

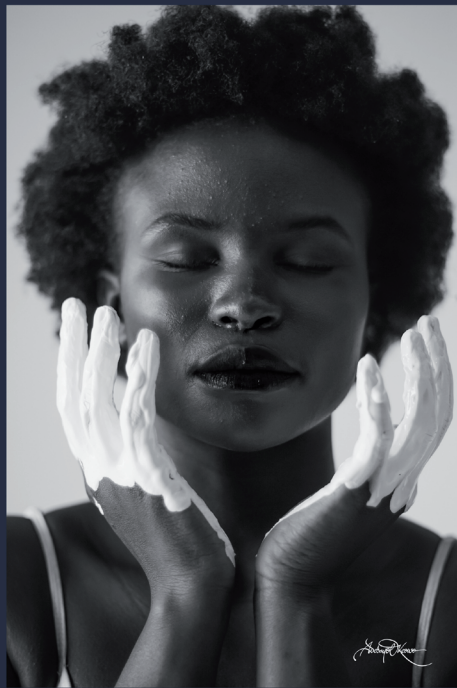
# PRETORIA STUDENT LAW REVIEW

2022 • 16

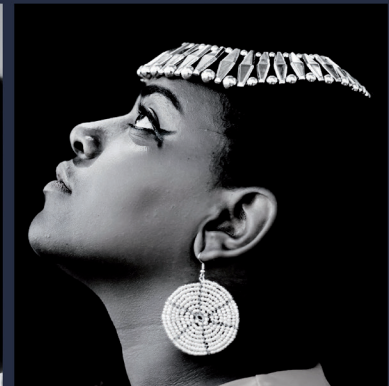
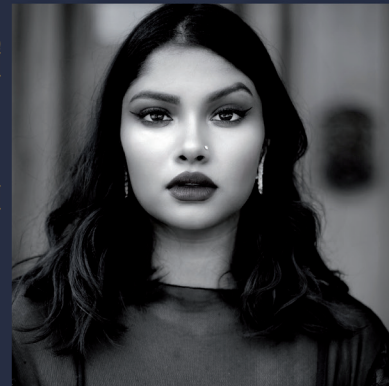
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# PRETORIA STUDENT LAW REVIEW (2022) 16

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## NOTE ON CONTRIBUTIONS

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

Please visit our website for more information:  
<https://www.up.ac.za/pretoria-student-law-review-pslr>

You may submit your contribution to:  
[pretoriastudentlawreview@gmail.com](mailto:pretoriastudentlawreview@gmail.com)

Alternatively you may submit your contribution by hand at the office of the Dean of the Law Faculty:

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0002



## EDITORS' NOTE

<https://doi.org/10.29053/pslr.v16i1.4500>

by Adelaide R Chagopa & Marno Swart



It is our great honour to present to our readers the sixteenth edition of the *Pretoria Student Law Review (PSLR)* and its special section on 'Law and Technology'. The *PSLR* is a journal published under the auspice of the Pretoria University Law Press (PULP), and we are proud to be a student-driven journal.

In recent years, the various editorial boards of the *PSLR* have frequently had to question our journal's role, purpose and direction. This year was no different. In the process of continuously re-evaluating ourselves and evolving to best cater to the demands of our readers and authors, certain aspects of the fibre of the *PSLR* have been distilled: First, we are a student-driven journal, providing a platform where early career academics, young practitioners and students alike may hone their writing skills and constructively express their views in a formal and high-quality journal. Of this characteristic we are immensely proud – we believe that the *PSLR* plays a vital role as one of only a handful of student-driven journals on the continent. Secondly, we are an African centred law journal – that is we are shaped, built and published within the context of Africa. We are proud to boast various contributions in this edition from around South Africa and Africa in this edition, including Ghana, Mauritius, Zimbabwe and Zambia. And thirdly, we are a generalist journal publishing on a wide variety of topics ensuring that any student may present their article to our publication for consideration.

As with any undertaking of this scale, this publication did not see the light without some difficulties. Chief among these was securing peer-reviewers to evaluate the contributions submitted to ensure our publication was of superior quality. It is a fact that academics at the



University of Pretoria, and our neighbouring universities, were hard-pressed in 2022. The return to contact teaching in the middle of the year and adapting to a post-COVID world has not been without its challenges. Like many others, this journal is built on a foundation of goodwill. With editors, peer-reviewers and technical teams working tirelessly to ensure this publication is made possible.

