified period of time'.¹⁵¹ The Court in *Linkside I* even permitted the attachment of Ministerial and MEC assets for the recovery debt arising from the department failing to 'reimburse the schools in compliance with the order'.¹⁵² The unpaid salaries of teachers amounted to R28 million.¹⁵³ In *Linkside II*, the Court held that the government's 'ongoing failure' to appoint teachers was an infringement of the right to education,¹⁵⁴ thereby confirming the *Linkside I* position.¹⁵⁵ In this second case, additional schools opted-in to the class action and the Court ordered that a claim's administrator be appointed to ensure the reimbursement of R81 million in outstanding salaries to the 90 schools that joined in the class action with the same deeming clause.¹⁵⁶ Ultimately, almost all of the terms of the order were complied with, namely that all the named teachers were appointed to the vacancies.¹⁵⁷ Sephton observes that the *Linkside I* and *II* strategies,

145 As above.

146 *Centre for Child Law v Minister of Basic Education* (n 143) para 32; Sephton (n 142) 256.

147 *Centre for Child Law v Minister of Basic Education* (n 143) para 35; Sephton (n 142) 256.

148 Veriava Lecture Notes (n 123).

149 Veriava Lecture Notes (n 123).

150 Sephton (n 142) 257.

151 As above.

152 Sephton (n 142) 257. Sephton notes that 'this technique was successful in forcing the department to reimburse the schools'.

153 *Linkside v Minister of Basic and Others* (3844/2013) 2015 ZAECGHC unreported.

154 Veriava (n 119) 336.

155 Sephton (n 142) 257.

156 *Linkside* (n 153) para 1.

157 Sephton (n 142) 257.

with pre-emptive safeguards and deterrents built-in, were successful in achieving the filling of vacant posts.¹⁵⁸

Equal Education initiated proceedings to compel the government to upgrade two schools in the Eastern Cape and to also oblige the Minister of Basic Education to finalise and publish regulations of norms and standards relating to infrastructure.¹⁵⁹ The case was settled, and norms duly promulgated. However, Equal Education again approached the High Court challenging those norms following the promulgation of norms: the High Court in *Equal Education v Minister of Basic Education* declared a sub-regulation incorporating a ‘loophole’ (making compliance with the norms and standards ‘subject to the resources and co-operation of other government agencies’) unconstitutional in light of government’s obligation to make education, including adequate school infrastructure as a crucial element thereof, immediately available.¹⁶⁰

The Court in *Komape* found the government’s torpor in mustering resources for safe sanitation facilities at schools unconstitutional. In this case, the lack of such facilities resulted in the young Michael Komape’s death after he fell into a school pit toilet and suffocated.¹⁶¹

In 2020, the High Court in *Equal Education v Minister of Basic Department of Education* ordered the Department to resume the National School Nutrition Programme and feed millions of learners despite the COVID-19 pandemic, finding that the Minister and MEC were under constitutional and statutory obligations to do so.¹⁶² The Court determined that: (1) school nutrition and education are unqualified rights; and (2) school nutrition was a self-standing right that interfaced with the right to education in that it was ancillary and supplementary in ensuring learning ability.

The line of cases summarised and commented on above make several things clear. First, the courts have begun to detail the content of the right to education both on the facts of the cases post *hoc* on review, and in the abstract. Concomitantly, the courts are growing more willing to tie the government to duties measured by objective standards determined with reference to access to the right to basic education and what is *sine qua non* of such ‘access’ in the subjective

158 As above. However, the shortfalls are the lack of inclusivity of poorer and under-resourced schools to the class action.

159 Veriava Lecture Notes (n 123).

160 *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) para 59; Section27 ‘Media Statement: Department of Basic Education argument dismissed in Norms and Standards case’ 19 July 2018 <https://section27.org.za/2018/07/media-statement-department-of-basic-education-argument-dismissed-in-norms-and-standards-case/> (accessed 28 September 2020).

161 *Komape v Minister of Basic Education* unreported case number [2018] ZALMPPHC 109 of 23 April 2018 paras 25, 55 & 63.

162 *Equal Education v Minister of Basic of Education* 2020 (4) All SA 102 (GP) para 103.

context and in general. Third, the courts (at least in the Eastern Cape) are prepared to hand down pre-emptive supervisory orders given that the government will not neglect its obligations to ensure continuity of provisioning and fairness to respective parties who would be injured by government torpor, ineptitude, or negligence. Fourth, the courts are willing to take a commanding role in enforcing the right to basic education in the face of departmental frustration of the right; this through the issuing of detailed structural orders and assuming supervisory roles despite the traditional conceptualisation of the doctrine of separation of powers dictating otherwise. This could be an overt trend in favour of a transformative adjudicative approach that places focus on the material conditions surrounding the case, on eliminating barriers to exercising the right, and on redress.¹⁶³ Last, the content of the right to basic education encompasses both classroom implements, equipment, and learning material, as well as necessary infrastructure and support to enable classroom learning for individual learners – extending the scope of the right beyond the four corners of the classroom.¹⁶⁴

Reaching settlement agreements by incorporating structural interdicts requiring reporting by government, or winning them in court, and monitoring them thereafter for implementation and compliance has, and continues to be, an effective strategy in ensuring the provisioning for education post-litigation.¹⁶⁵

Again, the Court, in this case, contributes to the delineation of the content of the right to basic education, both in and outside the classroom, and has thus continued the trajectory of a line of lower court cases adopting a substantive and objective approach to adjudicating the right to education by establishing the circumstances under and standards against which obligations (and their content) activate.¹⁶⁶

6 Conclusion

The right to basic education imposes a duty on government to deliver the right to the doorstep of learners. This right was confirmed to be immediately realisable and is not subject to progressive realisation within available resources like other socio-economic rights.¹⁶⁷ Despite the immediate realisation principle, government has shown a lack of urgency in delivering education, often relying on the

163 See Mtsweni (n 43) 334-338.

164 See Skelton (n 124) 2.

165 G Marcus & S Budlender 'An evaluation of strategic public interest litigation in South Africa' (2008) *Atlantic Philanthropies Report* at 92; Skelton (n 124) 3.

166 See Veriava (n 121) 21; F Veriava & A Skelton 'The right to basic education: a comparative study of the United States, India and Brazil' (2019) 35 *SAJHR* at 1.

167 *Juma Musjid* (n 71) para 37.

progressive realisation principle.¹⁶⁸ The delivery is not a reality for many who go without the education they need to eke out a living.

Resort, therefore, is made to the courts to rectify what government will not – or cannot do. NGOs, public interest groups, and others now litigate on behalf of the indigent to secure their right to education – a right to other rights.

And the posture of the courts, too, appears to be shifting from a purely review-type approach typical of South Africa's socio-economic rights jurisprudence to a sensitive, context, and content-based approach to section 29(1)(a) adjudication. The courts are finding that the right encompasses support systems, mechanisms, materials, facilities, and personnel, whether within or beyond the classroom, necessary to ensure that learners are ultimately placed in a position of safety, are capacitated, and reach the classroom in order to access and benefit from the right. Additionally, the courts have issued innovative orders such as deeming clauses, supervisory orders, and structural interdicts to oversee the progress of government and to hold it accountable.¹⁶⁹

It is patent that litigation has been and will, for the foreseeable future, continue to be a powerful, and unfortunately necessary, tool to achieve access to education in South Africa.

168 Arendse (n 99) 173.

169 Skelton (n 124) 62.

ADMINISTRATIVE JUSTICE AND COMMUNAL SUBSISTENCE FARMING IN FOOT-AND-MOUTH DISEASE CONTROL: THE POSSIBLE APPLICATION OF PROPORTIONALITY AS A GROUND OF REVIEW UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

by Lielie Viljoen* & MP Fourie**



Abstract

As one of the most contagious and economically impactful livestock diseases, foot-and-mouth disease presents South African lawmakers with the complicated issue of animal disease control. The regulation of the disease has a profound impact not only on commercial farmers but on communal subsistence farmers as well, whose stakes in control measures are often overlooked in policy-making. The authors investigate and crystallise the current legislative framework of foot-and-mouth disease control in South Africa against the backdrop of the scientific and epidemiological characteristics of the disease. The application of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to the control measures concerning the movement of animals is investigated and it is concluded that PAJA's administrative law requirements apply to both the Animal Diseases Regulations and the policy documents in question. Thereafter the administrative law concept of proportionality is set out and it is shown that the current control measures fall short of the requirements of proportionality as

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codified in PAJA. Especially when considering the necessity and balance of the control measures in question, it is found that the interests and rights of small-scale communal subsistence farmers are not adequately considered and that international standards, regardless of their applicability to the South African situation, are often blindly imposed, thus leaving these overlooked stakeholders vulnerable to the adverse effects that arise thereafter.

1 Introduction

Foot-and-mouth disease (also referred to as FMD) is one of the most impactful animal diseases worldwide, particularly in Southern Africa where more than 100 million people living in poverty are dependent on livestock as an inherent part of their lives and livelihoods.¹ The control of this multifaceted and often misunderstood disease in the context of balancing diverse stakeholder interests is not only a vital public function but also one in which public powers directly impact the lives of animals and humans alike.

In light of the impact of the measures implemented to control foot-and-mouth disease on lives, livelihoods, and access to international markets, it seems natural that principles of fairness and proportionality should not only be relevant but central in these decisions. It is thus of vital interest to consider whether the standards of administrative justice encapsulated by the Promotion of Administrative Justice Act² (PAJA) apply to the control measures implemented. This article will first set out the scientific context of FMD, crystallise the legal framework in which it is combatted, and discuss the specific South African movement control measures, their efficacy, and impact, as well as their effect on communal subsistence farmers. Secondly, the control measures will be evaluated against the tenets of South African administrative law to determine whether they fall under PAJA's purview. Finally, the implications of proportionality as a possible ground of administrative review will be examined.

2 Foot-and-mouth disease

2.1 Importance and aetiology

Foot-and-mouth disease has long shaped our understanding of pathogen dynamics and veterinary epidemiology. In 1546, Giolama Fracastoro proposed the concept of epidemic diseases and an early germ-theory of contagious disease after an epizootic disease spread

1 PK Thornton et al *Mapping Poverty and Livestock in the Developing World* (2002) at 124.

2 Promotion of Administrative Justice Act 3 of 2000 (PAJA).

through herds of cattle in Venice.³ As an aetiological agent of FMD, the foot-and-mouth disease virus (FMDV) was the first virus to be described as causative of an animal disease.⁴ FMDV has since not only served as a model for virological research, but also aids in the continual restructuring of virology and vaccinology knowledge bases,⁵ which improves the understanding of other unresearched diseases. The importance of FMD in driving these research efforts is not ill-founded. Arguably, as the most transmissible viral animal disease,⁶ it causes high morbidity rates and large-scale epidemics that, although of lesser clinical significance, have diversely impacted the livestock industry for many years.

FMD is a highly contagious viral disease which affects cloven-hoofed animals.⁷ It is caused by the foot-and-mouth disease virus, of the genus *Aphthovirus* in the family *Picornaviridae*,⁸ which affects a wide vertebrate host range,⁹ and includes the polio and hepatitis A viruses as well as the human common cold rhinovirus.¹⁰ Although all cases of FMD are caused by a single viral species, its evolution in different ecological niches¹¹ has caused differentiation over time on a clinical as well as a microscopic level resulting in different strains, serotypes, and prototypes that allow for the geographical tracking of the disease or outbreak origin. As is the case for many RNA viruses, FMDV populations are described as having a quasispecies structure¹² which departs from the view that virus populations are genetically stable even over short periods of observation. This mutation is accelerated by the antigenic heterogeneity¹³ of the virus and high

3 H Fracastorius *De contagione et contagiosis morbis et curatione* (1546) at 77.

4 F Loeffler & P Frosch 'Summarischer bericht uber die ergebnisse der untersuchungen der kommission zur erforschung der maul-und-kla- menseuche' (1897) 22 *Zentralbl. Bakteriol. Parasitenk. Infektionskr* at 257-259.

5 F Sobrino et al 'Foot-and-mouth disease virus: A long known virus, but a current threat' (2001) 31(1) *Veterinary Research* at 2.

6 H Pereira 'Foot-and-mouth disease' in E Gibbs (ed) *Virus Disease of Food Animals Vol II* (1981) at 334.

7 F Sobrino & E Domingo *Foot and Mouth Disease Virus: Current Research and Emerging Trends* (2017) at 13.

8 E Martinez-Salas & G Belsham 'Genome Organization, Translation and Replication of Foot-and-mouth Disease Virus RNA' in F Sobrino & E Domingo *Foot and Mouth Disease Virus: Current Research and Emerging Trends* (2017) at 16.

9 M Yinn-Murphy & J Almond 'Chapter 53: Picornaviruses' in S Baron (ed) *Medical Microbiology* (1996) at 984.

10 D Tully & M Fares 'The tale of a modern animal plague: Tracing the evolutionary history and determining the time-scale for foot-and mouth-disease virus' (2008) 382(2) *Virology* at 250-256.

11 S Metwally 'International and regional reference laboratory network' (2012) Presented at FAO/OIE Global Conference on Foot and Mouth Disease Control Session 4: *Key elements in the prevention and control of FMD and in implementing the strategy* at 91.

12 E Domingo et al 'Nucleotide sequence heterogeneity of the RNA from a natural population of foot- and-mouth-disease virus' (1980) 11 *Gene* at 333.

13 E Domingo & J Holland 'RNA virus mutations and fitness for survival' (1997) 51 *Annual Review Microbiology* at 151.

mutation rates¹⁴ which highlight evolutionary pressures and drivers of selection. These evolutionary drivers are significant when pathogen and animal dynamics are discussed as epidemiological considerations, especially when considering the differing dynamics and drivers in European and African geographical regions.¹⁵ There are seven serotypes of the FMDV with distinct genetic lineages¹⁶ and characteristic geographical distributions.¹⁷ The abovementioned antigenic heterogeneity caused several major lineage diversifications in the evolution of FMDV.¹⁸ The first lineage diversification led to the branching off of the Southern African Territories serotypes (SAT 1,2,3),¹⁹ from the Eurasian serotypes (A, O, C, and Asia1).²⁰ The relevance of evolutionary timelines is clear in differing severity of disease between serotypes, with a higher degree of similarity between serotype clusters. These differing pathogen dynamics in different regions are integral to understanding FMD epidemiology.

2.2 Epidemiology

As one of the most economically influential animal diseases worldwide, the epidemiology of FMD, although not yet fully understood, has been thoroughly dissected into different factors. The host characteristics, transmission, disease development, and human involvement should be fully unpacked before holistic epidemiological insight might be gained into the interaction between the abovementioned factors.

The host dynamics are important on an inter and intra-species level. FMD has a wide host range, including all cloven-hoofed animals. The pathogenesis and clinical presentation vary between and within hosts depending on breed, age, and husbandry methods.²¹ The most

14 E Domingo et al 'Evolution of foot-and-mouth disease virus' (2003) 91 *Virus Research* at 53.

15 The impact of evolutionary drivers and the context in which differing strains evolved further will be discussed later in the article. These drivers are one of the most important considerations in FMD control worldwide as the current 'one-size-fits-all' policy approach often overlooks these important epidemiological considerations and their implication for the efficacy of control measures.

16 Tully & Fares (n 10) 251.

17 N Knowles & A Samuel 'Molecular epidemiology of foot-and-mouth disease virus' (2003) 91(1) *Virus research* at 71.

18 Sobrino (n 5) 17.

19 M Martínez et al 'Evolution of capsid protein genes of foot-and- mouth disease virus: antigenic variation without accumulation of amino acid substitutions over six decades' (1992) 66 *Journal of Virology* at 3557.

20 J Dopazo 'Aphthovirus evolution' in A Gibbs & C Calisher (eds) *Molecular evolution of viruses* (1994) at 310-320.

21 C Nfon et al 'Clinical Signs and Pathology of 8 Foot-and-mouth Disease' in F Sobrino & E Domingo *Foot and Mouth Disease Virus: Current Research and Emerging Trends* (2017) at 171.

important susceptible domestic species are cattle, swine, sheep, and goats.²² Cattle are the domestic species most likely to develop the clinical disease and are also the primary concern on a trade and economic level. A short incubation period in cattle is followed by fever and viraemia, which precedes clinically detectable vesicle development,²³ thus causing a rapid spread within populations by the time diagnosis is likely to take place. Vesicles develop on the buccal surface, tongue, and dental pad, often first indicated by excessive salivation and lip-smacking before larger erosions develop from coalescing vesicles.²⁴ Lesions on the feet also develop within the same timeframe, mostly on the coronary band and interdigital spaces²⁵ which leads to weight shifting lameness. The impact on livestock production stems not only from a decreased feed intake, but also from a decreased feed efficiency over a protracted period.²⁶ These impacts are of little significance to communal smallholders that are most concerned with the survival and welfare of animals, but are of cardinal importance to large commercial farming operations where small changes in large-scale productivity can lead to significant economic losses.²⁷ Similar clinical signs are observed in pigs, however, they require a much higher infective dose²⁸ to contract the disease and excrete increased quantities of airborne viruses.²⁹ In small ruminants, (sheep and goats) clinical signs are often less severe and resolve faster.³⁰ The differing manifestations of FMD between species contribute to the complexity of controlling the spread and development of the disease, especially in countries where co-mingling of different livestock species takes place in communal farming systems and sylvatic cycles.

If seen in conjunction with interspecies dynamics, a severe complication is the duration of infectivity, directly increasing the infective reach of each animal in and between herds. In most

- 22 S Alexandersen & N Mowat 'Foot-and-Mouth Disease: Host Range and Pathogenesis' in B Mahy (ed) *Foot-and-Mouth Disease Virus* (2005) at 10.
- 23 M Grubman & B Baxter 'Foot-and-mouth Disease' (2004) 17 *Clinical Microbiological Review* at 468.
- 24 J Rhyan et al 'Foot-and-mouth disease in North American bison (*Bison bison*) and elk (*Cervus elaphus nelsoni*): Susceptibility, intra- and interspecies transmission, clinical signs and lesions' (2008) 44 *Journal of Wildlife Diseases* at 270.
- 25 S Alexandersen et al 'The pathogenesis and diagnosis of foot-and-mouth disease' (2003) 129 *Journal of Comparative Pathology* at 15.
- 26 JD Knight-Jones & J Rushton 'The economic impacts of foot and mouth disease – What are they, how big are they and where do they occur?' (2013) 112(3) *Preventive Veterinary Medicine* at 161.
- 27 AD James & J Rushton 'The economics of foot and mouth disease' (2002) 21(3) *Revue scientifique et technique-office international des epizooties* at 638.
- 28 RF Sellers 'Quantitative aspects of the spread of foot and mouth disease' (1971) 41 *Veterinary Bulletin* at 431.
- 29 AI Donaldson et al 'Air sampling of pigs infected with foot-and-mouth disease virus: Comparison of Litton and cyclone samplers' (1982) 33 *Research in Veterinary Science* at 384-385.
- 30 AI Donaldson & RF Sellers 'Foot-and- mouth disease' in WB Martin and ID Aitken (eds) *Diseases of Sheep* (2000) at 254-258.

domestic animals, infective long-term carriers emerge,³¹ and the length of these carrier states varies between species. These carrier states last up to three and a half years in cattle, five years in African buffalo³², and only nine days in pigs.³³ The length of the carrier state is very relevant to FMD dynamics in different species and herds as the latent presence of FMD in carriers is a significant source of infection.

It is important to note, however, that the clinical signs vary in severity, and the description above only describes a full set of clinical symptoms. Endemic populations in South Africa infected with SAT serotypes often develop less severe symptoms.³⁴ The morbidity (symptom development) rates in populations affected by the SAT serotypes are 3.3% on average, with the Eurasian strains causing 35.4% average morbidity over the same period,³⁵ clearly painting a very different epidemiological picture in African regions when compared to their Eurasian counterparts. Although an asymptomatic presence of the disease may decrease its implications for the animals' welfare, an asymptomatic carrier that is still shedding is of increased epidemiological and economic importance by posing a greater danger to 'disease-free' statuses, as will be discussed below. The large 'outbreak' that occurred in KwaZulu-Natal in 2011 was reported to the World Organisation of Animal Health (OIE) as being fully subclinical,³⁶ yet the fact that it was reported still led to trade implications and estimated losses of R8 billion for the red meat industry.³⁷ Not only is the control of an asymptomatic animal more difficult to diagnose, but decreased compliance with movement restrictions and quarantines also protracts the dissolution of such outbreaks simply because stakeholders, especially those not involved in the export industry, fail to realise the necessity of such measures.

31 Alexandersen et al (n 25) 2. Fifty percent of populations under experimental conditions persistently become infected.

32 Alexandersen et al (n 25) 19.

33 C Stenfeldt et al 'Duration of Contagion of Foot-and-Mouth Disease Virus in Infected Live Pigs and Carcasses' (2020) 7 *Frontiers in Veterinary Science* at 334.

34 GR Thomson & W Vosloo 'Natural Habitats in which Foot-and-Mouth Disease Viruses are Maintained' in F Sobrino & E Domingo *Foot and Mouth Disease Virus: Current Research and Emerging Trends* (2017) at 179.

35 Thomson & Vosloo (n 34) 179.

36 DD Lazarus et al 'Serological evidence of vaccination and perceptions concerning Foot-and-Mouth Disease control in cattle at the wildlife-livestock interface of the Kruger National Park, South Africa' (2017) 147 *Preventative veterinary medicine* at 18.

37 N Twala 'Failure to implement Animal Diseases & Meat Safety Acts: Urgent appeal by Red Meat Industry Forum, National Emergent Red Meat Producers' Organisation, African Farmers Association' 12 September 2011 <https://pmg.org.za/committee-meeting/13388/> (accessed 12 May 2020).

Wild ruminants are also of significant epidemiological importance with the pertinent species being the water buffalo in Asia and South America where they are intensively reared, as well as the African buffalo that serve as important reservoirs of the virus in Africa.³⁸ Wildlife mostly harbour the virus subclinically³⁹ whilst still shedding the virus to other wildlife and domestic species.⁴⁰ Wildlife species also typically display carrier states of a longer duration which increases the likelihood of sylvatic transmission through occasional contact with livestock. Again, this is of particular importance in Southern Africa where communal farming often entails mixed livestock herds being exposed to wildlife and, consequently, to FMD⁴¹V. The presence of massive numbers of endemic FMDV in buffalo, and the unthinkability of eradicating this consistent source of infection is one of the key considerations in the epidemiology and control of FMD in South Africa.⁴²

The last important epidemiological factor at play in the spread and persistence of FMD is the movement of animals. This is important for the evaluation of the efficacy of control measures and legislation. The movement of livestock, wildlife, and animal products is directly involved in pathogen spread along unnatural lines to different areas. The movement of commercial livestock during auctions and feedlots, for example, is responsible for large-scale animal movement and comingling of diverse groups thus posing a high risk for rampant spread should an infected animal be present at any level of the production system.⁴³ The movement of livestock in communal farming systems is less documented,⁴⁴ and while significant in the sylvatic spread of the disease,⁴⁵ the scale and speed of spread is a fraction of that in commercial settings and far outweighed by the livelihood of

38 W Vosloo et al 'Characterisation of a SAT-1 outbreak of foot-and-mouth disease in captive African buffalo (*Syncerus caffer*): Clinical symptoms, genetic characterisation and phylogenetic comparison of outbreak isolates' (2007) 120(3) *Veterinary Microbiology* at 228.

39 TJD Knight-Jones et al 'Global Foot-and-Mouth Disease Research Update and Gap Analysis: 2 – Epidemiology, Wildlife and Economics' (2016) 63 *Transboundary and Emerging Diseases* at 15.

40 B Bignon et al 'Characterization of SAT2 foot-and-mouth disease 2013/2014 outbreak viruses at the wildlife-livestock interface in South Africa' (2019) 67 *Transboundary and Emerging Diseases* at 1597.

41 GR Thomson et al 'Balancing Livestock Production and Wildlife Conservation in and around Southern Africa's Transfrontier Conservation Areas' (2013) 60 *Transboundary and Emerging Diseases* at 493.

42 F Jori & E Etter 'Transmission of foot and mouth disease at the wildlife-livestock interface of the Kruger National Park, South Africa- Can the risk be mitigated?' (2016) 16 *Preventative veterinary medicine* at 17.

43 James & Rushton (n 27) 638.

44 T Teklehiorghis et al 'Foot-and-mouth Disease Transmission in Africa/ Implications for Control, a Review' (2016) 63 *Transboundary and Emerging Diseases* at 136.

45 W Vosloo et al 'Review of the status of foot and mouth disease in sub-Saharan Africa' (2019) 21(3) *Revue scientifique et technique International Office of Epizootics* at 440.

smallholders. Animal product movement only causes a risk of infection when hides, hearts, glands, and/or whole carcasses are transported. The transport and consumption of mature, deboned meat poses no threat of FMD transmission even if diseased animals were slaughtered at the acute stage of the disease.⁴⁶ This has been the basis for many movements calling for a commodity-based trade of animal products, as will be discussed in the fourth section of this article.

Epidemiological factors relevant to the discussion of regulations instituted around FMD highlight the intricacy of disease spread. Pathogen or virus dynamics, host factors, interspecies transmission, and animal movement patterns in different animal husbandry systems are all factors to be considered in the transmission of FMD. These considerations find application in the control of the disease, policies instituted to do so, and the stakeholders involved in the livestock industry.

3 The legal framework of the control of FMD in South Africa

In order to evaluate the FMD control measures against the requirements of South African administrative law, it is first necessary to determine who the relevant legal operators are, and under which legal instruments they act. This section will consequently crystallise the legislative framework for the control of animal diseases generally, and foot-and-mouth disease specifically.

3.1 The Animal Diseases Act

The Animal Diseases Act (ADA) provides the main national legislative framework in terms of which animal diseases and parasites are confronted by the government.⁴⁷ The purpose of the Act has been elucidated by the Supreme Court of Appeal as authorising government action to ‘initiate measures to protect the country’s livestock against risk of disease’.⁴⁸ The ADA provides for a range of powers and duties of a number of important actors, namely animal owners or managers of land on which there are animals,⁴⁹ the Director of the Directorate of Animal Health (the Director), the Minister of Agriculture (the Minister), and state veterinarians.

46 E Ryan et al ‘Foot-and-Mouth Disease Virus Concentrations in Products of Animal Origin’ (2008) 55 *Transboundary and Emerging Diseases* at 90.

47 Animal Diseases Act 35 of 1984 (ADA).

48 *Kemp and Others v Van Wyk and Others* (335/2004) [2005] ZASCA 77 para 10.

49 ADA (n 47) sec 11.

With regard to the application of the Act and the legislation discussed below; a few related terms defined in the ADA are of particular importance. The first is that of an ‘animal disease’, defined as follows:⁵⁰

[A] disease to which animals are liable and whereby the normal functions of any organ or body of an animal is impaired or disturbed by any protozoon, bacterium, virus, fungus, parasite, other organism or agent.

This is clearly a broad definition, and the regulatory framework is further qualified by the second definition of a ‘controlled animal disease’:⁵¹

[A]ny animal disease in respect of which any general or particular control measure has been prescribed, and any animal disease which is not indigenous or native to the Republic.

The ‘general or particular control measures’ are prescribed in terms of section 9 of the Act⁵² and can be prescribed by the Minister for any ‘controlled purpose’, which includes:⁵³

[T]he prevention of the bringing into the Republic, or the prevention or combating of or control over an outbreak or the spreading, or the eradication, of any animal disease or, where applicable, of any parasite.

The application of the control measures envisioned by section 9 of the Act thus rests upon two important tenets. The first is the nature of the phenomenon being classified as an animal disease. The second is the purpose of the intervention; being confined to the prevention of bringing such a disease into the country, preventing or controlling an outbreak or spread of the disease, or eradicating the disease.

Section 9(2) describes the aspects of combatting animal disease to which the control measures may relate. It should be noted that the power to prescribe such control measures is granted to the Minister.⁵⁴ These are wide-ranging and cover the powers and duties of the owners of diseased or suspected diseased animals, the restriction or control of the slaughter of diseased animals, the transportation of animals from areas where an animal disease is or is suspected to be present, the powers and duties of the Director, the manner and form in which information must be collected and recorded, and even the movement and decontamination of conveyances and persons over and from areas where a diseased animal has been present.⁵⁵ Section 9(2)(h) authorises the Minister to prescribe control measures relating to any

50 ADA (n 47) sec 1, ‘animal disease’

51 ADA (n 47) sec 1, ‘controlled animal disease’.

52 ADA (n 47) sec 1 & 9, ‘control measures’.

53 ADA (n 47) sec 1, ‘controlled purpose’.

54 ADA (n 47) sec 9(1).

55 ADA (n 47) sec 9(2). The section prescribes the incidences to which control measures may relate in great detail. Only the overview of the breadth of the cover is relevant for the current investigation.

matter deemed expedient or necessary concerning the ‘controlled purpose’, diseased (or suspected diseased) animals, or any animal disease or parasite. Thus, the powers of the Minister in this regard are comprehensive.

The Minister is also, in terms of section 31 of the Act, empowered to issue certain regulations. These are focussed on two specific and two general areas. The regulations may, in terms of section 31(1)(a) and (b) firstly prescribe measures with regard to the isolation of diseased animals, and secondly, to the treatment or destruction of such animals. Section 31(1)(c) then authorises the Minister to make regulations in terms of any matter required or permitted by the ADA. The control measures permitted in section 9 would fall under such regulations. Section 31(1)(d) authorises regulations relating to the necessary and expedient achievement of the purpose of the ADA.

3.2 The Animal Diseases Regulations

The Regulations to the ADA (the Regulations) originally took effect with the ADA on 01 October 1986. They derive their legal authority from the power granted to the Minister under section 31 of the Act.⁵⁶

The Regulations prescribe a host of general control measures for the combatting of animal disease. Central to the current enquiry, it also prescribes specific control measures for different animal diseases. These prescriptions relate to two types of measures; (a) the geographic movement and (b) the treatment of animals in the case of specific animal diseases. These control measures are set out in Tables 1 and 2 of Annexure A of the Regulations.

Table 1 outlines certain areas in the Republic relating to control measures. These areas relate to Regulation 20(1)(a)(vi) which prohibits the movement of any controlled animal or thing from or to the outlined areas. It is important to note that here, ‘controlled animal’ refers to any animal in terms of the ADA,⁵⁷ and not to susceptible, contact, or infected animals only. The areas outlined in Table 1 relating to foot-and-mouth disease are divided into zones based on six provinces (Limpopo, Mpumalanga, KwaZulu-Natal, North-West, Northern Cape, and Gauteng) and are further divided into infected zones, protection zones, and high surveillance areas of the

56 Animal Diseases Regulations No. R2026 in Government Gazette No. 10469 of September 1986 (first published) (Regulations). The regulations have since been variously amended and corrected. Where an amended regulation is applicable, it will be indicated in the reference.

57 ADA (n 47) sec 1, ‘controlled animal’. It is interesting to note that the definition of ‘animal’ in the ADA, being ‘any mammal, bird, fish, reptile, or amphibian which is a member of the phylum vertebrates’, actually includes humans as well. This is not to suggest that the Act was intended to apply to humans and human diseases, but rather to point out the importance of exactness in legislative drafting, especially concerning definitional aspects.

free zone. These classifications of zones have no bearing on the Regulations themselves, which as shown above, simply prohibit animal movement from and to all zones mentioned in the Table, subject to an issued permit. This is an important incongruity in drafting as the Veterinary Practice Notice (VPN)⁵⁸ prescribes very specific control measures to each of the different zones. This will be discussed in more detail below.

Table 2 outlines veterinary acts relating to the treatment or control of animals in relation to different diseases. Animals are organised into three categories. 'Susceptible animals' relates to the type of animal vulnerable to the disease, set out for each disease in column 1 of the table.⁵⁹ 'Contact animals' are susceptible animals that have been in contact with an infected animal.⁶⁰ 'Infected animal' is a susceptible animal that is either infected or reasonably suspected to be infected.⁶¹ The table then accordingly prescribes the veterinary acts applicable to each different class of animal for each specific disease. The Table 2 control measures relate to a few regulations, of which the most important is Regulation 11(1) which mandates owners to apply the prescribed veterinary acts. An owner may receive a postponement for compliance from the responsible state veterinarian,⁶² or an exemption from the Director.⁶³ The veterinary acts prescribed for foot-and-mouth disease mandate the regular vaccination of susceptible animals at intervals determined by the Director.⁶⁴ Contact animals are not prescribed a specific veterinary act but must simply be 'isolated and dealt with as determined by the Director'.⁶⁵ Similarly, infected animals must be isolated and either immunised or disposed of as determined by the Director.⁶⁶

The bounds and nature of the Director's powers in terms of the Regulations are clearly set out. The Director may direct the intervals of vaccinations of susceptible animals and may direct what must be done with contact and infected animals. The Director may also exempt owners from compliance with these measures. The Director does not, however, have any discretion in setting out areas from and to which movement is prohibited as this must be done by the Minister through an amendment of the Regulations. Furthermore, while Regulation 20(1)(a)(iv) empowers the Minister to extend permits for

58 Veterinary Procedural Notice for Foot and Mouth Disease Control in South Africa June 2012 (VPN).

59 ADA (n 47) sec 1, 'susceptible animal'.

60 ADA (n 47) sec 1, 'contact animal'.

61 ADA (n 47) sec 1, 'infected animal'.

62 ADA (n 47) sec 2(a).

63 ADA (n 47) sec 2(b).

64 Regulations (n 56) Annexure A, Table 2, column 4.

65 Regulations (n 56) Annexure A, Table 2, column 5.

66 Regulations (n 56) Annexure A, Table 2, column 6.

the movement of ‘controlled animals’ in terms of the Act, Regulation 20(7) further provides a blanket ban on the movement of cloven-hoofed animals from FMD infected zones to protected and free zones, as described in Table 1.

3.3 The Veterinary Procedural Notice

The VPN is a policy document that was effected by the Director of Animal Health on 01 November 2014. It replaces the previous Veterinary Procedural Notice of 2012 and provides for a number of measures including complex movement controls and permits, the vaccination plans of animals, the designation of abattoirs, and surveillance and early detection measures.⁶⁷ It also undertakes the description of a geographical division of South Africa into infected zones, protected zones with vaccination, protected zones without vaccination, high surveillance zones with movement control, high surveillance zones of the free zone, and the free zone.⁶⁸ The details, efficacy, and impact of these measures will be discussed in the fourth section of this article.

The VPN purports to derive its legal basis from the ADA and the Regulations.⁶⁹ According to Article A.4.1.1., its purpose is to prevent the spread of foot-and-mouth disease in South Africa. Importantly, it does not attempt to provide a protocol for an FMD outbreak, but simply outlines normal control measures for disease prevention and containment. The VPN is applicable ‘for all role players who are involved in FMD control’. No deviation is allowed from the VPN by state veterinarians, other veterinary officials, or other persons and role-players involved in FMD control.⁷⁰ This includes owners of animals or owners of land within FMD controlled areas.⁷¹

The VPN is a long and detailed document, as can be expected from a notice that aims to prevent the spread of an epidemiologically complicated disease. While the rationality of the geographical-based approach to preventing the spread of FMD might be questioned, any control measures prescribed will be complex, taking factors such as species susceptibility, the morbidity and mortality of the disease, and the specific serotypes of the disease into consideration. In the opinion of the authors, it is not only a scientific fact but a logical given that effective disease control critically depends on the nature of the disease. It is then curious that the scheme by which the Regulations aim to install control measures for FMD (and a range of other animal diseases) turns the ‘disease-first’ approach on its head. It firstly

67 VPN (n 58) Art A.4.1.2.

68 VPN (n 58) Art B.3.

69 VPN (n 58) Art A.4.1.

70 VPN (n 58) Art A.4.4.

71 VPN (n 58) Art B.4.

provides general control measures and classifications, and then subdivides diseases accordingly.

The Director's role and powers in formulating the VPN are encapsulated within a combination of Regulations. The most notable of these are columns 4, 5, and 6 of Table 2 of the Regulations which confer discretion on the Director as discussed above. Table 1 does not confer power on the Director but nonetheless forms an important part of the VPN's authority as the geographical areas used by the VPN are used in reference to Table 1. The VPN makes this clear in Article B.3. What is interesting about this is that the VPN thus combines the discretion granted by the Director in Table 2 and the areas of Table 1 in formulating the FMD control measures. This is important as it means the authority of the VPN is derived, (a) indirectly from the Minister's power to make Regulations, as encapsulated in section 31 of the ADA, and (b) directly from section 31, as part of the Regulations. Ultimately, the VPN derives its authority and mandate solely from the stipulations of the ADA.

4 Foot-and-mouth disease control in South Africa: Efficacy and impact

The control of FMD in South Africa, as detailed in the VPN, relies on a zonal approach where different control measures are implemented in infected and protection zones. These aim to maintain the World Organisation of Animal Health's (OIE) endorsed status of 'FMD-free with infected zones',⁷² with the majority of the country's livestock rearing areas being in the free zone. Although recent outbreaks have led to the suspension of the free status,⁷³ the control measures have yet to be adapted accordingly. The FMD infected zone⁷⁴ mostly consists of nature reserves, mainly the Kruger National Park, with the FMDV endemic cycling in carrier buffalo and other susceptible antelope. Protection zones⁷⁵ are then adjacent to the Northern and Western borders of the infected zone and divided into three different sub-zones serving as immunological (vaccines) and clinical (surveillance) safeguards against the potential spread of FMD from the infected zone into the free zone.⁷⁶ The first two parts of the protection zones form the buffer zone. The first is directly adjacent

72 Blignaut (n 40) 1596.

73 As above.

74 F Jori et al 'A qualitative risk assessment of factors contributing to foot-and-mouth disease outbreaks in cattle along the western boundary of the Kruger National Park' (2009) 28(3) *Revue scientifique et technique International Office of Epizootics* at 920.

75 OL van Schalkwyk et al 'Description of Events Where African Buffaloes (*Syncerus caffer*) Strayed from the Endemic Foot-and-Mouth Disease Zone in South Africa 1998-2008' (2016) 63(3) *Transboundary and emerging diseases* at 334.