In 2022, the *PSLR* also set out to become a more prominent presence on campus, collaborating with the UP Legal Shebeen and offering a writing workshop for students. These are collaborations that we hope to build upon to ensure that all law students benefit from the creative, knowledge-generating platform the *PSLR* presents.

We hope that the future editorial boards will continue to think about the role of the *PSLR* and strive to ensure that we remain an evolving and relevant platform where students can express their thoughts, develop their writing abilities, and learn to present arguments in a logical, well-structured and authoritative manner. We also hope that future editorial boards will learn from our triumphs and mistakes and maintain the fibre of the *PSLR*.

The publication and success of this journal are not ours but that of a whole community of people, and we would like to extend our sincere thanks to them:

To our authors for their ideas, hard work and bravery. We realise how daunting it is to submit your work – of which you are so proud – to be scrutinised and criticised. Without your contributions, dedication and zeal, we would have no journals, no ideas, and no progress. Continue to write, and allow yourselves to be proud of this fine achievement.

To the peer-reviewers without whom we could not ensure the quality of this work. Thank you for taking the time to give back, cultivate young minds and ensure this edition's excellence. We value your contributions immensely.

To the editors of this edition, Andiswa Kibi, Dr Shelton Mota Makore, Elmé Ravenscroft, Eric Geldenhuys, Kherina Narotam, Nomthandazo Mahlangu, Tendai Mikioni, Thuli Zulu, Tumelo Modiselle and Zakariya Adam, we hope that you enjoyed this year as much as we did. We hope the experience enriched you and thank you for your hard work and dedication.

To our guardian, Ilana le Roux, for her unwavering support, wisdom, advice and caring. We are immensely grateful for your invaluable input and marvel at your dedication to our cause. Our deepest thanks, Ilana.

We would like to thank the Faculty of Law, University of Pretoria, the Office of the Dean and PULP for providing the support to ensure that this publication is possible. We would like to thank our Dean,

Prof. Elsabé Schoeman and Deputy-Dean, Prof. Charles Maimela, for their assistance. A special word of thanks is also due to Lizette Hermann from PULP for fine-tuning this journal and for overseeing the process with us. We would be lost without her.

Our deepest thanks to all of our loved ones, the people who support us and make this world a place worth living.

We hope that you will enjoy this edition of the *PSLR*, and may the journal continue to thrive!

**Adelaide R Chagopa**  
Co-Editor-in-Chief  
Pretoria Student Law Review  
2022

**Marno Swart**  
Co-Editor-in-Chief  
Pretoria Student Law Review  
2022



# GUARDIAN'S REFLECTION: THE *PSLR* AS A SITE FOR THINKING ABOUT COMMUNITY ETHICS IN THE UNIVERSITY

<https://doi.org/10.29053/pslr.v16i1.4501>

by Ilana le Roux\*



In this reflection I draw on the *PSLR* Editorial Board's experiences to broadly think about our understanding of community within the university, and beyond. The purpose of this reflection is to remind readers of the *PSLR*'s significance and potential, and to encourage a radical rethinking of the type of university community we nurture.

## 1 Introduction

This publication is a rare find. There are very few opportunities for students to serve on editorial boards of academic journals so early on in their careers. Similarly, there are not many opportunities for student authors to build confidence in academic publishing by engaging with their peers as editors. Although no less serious than any other review and publication process, I believe this encounter between student-editor and student-author offers safer, less intimidating waters for authors to test and develop their writing and critical thinking skills. The *Pretoria Student Law Review (PSLR)* is a space where the voices and abilities of students are affirmed. This, I consider, to be an invaluable enterprise for the thinkers and makers of the world-to-come.

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With this special character of the journal in mind, the editorial board is asked to do more than just communicate with authors and reviewers, edit articles, and ensure the timely publication of a volume. They are also tasked with sustaining and growing a meaningful and instrumental vehicle for dialogue, knowledge production, and social change among young scholars. With a proper appreciation for the value and significance of this project, the *PSLR* is fertile soil for a rewarding and valuable human experience.