76 Vosloo et al (n 45) 445.

to the infected zone and vaccination takes place every four months.⁷⁷ The second part, known as the buffer zone without vaccination, requires clinical surveillance at 14-day intervals. The third part of the protection zone, known as the surveillance zone, requires clinical surveillance of livestock at intervals of 28 days.

FMD control measures in South Africa entail four primary methods:⁷⁸ the movement control of cloven-hoofed animals and animal products, clinical livestock surveillance, selective prophylactic vaccination, and disease control fences.

Strict movement control is applicable in the infected and protection zones,⁷⁹ restricting the movement of any cloven-hoofed animal into or out of these areas. For livestock farmers in these areas, 80% of which are communal farmers,⁸⁰ the implication is that nearly no trade in livestock is possible, with absolutely no access to national or international markets and auctions. A national permit system is also implemented where the movement of any cloven-hoofed animal between FMD zones must be approved by the Provincial Executive Officer (PEO), and any movement of free buffalo requires PEO approval in both the province of origin and destination.⁸¹ Additional movement restrictions are applicable in an outbreak situation⁸² which might entail additional quarantine or culling protocols.

Clinical surveillance is applied at different intervals in each zone (as discussed above),⁸³ and entails clinical inspection of tongues, buccal cavities, and the coronary bands of animals.⁸⁴ The efficacy of clinical monitoring has been questioned as a mild disease can often go unnoticed.⁸⁵

Prophylactic vaccines of cattle, small stock, and pigs are administered on a zone-based vaccine protocol.⁸⁶ All livestock in both the infected zones and protection zones with vaccination are vaccinated every four months and permanently branded to ensure that circulating viral shed from these animals cannot spread to susceptible animals through accidental contact.

Game-proof fences are the main measure instated against sylvatic FMD transmission and are 2.4 metres in length, with the bottom metre being closely strained to prevent the movement of small stock and

77 Lazarus et al (n 36) 8.

78 LC Roberts & GT Fosgate 'Stakeholder perceptions of foot-and-mouth disease control in South Africa' (2018) 156 *Preventive veterinary medicine* at 40.

79 VPN (n 58) Art C.4.

80 Vosloo et al (n 45) 439.

81 VPN (n 58) Art A.5.14.

82 VPN (n 58) Art A.4.1.3.

83 VPN (n 58) Art C.2.

84 Vosloo et al (n 45) 425.

85 D Kennedy et al 'Difficulties experienced in recognizing foot-and-mouth disease in an outbreak in Zimbabwe' (1984) 61 *Australian veterinary Journal* at 164.

86 VPN (n 58) Art C.3.

game.⁸⁷ It is also the responsibility of all owners of live buffalo to ensure that game-proof fences prevent contact between their buffalo and other livestock.⁸⁸ Game-proof fences have a devastating environmental impact as they are both hazardous to wildlife⁸⁹ and disruptive of the natural habitus thus undermining the very purpose of conservation areas.⁹⁰

These control measures cause considerable losses not only to the South African livestock industry and the livelihoods it sustains, but also to the environment. The disruption caused by these measures provides an incentive to not only re-evaluate its efficacy, but also to question the aims and justifiability thereof. The necessity of considering alternative control approaches has especially become clear following recent outbreaks and the harsh effects of a zonal approach to FMD control.⁹¹ The commodity-based trade approach to FMD control is gaining popularity among epidemiologists and industry stakeholders. This approach is focused on the safety of the meat product itself rather than the FMD status of broad geographic regions.⁹² This would result in decreased disruption of traditional farming and conservation activities and will benefit the South African meat industry as a whole.⁹³

Apart from the cost of control measures, the economic impact of FMD lies in the decreased productivity of high producing animals, the persistent long-term decrease in the production of commercial animals, and trade implications, and the access to lucrative export markets.⁹⁴ When considering the economic benefits gained from eradicating FMD, it must be noted that these are often unequally distributed.⁹⁵ This is of particular importance in South Africa where the majority of control costs and cullings will have to take place in communal subsistence farming communities sharing pastures with

87 VPA (n 58) Art A.5.7.2.b.

88 VPA (n 58) Art A.4.9.

89 M Owen & D Owen 'The fences of death' 34 *African Wildlife* at 25.

90 ME Gadd 'Barriers, the beef industry and unnatural selection: a review of the impact of veterinary fencing on mammals in Southern Africa' (2012) 13 *Fencing for conservation* at 154.

91 A Catley et al 'Communities, commodities and crazy ideas: Changing livestock policies in Africa' (2005) 36(2) *Institute of Development Studies Bulletin* at 96.

92 G Thomson et al 'Guidelines on Commodity-based Trade Approaches for Managing Foot and Mouth Disease Risk in Beef in Southern Africa' (2018) *Technical Report on behalf of Cornell University's AHEAD Program* at 10.

93 Thomson et al (n 92) 8.

94 G Thomson et al 'International trade Standards for commodities and Products Derived from Animals: The need for a system that integrates food safety and animal disease risk management' (2013) 60 *Transboundary and Emerging Diseases* at 509.

95 A McLeod & J Leslie 'Socio-economic impacts of freedom from livestock disease and export promotion in developing countries' (2000) 3 *Livestock Policy Discussion Paper* at 9.

endemic FMDV infected buffalo that will reap no benefits from access to the export market.⁹⁶ The continued costs and questionable efficacy of control measures, in light of sustained sporadic outbreaks, should also be taken into account.⁹⁷

An application of the abovementioned epidemiological considerations and control measures can only be explored with the necessary nuance if FMD is viewed as one of the most important transboundary animal diseases in the world today, with all the practical and political implications of that status. Transboundary animal disease is defined by the Food and Agriculture Organisation (FAO) of the United Nations as:⁹⁸

Those that are of significant economic, trade and/or food security importance for a considerable number of countries; which can easily spread to other countries and reach epidemic proportions; and where control/management, including exclusion, requires cooperation between several countries.

The international presence of FMDV, the rapid spread of FMD, and the history of FMD at the forefront of animal disease research have led to the unequivocal classification of the disease as a transboundary animal disease.

The nature of transboundary diseases has shaped the way in which animal disease control is approached worldwide. FMD is regarded as one of the most impactful transboundary animal diseases worldwide by international bodies such as the FAO and the OIE.⁹⁹ The scale of control measures instituted by international movements and organisations is immense. The global foot-and-mouth disease control strategy jointly released by the OIE and FAO¹⁰⁰ describes FMD endemic countries, mostly developing countries, as threats to free countries and consequently aims to 'improve FMD control in regions where the disease is still endemic, thereby protecting the advanced animal disease control status in other regions of the world'.¹⁰¹ This is set against a backdrop of the Progressive Control Pathway for the control of foot-and-mouth disease (PCP-FMD)¹⁰² which aims to

96 TJD Knight-Jones et al 'Foot-and-mouth Disease Impact on Smallholders: What we know, what we don't know and how can we find out more?' (2017) 64 *Transboundary and Emerging Animal Diseases* at 1081.

97 Lazarus et al (n 36) 12.

98 MJ Otte et al 'Transboundary Animal Diseases: Assessment of socio-economic impacts and institutional responses' (2004) 9 *Livestock Policy Discussion Paper* at 6.

99 Otte et al (n 98) 7.

100 OIE & FAO 'The Global Foot and Mouth Disease Control Strategy' July 2012 <https://www.oie.int/doc/ged/D11886.PDF> (accessed 11 May 2021) at 2 (Global FMD Control Strategy).

101 Global FMD Control Strategy (n 100) 5.

102 OIE & FAO 'The Progressive Control Pathway for FMD Control' compiled by OIE and FAO 2008 <http://www.fao.org/eufmd/global-situation/pcp-fmd/en/> (accessed 12 May 2021) at 8 (The Progressive Control Pathway for FMD Control).

eventually achieve an FMD free status in all endemic countries. Thus, the effect of academic, Eurocentric goals for disease control have far-reaching effects in many countries. Attaining a geographically free status throughout South Africa would, for example, require the culling of all endemic African buffalo or preventing any proximity between buffalo and livestock nationwide to eradicate a disease that only shows symptoms in 3.3% of animals all the while alternative control approaches exist which prevent the negative socio-economic impact of this small percentage of animals. When considering the implementation of control measures in South Africa, international guidelines and action plans are often complied with notwithstanding the fact that many local variables, such as stakeholder and host dynamics, have a significant effect on the efficacy and environmental, economic, and human impact of proposed guidelines.¹⁰³ The decisions made on the level of the VPN, as described above, should, therefore, not be taken up lightly and it is the analysis of the nature of these decisions that begs the question of whether these decisions constitute administrative action.

5 FMD movement control and communal subsistence farming

A large proportion of South Africa's economically active population is employed in the agricultural sector, of which most workers are small-scale subsistence farmers on communal land.¹⁰⁴ Also known as smallholder pastoralists, these farmers often maintain large herds of cattle but are economically vulnerable.¹⁰⁵ They are classified by their production goals and free-ranging nature rather than the number of cattle they own.¹⁰⁶ This section aims to evaluate the impact of FMD regulations on communal subsistence farming communities in South Africa not because they are the only stakeholders to be considered in regulatory decisions, but because these stakeholder impacts are often overlooked.

To illustrate the relevance of the question as to whether PAJA is applicable, focus will be placed on the direct external legal effects of FMD regulations on the rights of communal subsistence farmers who own the majority of cattle in FMD infected zones.¹⁰⁷ Decisions made regarding the regulation of FMD in South Africa have been largely

103 A Mcleod & J Leslie 'Socio-economic Impacts of Freedom from Livestock Disease and Export Promotion in Developing Countries' (2000) 3 *Livestock Policy Discussion Paper* at 17.

104 GR Thomson 'Overview of foot and mouth disease in southern Africa' (1995) 14(3) *Revue scientifique et technique* at 510.

105 Knight-Jones et al (n 96) 1081.

106 Knight-Jones et al (n 96) 1083.

107 Lazarus et al (n 36) 5.

based on international recommendations and generic action plans set out by bodies such as the World Trade Organisation, Food and Agriculture Organisation of the UN, and the OIE. It is critical for South African decision-makers to be informed and considerate of not only scientific factors, but also the social and economic factors unique to the situation in South Africa. The right questions can be asked if decisions are measured by their benefits weighed against their impact on the rights of all affected parties. These considerations will be applied by the authors to illustrate the complexity of regulatory decision-making regarding FMD by focusing on regulation 20(7) and the movement restrictions on live cattle.

It is important to understand the composition and nature of the South African agricultural sector as the context to which regulatory decisions are to be made. In a country where most cattle are kept extensively on communal lands, there also exists a large commercial farming industry with high productivity in intensive operations.¹⁰⁸ The industry is not simply one of optimisation and profit, but a deeply divided sector with deep-seated differences. The FMD endemic regions in South Africa mainly consist of the communal farming areas surrounding national parks.¹⁰⁹

The external effects of FMD regulations and the costs of FMD outbreaks in developed countries are well understood.¹¹⁰ Large-scale outbreaks of highly virile European FMD strains cause immense financial ruin in highly intensive commercial farming systems. These costs and trade barriers justify expensive and invasive FMD control measures.¹¹¹ An understanding of similar parameters in communal subsistence farming is, on the other hand, lacking. Oversimplification is common in the determination of the benefits of FMD control by omitting thorough analysis on the efficacy and impact of regulations.¹¹²

A 1995 review of FMD in South Africa¹¹³ highlights that the effect of FMD outbreaks on rural small-scale farmers is limited, which is relevant when analysing the proportionality of regulations. This is not only due to the decreased pathogenicity of SAT strains, resilient indigenous cattle, and low incidence, but also due to their production goals.¹¹⁴ Where intensive systems rely on a short time to finishing weight, subsistence farming systems often keep livestock in their flocks for extended periods and only trade as a source of additional or

108 Thompson (n 104) 511.

109 Knight-Jones et al (n 96) 1081.

110 Knight-Jones & Rushton (n 26) 162.

111 As above.

112 TJD Knight-Jones et al 'Randomised field trial to evaluate serological response after foot-and-mouth disease vaccination in Turkey' (2015) 33 *Vaccine* at 807.

113 Thomson (n 104) 511.

114 As above.

replacement income.¹¹⁵ Subsistence farmers are also held back by unrelated, more invasive barriers to productivity such as poor sources of grazing and limited knowledge of management practices. Therefore, the decreased feed conversion associated with FMD outbreaks has little effect on the livelihoods of subsistence farmers. In other words, where productivity and efficiency are high, the impact of an FMD outbreak is great, but where productivity is already low, FMD has a less dramatic impact.¹¹⁶ Although productivity might sound like an end goal for every farmer, these end goals cannot be imposed on communal farmers that have been accustomed to a certain way of life for generations. It is important to treat subsistence farming as a separate model and not as a failed attempt at commercial farming as many international bodies and policies do. If only monetary factors are considered, the central role played by cattle in these communities is overlooked.¹¹⁷ These farmers do not only keep cattle for meat production and sale, but also for ceremonies, dowries, and as draught animals.¹¹⁸ This is often seen as a barrier to the enforcement of current regulations as it is difficult to convince these farmers that their animals must be culled or contained to serve a purpose inconsistent with their way of life.¹¹⁹ The commercialisation of subsistence farming by attempting to improve the productivity of subsistence farmers is not only patronising but also ineffective.

Thus, not only is the necessity of FMD control measures called into question, but numerous adverse effects can also be observed. Movement restrictions have multiple direct and indirect effects on the lives of communal subsistence farmers who make up the majority of cattle owners in FMD infected zones.¹²⁰

Restricting the movement of live animals and meat products is integral in the zonal approach to FMD regulation. The maintenance of the OIE endorsed status of 'FMD-free with infected zones' is the main objective of this approach as it is trade-oriented and aimed at protecting the commercial farming areas from infected buffalo as disease reservoirs.¹²¹ These commercial areas coincide with FMD free zones where the unrestricted trade and movement of cattle is allowed. Export of cattle from these areas and lucrative markets are enabled by the free status of the country as a whole.¹²² The FMD infected zones, on the other hand, are subjected to stringent

115 Knight-Jones et al (n 96) 1804.

116 BG Bayissa et al 'Study on seroprevalence, risk factors, and economic impact of foot- and-mouth disease in Borena pastoral and agro-pastoral system, southern Ethiopia' (2011) 43 *Trop. Anim. Health Prod.* at 765.

117 Thomson (n 104) 511.

118 W Vosloo et al 'Foot and mouth disease: The experience of South Africa' (2003) 21(3) *Rev. sci. tech. Off. int. Epiz.* at 760.

119 Vosloo (n <XREF>) 760.

120 Jori et al (n 74) 920.

121 Knight-Jones & Rushton (n 26) 164.

122 Knight-Jones & Rushton (n 26) 166.

movement restrictions to prevent FMD from spreading to adjacent protection zones and subsequently to free zones. Even in the event that a herd is FMD negative and proven to have been isolated from buffalo, farmers in an infected zone are unable to move live animals to an FMD free zone. When moving animals to adjacent protection zones with or without vaccination, Red Cross permits are required, and expensive surveillance protocols must be complied with.¹²³ Criteria such as clinical examinations, vaccination of the entire herd, and written approval of provincial executive officers can be seen as effective barriers to any sale of cattle outside of the infected zone.

The adverse effects of the movement restrictions can only be appreciated when looking at their direct effect. Movement restrictions affect the ability of communal farmers to graze, trade, and practise cultural traditions.

Traditional extensive grazing patterns are disrupted by drawing arbitrary lines in communal farming areas. Extensive or pastoralist farming practices rely on the utilisation of large areas, often in biomes of lower carrying capacity, in order to maintain herds without supplementary feeding.¹²⁴ If the movement of these herds is restricted, the model is no longer sustainable and the use of these cattle as stores of wealth and replacement income in trying times becomes impossible. Communal cultural practices involving cattle are also significantly affected by movement restrictions. Large livestock herds and trading livestock play an integral role in many Southern African cultures.¹²⁵ Customary celebrations, rituals, and spiritual processes are impeded by the inability of farmers to move cattle to areas where celebrations are taking place or are traditionally held.¹²⁶

Finally, the severe financial impact of movement restrictions severely affects the value of cattle as assets and income replacements for communal subsistence farmers. There is a substantial difference in the market price of cattle within and outside of the infected zone.¹²⁷ Movement restrictions prevent smallholder access to lucrative markets. This has been discussed in detail by researchers as a threat to the efficiency of current control methods because the price disparities have incentivised illegal movement and the trade of animals in higher-paying free zone markets.¹²⁸ This only serves to illustrate the perspective from which regulatory objectives are set. These objectives set by public functionaries should therefore

123 VPN (n 58) Art 5.1.2.3(a)(iii).

124 JC Barret 'The economic role of cattle in communal farming systems in Zimbabwe' (1991) 61 *Zimbabwean Veterinary Journal* at 7.

125 JP Danckwerts *A socio-economic study of veld management in the tribal areas of Victoria Province Department of Agriculture* (1974) at 33.

126 Danckwerts (n 125) 34.

127 Vosloo et al (n 118) 754.

128 Jori et al (n 74) 926.

be weighed up more carefully against the adverse financial effects that are presented to smallholders.

The broader dissonance in FMD regulation-making becomes apparent through the discussion of the impact of movement restrictions. Currently, decision-making has weighed up the trade and export benefits of commercial farmers against the costs of regulating communal areas. On a monetary level, this makes sense but this utilitarian view of some stakeholders as assets and others as liabilities is in dire need of re-evaluation. Given the deeply divided and unequal nature of the South African agricultural sector, economic factors prioritised by the FAO and WTO should not be the main grounds for decision-making without weighing up the costs of these regulations against the lack of benefits experienced by communal subsistence farmers. It is critical for South African decision-makers to be informed and considerate of not only the scientific and macro-economic factors, but also the social and economic factors unique to the situation in South Africa.

6 FMD control measures and administrative law

In this section, the current FMD control measures will be evaluated to determine the applicability of administrative law. This will be done by setting out the importance of ‘administrative action’ in terms of the Promotion of Administrative Justice Act¹²⁹ (PAJA), with particular focus on whether regulations and policy development can be regarded as administrative action. This will be considered with reference to the Regulations of the ADA, and the VPN to evaluate the appropriateness of holding them to the standards set in administrative law.