The *PSLR* faced many challenges and claimed just as many victories during the coronavirus pandemic over the past two years; emphasising the importance and value of community. The nature of the pandemic required that we physically distance ourselves from one another, with the unfortunate consequence of severing human connections at a time when they were most needed. Social distancing measures prevented communities from gathering and highlighted just how fragmented and fragile the world community is. For some, community was a source of strength and support during this frightening time. For others, the pandemic demanded a re-evaluation of their membership to their community and brought into question the meaning of community itself.<sup>1</sup> In this short reflection, I look at the university's conception of community – that is, the meaning of community and the system of ethical values that orchestrate human relations – and its implications for humane experiences.

## 2 The dominant conception of community within the South African university

Depending on where one looks, the definition and understanding of community, as well as the ethical values that regulate human relations in and between communities, will vary. This is because meaning, as Mogobe B Ramose points out, is both historical and contextual.<sup>2</sup> The idea of community and the ethical system that guides and ensures community wellbeing is experiential and culturally particular. According to H Odera Orika, the dominant cultural system in a heterogenous community can be understood as an ideological assertion.<sup>3</sup> On this score, Orika writes that

[i]n every community there may be several competing ideologies but usually there is one common and dominating culture for the people.

- 1 For some examples of such reflections within the academe, see [https://lareviewofbooks.org/article/quarantine-files-thinkers-self-isolation/#\\_ftn1](https://lareviewofbooks.org/article/quarantine-files-thinkers-self-isolation/#_ftn1) (accessed 17 September 2022). I am grateful to Tumelo Modiselle for sharing these essays.
- 2 MB Ramose 'In search of an African philosophy of education' (2004) 18(3) *South African Journal of Higher Education* at 150.
- 3 HO Orika 'Ideology and culture: The African experience' in PH Coetzee & APJ Roux (eds) *The African philosophy reader* (2003).

Every ideology spells out a possible cultural system which it posits as alternative to the cultures advocated by its rivals. The dominating culture is a result of the victorious ideology, it becomes both a theory and a practical form of life. It sublimates both as a living spiritual culture and the philosophy underlying the dominating culture in society. The dominating culture utilizes its underlying ideology as the official socio-political philosophy in the society.<sup>4</sup>

The university then, as a product and producer of community, is always faced with two pertinent questions: Firstly, *what* is the dominant cultural system and victorious ideology in the university community? And secondly, *should* this be the dominant culture and victorious ideology of the university? To answer the first question, one need only look at the content of the curriculum and the conditions of everyday university life. The second question is an ethico-political provocation – a question of historical justice – which then leads to more questions: in what way, *if any*, are universities in South Africa ‘African’ if these institutions are not grounded in African epistemologies, ethics, and culture? Said differently, what would universities in Africa look like if the meaning of ‘African’ was not taken for granted?<sup>5</sup> But more importantly, what are the material, *real life*, implications of non-African universities for Black and white people in Africa and elsewhere? Is the dominant culture and victorious ideology in our contemporary university space oppressive, or liberatory? These are the questions justice demands we not only grapple with, but answer.

Ndumiso Dladla answers this call. He argues that ‘we *continue* to have [Western] universities in Africa, rather than African universities in Africa’.<sup>6</sup> Institutions of higher education were, and still are, precisely where people are trained to (re)produce a ‘province of Europe’.<sup>7</sup> This is as Western epistemologies, values, and ways of being continue to dictate the terms of knowledge and power in the South African university. This much is evidenced by the fact that the current curriculum includes the odd ‘African’ module or course, which can only mean that the rest of the curriculum is non-African – i.e., Western.<sup>8</sup>

As a response to student demands for the decolonisation of higher education and institutional culture, the Faculty of Law at the University of Pretoria (UP) in 2016 launched the Curriculum Transformation Drive.<sup>9</sup> The aim of this drive was to remedy the

4 Oruka (n 3) 71.

5 See Ramose (n 2) 143-146.

6 N Dladla ‘Racism and the marginality of African philosophy in South Africa’ (2017) 18 *Phronimon* at 213. Emphasis added.

7 See SB Biko *I write what I like* (2017) at 148.

8 See Dladla (n 6) 212-213.

9 <https://www.up.ac.za/faculty-of-law/article/2291240/curriculum-transformati-on-framework> (accessed 22 September 2022).

marginalisation of indigenous knowledge systems and to cultivate a culture of critical thinking.<sup>10</sup> Whether the university *can* undo its fundamentally (white) Western epistemological identity remains to be seen. However, in this reflection I wish to pay special attention to how the naturalisation of Western *ways of being*, i.e., culture, within the university affects affect, or the quality of human relations and experience. Put another way, I consider the ways in which a Western conception of community within the university normalises a culture of social disintegration.

Over the years the South African university has certainly made some strategic adjustments to mould to the dominant political temperament and economic agenda of its time. Originally the exclusive domain of European settlers who sought to preserve ties to the metropole, the university, in what came to be known as 'South Africa,' eventually admitted Africans into its ranks in order to stabilise and swell the racial capitalist enterprise and rid Africans of their 'barbarism'.<sup>11</sup> In our present moment, the purpose or mission of the Western university is to produce a steady supply of so-called 'skilled' labourers that service a fundamentally racist neoliberal capitalist structure.<sup>12</sup> To this end, the institutional culture of the South African university is characterised by what Wendy Brown describes as a 'neoliberal rationale'.<sup>13</sup> She explains that

neoliberalism is a governing social and political rationality that submits all human activities, values, institutions, and practices to market principles. It formulates *everything* in terms of capital investment and appreciation (including and especially humans themselves).<sup>14</sup>

Within the neoliberal order then, human relations are governed by a supposedly deracialised economic schema that not only glorifies individual success; fragmentising communities and communal resources to maximise the profits of a small elite. No, this order also reduces human encounters to transactions and transforms humans themselves into atoms of capital. The neoliberal university is then driven and managed by an ethics of economic competition, premised on the logic of killing one's opponent even when killing is avoidable or unnecessary.<sup>15</sup> The prioritisation and monopolisation of projects based on market factors – such as the potential to generate profit, enhance the university's ratings and rankings, or the ability to attract

10 See [https://www.up.ac.za/news/post\\_3018862-every-field-of-study-requires-regular-renewal-reinvention-and-new-knowledge-up-law-professor-on-curriculum-transformation](https://www.up.ac.za/news/post_3018862-every-field-of-study-requires-regular-renewal-reinvention-and-new-knowledge-up-law-professor-on-curriculum-transformation) (accessed 22 September 2022).

11 Dladla (n 6) 209-213.

12 See S Terreblanche *Lost in transformation* (2012).

13 W Brown 'Neoliberalized knowledge' (2011) 1 *History of the Present* at 118. Emphasis added.

14 As above.

15 See Ramose (n 2) 157; MB Ramose 'Better see than look at Ramose: A reply to Cees Maris' (2022) *South African Journal of Philosophy* at 17-19; MB Ramose 'Globalization and *ubuntu*' in Coetzee & Roux (n 3) 750-752.

donors – is characteristic of this neoliberal logic. For example, I submit that the use of competitive market-orientated language employed by UP to describe its ‘vision, mission, and values,’ is illustrative of this ethics of competition that underpin a neoliberal rationality.<sup>16</sup> Perhaps the most explicit example of this logic is where staff and students are described as UP’s ‘core assets’.

Within a neoliberal paradigm, the university’s conception of ‘community’ mirrors that of a business firm.<sup>17</sup> It operates with a Western understanding of community, which Ifeanyi A. Menkiti describes as

nothing more than a mere collection of self-interested persons, each with his private set of preferences, but all of whom get together nonetheless because they realize, each to each, that in association they can accomplish things which they are not able to accomplish otherwise.<sup>18</sup>

This conception of community might get the job done if the job is focused on the final product and unconcerned with the conditions under which the job is completed. The question then is whether it is *at all* possible for the university claiming to be committed to African knowledges and ways of be-ing which ‘promote[s] life and avoid[s] killing’ to subscribe to an economic fundamentalist dogma premised on the licence to kill?<sup>19</sup> In the section that follows, I think through how this Western neoliberal, individual-centred conception of (university) community shaped the *PSLR*’s experience over the past year.