6.1 Administrative action in South Africa.

The current scheme of South African administrative law is founded on the PAJA, a piece of legislation mandated by the Constitution to encompass the right to administrative action that is lawful, reasonable, and procedurally fair.¹³⁰ The application of PAJA, confined to ‘administrative action’, has been a contentious point of litigation. There are two discernible reasons for this. First, the definitional requirements of ‘administrative action’ are an onerous exercise for litigants to prove.¹³¹ Second, state actors are held to a higher standard under PAJA than under the principle of legality which provides the grounds of review for any exercise of public power or

129 PAJA (n 2).

130 Constitution of the Republic of South Africa, 1996 (Constitution) sec 33.

131 G Quinot & P Maree ‘Administrative Action’ in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2020) at 79.

performance of a public function not covered by PAJA¹³² This contention has been furthered by the courts. In the case of *Albutt v Centre for the Study of Violence and Reconciliation*,¹³³ the Constitutional Court seemingly supported the idea that one could choose between PAJA or legality when reviewing administrative action.¹³⁴ This has been held by some to be a grievous side-stepping of constitutionally mandated legislation and a violation of the separation of powers as well as the principle of subsidiarity.¹³⁵ The Constitutional Court has subsequently reaffirmed the proper sequence of enquiry in that a court must first investigate whether PAJA applies to an applicable case.¹³⁶ Although a perhaps uncomfortable fact for the modern administrative-legal practitioner, PAJA remains the mandated avenue for the review of administrative action.¹³⁷

Before an assessment is made on whether PAJA applies to the development of the Regulations and the VPN, it is important to set out the implications of such findings. As discussed above, PAJA provides different grounds of review than does the principle of legality, and according to certain scholars, it also provides a more onerous standard for government action than does the principle of legality. PAJA requires, firstly, a host of procedural fairness requirements set out in sections 3 and 4 thereof.¹³⁸ Although some elements of procedural fairness have been incorporated in the legality principle, they are nowhere near as comprehensive.¹³⁹ Secondly, the legality principle requires a less strict interpretation of rationality (included under the 'reasonableness' requirement of PAJA).¹⁴⁰ Finally, the reasonableness envisioned by section 33 of the Constitution, and encapsulated by PAJA, demands not only rationality, but also

132 *Minister of Defense and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) (*Motau*) para 27.

133 2010 (3) SA 291 (CC).

134 *Albutt* (n 133) para 81.

135 M Murcott & W van der Westhuizen 'The ebb and flow of application of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* at 54; C Hoexter *Administrative Law in South Africa* (2012) at 131.

136 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (1) BCLR 1 (CC) para 99; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (*New Clicks*) para 183. In *My Vote Counts*, the legislation concerned was the Promotion of Access to Information Act 2 of 2000 (PAIA). The Court, however, drew numerous comparisons with PAJA (see, for example, para 148) when discussing the principle of subsidiarity and the importance of its application. See also *Motau* (n 132) para 27.

137 Hoexter (n 135) 42.

138 PAJA (n 2) secs 2-4.

139 M Murcott 'Procedural Fairness' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2020) at 195-196.

140 PAJA (n 2) sec 6(2)(f)(ii); *Minister of Defense and Another v Xulu* 2018 (6) SA 460 (SCA) para 50.

proportionality.¹⁴¹ This is not a ground of review under the legality principle.

However, it is not PAJA's alleged onerous standards that determine whether administrative action should be reviewed in terms thereof, but rather the principle of subsidiarity and the separation of powers. The first point of call for a court is to investigate whether PAJA is applicable. If it does, it must thereafter be utilised.

The threshold for the use of PAJA is the definition of 'administrative action' contained in section 1(i) thereof.¹⁴² Only when the definitional requirements have been met will PAJA be applicable. The requirements, as crystallised in *Motau*, are '(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'.¹⁴³

It is, however, a first requirement that a decision of an administrative nature must be present and this has given rise to the most complicated legal questions in the current instance. Furthermore the requirements of 'adverse effect on rights' and 'direct legal effect' will also be discussed. The other elements of the definition do not pose significant obstacles in the current case and will only be fleetingly touched on.

The first requirement contains two elements. First, a 'decision' must be present, which is defined in section 1(v) as:¹⁴⁴

[A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision ...

It is confounding that the definition of a decision both includes the terms 'decision' and 'of an administrative nature'. Some principles have, however, emerged from the courts as to what constitutes a decision. A decision must not be of an 'automatic' nature or happen

141 C Plasket 'Disproportionality – the hidden ground of review: *Medirite (Pty) Ltd v South African Pharmacy Council & Another*' (2019) 136(1) *South African Law Journal* at 26.

142 Quinot & Maree (n 131) 79.

143 *Motau* (n 132) para 33. This definition is the main reason why legal professionals are reluctant to utilise PAJA, as discussed below, and has been described in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (*Grey's Marine Hout Bay*) as a 'palisade of qualifications'.

144 PAJA (n 2) sec 1(v).

solely through the working of the law or legislation.¹⁴⁵ A decision must also communicate a certain level of finality.¹⁴⁶

6.2 Subordinate legislation and administrative action

The second definitional requirement of an administrative action is that the decision must be of an ‘administrative nature’. Central to the investigation of what an administrative nature entails is the principle of the separation of powers.¹⁴⁷

It remains contentious in South African administrative law whether enacting subordinate legislation (or ‘legislative administrative action’ as it is referred to by Chaskalson CJ in *New Clicks*)¹⁴⁸ amounts to administrative action in terms of PAJA. Subordinate legislation such as the Regulations are, of course, already a hybrid form of state power, being an essentially legislative function exercised by the executive branch. As administrative action already substantively engages with the meaning of the separation of powers, it is not surprising that controversy surrounds the issue of whether subordinate legislation is reviewable under PAJA.

Unfortunately, our courts have not been forthcoming with an answer. The seminal case concerning regulations and PAJA, *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd*, did not provide a conclusive majority opinion on this issue.¹⁴⁹ In order to ascertain whether the Regulations are governed by PAJA, it will be necessary to analyse the arguments given by Chaskalson CJ, and the other judges in *New Clicks*, as well as a few subsequent cases that have commented on their judgments.

The case of *New Clicks* concerned the regulations promulgated by the Minister of Health to introduce a ‘transparent pricing system for medicines and Scheduled substances’.¹⁵⁰ The decision is of extreme length and contains eight different judgments, concurring and dissenting on different points. Chaskalson CJ sets out the main argument in favour of PAJA being applicable to the development of regulations. He points out that such delegated legislation was subject to judicial review in certain regards before the advent of the constitutional dispensation.¹⁵¹ He then finds his argument firstly in

145 *Phenithi v Minister of Education and Others* 2008 (1) SA 420 (SCA) paras 9-10.

146 *Quinot & Maree* (n 131) 82. The authors point out that the finality requirement is not absolute. An in-depth discussion thereof is however irrelevant to the current investigation.

147 *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA).

148 *New Clicks* (n 136) para 118.

149 *New Clicks* (n 136) para 13.

150 *New Clicks* (n 136) para 23.

151 *New Clicks* (n 136) paras 102-109.

section 33(1) of the Constitution.¹⁵² He expounds on the principles of an open and transparent government and adopts a purposive interpretation of section 33 of the Constitution in establishing a unified and overarching system of administrative review, as confirmed in the *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*¹⁵³ case.¹⁵⁴ He concludes that ‘administrative action’ as contained in section 33 of the Constitution does encompass delegated legislation. He then turns to the definition in PAJA, investigates the exclusions set out in sections 1(i)(aa) and (bb), and points to the fact that the section in the Constitution referring to the implementation of legislation by the President and his Cabinet is deliberately left out (excluded from the exclusions).¹⁵⁵ This, together with the meaning of administrative action under the Constitution, leads Chaskalson CJ to, correctly in the authors’ opinion, conclude that enacting delegated legislation, including regulations, is, in fact, administrative in nature. This conclusion is supported by the judgment of O’Regan J.¹⁵⁶ Ncgobo J argues separately that it is unnecessary to conclude whether all regulations are administrative in nature but finds the regulations *in casu* to, in any case, be administrative in nature. His stance is supported by the judgments of Van der Westhuizen and Langa JJ.¹⁵⁷ O’Regan J rightly points out that Ncgobo J agrees with Chaskalson CJ’s reasoning and that his own arguments also underscore the administrative nature of regulation-making.¹⁵⁸

The arguments put forth by Chaskalson CJ are not only legally persuasive but embody a particularly appealing view of administrative law under the Constitution. It is unfortunate that four of the remaining judges chose not to engage with the question of whether delegated legislation was of an administrative nature or not. The final judgment, that of Sachs J, argues in favour of delegated legislation not being administrative in nature.¹⁵⁹ This argument, in the authors’ opinion, significantly narrows the purview and purpose of PAJA to an extent not envisioned by section 33 of the Constitution.

Two Supreme Court of Appeal cases followed *New Clicks* and are worth mention. In the case of *City of Tshwane Metropolitan*

152 *New Clicks* (n 136) para 100. In *Motau*, (n 132) at 35, it was held that Chaskalson CJ’s approach is correct insofar as the definition of administrative action must be construed consistently with constitutional rights.

153 2004 (4) SA 490 (CC) (*Bato Star Fishing*) para 22.

154 *New Clicks* (n 136) paras 110-118. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), where the Court confirmed the possibility of delegated legislation being classified as administrative in nature.

155 *New Clicks* (n 136) paras 122-126.

156 *New Clicks* (n 136) paras 135 & 849.

157 *New Clicks* (n 136) paras 480, 843, & 851.

158 *New Clicks* (n 136) para 849.

159 *New Clicks* (n 136) para 610.

Municipality v Cable City (Pty) Ltd,¹⁶⁰ the Court endorsed the view of Chaskalson CJ and found that regulation-making by a Minister is administrative in nature and governable by PAJA.¹⁶¹ However, the case of *Mostert NO v Registrar of Pension Funds and Others*¹⁶² correctly pointed out that Chaskalson CJ's judgment was not authoritative in that regard. The Court, however, incorrectly held that the judgment was also only a comment on the particular regulations considered in *New Clicks*.¹⁶³ Respectfully, this view is mistaken. Chaskalson CJ makes a clear case on the administrative nature of all regulation-making based, *inter alia*, on the principles of transparency and justifiability as well as the construction and purpose of PAJA, as discussed above. The Court in *Mostert* also mentioned, although not conclusively, that the regulation-making power would be hampered by administrative review under PAJA.¹⁶⁴ This factor was also considered in Chaskalson CJ's argument but found not to outweigh the considerations of section 33(2) through which the Constitution gives Parliament an instrument to address these concerns.¹⁶⁵ In this regard, it is important to remember that the purposive application of PAJA endorses not only a constitutional mandate, but also underscores the legislature's significant position in the separation of powers.¹⁶⁶

Whether policy-making constitutes administrative action is a less contentious question in our administrative law. Policy is often seen as belonging squarely with the executive branch in the exercise of executive power. However, it is important to understand that our courts have drawn a distinction between policy in a broad sense and policy in a narrow sense.¹⁶⁷ Policy in a broad sense relates to political decisions by the executive and is not subject to administrative law.¹⁶⁸ Policy that is formulated in the implementation of legislation may, however, constitute administrative action, and the stricter the constraints of the legislation, the more likely that the decision is administrative in nature.¹⁶⁹

The guidance that the Court has given concerning policy can be instructive when investigating the administrative nature of other decisions, including regulations. In the case of *Motau*, the Court held that instrumental to the enquiry into administrative nature is whether

160 2010 (3) SA 589 (SCA) (*City of Tshwane*).

161 *City of Tshwane* (n 160) para 10.

162 (986/2016) ZASCA 108 (*Mostert*).

163 *Mostert* (n 162) para 10.

164 As above.

165 *New Clicks* (n 136) paras 115-117.

166 *Murcott & van der Westhuizen* (n 135) 54.

167 *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) Section21) Inc.* 2001 (2) SA 1 (CC) (*Ed-U-College*) para 18.

168 As above.

169 *Ed-U-College* (n 167) paras 18 & 21.

the decision is more closely related to policy (here in the broad sense) or to the implementation of legislation (which includes policy in the narrow sense).¹⁷⁰ Ancillary hereto is the source of the power and the discretion awarded to the decision-maker. Critically, the courts must consider the appropriateness of holding the specific decision to the higher standard set by PAJA.¹⁷¹

6.3 Are the FMD control measures subject to PAJA?

The Regulations enacted in terms of the ADA and the Veterinary Procedural Notice are considered under this section. The exact hierarchy of the authority and workings of both were discussed above¹⁷² and now the administrative law guidelines that have now been illuminated must be applied.

Does the nature of the Regulations and the VPN correspond to policy in a broad sense or rather to the implementation of legislation? The Regulations are enacted in terms of section 31 of the ADA. They do not constitute political decisions but are closely confined to the implementation of specific provisions of the ADA itself. The control measures concerning foot-and-mouth disease are set out in accordance with section 9 and in furtherance of the goal of the ADA as a whole. Regarding the VPN, Article A.4.1 confirms that the sole purpose and application of the VPN is mandated by the ADA. Both the Regulations and the VPN are much closer to the implementation of legislation (or policy in a narrow sense) than to a broad sense of policy.

What are the sources of power? The Minister derives their power to make the Regulations directly from legislation, specifically from section 31 of the ADA. The source of the Director's power in formulating the VPN was expounded upon above, with the result that it derives both indirectly from the ADA through the Regulations, and where parts thereof are encapsulated by the Regulations, directly from the ADA.

What discretion is granted to the decision-maker? Here the Minister and the Director have some broad discretions in formulating a particular response to the spread of FMD. This discretion is, however, qualified significantly. The purpose of the control measures does not allow for discretion in that they must combat the spread of FMD. This is important since it constitutes what is essentially a scientific goal. Where discretion is granted, it relates to the most effective measures to be taken against a disease.

170 *Motau* (n 132) para 40.

171 As above.

172 See section 3 of this article.

Is it appropriate to view these decisions as administrative in nature given the more rigorous standard of PAJA? Given the sizeable impact that FMD measures may have on the lives and livelihoods of persons who do not enjoy strong economic bargaining power (such as communal farmers), the standards of procedural fairness seem especially necessary. This possibly destructive impact on subsistence living caused by arbitrary and disproportionate measures, balanced against the relative safety of rationally formulated alternative control measures, also weigh heavily in favour of holding the Regulations as well as the VPN to the standard of proportionality, as required by PAJA.

These factors all indicate, in varying degrees, that both the Regulations and the VPN constitute decisions of an administrative nature. The other requirements of section 1(i) of PAJA may be quickly addressed. The FMD control measures are affected by organs of state exercising public power in terms of legislation, as discussed in detail above.

When considering the requirement that such action must 'adversely affect rights', a broad interpretation is in order.¹⁷³ The Constitutional Court in *Joseph* held that the 'rights' of section 3(1) of PAJA should not be strictly defined to only encompass private law rights, but must also extend to constitutional and statutory rights owed to rights-bearers by the state.¹⁷⁴ The Court in *Grey's Marine Hout Bay* clarified the adverse effect as being a direct and immediate impact on said rights.¹⁷⁵ It is sufficient to discuss the element of a 'direct, external legal effect' in tandem herewith. The Court in *Joseph* confirmed that this element adds little to the previous requirement, as any action that adversely affects rights will have a direct, external legal effect.¹⁷⁶

As was shown above, the movement control measures set out in the VPN and the Regulations impact the lives and livelihoods of communal subsistence farmers in numerous ways. If pure private law rights are to be identified, the rights contained in ownership are clearly impacted since subsistence farmers are curtailed from moving and selling their property. If the wider definition of *Joseph* is accepted, one could also make the argument that their right to occupational freedom, as contained in section 22 of the Constitution, is adversely affected. Currie and de Waal note that the section 22 right extends to the 'freedom to be occupationally active and to pursue a livelihood'.¹⁷⁷ Furthermore, the constitutional rights to

173 *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) (*Joseph*).

174 *Joseph* (n 173) para 43.

175 *Grey's Marine Hout Bay* (n 143) para 23.

176 *Joseph* (n 173) para 27; *Grey Marines Hout Bay* (n 143) para 23.

177 I Currie & J de Waal *The Bill of Rights Handbook* (2013) at 466.

culture and the enjoyment of cultural practices are adversely impacted, as was shown above.¹⁷⁸

The exclusions relating to the exercise of executive powers were discussed above with regard to the *New Clicks* case and do not apply. The same can be said for any other exclusions set out in section 1(i)(b). It can then be confidently concluded that the FMD control measures set out in both the Regulations to the ADA and the VPN do constitute administrative action reviewable under PAJA.

6.4 (Dis)proportionality as a ground of review

It is accepted that under PAJA, administrative action is reviewable on the three main grounds set out in section 33 of the Constitution namely; lawfulness, reasonableness, and procedural fairness. These grounds are not set out separately and explicitly in PAJA, but are made up of a web of different but interrelated grounds of review. The focus of this study specifically concerns reasonableness, and more specifically, proportionality.

Reasonableness is highlighted by Corder to comprise of two different standards against which administrative action can be measured with the first being rationality and the second being proportionality.¹⁷⁹ The inclusion of these grounds of review in PAJA is, however, not as clear-cut. Reasonableness in general is included in section 6(2)(h) of PAJA under which public power or functions that 'are so unreasonable that no reasonable person could have exercised [them]' are reviewable.

Rationality, one of Corder's components of reasonableness, is, however, separately included in PAJA. Before PAJA, it was an established principle of administrative law under legality that administrative action that was irrational could be reviewed by the courts.¹⁸⁰ Rationality as a ground of review was codified by PAJA in section 6(2)(f)(ii), which sets out that administrative action is reviewable if:

- ... not rationally connected to –
- (aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator.

178 Constitution (n 130) secs 30-31.

179 H Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) 121 *South African Law Journal* at 443.

180 M Kidd 'Reasonableness' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2020) at 210; *Democratic Alliance v President of Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 34.

The Supreme Court of Appeal, in the *Xulu* case, has indicated that rationality under legality provides a narrower basis of review not synonymous with section 6(2)(f)(ii).¹⁸¹

Proportionality, as the second part of reasonableness, is less easily identified and delineated. Hoexter identifies three characteristics of proportional administrative action; namely that the action be necessary to achieve the stated goal (necessity), that adverse effects of the action do not outweigh the beneficial effects (balance), and whether the means decided on are suitable or appropriate in attaining the desired outcome (suitability).¹⁸² It is trite to refer to the remark on disproportionality by Hoexter that one would not use a sledgehammer to crack a nut.¹⁸³

Courts have, now and again, included the principles of proportionality under reasonableness pre-PAJA albeit in a limited fashion.¹⁸⁴ However, PAJA itself makes no mention of the reviewability of disproportionate action.¹⁸⁵ It is rather inferred from the inclusion of both sections 6(2)(h) and 6(2)(f)(ii). Plasket notes that if rationality is included explicitly in section 6(2)(f)(ii), then the unreasonableness of section 6(2)(h) must include more than simple irrationality.¹⁸⁶ Plasket also argues that proportionality can be included under section 6(2)(i), which provides for the reviewability of unconstitutional or unlawful action, as 'reasonableness' under section 33 of the Constitution encapsulates proportionality.¹⁸⁷

The criteria for proportionality can be based on the final two factors set out in *Bato Star Fishing* are the 'nature of the competing interests involved' and 'the impact of the decision on the lives and well-being of those affected'.¹⁸⁸ A critical consideration at this stage, but which remains important throughout administrative review, is that courts show proper deference to the other branches of state (usually the executive branch).¹⁸⁹ This careful balance is essential in maintaining the separation of powers. De Ville makes the argument that proportionality should only be used as a ground of review in cases where fundamental rights are infringed upon, in order to ensure that courts do not undertake decision-making that is not constitutionally

181 *Minister of Defense and Another v Xulu* (337/2017) [2018] ZASCA 65 para 50.

182 Hoexter (n 135) 334.

183 As above.

184 Plasket (n 141) 21.

185 Plasket makes reference to the fact that some early drafts of PAJA by the South African Law Reform Commission did include disproportionality as ground of review, but that it was omitted from the final legislation. See Plasket (n 141) 25.