### 3 What the *PSLR* reveals

The *PSLR* is an interesting site to reflect on the meaning and value of community within the university space. It is a social project where students, academics, and technical staff join forces as members of the UP community in pursuit of a shared goal: the facilitation of dialogue in the form of a published law review. The overall or general character of the publication – that is, the language used, the sources

16 See <https://www.up.ac.za/article/2749453/vision-mission-and-values> (accessed 22 September 2022). A few examples of such competitive market-orientated language would be captured on the UP site, when it states that: ‘[UP’s aim is to] be a leading research-intensive university in Africa, recognised internationally for its quality, relevance and impact, as also for developing people, creating knowledge and making a difference locally and globally’; ‘membership [to the UP community] acquired on the basis of intellectual merit, ability and the potential for excellence’; ‘in a resource-constrained world where vast disparities remain, the University must endeavour to produce graduates who appreciate the importance of community service, entrepreneurial endeavours and innovative actions in generating employment and development in our local communities.’ Emphasis added.

17 Brown (n 13) 120.

18 IA Menkiti ‘Person and community in African traditional thought’ in RA Wright (ed) *African philosophy: An introduction* (1984) at 179.

19 See Ramose (n 15) 17-19 & 750-754.



cited, the problems identified, the assumptions and arguments presented – reveals the dominant culture and reigning ideology of the university. It is then also a site where trends and transformation in the legal curriculum can be detected. But to make an evaluation of the institutional culture within the university space requires that one looks at that which is missing from the pages of the publication. In other words, we ought to look at the character and quality of the interactions and experiences of those involved in the publication process.

Of course, the motives or reasons for why individuals join this venture will vary. In a few instances, authors are motivated by their desire to improve and refine their writing and thinking skills, or by the emotional and intellectual commitments they have towards their topics. On the other hand, some editors join the *PSLR* to learn the ins-and-outs of academic publishing, or to make a meaningful contribution to an important social initiative. But if we are honest, I think it is safe to admit that in most cases, students submit their work to the *PSLR* or join the editorial board to bolster their 'value' or earning potential as they prepare to enter a highly competitive job market.

Then there are the reviewers: some academics accept the invitation to review as they consider it an ethical duty they have towards their students or their ethical causes, while the majority probably conceive of it as an inconvenient but unavoidable part of the job as they too try to enhance their individual portfolios in a market-focused 'community'. However, what I am suggesting is that it is precisely a culture of self-interest cultivated and encouraged by a Western conception of community in a neoliberal paradigm that determines the quality of human experience when working with others towards a shared goal.

This year was especially testing for the *PSLR*, and I commend the editorial board and Editors-in-Chief for their tenacity. Perhaps their greatest challenge was securing reviewers. All editors will know that the search for suitable reviewers usually starts with a familiar face – after all, charity begins at home. For the undergraduate and postgraduate student editors of the *PSLR*, these faces are often limited to nearby teachers or colleagues. And when this search is unsuccessful, they must turn to academics (strangers) located elsewhere. But even when editors with ties to different universities could recommend potential reviewers to their colleagues, securing reviewers proved to be very difficult. Reasons for this difficulty are many. Some academics reject the request to review as they are disinterested in the topic, or the subject matter is beyond their field of expertise. In most instances, however, the reason for rejecting the invitation to review appears to be that reviewers simply did not have

the time – especially as lockdown restrictions were relaxed and students returned to campus.

Much is expected of academic staff. Teaching and learning responsibilities are generally demanding and especially taxing with student-to-staff ratios becoming more disproportionate every year. On top of that, the pressure to publish, present at conferences, serve on committees, and meet numerous deadlines is unforgiving. The *PSLR* then asks of academics to dedicate time they often do not have to review for an unaccredited student journal. I suspect, sympathetically, that the status and nature of the *PSLR* might disincentivise academics from accepting the invitation to review. This is as they are compelled to prioritise more profitable or influential journals and projects that actually pay for services rendered, or have the greatest potential to boost their professional portfolios.

In my view, the struggle to secure reviewers is a symptom of a fragmented conception of community; a community in which communal wellbeing and mutual care and responsibility is undermined by a self-serving economic rationality. This symptom had a direct impact not only on whether authors and editors could publish a quality publication, but it also normalised a questionable way of interacting with and relating to others. At the end of the day, the authors and editorial board – those with the least bankability in a system motivated and regulated by market logic – absorbed the effects of this fragmentation.

I consider it necessary to remind readers that every year the *PSLR* has a brand-new editorial board, and that most members are unfamiliar with the process of academic publishing and review. The *PSLR* is precisely an extraordinary opportunity for students to acquire editorial knowledge and experience in academic publishing. As each new editorial board learns the ropes, they are entrusted with handling every author's work with the utmost care and respect. Of course, this can be quite a daunting undertaking, but with a shared vision, dedication, and mutual support, it can also be enriching and exciting. However, the economic terms of the review process in a neoliberal paradigm are a source of anxiety for an editorial board entirely dependent on the altruism of academics. More time spent finding reviewers means less time for authors to digest the reviewers' feedback and effect the recommended changes; and less time for editors to edit. This threatens to not only taint the quality of the publication, but also the editorial board and authors' ability to learn from and truly appreciate their time with the *PSLR*.

This fragmentation (which was beyond the control of the editorial board) was further exacerbated by the nature of the pandemic. Knowing that you are working together and supported as you pursue a shared goal can be a source of comfort and reassurance. It is a sense of communal solidarity that gives editors the confidence to perform

and allows them to savour this treasured experience. Such support is founded on trust – a feeling fostered through communion, sharing, and mutual recognition. But the pandemic made communion dangerous and highlighted just how invaluable the intimacy of physical proximity and sharing space is when forming and nurturing a supportive community. Social distancing and the technological depersonalisation of contact made it difficult to resist Menkiti's Western understanding of community mentioned above. It became too easy to succumb to the idea that contact with others is no more than a means to a self-serving end. Under these conditions, learning opportunities become burdens and an atmosphere of detachment and hostility was perceived as natural and normal.

This past year has left me, as Guardian, with many questions: How will authors, editors, and reviewers remember their encounter with the *PSLR*? Is it not the feelings stirred by this memory that determines whether an endeavour was ethical, humane, and meaningful? Or is the significance of a project merely limited to a decontextualised final product? In what ways are we impoverished as Beings with feelings by this Western conception of community in a neoliberal university? To what extent do we carry this impersonal and mechanised way of relating to one another when we leave the university space?

To reflect on the *PSLR*'s challenges is not to guilt academics into reviewing. Admittedly, the work of authors and editors would be much easier if reviewers weren't so hard to come by. But if reviewers were to donate their time and efforts with everything else being what it is, it will be these very reviewers that will pay the price when a system that generates a culture of emotional distress and spiritual decay is not corrected. Rather, the point of reflecting on the *PSLR*'s experience over the past year is to emphasise the need for a *radical* reimagining of community and community ethics in the university, and beyond.

I conclude this reflection with a few questions the university community in (southern) Africa is then to contend with if it is sincere and genuine about its intention to decolonise the university: What is the mission of the university in a liberated Africa? What do we make of the view that an African conception of community founded on *ubuntu* ethics – a way of be-ing in the world that accords primacy to harmonious and *humane* human relations – is completely at odds with the present fragmented, economic fundamentalist mode of existence within the university space?<sup>20</sup> Will the inclusion of indigenous

20 See MB Ramose *African philosophy through ubuntu* (1999) 35-46, 149-151. Ramose argues that '*ubuntu*' is better understood as a hyphenated word. The prefix *ubu-* is understood as the general unfoldment of be-ing and speaks -\*to 'motion as the principle of be-ing' in African thought. The stem, *-ntu*, is the point at which the continuously unfolding of be-ing is temporarily concretised. *Ubu-*, then, represent 'be-ing becoming', and *-ntu* an interim moment in which be-ing

knowledges into the curriculum not be performative and superficial if the university clings to its neoliberal culture?

Despite uncomfortable circumstances, the *PSLR* achieved great things. Editors, authors, and reviewers all worked hard to publish this volume. A hearty and well-deserved congratulations and thank you to every author who submitted a paper and trusted the editorial board with their hard work.

A massive thank you to all the reviewers who dedicated their time and energy to this project, and for educating both authors and editors in the process. It ought to never be lost on more senior academics that the students who submit their work to the *PSLR* rely heavily on their insights and expertise to grow and improve their writing and thinking.

I applaud both the previous and the current Editorial Board with whom I had the great pleasure and honour of working with. Together we faced many challenges, but all was well precisely because there were hands to hold. These champions were excellent teachers of many treasured lessons on dedication, wisdom, innovativeness, respect, care, and to never underestimate the value of a good laugh. The 2022 Editorial Board can pass the torch with pride, and it is my hope that their successors do not underestimate the value of communal support and their own ability to nurture a healthy community.