186 As above.

187 Plasket (n 141) 26.

188 *Bato Star Fishing* (n 153) para 45; Kidd (n 180) 212.

189 *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing* (n 153).

sanctioned or where they are ill-equipped.¹⁹⁰ Kidd however argues that the nature of the right or interest must already be considered to determine whether administrative review is appropriate, as set out in *Bato Star Fishing*, thus providing a safeguard against judicial overreach.¹⁹¹ Therefore, proportionality need not be confined only to administrative action that violates fundamental rights.

It is then the three characteristics of necessity, balance, and suitability that provide the measures of proportionality *in casu*. Necessity begs the question of whether the measure or action was necessary to achieve the desired end. De Ville adds that the enquiry includes whether no lesser form of interference with a person's right was possible.¹⁹² It is prudent to discuss this requirement with the requirements of suitability, which require that the measure be appropriate and effective in achieving the desired outcome. We have discussed above that to treat the prevention of the spread of FMD itself as a black and white standard is to miss both the scientific complexity of the disease as well as the relatively low risk that the disease poses for communal subsistence farmers. Thus, while the movement control measures might be necessary or suitable when attempting to achieve international standards blindly imposed, the same cannot simply be accepted when considering South Africa's unique agricultural make-up, as well as the epidemiological aspects of FMD.

The element of balance is also critical in the current enquiry. De Ville characterises the enquiry into balance as to whether an excessive burden is placed on the individual that is *disproportionate* to the public interest at stake.¹⁹³ It is here that proportionality as a ground of review presents, in the authors' opinion, the most valuable contribution *in casu*. It is clear that on both ends of the balancing scale there are factors being missed. Communal subsistence farmers are adversely impacted in numerous ways by the movement controls which infringe upon their property rights, their rights to cultural practices, and their rights to trade and occupational freedom. It is these farmers who are first affected by the control measures, making up the majority of farmers in FMD infected zones. On the other hand, when considering the 'public interest at stake', there is a clear discrepancy between the control measures and the scientific dangers posed by FMD. Although the disease poses some risk, the epidemiological complexity requires a more nuanced approach than what is put in place by the movement control measures of the ADA Regulations and the VPN.

190 JR de Ville *Introduction to the Study of the Law of the Constitution* (1915) at 205-206.

191 Kidd (n 180) 217.

192 de Ville (n 190) 203.

193 de Ville (n 190) 206.

The exact balance is not easily determinable and, in any case, lies beyond the scope of a preliminary study such as this one. What is essential, however, is that proportionality, as part of reasonableness, requires a thorough investigation of the stakeholders at play, and a re-examination of the current legislative framework.

7 Conclusion

This article explored the administrative nature of FMD movement control measures in South Africa and measured them against the appropriate standard of proportionality under PAJA. The aetiological and epidemiological nature of the disease was used to illuminate the nuanced challenges in disease control. The legal entrenchment of FMD control in South Africa was set out and the specific movement control measures currently employed were critically explored. The characteristics of the disease, the efficacy and impact of current control measures, and the legal nature of the control measures were then measured against the current framework of administrative law. It is concluded that the current movement control measures, as contained in the Regulations and the VPN, can and should be subjected to the standards of PAJA. From this, the movement control measures were evaluated in light of the reasonableness requirement under PAJA, specifically looking at proportionality as a ground of review.

This article attempts to alleviate the dearth of legal research into the regulation of animal diseases. It represents a preliminary enquiry into the overlooked but important intersection between the legal and the epidemiological fields. The scope of the article is, by necessity, narrow but points to several lacunae in current legal-scientific discourse.

CONSERVATION CRIME AND PANGOLIN POACHING: TENSIONS BETWEEN CUSTOMARY USE AND CONSERVATION LAW

by Nicola Irving*



Abstract

In this paper, the author assesses the interplay between African customary use of pangolin and conservation law and to what extent the existing legislative framework undermines the heritage value of pangolins for customary communities. The author discusses the extent to which the laws governing pangolin protection in South Africa impose limitations on the customary use of pangolin for customary communities. Finally, the author considers whether customary law rights of access to and use of pangolin can or ought to coexist with conservation law. This paper aims to illustrate that the conservation laws regulating pangolin in South Africa impose excessive limitations on customary use and access to pangolin.

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1 Introduction

My research is premised on the assumption that there is legitimate customary use of pangolin in South Africa and whilst some very limited use ought to be permissible, the conservation laws inhibit all forms of customary use.¹ The term ‘customary use’ refers to the utilisation of indigenous plants and animals, by adherents of African customary law, in maintaining a customary relationship with the natural environment for purposes including traditional medicine and healing.² This paper aims to prove that the conservation laws regulating pangolin in South Africa impose excessive limitations on customary use and access to pangolin and motivates for coexistence between conservation law and customary law.³

The species focus of this paper will be the Temminck’s pangolin, or *Smutsia temminckii* – the only pangolin species found in South Africa and one of eight pangolin species globally.⁴ My research is motivated by threats to pangolin and is relevant because: (1) pangolins are the world’s most illegally trafficked mammal;⁵ (2) pangolins are highly sought after and used regularly in traditional medicine and divination in South Africa;⁶ (3) pangolins have high

- 1 D Pietersen ‘Behavioural ecology and conservation biology of ground pangolins *Smutsia temminckii* in the Kalahari Desert’ (2013) Department of Zoology and Entomology, University of Pretoria. The pangolin, or *penggulong* meaning ‘one who rolls up’ in Malay, is a toothless, ant-eating mammal endemic to regions of Asia and Africa. The animal is protected by overlapping keratinous scales which account for approximately 20 per cent of its body mass. When threatened, a pangolin’s defence mechanism involves curling into a tight ball, by tucking its head beneath its strong, muscular tail. There are eight different pangolin species across Asia and Africa. See also D Pietersen, A McKechnie & R Jansen ‘A review of the anthropogenic threats faced by Temminck’s ground pangolin, *Smutsia temminckii*, in southern Africa’ (2014) 44 *South African Journal of Wildlife Research* at 167.
- 2 S Weaver ‘The Call of the Kererū: The Question of Customary Use’ (1997) 9(2) *The Contemporary Pacific* at 383.
- 3 W Wicomb & H Smith ‘Customary communities as “peoples” and their customary tenure as “culture”: What we can do with *Endorois* decision’ (2011) 11 *African Human Rights Law Journal* at 423; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 2011. The term ‘customary communities’ is used to denote communities who regulate their lives in terms of customary law, referring to a broader group of individuals than those circumscribed by the definitions of ‘indigenous’ and ‘tribal’ persons in international law instruments.
- 4 Pietersen, McKechnie & Jansen (n 1) 167. The Temminck’s pangolin is the most widespread of the four African pangolin species, whose distribution ranges from northern South Africa, throughout most of East Africa, and into southern Sudan and Chad. See also D Pietersen et al ‘*Smutsia temminckii*. The IUCN Red List of Threatened Species 2014’ 2015 <http://dx.doi.org/10.2305/IUCN.UK.2014-2.RLTS.T12765A45222717.en> (accessed 20 October 2019).
- 5 T Knight ‘Scaling up protection of Earth’s most heavily poached and trafficked mammal’ *Daily Maverick* 06 September 2019 <https://www.dailymaverick.co.za/article/2019-09-06-scaling-up-protection-of-earths-most-heavily-poached-and-trafficked-mammal/> (accessed 20 October 2019).
- 6 A Baiyewu et al ‘Ethnozoological Survey of Traditional Uses of Temminck’s Ground Pangolin (*Smutsia temminckii*) in South Africa’ (2018) 26(3) *Society & Animals* at 12.

conservation and intrinsic value, which limits the uses that ought to be made of them;⁷ and (4) the traditional practices of customary communities, including their legitimate uses of pangolins, ought to be respected.⁸ To foreground my discussion on the harmonisation of conservation laws and customary law, what follows is a series of introductory remarks on the threats to pangolins, the uses and significance of pangolins, the drivers of pangolin poaching, the current legal response to curbing pangolin poaching in South Africa, and the methodology of this article.

1.1 Threats to pangolins

The threats to pangolins are both national and international, however, the substantial drivers of pangolin extinction are believed to be issues of an increasingly cross-border nature.⁹ The transnational illegal wildlife trade is threatening the survival of all eight species of pangolin because the regeneration of wild populations cannot meet the rate of poaching and the exorbitant demand for pangolin products in southeast Asia.¹⁰ In an assessment report released by the International Union for Conservation of Nature (IUCN) in December 2019, three out of the eight pangolin species were declared to be facing severe survival threats due to poaching pressures.¹¹ Although the Temminck's pangolin is currently categorised as 'Vulnerable' (as opposed to 'Endangered' or 'Critically Endangered') on the IUCN Red List, it is only a matter of time before increased poaching pressures affect southern African pangolin populations on a detrimental scale because populations are decreasing.¹²

Approximately 100 000 Asian and African pangolins are poached annually, with the illegal trade in pangolin scales alone being estimated at R644 million per year.¹³ Recent data recording the seizures of illegally traded goods in primary markets such as China and Vietnam, as well as in transit hubs like Singapore and Hong Kong, suggests that the number of pangolins in the illegal wildlife trade is increasing and that, as Asian pangolin populations decrease, poaching

7 D Challender et al 'Taking pangolin conservation to scale' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 609.

8 M Walsh 'Symbolism, myth and ritual in Africa and Asia' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 208.

9 S Harrop 'Conserving pangolins through international and national regulation and effective law enforcement' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 283.

10 A Gupta 'Poaching driving three pangolin species toward extinction: report' 20 December 2019 <https://news.cgtn.com/news/2019-12-20/Poaching-driving-three-pangolin-species-toward-extinction--MzLmkwx5ba/index.html> (accessed 17 January 2020).

11 D Pietersen et al (n 4).

12 D Pietersen et al (n 4).

13 A Minaar 'Conservation crime, wildlife trafficking and organised crime' (2018) 31 *Acta Criminologica: Southern African Journal of Criminology & Victimology* at 3.

pressures are steadily transferring from Asia to Africa.¹⁴ Between April and July 2019, for example, Singaporean customs officials intercepted 37.5 tonnes of pangolin scales, *en route* to Vietnam from Nigeria.¹⁵ However, Interpol estimates that nine out of every ten illegally trafficked pangolins are undetected by authorities, meaning that existing seizures data probably only represents one-tenth of the actual illegal trade in pangolins.¹⁶

Pangolin scales form an integral part of Traditional Chinese Medicine (TCM).¹⁷ The perceived medicinal value and the high price of pangolin scales have bolstered the cultural value of pangolin across East and Southeast Asia, leading to it becoming a luxury wildlife product for affluent consumers.¹⁸ Arguably, the scale of the demand for pangolins and derivative products in Asia is illustrative of the neo-liberal capitalist propensity towards the commodification of nature.¹⁹ As an unfortunate by-product of increasing wealth and a growing middle class in China and Vietnam, the levels of demand are proving unsustainable for the dwindling populations of the species, with upwards of one million pangolins trafficked in the last decade.²⁰

14 T Ullmann, D Veríssimo & D Challender 'Evaluating the application of scale frequency to estimate the size of pangolin scale seizures' (2019) 20 *Global Ecology and Conservation* <https://www.sciencedirect.com/science/article/pii/S235198941930424X> (accessed 15 January 2020).

15 Al Jazeera 'Singapore seizes pangolin scales, ivory worth over \$48m' *Aljazeera* 23 July 2019 <https://www.aljazeera.com/news/2019/07/singapore-seizes-pangolin-scales-ivory-worth-48m-190723073748818.html> (accessed 15 January 2020).

16 T Yao-Cheng et al 'The Pangolin Reports' *Trafficked to Extinction* <https://globalstory.pangolinreports.com/#china-coda> (accessed 16 January 2020).

17 A Aisher 'Scarcity, Alterity and Value Decline of the Pangolin, the World's Most Trafficked Mammal' (2016) 14 *Ashoka Trust for Research in Ecology and the Environment* at 320.

18 Aisher (n <XREF>) 320.

19 J Cock "'Green Capitalism' or Environmental Justice? A Critique of the Sustainability Discourse' (2011) 63 *Focus* at 51. Neoliberalism is generally understood as a new stage in the growth of capitalism, having evolved from the wake of the 'post-war-boom'. Neoliberalism is understood as encompassing three intertwined characteristics, namely: an apparatus of institutions, policies, and practices; a structure of economic, social, and political reproduction characterised by financialisation; and a system of capitalism for the minority and against the majority. Neoliberalism is a complex system of multifaceted ideological, practical, and policy features and is characterised by strong private property rights, free markets, and free trade. See also K Bayliss et al '13 Things you need to know about neoliberalism' (2016) 43 *New Agenda: South African Journal of Social and Economic Policy* at 25; and D Harvey *A brief history of neoliberalism* (2005) at 71.

20 A Andersson 'China's Appetite for Pangolin is Threatening the Creature's Existence' 12 June 2014 <https://time.com/2846889/pangolins-china-cites-trafficking-endangered/> (accessed 16 October 2019); WildAid 'Pangolins are the world's most heavily-trafficked wild mammals' <https://wildaid.org/programs/pangolins/> (accessed 7 January 2020).

1.2 Uses and significance of pangolin

In Africa, pangolins are sourced as bushmeat and utilised traditionally for the treatment of various physical infirmities and as spiritual antidotes.²¹ Despite a relatively sparse body of literature, a recent ethnozoological survey of the traditional uses of Temminck's pangolin operates as a useful tool in ascertaining the significance of the animal across South Africa.²² The survey was conducted in four out of the nine provinces, namely; KwaZulu-Natal, Mpumalanga, Limpopo, and North West, with participants from the Sepedi, isiZulu, Tsonga, Tswana, Venda, Ndebele, and Swati speaking communities.²³

Respondents from the participating communities illustrated the cultural magnitude of the pangolin in numerous ways.²⁴ It appears that the pangolin represents both a good and bad omen and is generally perceived to have connections to thunder, lightning strikes, and rain.²⁵ Children in these communities are cautioned against maiming the animal for fear of causing drought and famine.²⁶ Across these communities, pangolin scales are used as talismans to protect against evil forces and are often carried in wallets or stored in vehicles to protect passengers from accidents.²⁷ Moreover, for reasons not stipulated, women are forbidden from handling both dead and live pangolins.²⁸

In the Sepedi community, pangolins are never killed during the rainy season because it is believed that drought will ensue.²⁹ Additionally, pangolins are utilised in traditional veterinary medicine and animal husbandry to enhance fertility in cattle and protect livestock against predators.³⁰ The burning of pangolin scales is thought to improve the health of livestock and repel lions.³¹

In the Tswana and Venda communities, the person who initially sights a pangolin is afforded special treatment by the chief and tribesmen.³² These communities also believe that bad luck follows if pangolin blood is spilt in a village, hence pangolins are slaughtered over repositories to assist in the collection of blood.³³

21 Baiyewu et al (n 6) 2.

22 Baiyewu et al (n 6) 5.

23 As above.

24 Baiyewu et al (n 6) 9.

25 Baiyewu et al (n 6) 10.

26 As above.

27 Baiyewu et al (n 6) 14.

28 As above.

29 Baiyewu et al (n 6) 10.

30 Baiyewu et al (n 6) 15.

31 As above.

32 Baiyewu et al (n 6) 10.

33 Bräutigam et al 'Recent Information on the Status and Utilization of African Pangolins' (1994) 15 *TRAFFIC Bulletin* at 17.

The Lobedu community of the Limpopo Province believes that Temminck's pangolins traditionally belong to the queen and must be captured alive.³⁴ The animals' fat is utilised in making so-called 'rain medicine', which the queen uses in her role as a rainmaker.³⁵

The survey concluded that the Temminck's pangolin is still highly sought after and used regularly in traditional medicine and divination in South Africa, whilst revealing several restrictions on the uses of pangolin and illustrating that communities have the utmost respect for the animal and its connection to nature.³⁶ Most of the respondents were middle-aged or elderly persons, suggesting that the younger generation is less familiar with the pangolin due to its increased scarcity, or that most people belonging to the younger generation have moved to urban areas.³⁷ The survey also noted that members of these communities are aware, not only of the heritage value and need to conserve pangolin, but also of the perceived economic value thereof.³⁸ This awareness of the pangolin's economic value may contribute to the indiscriminate hunting and poaching of the animal.³⁹ Another troubling finding was that the same community members who rely on pangolins for customary use may also turn to poaching because of their poor socio-economic circumstances and the financial relief that pangolin poaching may provide them.

The high monetary value attached to pangolins epitomises the commodification of nature as a central feature of the contemporary period of neoliberal capitalism.⁴⁰ For example, Baiyewu et al's survey concluded that even the customary communities, particularly the younger generations, are aware of the perceived attractive economic value of pangolins.⁴¹ According to Professor Raymond Jansen, Chairperson of the African Pangolin Working Group, the majority of poachers that are intercepted in South Africa are financially destitute people who have turned to crime.⁴² A recent report by a global non-governmental organisation, TRAFFIC, on the demographics of offenders and their activities in the illegal wildlife trade in South Africa revealed that 86% of poachers did not reach or complete secondary school and 38% were unemployed.⁴³ This is an unfortunate characteristic of the illegal wildlife trade – the poachers, who are

34 Walsh (n 8) 204.

35 As above.

36 Baiyewu et al (n 6) 12.

37 Baiyewu et al (n 6) 15.

38 Baiyewu et al (n 6) 16.

39 As above.

40 Cock (n) 51.

41 Baiyewu et al (n 6) 16.

42 A Alim 'Stop the Illegal Wildlife Trade: How pangolins became the ultimate luxury good' 01 September 2020 <https://www.independent.co.uk/environment/pangolin-scales-trafficking-africa-stop-illegal-wildlife-trade-ivory-drugs-a9696041.html> (accessed 14 October 2020).

43 S Moneron, A Armstrong & D Newton 'The people beyond the poaching: Interviews with convicted offenders in South Africa' (2020) *TRAFFIC Report* at 10.

driven to crime through greed or desperation, are the ones confronted with lengthy prison sentences, whilst the traders, smugglers, and wealthy consumers who derive benefit from the globalisation of crime,⁴⁴ often escape the clutches of the law because they tend to have enough wealth and political connections to ensure protection from the authorities.⁴⁵

In South Africa, Temminck's pangolin is available in traditional medicine markets and is marketed as a remedy for a range of ailments.⁴⁶ Although the magnitude of the threat to pangolins by the *umuthi* trade in South Africa has not yet been quantified, the scale of use in traditional medicine is known to be high in both urban *umuthi* markets and rural areas.⁴⁷ While such use might have been historically sustainable, evidence suggests that this is no longer the case and that the species has been eliminated from parts of its distribution range due to overexploitation for *umuthi*, food, or for presentation to tribal chiefs and statesmen as gifts.⁴⁸ Based on anecdotal evidence from Professor Raymond Jansen of the African Pangolin Working Group, the scale of use by members of customary communities is not an immediate threat to pangolins in South Africa.⁴⁹ For example, traditional health practitioners use only a few grams of pangolin scale powder when dispensing to a patient.⁵⁰ Therefore, although many traditional health practitioners keep pangolin scales in their inventories, these scales can last a number of years due to the very low volumes dispensed at any one time.⁵¹ For this reason, Professor

44 K Zhang & J Xu 'Pangolin scale smugglers: a few culprits caught, but masterminds behind illegal wildlife trade evade arrest' 3 February 2020 <https://www.scmp.com/news/hong-kong/health-environment/article/3048633/pangolin-scale-smugglers-few-culprits-arrested> (accessed 5 November 2020). For example, Chinese customs officials and local police recently raided the premises of a suspected international wildlife smuggling syndicate led by prominent Hong Kong businessman, Wong Muk-nam and although a few perpetrators were apprehended, the masterminds behind the operation evaded arrest. Chinese court documents illustrate that between 2014 and 2016, Wong and his associates smuggled at least three shipments of pangolin scales, worth \$547 000, from Nigeria to his factory in the Guangdong Province, with the cargo passing through South Korea, Hong Kong, and the southern Chinese city of Shenzhen.

45 Alim (n 42); United Nations Office on Drugs and Crime 'World Wildlife Crime Report: Trafficking in protected species' (2020) at 68.

46 A Kriel 'Curbing consumption of pangolins' 10 July 2019 <https://africanpangolin.org/2019/07/10/in-the-news-curbing-consumption-of-pangolins/> (accessed 14 January 2020). These ailments include epilepsy, infertility, and cancer.

47 Pietersen, McKechnie & Jansen (n 2) 172; Baiyewu et al (n 6) 2.

48 D Pietersen et al 'Temminck's pangolin *Smutsia temminckii* (Smuts, 1832)' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 190; Pietersen et al 'A conservation assessment of *Smutsia temminckii*' in M Child et al (eds) *The Red List of Mammals of South Africa, Swaziland and Lesotho* (2016) at 3.

49 A Kriel 'The traditions and beliefs threatening the endangered pangolin' 5 July 2019 <https://old.earthjournalism.net/stories/the-culture-driving-the-illegal-trade-of-the-endangered-pangolin> (accessed 15 October 2020).

50 Kriel (n 49).

51 As above.

Raymond Jansen has drawn the tentative conclusion that such use is currently sustainable.⁵² Ultimately, there are no definitive findings to suggest that the scale of customary use is, in fact, ecologically sustainable. An argument in favour of the coexistence of conservation law and customary law could be made in the future, subject to further research that illustrates the extent of pangolin use and whether customary communities hold comparable internal sustainable measures to those evidenced by the communities in *Gongqose*, which I will discuss below.

1.3 Drivers of pangolin poaching

In pursuit of the illegal wildlife trade, a variety of anthropogenic factors are threatening Temminck's pangolin populations, some rooted in poverty and need, and others in profit and greed.⁵³ However, almost all of them originate from a neo-liberal commodification of nature because exorbitant monetary values are attached to pangolins on the illegal wildlife market.⁵⁴

Although overexploitation in rural areas might be contributing to population decline, overexploitation by poaching for the international consumer markets of the illegal wildlife trade is the foremost threat to pangolins.⁵⁵ How much of the hunting and trade in pangolins in South Africa is intended for the transnational illegal wildlife trade or domestic use is unclear.⁵⁶ However, the nature and circumstances surrounding recent seizures suggest links between rapid pangolin population decline and transnational and intercontinental trade, rather than local use.⁵⁷

1.4 Current legal response to curb pangolin poaching in South Africa

The scale of the transnational illegal wildlife trade explains why contemporary national and international legal responses have opted for a more fortress-oriented approach to pangolin conservation,

52 Kriel (n 49).

53 K Abotsi, P Galizzi & A Herklotz 'Wildlife crime and degradation in Africa: An analysis of the current crisis and future prospects for a secure future' (2016) 27 *Fordham Environmental Law Review* at 395.

54 Abotsi, Galizzi & Herklotz (n 53) 395; Alim (n 42).

55 D Challender et al 'International trade and trafficking in pangolins, 1900-2019' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 271. These threats are not exhaustive and include electrocution by electrified fences, traditional medicinal (*umuthi*) use, the bushmeat trade, road mortalities, gin traps, habitat loss, poisoning, and the pet trade. See also Pietersen, McKechnie & Jansen (n) 167.

56 D Challender & L Hywood (2012) 'African pangolins under increased pressure from poaching and intercontinental trade' (2012) 24 *Traffic Bulletin* at 54.

57 Challender & Hywood (n 56) 54.

meaning that the interests and traditional practices of customary communities are excluded.⁵⁸ The prevailing uncertainty surrounding the number of pangolins in the illegal wildlife trade is another reason why policymakers have opted for a more precautionary approach to pangolin conservation. Notwithstanding this uncertainty, to preserve dwindling species' numbers, South Africa has clamped down on poaching by adopting a so-called 'command-and-control' approach to pangolin conservation by imposing restrictions and extensive penalties.⁵⁹ Command-and-control approaches to conservation are widely criticised for their unresponsiveness to the complexities of humanity's contemporary interactions with nature.⁶⁰ Ultimately, command-and-control approaches only respond to the poachers (and perhaps some of the intermediaries, such as traders and smugglers) in the trafficking supply chain of pangolin, and not those who are driving the illegal trade in the first place.⁶¹ Furthermore, command-and-control measures disproportionately criminalise the poor and vulnerable, whilst being unable to target the wealthy and influential perpetrators further down the trafficking supply chain.⁶²

1.5 Methodology

By encouraging greater respect for the traditional practices of customary communities and casting doubt on the effectiveness of a fortress-oriented approach to conservation, this paper explores the possibility of adopting a more custodianship approach towards pangolin conservation. In contrast to a fortress-oriented approach, a custodianship approach to conservation is founded on inclusion and participation, casting local people as custodians, rather than the principal threats to wildlife and natural habitats.⁶³ Also known as community conservation, this approach is presented as a means of reconciling conservation and development objectives by considering the interests of local communities.⁶⁴ In this paper, the possibility of adopting a more custodian approach to conservation is explored

58 Abotsi, Galizzi & Herklotz (n) 397; B Büscher 'Reassessing Fortress Conservation? New Media and the Politics of Distinction in Kruger National Park' (2016) 106 *Annals of the American Association of Geographers* at 114.

59 R Fletcher 'Neoliberal environmentalism: Towards a poststructuralist ecology of the conservation debate' (2010) 8 *Conservation and Society* at 172.

60 C Holling & G Meffe 'Command and Control and the Pathology of Natural Resource Management' (1996) 10 *Conservation Biology* at 329.

61 United Nations Office on Drugs and Crime (n 45) 69.

62 United Nations Office on Drugs and Crime (n 45) 69.

63 A Paterson & M Mkhulisi 'Traversing South Africa's Conservation and Land Reform Objectives: Lessons from the Dwesa-Cwebe Nature Reserve' (2014) 131 *South African Law Journal* at 365.

64 W Adams & D Hulme 'If community conservation is the answer in Africa, what is the question?' (2001) 35 *Oryx* at 194.

through the African philosophical adage of ubuntu as an ecophilosophy.⁶⁵ Ubuntu originates from the isiXhosa expression 'umuntu ngumuntu ngabanye bantu', meaning that our full humanity is experienced through relationships with others.⁶⁶

According to Le Grange, the purpose of an ecophilosophy is to explore a range of human-nature relationships, to foster 'deeper and more harmonious relationships between place, self, community, and the natural world'.⁶⁷ Le Grange argues that ubuntu is consistent with ecophilosophy in that it embodies the principle of wholeness between human beings and physical nature.⁶⁸ Ubuntu implies a duty of care for fellow humans and by implication, care for one's natural environment and the other living beings within it.⁶⁹ Arguably, without such care, the interdependence between humans and physical nature would be undermined.⁷⁰

In the next section, the national and international legislative framework regulating pangolin conservation in South Africa will be outlined and discussed. Thereafter, the effects of the conservation laws on customary use and heritage value of pangolin for customary communities will be analysed in the third section. In the fourth section, the possibility for the coexistence of the conservation laws and customary law will be explored, with reference to recent case law that provides a compelling argument in favour of harmonisation. Finally, consideration will be given to the possibility for the coexistence of conservation laws and customary law in relation to pangolin, with reference to the principles of intergenerational equity and ubuntu as an ecophilosophy, respectively.

2 South Africa's national and international legislative framework regulating Temminck's pangolin

To begin with, it is necessary to consider the conservation laws regulating pangolin conservation and use in South Africa. Pangolins are regulated in terms of both national and provincial biodiversity legislation. However, it is also acknowledged that outdated provincial legislation often stifles the proper judicial protection of pangolins.⁷¹

65 L Le Grange 'Ubuntu/Botho as Ecophilosophy and Ecosophy' (2015) 49 *Journal of Human Ecology* at 303.

66 L Le Grange 'Ubuntu, Ukama and the Healing of Nature, Self and Society' (2012) 44 *Educational Philosophy and Theory* at 61.

67 Le Grange (n 65) 61.

68 Le Grange (n 65) 305.

69 Le Grange (n 66) 63.

70 M Ramose 'Ecology through Ubuntu' in R Meinhold (ed) *Environmental Values: Emerging from Cultures and Religions of the ASEAN Region* (2015) at 70.

71 Ramose (n 70) 70.

Furthermore, a plethora of outdated provincial legislation exists which is yet to be harmonised with the sentencing objectives of the national enabling legislation.⁷²

For the sake of brevity, only the national legislative framework will be discussed in this paper.⁷³ The conservation laws include: relevant provisions of the Constitution of the Republic of South Africa, 1996;⁷⁴ the National Environmental Management Act 73 of 1998 (NEMA);⁷⁵ the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA);⁷⁶ the Threatened or Protected Species Regulations (ToPS Regulations);⁷⁷ the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and the Convention on Biological Diversity (CBD).⁷⁸ Although not conservation legislation, the Traditional Health Practitioners Act 35 of 2004 (THPA) will be discussed in this section, insofar as it operates as a possible avenue for the customary use of pangolin.⁷⁹ In conjunction with the THPA, in the next section, I will turn to a discussion of relevant case law to unlock the possibility of acknowledging the customary use of pangolin in the future.

2.1 Laws regulating pangolin conservation in South Africa

According to a policy brief by Enact and the Institute for Security Studies, with regards to wildlife legislation at national and provincial levels, South Africa has the most progressive legislation, globally, aimed at protecting pangolins.⁸⁰ Section 24 of the Constitution enshrines an environmental right in South Africa and is the

72 For example, sec 86(1) of the Mpumalanga Nature Conservation Act 10 of 1998 empowers the responsible member of the provincial legislature to make regulations pertaining to the administration of various biodiversity matters. Sec 86(4) provides for the imposition of a fine or a period of imprisonment not exceeding three years, or both a fine and such imprisonment for contravention of these provincial regulations.

73 Examples of provincial legislation pertaining to pangolin conservation that will not be addressed in this article are the Limpopo Environmental Management Act 7 of 2003 and the Mpumalanga Nature Conservation Act 10 of 1998.

74 Constitution of the Republic of South Africa, 1996 (Constitution) sec 24.

75 National Environmental Management Act 73 of 1998 (NEMA) secs 1(1)(xi) & 2.

76 National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) secs 3, 5, 56, 57, 80, 87, 101 & 102.

77 Threatened or Protected Species Regulations Notice 255 of 2015 published in Government Gazette No. 38600 of 31 March 2015 (ToPS Regulations) Regulations 122-123.

78 Convention on Biological Diversity (Rio de Janeiro) (adopted 5 June 1992, in force 29 December 1993) to which South Africa is a contracting state party, having ratified the Convention on 31 January 1996 (CBD) Arts 2 & 6.

79 Traditional Health Practitioners Act 35 of 2004 (THPA) sec 21.

80 R Chelin 'A question of scales: Assessing strategies for countering illegal trafficking of pangolins in Africa' October 2019 <https://enactafrica.org/research/policy-briefs/a-question-of-scales-assessing-strategies-for-counter-illegal-trafficking-of-pangolins-in-africa> 10 (accessed 7 January 2020).

cornerstone of the discussion on the laws regulating pangolin conservation, as an aspect of ‘the environment’.⁸¹

NEMA is an important piece of conservation legislation that gives effect to section 24 of the Constitution, with which all specific environmental legislation must be read.⁸² NEMA defines the environment as: ‘the surroundings within which humans exist and that are made up of, *inter alia*, microorganisms, plant and animal life’.⁸³ Therefore, in accordance with NEMA, animals, including pangolins, must be included within the scope of protection afforded to the environment in section 24 of the Constitution.

NEMBA regulates the conservation of pangolin in South Africa. Within the context of international law, section 5 of NEMBA provides that where South Africa has ratified international agreements affecting biodiversity, these obligations ought to be fulfilled.⁸⁴ In this vein, it is important to consider the implications of South Africa’s international obligations under CITES – a multilateral agreement on biodiversity and sustainable use – when establishing domestic regulation of pangolin. At the 17th meeting of the Conference of the Parties to CITES, an international commercial trade ban on all eight species of pangolin was imposed.⁸⁵ Under CITES Notification No. 2016/063, pangolins are afforded Appendix I status which applies to ‘all species threatened with extinction which are or may be affected by trade’, meaning that there is a zero annual export quota of pangolin.⁸⁶ Under CITES, South Africa has both an international and domestic obligation to conserve its biodiversity and to protect threatened and endangered species, including pangolin.⁸⁷ Although this certainly includes an obligation to eliminate the commercial use

81 Section 24 of the Constitution, (n 74), governs the rights of everyone to an environment. See also D Bilchitz ‘Exploring the relationship between the environmental right in the South African Constitution and protection for the interests of animals’ (2017) 134 *South African Law Journal* at 745; and *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124 (W) para 145.

82 M Murcott ‘Transformative Environmental Constitutionalism’s Response to the Setting Aside of South Africa’s Moratorium on Rhino Horn Trade’ (2017) 6 *Humanities* at 87.

83 Section 1(1)(xi) of NEMA, (n 75), defines the ‘environment’ as the surroundings within which humans exist and that are made up of (i) the land, water, and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii), and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

84 Section 5 of NEMBA, (n 76), pertains to the application of international agreements affecting biodiversity to which South Africa is a party and which bind the Republic.

85 Notification to the Parties 2016/063, *Amendments to Appendices I and II of the Convention*, Convention on International Trade in Endangered Species of Wild Fauna and Flora (29 November 2016).

86 Challender (n 55) 265.

87 *Kruger v Minister of Water and Environmental Affairs* 2016 (1) All SA 565 (GP) (*Kruger*) para 26.

of pangolin, it also potentially entails an obligation to curtail the traditional use of pangolin by customary communities.

In accordance with section 56 of NEMBA, the Minister of Environmental Affairs (the Minister) is empowered to publish lists of species that are threatened or protected, as well as a list of prohibited activities and exemptions from restriction.⁸⁸ These lists are published in the ToPS Regulations, which categorise pangolin as a vulnerable terrestrial mammal species because they are 'facing an extremely high risk of extinction in the wild in the medium-term future'.⁸⁹ Section 57(1) of NEMBA provides that no one may carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7.⁹⁰ Chapter 7 of NEMBA pertains to the issuing of permits that authorise the conduct of restricted activities involving specimens of, *inter alia*, listed threatened or protected species and activities regulated in terms of section 57(2).⁹¹

Section 57(2) of NEMBA confers on the Minister the power to prohibit certain activities, however, there are only two reported instances of this occurring: the domestic trade in rhino horn, which has subsequently been reviewed and set aside;⁹² and the trade of certain cycads.⁹³ The Minister has not yet explicitly prohibited any activities in relation to pangolin specifically. Based on the ToPS Regulations, it is not a restricted activity to have or exercise physical control over individual pangolins or to cause specimens to multiply within an extensive wildlife system.⁹⁴ However, this does not include

88 ToPS Regulations (n 77).

89 Section 56 of NEMBA, (n 76), refers to the listing of species that are threatened or in need of national protection.

90 Section 1 of NEMBA, (n 76), defines a restricted activity in relation to a specimen of a listed threatened or protected species as, *inter alia*, hunting, catching, capturing or killing any living specimen by any means; gathering, collecting or plucking; damaging or destroying; importing into and exporting from the Republic; having in possession or exercising physical control over; breeding or causing it to multiply; conveying, moving or translocating; and selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift. Correspondingly, Chapter 7 of NEMBA governs the issuing of permits.

91 Section 87 of NEMBA, (n 76), outlines the purpose of Chapter 7 pertaining to permits.

92 *Kruger* (n 87).

93 Notice 382 of 2012 published in Government Gazette No. 35343 of 14 May 2012 pertains to the prohibition of trade in certain *Encephalartos* (cycad) species.

94 According to Regulation 1 of the ToPS Regulations, (n 77), an 'extensive wildlife system' is a natural environment: that is of sufficient size for the management of free roaming populations of a listed threatened or protected species, irrespective of whether it is fenced or not; meets the ecological requirements of the populations of listed threatened or protected species; and where no minimal human intervention is required in the form of, *inter alia*, the provision of healthcare or water.

having or exercising control over individual pangolins in a controlled environment.⁹⁵

Although NEMBA and the ToPS Regulations do not explicitly prohibit the use of pangolin, such use is regulated through permits, and it appears that permits have not yet been granted for purposes of customary use. In accordance with section 57(4) of NEMBA, the ToPS Regulations stipulate that only members of: (i) the South African Police Force and members of the South African Revenue Services, Customs Division in the execution of their official duties, in relation to the carrying out of restricted activities;⁹⁶ and (ii) veterinarians in the performance of various listed functions, may perform the following restricted activities in relation to pangolin: to have in their possession or exercise physical control over specimens of the species; or cause specimens to multiply.⁹⁷ Therefore, the performance of any other restricted activity by persons or categories of persons not exempted by the Minister, without a permit, will constitute an offence under the ToPS Regulations.⁹⁸

Chapter 9 of NEMBA pertains to offences and penalties in terms of national legislation. Section 101 of NEMBA identifies punishable offences, whilst section 102 establishes the penalties which include the imposition of a fine not exceeding R10 million or imprisonment for a period not exceeding ten years or both such a fine and imprisonment.⁹⁹ However, Chapter 13 of the ToPS Regulations creates lesser offences and penalties than those contained within NEMBA.¹⁰⁰ Regulation 123 stipulates that persons convicted of an offence are liable, upon conviction, to a fine not exceeding R5 million or imprisonment for a period not exceeding five years or both such fine

95 In terms of Regulation 1 of the ToPS Regulations, (n 77), a 'controlled environment' is an enclosure of insufficient size for the management of self-sustaining populations of listed threatened or protected species and is designed to hold the specimens in such a population in a manner that *inter alia*: prevents them from escaping; and facilitates intensive human intervention or manipulation, and may facilitate the intensive breeding or propagation of specimens of a listed threatened or protected species.

96 Schedule 2(a)(i) of the ToPS Regulations, (n 77), stipulates that members of the South African Police Services and the South African Revenue Services, Customs Division may acquire, receive, possess, transport, and dispose of pangolin in relation to the confiscation and subsequent handling of specimens thereof, in the execution of their official duties.

97 The ToPS Regulations pertain to the publication of lists of species that are threatened or protected, activities that are prohibited, and exemptions from these restrictions.

98 Chapter 13 of the ToPS Regulations, (n 77), pertains to offences and penalties, which will be discussed in greater detail below.