I give special thanks to our Editors-in-Chief, Adelaide Chagopa and Marno Swart, as well as their predecessor, Pheny Sekati, who all steered this ship like seasoned pros. The waters were rough, but you made it to the other side with your chins held high. I am so very proud of the teams I've worked with. The *PSLR* is richer for all your contributions.

Lastly, a word to future authors and editors: I urge you to be bold and to be brave. Say what you need to. Call on those you trust to guide you along the way – be receptive, be generous with your thoughts, be deliberate. Treat the *PSLR* with thoughtfulness, be kind to yourself, and be sure to appreciate your shared journey. There is only one *PSLR*. You have a responsibility to make sure it lives on. Take it seriously, and who knows what can happen.

has become. Ramose explains that *ubu-* and *-ntu* are not opposites or distinct realities. Rather, their joinder speaks to the 'be-ing as a one-ness and indivisible whole-ness'. Accordingly, I borrow Ramose's use of '*ubu-ntu*' which refers to the 'philosophical concept', as opposed to '*ubuntu*,' which refers to the everyday use of the word with no explicit mentioning or meaningful appreciation of the philosophical concept of *ubu-ntu*. See Ramose (n 15) 1.



# A CRITICAL DISCOURSE ON THE RELATIONSHIP BETWEEN SCIENCE, TECHNOLOGY, INNOVATION, AND INTELLECTUAL PROPERTY IN AFRICA

<https://doi.org/10.29053/pslr.v16i1.4502>

by Ntando Sindane\*

BOOK REVIEW: CB Ncube *Science, technology & innovation and intellectual property: Leveraging openness for sustainable development in Africa* (2021) 1st ed 1-213, Juta and Company Ltd, ISBN 9781485137658.

## 1 Introduction

On the evening of 23 March 2020, the President of South Africa, Cyril Ramaphosa, appeared on our television screens announcing a nationwide lockdown in an effort to contain the spread of the novel coronavirus. This was an unprecedented moment that changed the course of global history. The coronavirus pandemic led to a grappling and rethinking of the very definition of our society. Academics, intellectuals, and thinkers alike have attempted to respond to the anomalous conditions occasioned by this pandemic.

In the area of intellectual property law, Caroline B Ncube's *Science, technology & innovation and intellectual property: Leveraging openness for sustainable development in Africa* represents a timely critical dialogue on the direction of society as it concerns sustainable development, the openness paradigm, and knowledge governance<sup>1</sup> in the context of Africa.

Although the book ideationally predates the breakout of the pandemic,<sup>2</sup> it holds relevance for how the continent of Africa and the rest of the world responded to the pandemic. The relationship between science, technology, innovation, and intellectual property is essential in light of the pandemic, precisely because the globe's knowledge economy and prospects of the openness paradigm (and therefore access to essential medicine or vaccines) rest on a thorough understanding of this relationship.

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1 These concepts are discussed/defined at length and with greater depth in the book.

2 The book is a culmination of a lifetime of CB Ncube's scholarly work. It includes insights that are drawn from her inaugural lecture titled 'The public interest in intellectual property law: African solutions to global challenges', University of Cape Town, 2018.

## 2 Overview of chapters

The argument of the book is set out in six chapters. The four substantive chapters are titled: (1) The continental framework for sustainable development, (2) Intellectual property: Global framework, (3) Intellectual property: African frameworks, science technology and innovation and sustainable development, (3) Leveraging openness to meet the challenges of our time and, (4) Continental IP Instruments and Institutions.

Chapter 1 introduces the book and unpacks the thesis the author intends to defend. Before arguing that the openness paradigm is an effective method for attaining sustainable development, Ncube begins by canvassing the minute details that foreground Africa's framework for sustainable development. She maps Africa by briefly revisiting the history of the African Union (AU), tracing its development from the Organisation of African Union's (OAU) inception in 1963. From the book's mapping of Africa, it becomes clear that the continent is politically, culturally, and economically diverse. For example, Ncube identifies five Regional Economic Communities (RECs) in Africa and illustrates the similarities and differences between them.

The core thrust of this chapter is its illustration of the organogram in which Africa's intellectual property regulatory hierarchy is layered. This organogram suggests that the AU is at the zenith, followed by RECs and intellectual property (IP) organisations. Intellectual property laws and policies, science, technology and innovation (STI) policies, and national policies are located at the lowest end of the hierarchy.