99 Section 102(1) of NEMBA, (n 76), stipulates the penalties applicable to persons convicted of an offence involving a specimen of a listed threatened or protected species.

100 Chapter 13 of the ToPS Regulations, (n 77), consists of Regulations 122 and 123 which pertain to offences and penalties, respectively.

and imprisonment.¹⁰¹ Moreover, only in the case of a second or subsequent conviction under the ToPS Regulations, is a convicted person liable for imprisonment for a period not exceeding ten years or a fine not exceeding R10 million, or both such fine and imprisonment.¹⁰²

Considering that pangolin constitutes an ‘indigenous biological resource’ for purposes of NEMBA,¹⁰³ it is necessary to consider the relevance, if any, of Chapter 6 of NEMBA. Chapter 6 pertains to bioprospecting,¹⁰⁴ access, and benefit-sharing.¹⁰⁵ Bioprospecting refers to a limited group of activities undertaken by a small number of commercial sectors and not to academic or conservation research on biodiversity.¹⁰⁶ According to part (d) of the definition of ‘bioprospecting’, the use of pangolin for traditional medicine might involve bioprospecting, however, further research is required to ascertain the nature and extent of the use of pangolin in traditional medicine to respond to this issue.¹⁰⁷ Considering that bioprospecting is aimed at harnessing traditional knowledge for purposes of the commercial or industrial exploitation of biological resources, I do not believe that the provisions of Chapter 6 are relevant to this discussion. The basis of this assertion is twofold: first, small-scale customary use does not operate on a commercial or industrial scale; and secondly, there are no proven medicinal benefits to pangolin consumption.¹⁰⁸ However, there is still an argument to be made in favour of sustainable customary use of pangolins, which constitutes an integral part of cultural beliefs, by adopting a more custodianship approach to pangolin conservation.

The general approach to South Africa’s conservation laws can be described as fortress-oriented, in that the interests and traditional

101 Regulation 123 of the ToPS Regulations, (n 77), prescribe the penalties applicable to persons convicted of an offence in terms of Regulation 122.

102 Regulation 123(1)(d) of the ToPS Regulations (n 77).

103 Sections 1 and 80(2) of NEMBA, (n 76), define ‘indigenous biological resources’ in relation to bioprospecting as, *inter alia*, any resource consisting of any living or dead animal, plant, or other organism of an indigenous species; any derivative of such animal, plant or other organism; or any genetic material of such animal, plant, or other organism.

104 Section 1 of NEMBA, (n 76), defines ‘bioprospecting’ in relation indigenous biological resources as, *inter alia*, any research on or development or application of indigenous biological resources for commercial or industrial exploitation.

105 Section 1 of NEMBA, (n 76), defines ‘benefit’, in relation to bioprospecting, as any benefit, whether commercial or not, arising from bioprospecting involving indigenous biological resources and includes both monetary and non-monetary returns.

106 R Wynberg ‘Bioprospecting, access and benefit-sharing in South Africa: Towards a strategic assessment’ (2004) at 8.

107 NEMBA (n 76) sec 1(d). This section provides a possibility for bioprospecting in relation to the use of pangolin for traditional medicine insofar as it relates to ‘the trading in indigenous biological resources in order to develop and produce products, such as drugs ...’.

108 X Jin et al ‘Evidence for the medicinal value of Squama Manitis (pangolin scale): A systematic review’ (2021) 10 *Integrative Medicine Research* at 6.

practices of customary communities are excluded.¹⁰⁹ In its present form, this approach seems to be diametrically opposed to the philosophical underpinnings of ubuntu as an ecophilosophy.¹¹⁰ By imposing restrictions and extensive penalties on the access to and use of many natural resources, South Africa's conservation laws proceed from the point of departure that the erection of fences and the imposition of fines are the best way to protect biodiversity.¹¹¹ Fortress conservation is criticised for many reasons, including how the management of protected areas and wildlife is detached from the everyday lives of local people.¹¹² The distinction between a fortress-oriented and a custodianship approach to conservation represents a historical juxtaposition between local people and conservation success, which will be discussed in greater detail in the next section.¹¹³ The following subsection turns to a discussion on the laws that specifically regulate pangolin use in South Africa.

2.2 Laws regulating pangolin use in South Africa

Despite an extensive body of legislation regulating pangolin conservation from a fortress-oriented perspective, there is no legislation directly regulating the use of terrestrial resources, including pangolin, with specific attention on customary use and the traditional way of life of customary communities.¹¹⁴ The THPA indirectly regulates the use of pangolin, as discussed below.

Notwithstanding the absence of the direct regulation of pangolin use in South Africa, NEMA, which should be read alongside NEMBA, contains various indications that a more inclusive, custodianship approach to pangolin conservation should be adopted.¹¹⁵ The first indication of this is contained in section 2(2) of NEMA which stipulates that environmental management must serve, amongst other things, the cultural and social interests of people equitably.¹¹⁶ Secondly,

109 Abotsi, Galizzi & Herklotz (n <XREF>) 395; B Büscher 'Reassessing Fortress Conservation? New Media and the Politics of Distinction in Kruger National Park' (2016) 106 *Annals of the American Association of Geographers* at 114.

110 Le Grange (n 65) 305.

111 Adams & Hulme (n 64) 193.

112 P Steyn 'The Environmental Legacy of the Apartheid Era' (2005) 2 *Globalizations* at 394.

113 H Siurua 'Nature above People: Rolston and "Fortress" Conservation in the South' (2006) 11 *Ethics and the Environment* at 87.

114 L Monyamane & M Bapela 'Gongqose v Minister of Agriculture, Forestry and Fisheries – A Tale of Customary Rituals and Practices in Marine Protected Areas' (2019) 22 *Potchefstroom Electronic Law Journal* at 9.

115 Section 2(1)(e) of NEMA, (n 75), stipulates that the principles contained in Chapter 1 shall guide the interpretation, administration, and implementation of the Act and any other law concerned with the protection or management of the environment.

116 Section 2(2) of NEMA, (n 75), provides that environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural, and social interests equitably.

section 2(4)(d) of NEMA provides for equitable access to environmental resources, benefits, and services to meet basic human needs and ensure human wellbeing, and makes provision for the implementation of special access measures for persons disadvantaged by unfair discrimination. Thirdly, section 2(4)(g) of NEMA states that decisions must consider the interests, needs, and values of all interested and affected parties, including the recognition of traditional knowledge. Finally, section 2(4)(h) of NEMA provides for the promotion of community wellbeing and empowerment through environmental education, the raising of environmental awareness, and the sharing of knowledge and experience. These provisions indicate that the cultural practices of customary communities ought not to be overlooked and instead, should be protected and promoted. Therefore, NEMA, as a framework of environmental legislation, must be used to guide the interpretation of the fortress-oriented provisions in NEMBA and other environmental legislation.

Within the context of the consumptive use of pangolin, the notion of ‘sustainable use’ is relevant. ‘Sustainable use’ is a well-used term with little in the way of supporting documentation. However, this concept is entrenched in section 24(b)(iii) of the Constitution.¹¹⁷ South African biodiversity legislation also recognises the sustainable use of indigenous biological resources.¹¹⁸ The Preamble to NEMBA stipulates that the Act provides for, *inter alia*, the sustainable use of indigenous biological resources. According to section 1 of NEMBA, ‘sustainable’ in relation to the use of biological resources, means the use of such resource in a manner and at a rate that: (a) would not lead to its long-term decline; (b) would not disrupt the ecological integrity of the ecosystem in which it occurs; and (c) would ensure its continued use to meet the needs and aspirations of present and future generations of people. Moreover, section 2(a)(ii) of NEMBA provides that one of the objectives of the Act is, *inter alia*, to provide for the use of indigenous biological resources in a sustainable manner.

‘Sustainable use’ was identified as one of the strategic goals of South Africa’s environmental policy in the White Paper on Environmental Management Policy (the White Paper).¹¹⁹ The White

117 Section 24(b)(iii) of the Constitution, (n 74), stipulates that the right to an environment includes, *inter alia*, environmental protection measures that secure ecologically sustainable development and use of natural resources. Moreover, the Preamble of NEMBA, (n 76) stipulates that the sustainable use of indigenous biological resources must be accommodated, whilst section 2(a)(ii) identifies one of the objectives of the Act as providing for the use of indigenous biological resources in a sustainable manner.

118 According to section 1 of NEMBA, (n 76), ‘indigenous biological resources’ are, *inter alia*, any living or dead animal, plant or other organism of an indigenous species; any derivative of such animal, plant or other organism; or any genetic material of such animal, plant or other organism.

119 Goal 2: Sustainable Resource Use and Impact Management in *White Paper on Environmental Management Policy* published in Government Gazette No. 18894 on 15 May 1998 (*White Paper on Environmental Management Policy*).

Paper stipulated that natural resources encompass ‘all forms of life’, including animals and thus, Temminck’s pangolin. The goal of sustainable resource use aims to, *inter alia*, promote equitable access to and sustainable use of natural and cultural resources.¹²⁰ Likewise, the IUCN recognises that wise and sustainable use of wildlife can be consistent with and contribute to conservation because the benefits derived from the use of species can incentivise communities to conserve them and their habitats.¹²¹

It has already been stipulated that where South Africa has ratified international agreements affecting biodiversity, these obligations ought to be fulfilled.¹²² Therefore, within the context of international law, the CBD, to which South Africa is a contracting party, is applicable. The concept of sustainable use is defined in Article 2 of the CBD, as:¹²³

... the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity and thereby maintain its potential to meet the needs and aspirations of present and future generations.

According to Article 6 of the CBD, South Africa must, *inter alia*, develop national strategies, plans, or programmes for the conservation and sustainable use of biological diversity.¹²⁴ Therefore, the notion of sustainable use illustrates that the sustainable use of pangolin may be consistent with and contribute to conservation, in addition to fulfilling the rights in section 24(b)(iii) of the Constitution and South Africa’s international obligations under the CBD.¹²⁵

The THPA, albeit indirectly related to the use of pangolin, may provide an avenue for customary use through the requirement of registration to practise as a traditional health practitioner.¹²⁶ According to section 21 of the THPA, no person may practise as a traditional health practitioner unless they are registered in terms of the Act.¹²⁷ Consequently, although NEMBA,¹²⁸ the ToPS Regulations,¹²⁹ and CITES envisage no use of pangolin by customary

120 *White Paper on Environmental Management Policy* (n 119).

121 IUCN SSC *Guiding Principles on Trophy Hunting as a Tool for Creating Conservation Incentives* (2012) at 2.

122 Section 5 of NEMBA, (n 76), pertains to the application of international agreements affecting biodiversity to which South Africa is a party and which bind the Republic.

123 CBD (n 78) Art 2.

124 Article 6 of the CBD, (n 78), pertains to the general measures for conservation and sustainable use.

125 IUCN SSC (n121) 2.

126 ‘Traditional health practitioner’, as defined in section 1 of the THPA, (n 79), means a person registered under the Act in one or more of the categories of traditional health practitioners.

127 Section 21 of the THPA (n 79), pertains to the application for registration to practise as a traditional health practitioner.

128 NEMBA (n 76) secs 3, 5, 56, 57, 87, 101 & 102.

129 ToPS Regulations (n 77) Regulations 122-123.

communities whatsoever, a person who is registered as a traditional health practitioner under the THPA could potentially rely on the custodianship-oriented provisions in NEMA to facilitate the customary use of pangolin.

Whilst conservation laws serve the legitimate purpose of conserving biological diversity within South Africa and notwithstanding the potential avenue for traditional health practitioners and the implications of sustainable use, these laws ultimately fail to recognise that many traditional South African communities are engaged in legitimate customary use of pangolin, which constitutes an integral part of their cultural beliefs.¹³⁰ This mandates a closer look into the effects of conservation laws on customary use and heritage value for customary communities.

3 Effects of the conservation laws on customary use and heritage value for customary communities

The intersection between conservation and cultural interests is at a contentious crossroads. On the one hand, the conservation laws reflect the historical juxtaposition of local people with conservation success and on the other hand, they present the need to adopt and implement rigorous measures aimed at protecting vulnerable species.¹³¹

In general, South Africa's conservation laws are fortress-oriented and protectionist as local people are excluded from the use and control of natural resources.¹³² Despite the provisions of NEMA and NEMBA that support a more inclusive, custodianship approach to conservation, the legislative framework as a whole has contributed to a conservation approach that elevates punishment over custodianship, even in instances of legitimate customary use.¹³³ This is indicative of the general failure of environmental governance in South Africa, particularly in the context of biodiversity conservation, to recognise the extant traditional practices of customary communities in relation to physical nature, which will be discussed below.¹³⁴

Many traditional South African communities are engaged in legitimate customary use of pangolin, which constitutes an integral

130 Baiyewu et al (n 6) 10.

131 Siurua (n 113) 87.

132 Abotsi, Galizzi & Herklotz (n 53) 397.

133 *Gongqose and Others v Minister of Agriculture, Forestry & Fisheries and Others; Gongqose and Others v State and Others* [2018] ZASCA 87, 01 June 2018 (*Gongqose*) paras 13-19.

134 Abotsi, Galizzi & Herklotz (n 53) 397.

part of cultural beliefs.¹³⁵ Consequently, to the extent that the conservation laws prevent the consumptive use of pangolin, the ancestral ties between customary communities and the natural environment are disrupted and ignored.¹³⁶

Arguably, the laws governing pangolin protection in South Africa operate to inhibit and undermine the customary use and value of pangolin insofar as there are currently no legally protected uses thereof. Therefore, if the prohibition on the consumptive use of pangolin is understood to be an absolute prohibition, these restrictions would apply to anyone wishing to exercise their customary rights. Consequently, the role of this prohibition in the dispossession of access to and use of pangolin for customary communities could also amount to the dispossession of cultural interests.¹³⁷

Although the laws governing pangolin protection in South Africa potentially undermine the heritage value for customary communities, it is argued that it is the poaching of pangolins for the international consumer markets of the illegal wildlife trade that ultimately poses the greatest threat to heritage value for customary communities. The illegal wildlife trade adversely impacts local communities who are affected by insecurity, regional instability, the depletion of livelihood and economic assets, and heavy-handed militarised responses to wildlife crimes.¹³⁸ Nevertheless, diminished population status may result in the eventual elimination of possessory interests and any legally protected uses of pangolin for customary communities.¹³⁹

Ultimately, the traditional practices of customary communities depict longstanding and deeply rooted ties to land and other natural resources.¹⁴⁰ Evidence suggests that the traditional practices of customary communities relating to pangolin extend further than the imperatives of subsistence and food security, into the realm of cultural identity and belief.¹⁴¹

In response to growing disenchantment with fortress conservation, many scholars have advocated for more participatory approaches to conservation.¹⁴² Consistent with this shift in the

135 Baiyewu et al (n 6) 12.

136 Abotsi, Galizzi & Herklotz (n 53) 398.

137 L Feris 'A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights' (2013) 16 *Potchefstroom Electronic Law Journal* at 557.

138 IUCN 'Communities and Illegal Wildlife Trade' <https://www.iucn.org/commissions/commission-environmental-economic-and-social-policy/our-work/specialist-group-sustainable-use-and-livelihoods-suli/communities-and-illegal-wildlife-trade> (accessed 28 January 2020).

139 Feris (n 137) 557.

140 As above.

141 As above.

142 Adams & Hulme (n 64) 193.

dominant conservation narrative, is the potential for the coexistence of the conservation laws and customary law, in relation to the exercise of a customary right of access to and use of pangolin, as will be discussed below.

4 Potential for the coexistence of the conservation laws and customary law

In this section, the potential for the coexistence of conservation laws and customary law will be considered against the backdrop of the rights to culture in sections 30 and 31 of the Constitution. I will then discuss how these rights were interpreted in *Gongqose* and attempt to apply the Court's reasoning to the exercise of a customary right of access to and use of pangolin.¹⁴³ Although the so-called living customary law pertaining to pangolin use in South Africa is difficult to ascertain due to abject literature,¹⁴⁴ I will rely on the findings of Baiyewu et al's recent ethnozoological survey to construct an argument in favour of adopting a custodianship approach to pangolin conservation.¹⁴⁵ Thereafter, I will reflect on the possibility and desirability of shifting from a fortress-oriented to a custodianship approach to pangolin conservation, by referring to the notion of intergenerational equity, as well as the African philosophical adage of *ubuntu ngumuntu ngabanye* as an ecophilosophy.

4.1 Reflecting on *Gongqose*

Section 211 of the Constitution provides for the judicial recognition of customary law rights.¹⁴⁶ Read together, sections 30 and 31 of the Constitution provide for the entrenchment of the rights to culture and cultural practices.¹⁴⁷ Notwithstanding textual recognition by the Constitution, some academics argue that customary law norms and practices still operate on the fringes of South African law.¹⁴⁸ However, recent judgments confirm that in South Africa's constitutional dispensation, customary law occupies equal footing with the common law and that the rights and cultural practices that

143 *Gongqose* (n 133).

144 D Ndirima 'The African law of the 21st century in South Africa' (2003) 36 *The Comparative and International Law Journal of Southern Africa* at 325.

145 A Wiersema 'Incomplete Bans and Uncertain Markets in Wildlife Trade' (2016) 12 *University of Pennsylvania Asian Law Review* at 84; Baiyewu et al (n 6) 2.

146 Section 211 of the Constitution, (n 74) recognises customary law and traditional leadership. Section 211(3) provides that the courts must apply customary law when applicable, subject only to the Constitution and any legislation that specifically addresses customary law.

147 Section 30 of the Constitution, (n 74), protects the right of everyone to use the language and to participate in the cultural life of their choice, whilst section 31 protects the rights of cultural, religious, and linguistic communities.

148 Monyamane & Bapela (n 114) 3.

underpin it now enjoy full legal protection.¹⁴⁹ For example, in *Bhe & Others v Khayelitsha Magistrate & Others*, the Court held that customary law is an independent norm within the legal system and is 'protected by and subject to the Constitution in its own right'.¹⁵⁰ Furthermore, in *Gongqose*, the Supreme Court of Appeal made the following remark about the fusion of customary law in South Africa's jurisprudence: '[t]his appeal brings customary law, which has not occupied its rightful place in this country, directly to the fore'.¹⁵¹

The history of South Africa is fraught with the dispossession of the land and livelihoods of customary communities.¹⁵² Of relevance to this discussion is the Court's articulation in *Alexkor Ltd and Another v Richtersveld Community (Richtersveld Community)*, on the relationship between customary law and natural resources.¹⁵³ In *Richtersveld Community*, the Court confirmed that customary law may operate as the basis for claims to natural resources and reiterated the importance of customary law as an integral part of South African law.¹⁵⁴

In *Gongqose*, two opposing legal interests were seemingly pitted against each other: the cultural practices and customary rights which stem from customary law; and the preservation or sustainability of the natural environment.¹⁵⁵ The appellants contended that their communities, collectively referred to as 'the Dwesa-Cwebe communities', had historically relied on forest and marine resources for their livelihoods.¹⁵⁶ For many decades, the Dwesa-Cwebe communities experienced the systematic obstruction of their access to forest and marine resources, revealing a long history of fortress-conservation.¹⁵⁷ Between 1900 and 1950, the Dwesa-Cwebe communities were forcibly removed from the area which is now known as the Dwesa-Cwebe Marine Protected Area (MPA) to give

149 *Monyamane & Bapela* (n 114) 6.

150 *Bhe & Others v Khayelitsha Magistrate & Others* 2005 1 BCLR 1 (CC) (*Bhe*) para 41.

151 *Gongqose* (n 133) para 1.

152 M Ramutsindela 'Land reform in South Africa's national parks: a catalyst for the human-nature nexus' (2003) 20 *Land Use Policy* at 42.

153 *Alexkor Ltd and Another v Richtersveld Community* 2004 (5) SA 460 (CC) (*Richtersveld Community*). In *Richtersveld Community*, a customary community instituted a successful land restoration claim. The Court held that the content of the land rights held by the Richtersveld community must be ascertained with reference to the traditional uses and the history of dispossession of the subject land. Evidence suggested that the community had a history of prospecting in minerals and that their conduct was consistent with ownership of the minerals being vested in them. The Court confirmed the right to exclusive occupation of the subject land, which included the right to use its water, its land for hunting and grazing, and to exploit its natural resources, including its mineral resources by the Richtersveld community.

154 *Richtersveld Community* (n 153) paras 51 & 64.

155 *Monyamane & Bapela* (n 114) 2.

156 *Gongqose* (n 133) para 4.

157 *Gongqose* (n 133) para 11.

priority access to prime land to white traders and farmers.¹⁵⁸ In 2000, a MPA was declared in terms of the Marine Living Resources Act 18 of 1998 (MLRA).¹⁵⁹ The MLRA, which has subsequently been amended by the National Environmental Management: Protected Areas Amendment Act 21 of 2014, provided for the conservation of marine ecosystems, the long-term sustainable use of marine living resources, and the orderly access to certain marine living resources.¹⁶⁰ Following the declaration of the MPA, the Dwesa-Cwebe communities were prohibited from fishing, save in accordance with certain provisions of the Transkei Nature Conservation Act 6 of 1971.¹⁶¹ However, despite this prohibition, the Dwesa-Cwebe communities continued to fish according to their customary practices, claiming that they were aligned, rather than at odds, with ecological sustainability.¹⁶²

A court has the power and the discretion to declare a traditional practice as law and in doing so, it must make a value judgment regarding the authenticity and persuasiveness of the evidence presented in support of the existence of such a custom.¹⁶³ In *Gongqose*, the appellants successfully proved the existence of a customary right of access to and use of marine and forest resources, in addition to an extant system of customary regulation governing all aspects of life in the Dwesa-Cwebe communities.¹⁶⁴ By adducing extensive evidence, the appellants demonstrated that the system of customary regulation in the Dwesa-Cwebe communities manifested ecological sustainability.¹⁶⁵ The following quote demonstrates the appellants' appreciation of the natural environment:¹⁶⁶

[T]hey understood that nature had a way of protecting itself and this is what regulated their harvesting; the tides and the weather did not allow them to go fishing every day; they also had their own way of making sure that there were enough fish for the generations to come, having been taught by their fathers and elders not to take juveniles and to put the small fish back. These rights were never unregulated and were always subject to some form of regulation either under customary or traditional practices.

One of the questions before the court in *Gongqose* was whether the MLRA had extinguished the appellants' customary rights.¹⁶⁷ The Court pronounced on the test for extinguishing customary law rights as follows: 'first, a customary right can only be extinguished by legislation specifically dealing with customary law; and secondly, that

158 As above.

159 *Gongqose* (n 133) para 2.

160 Marine Living Resources Act 57 of 2003, Long title.

161 *Gongqose* (n 133) para 4.

162 *Gongqose* (n 133) para 13.

163 Feris (n 137) 565.

164 *Gongqose* (n 133) para 31.

165 *Gongqose* (n 133) para 56.

166 *Gongqose* (n 133) para 39.

167 *Gongqose* (n 133) para 21.

such legislation must do so either expressly or by necessary implication'.¹⁶⁸ The Court held that nothing in the language of the MLRA specifically addressed customary rights.¹⁶⁹ Furthermore, the Court held that the rights and practices of the Dwesa-Cwebe communities were in existence long before the MLRA came into force and were subject to significant regulation by customary law.¹⁷⁰ Ultimately, the Supreme Court of Appeal allowed the exercise of a customary right of access to and use of marine resources to coexist alongside the conservation protection afforded under the MLRA.¹⁷¹ Moreover, the Supreme Court of Appeal rejected the High Court's reasoning that elevating the rights to culture in sections 30 and 31 of the Constitution would occur at the expense of the right to an environment.¹⁷² Instead, the Supreme Court of Appeal held that the recognition of the customary rights of the Dwesa-Cwebe communities could be reinforcing, rather than destructive, of the environmental right.¹⁷³ Writing for the majority, Schippers AJA confirmed that: '... the customary law of the Dwesa-Cwebe communities provides for sustainable conservation and utilisation of resources ...'.¹⁷⁴

What is clear from *Gongqose* is that customary rights and conservation can coexist, provided that customary use has not been extinguished by conservation law and provided further that the customary use pursues ecological sustainability.¹⁷⁵ In *Gongqose*, the Supreme Court of Appeal indicated that customary law may give rise to rights, such as access and use rights to resources.¹⁷⁶ This raises the discussion on whether customary law rights of access to and use of pangolin can coexist with conservation laws by reflecting on the approach adopted by the Supreme Court of Appeal in *Gongqose*, where custodianship was elevated over punishment.

4.2 The possibility for the coexistence of the conservation laws regulating pangolin and a customary right of access to and use of pangolin

Based on the *Gongqose*-reasoning, the exercise of a customary right of access to and use of pangolin is dependent on several factors, including: (1) the existence of a customary right, including the presence of a system of customary regulation governing the consumptive use of pangolin; and (2) the survival of existing

168 *Gongqose* (n 133) para 50.

169 *Gongqose* (n 133) para 52.

170 *Gongqose* (n 133) para 56.

171 *Gongqose* (n 133) para 65.

172 *Gongqose* (n 133) para 66.

173 *Gongqose* (n 133) para 56.

174 As above.

175 *Gongqose* (n 133) paras 39, 56 & 59.

176 *Gongqose* (n 133) para 25.

customary rights following the enactment of the conservation laws regulating pangolin in South Africa.¹⁷⁷

4.2.1 *The existence of a customary right – including the presence of a system of customary regulation*

The existence of a customary right of access to and use of pangolin depends on: (1) whether customary law gives rise to such rights; (2) whether those communities who may assert the existence of a customary right of access to and use of pangolin are governed by a system of customary regulation that ensures sustainable use; and (3) whether customary rights have been extinguished by the conservation laws (which will be discussed below).¹⁷⁸ Points (1) and (2) raise factual questions that cannot be answered in abstract. However, for purposes of this discussion, the similarities and differences that exist between the access to and use of marine resources in *Gongqose* and the traditional practices of customary communities relating to pangolin will be considered in an attempt to provide a framework for future comparison. In referring to the communities who may assert the existence of a customary right of access to and use of pangolin, I will collectively refer to the participating communities in Baiyewu et al's ethnozoological survey – namely, the Sepedi, isiZulu, Tsonga, Tswana, Venda, Ndebele and Swati communities – as the customary communities.¹⁷⁹

There are notable similarities in cultural significance amongst the Dwesa-Cwebe communities in *Gongqose* and the traditional practices of customary communities relating to pangolin. In *Gongqose*, the Dwesa-Cwebe communities established that their customary rights were not confined to consumption, but were exercised for purposes of customary rites, rituals, ancestral ceremonies, and adornment.¹⁸⁰ Similarly, although pangolins are sourced as bushmeat, Baiyewu et al illustrate that pangolins are also highly sought after and used regularly in traditional medicine and divination in South Africa.¹⁸¹ Therefore, like the Dwesa-Cwebe communities, the traditional practices of customary communities relating to pangolin transcend the imperatives of food security and subsistence, into the realm of cultural identity and belief.¹⁸²

Notwithstanding the similarities in cultural significance, several important differences also exist. Firstly, unlike the Dwesa-Cwebe communities, the customary communities in Baiyewu et al's survey do

177 *Gongqose* (n 133) paras 31, 39 & 57.

178 *Richtersveld Community* (n <XREF>) para 62.

179 Baiyewu et al (n 6) 5.

180 Baiyewu et al (n 6) 5; *Gongqose* (n 133) para 53.

181 Baiyewu et al (n 6) 12.

182 Feris (n 137) 557.

not rely on pangolins for their livelihoods.¹⁸³ Secondly, in *Gongqose*, the appellants successfully adduced extensive evidence regarding the nature of a living customary law system governing all aspects of life, including a venerable tradition of sustainably utilising marine and terrestrial natural resources.¹⁸⁴ Therefore, owing to the wide geographic distribution of pangolins across South Africa, and unlike the localised access to and use of forest and marine resources in *Gongqose*, the task of ascertaining the living customary law for a specific customary community could be problematic.¹⁸⁵ As Ndimba argues, the meaning of customary law is heavily dependent on its context.¹⁸⁶ Therefore, the traditions, norms, and practices underpinning the customary law of the individual customary communities cannot be divorced from the social realities in which each of them operates.¹⁸⁷ The implications of this fusion between customary law and social reality are that the exercise of a customary right of access to and use of pangolin in one participating community might be different when compared to the social reality of another participating community.¹⁸⁸

Therefore, the potential for the coexistence of conservation and customary law in relation to pangolin depends on the existence of a customary right of access to and use of pangolin, in addition to an extant system of customary regulation that pursues ecological sustainability. However, based on the *Gongqose*-reasoning, it is also important to consider the survival of existing customary rights, following the enactment of the conservation laws regulating pangolin in South Africa, which is discussed below.

4.2.2 *The survival of existing customary rights following the enactment of the conservation laws regulating pangolin in South Africa*

The survival of existing customary rights following the enactment of the conservation laws depends on the existence of a customary right,

183 D Soewu et al 'Bushmeat and beyond: historic and contemporary use in Africa' in D Challender, H Nash & C Waterman (eds) *Pangolins: Science, Society and Conservation* (2020) at 251. Evidently, pangolins are consumed much less frequently in Southern Africa than in West and Central Africa. Although farm workers in South Africa are recorded to have eaten pangolins found as roadkill or those that have been electrocuted, there is little evidence to suggest that people actively source them for food.

184 *Gongqose* (n 133) paras 37 & 39.

185 F Osman 'The ascertainment of living customary law: an analysis of the South African Constitutional Court's jurisprudence' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* at 101.

186 Ndimba (n 144) 328.

187 Ndimba (n 144) 326.

188 Baiyewu et al's (n 6). The survey illustrates that pangolin, although revered by all participating communities, are utilised for vastly different purposes at differing frequencies of use.

including the presence of a system of customary regulation which, as indicated above, cannot be answered in abstract. However, what is clear is that the practices of customary communities in relation to pangolin would only be protected on the *Gongqose* reasoning to the extent that they are not specifically regulated (and thus, extinguished) by the conservation laws.

A central feature of the Supreme Court of Appeal's discussion in *Gongqose* on whether the MLRA extinguished the appellant's customary rights, was how the Dwesa-Cwebe communities' customs recognised the importance of ecological sustainability.¹⁸⁹ The question arises whether the customary laws in relation to pangolin are aimed at ecological sustainability. Although Baiyewu et al's survey concludes that the customary communities use the animal parts sustainably because they are aware of the protected status of pangolins in their provinces,¹⁹⁰ there is no quantitative research, peer-reviewed literature, or judicial precedent to suggest that customary communities hold comparable internal sustainability measures in respect of pangolins.¹⁹¹ In the absence of demonstrable sustainability measures, it is unlikely that a court would uphold such a customary right because the rights to culture and cultural practices cannot be exercised in a manner that is inconsistent with other rights, such as the right to an environment, as enshrined in section 24 of the Constitution.¹⁹²

Although coexistence may be possible, the question of desirability brings overarching conservation objectives and ethical considerations to the fore. Considering the scale of the transnational illegal wildlife trade, how could regulations pertaining to access and use of pangolin ensure that wildlife trafficking does not masquerade for legitimate domestic utilisation? Although the answer to this question falls outside the scope of my research, it is central to the practical realisation of a customary right of access to and use of pangolin by customary communities.

Owing to the nature of customary law, the rights embodied therein do not easily translate into a law that is foreign to it.¹⁹³ Consequently, to provide proper recognition to the customary rights of communities in South Africa, there ought to be a shift in the legal and environmental governance landscape – one that the Supreme Court of Appeal in *Gongqose* nudged us more closely towards. This shift may be achieved through decolonising the existing environmental law and reassessing the relationship between humans and nature.

189 *Gongqose* (n 133) para 56.

190 Baiyewu et al (n 6) 16.

191 Pietersen et al (n 48) 190.

192 *Gongqose* (n 133) para 66.

193 Ndimma (n 144) 327.

5 Intergenerational equity and ubuntu: Foundations for the coexistence of the conservation laws regulating and the exercise of a customary right of access to and use of pangolin

The principle of intergenerational equity refers to the notion of fairness or justice between generations and is widely accepted as a constituent part of the wider concept of justice.¹⁹⁴ Intergenerational equity is premised on the idea that a collective commitment to the future helps communities to address present-day issues.¹⁹⁵ Section 24(b) of the Constitution is premised on the notion of intergenerational equity and recognises an express entitlement to have the environment, including pangolin, protected for the benefit of present and future generations.¹⁹⁶ This section protects the right to an environment through reasonable and other legislative 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.¹⁹⁷

It is contended that the principle of intergenerational equity is a site for legislative reform insofar as it protects the legitimate customary interests of access to and use of pangolins against the threat posed by the exploitation and diminished population status thereof.¹⁹⁸ What is clear is that the overuse of pangolins (for any purpose) will result in a diminished population status, which in turn, will result in the diminution (or potential elimination) of cultural interests and practices in relation to pangolins for present and future customary communities. Therefore, the ability of communities to work collectively and in a self-regulating manner is crucial for the long-term sustainability of pangolins and to avoiding a ‘tragedy of the commons’ situation.¹⁹⁹

194 K Bosselmann ‘Strong and Weak Sustainable Development: Making Differences in the Design of the Law’ (2006) 13 *South African Journal of Environmental Law and Policy* at 40.

195 E Weiss ‘The Planetary Trust: Conservation and Intergenerational Equity’ (1984) 11 *Ecology Law Quarterly* at 501.

196 Bilchitz (n 81) 447.

197 Constitution (n 74) sec 24(b).

198 Abotsi, Galizzi & Herklotz (n 53) 38.

199 The tragedy of the commons illustrates the conflict between individual and collective rationality in relation to the continued use of shared resources, and denotes the chronic inability of humankind to sustain resources. See G Hardin ‘The Tragedy of the Commons’ (1968) 162 *Science* at 1244; and E Ostrom *Governing the Commons* (1990) at 90.

In terms of ubuntu as an ecophilosophy, what is clear is that humanness is an expression of the interconnectedness amongst people and the natural world.²⁰⁰ Humanness finds expression in a communal context rather than the individualism prevalent in many Western societies.²⁰¹ According to Le Grange, the sense of wholeness and interconnectedness of self with the social and natural worlds implies that caring for others also involves a duty of care for nature.²⁰² Therefore, harnessing ubuntu as an ecophilosophy can add value to existing approaches to addressing environmental issues and can potentially contribute to greater environmental consciousness on the part of South Africans.²⁰³

Ubuntu, as an ecophilosophy, provides a compelling argument for the coexistence of conservation laws and customary law. Considering that recent seizures data suggests that the number of pangolins in the illegal wildlife trade is increasing, the effectiveness of the contemporary fortress-oriented approach to pangolin conservation is questionable.²⁰⁴ Some scholars argue that the traditional practices executed by customary communities that manifest sustainability reveal a host of approaches to protecting the natural world and securing the sustainable utilisation of natural resources.²⁰⁵ Additionally, there is growing international support for tearing down the walls of fortress conservation and having greater regard for the rights and interests of local people.²⁰⁶ A more custodianship approach to pangolin conservation, through ubuntu as an ecophilosophy, could enable better protection for pangolins in South Africa. In addition to the high conservation value and intrinsic value of pangolins in general, the cultural magnitude of the animal for customary communities in South Africa indicates that they too have a great interest in ensuring the survival of the species.

In returning to the *Gongqose*-reasoning, the Supreme Court of Appeal, albeit implicitly, endorsed a custodianship approach to conservation through ubuntu as an ecophilosophy. However, it is submitted that the Court in *Gongqose* did not go far enough in emphasising the strengths of ubuntu as an ecophilosophy. Furthermore, the Court overlooked the potential for ubuntu to harness greater environmental consciousness, in the wake of a neo-liberal capitalist propensity, towards the commodification of nature.

200 Le Grange (n 66) 63.

201 Le Grange (n 66) 66.

202 Le Grange (n 66) 63.

203 Le Grange (n 66) 63 & 64.

204 Ullmann, Verissimo & Challender (n 14).

205 Harrop (n 9) 284.

206 I Betokko & S Carvalho 'To protect nature, bring down the walls of fortress conservation' 12 October 2020 <https://www.aljazeera.com/opinions/2020/10/12/to-protect-nature-bring-down-the-walls-of-fortress-conservation/> (accessed 16 October 2020).

6 Conclusion and recommendations

In this paper, some of the prevailing complexities between the conservation laws and the African customary use of pangolin were assessed. It was argued that the conservation laws impose limitations on customary use insofar as there are currently no legally protected uses of pangolin. The existing legislative framework undermines the heritage value of pangolins for customary communities in that punishment is elevated over custodianship, even in instances of legitimate (and sustainable) customary use. This is illustrated by the fact that NEMBA fails to provide for a permit system for the performance of restricted activities or any other avenue for the exercise of customary rights in relation to pangolin and thus, excludes customary use entirely.

On the face of it, the simultaneous practical realisation of pangolin protection on the one hand and customary use of pangolin on the other, are at odds. However, the coexistence of conservation laws and customary use of pangolin may be achieved through the promotion of ubuntu as an ecophilosophy and the constitutionally enshrined principle of intergenerational equity.²⁰⁷ The conservation laws regulating pangolin should seek to incorporate custodianship approaches to pangolin conservation, as opposed to the prevailing fortress-oriented and protectionist legislative approach. I assert that the possibility of coexistence ought to be more closely considered to afford practice under customary law its rightful place in South Africa's constitutional dispensation. The Supreme Court of Appeal in *Gongqose* nudged the legal and environmental governance landscape closer towards harmonisation and revealed the possibility for coexistence between conservation law and customary law.

It is contended that Parliament ought to expressly regulate the customary use of pangolins in South Africa. By casting local people as custodians, rather than the principal threats to pangolins, legislative reform ought to provide for a permit system for the performance of restricted activities in terms of NEMBA, as well as a prospective quota system for the small-scale use of pangolins by registered traditional health practitioners. Although the risks associated with legalising the use of an endangered species are acknowledged together with the potential for 'opening the floodgates' to illicit activities that masquerade as legitimate customary use, it is necessary to consider affording the rights of access to and use of pangolins to customary communities to recognise and fulfil the equal status of customary law within the realm of environmental law and governance, as envisaged by the Constitution.

207 Le Grange (n 66) 65.