Another crucial component of this chapter is that it deepens definitional clarity regarding knowledge governance. The chapter proffers three elements of sustainable development; these are: economic, environmental, and social. The chapter argues that these three elements allow for a sharpened focus on deliverables at a policy level. Unsurprisingly, the African Continental Free Trade Agreement (AfCFTA) uses these elements to link its ambitions to Agenda 2063's vision towards achieving the integrated high-speed train network, a Pan-African Electronic University, a communications strategy, a common African passport, and others.

Chapter 2 discusses the prevailing global intellectual property law framework. The chapter recalls that the international organisation responsible for the global intellectual property framework is the World Intellectual Property Organisation (WIPO). It identifies the The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) as the most significant multilateral IP treaty. It further illustrates how this treaty defines existing forms of

IP such as copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information (also known as trade secrets).

Chapter 3 demonstrates the various intellectual property frameworks in Africa. The chapter begins by distinguishing between plurilateral and bilateral agreements. The latter refers to those agreements that African states enter with a single state or a regional block (such as the EU). In contrast, the former refers to those treaties that an African state enters with several states – especially those from outside of Africa. This chapter identifies some of these treaties as potentially dangerous or concerning because they allow African states to enter into agreements that deviate from the provisions of the TRIPS agreement, culminating in what is known as TRIPS-plus.

The chapter further discusses the two African Regional IP organisations, which are the African Regional Intellectual Property Organization (ARIPO) and the *Organisation Africaine de la Propriété Intellectuelle* (OAPI). A brief read-through of the member states of these two organisations show that the divisions are between Anglophone and Francophone countries, with the latter forming OAPI and the former constituting ARIPO. This speaks to the vestigial force of colonialism that continues to define African institutions of power and knowledge long after the demise of official colonisation. The chapter reinforces that even though these two organisations hold distinct approaches to the intellectual property policy framework and knowledge governance, they strive to cooperate bilaterally and with other organisations.

Chapter 4 identifies STI as a significant component of the African Development Agenda as expressed in the Common African Position. Most importantly, the chapter shows that STI responses were critical and called upon to meet the emergency needs such as those needs necessitated by the coronavirus pandemic. In creating an academically authentic link between science and innovation, the chapter draws the reader's attention to the Draft International Code of Conduct on the Transfer of Technology, which defines technology transfer as 'the transfer of systematic knowledge for the manufacture of a product, for the application of a process or the rendering of a service and does not extend to the mere sale or lease of goods'. In this chapter, Ncube insists that the interconnectedness of innovation and intellectual property calls for a deepened re-evaluation of how IP is used and how much this aids the advancement of innovation.

Chapter 5, which I consider the most important chapter of the book, not only demonstrates how openness can be leveraged to meet the challenges facing society but also argues why it is necessary:

As a way to contextualize ... IP and openness, it is important to begin by expressly linking IP with sustainable development goals as articulated in the SDGs and Agenda 2063, which have been reprised in section 1.5



#### 4 Book review

above. Inclusive and equitable development are major themes in IP generally, with much focus on the creation of IP frameworks that enable and support innovation in all sectors, including marginalized constituencies such as the informal sector, women and indigenous peoples and local communities.<sup>3</sup>

The breaking down of SDGs in their contexts as they relate to people, prosperity and the planet is the fulcrum of the book's argument that the openness paradigm should be central to how we approach intellectual property frameworks and sustainable development. The chapter defines the openness paradigm by listing the four dimensions that underpin openness, and these are (1) ideological, (2) legal, (3) technical, and (4) operational. Furthermore, it appreciates that there are four ideological underpinnings of openness, and these are (1) social justice imperatives, (2) sustainable development, (3) human development, and (4) human rights.

Some practical examples for enacting the ideals of the openness paradigm include open access, open data, open collaborative innovation, open research, open science, and open-source software.

Chapter 6, which concludes the book, discusses continental intellectual property instruments and institutions. As a point of entry, the chapter notes that the AU has been largely inactive in the domain of intellectual property. The AU passed the Continental Strategy on GIs in 2017, the Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and the Regulation of Access to Biological Resources in 2000. None of these instruments have binding force. The chapter looks unto the AfCFTA with optimism, noting that its varied principles appear to be pointed and action enthused.

### 3 Concluding remarks

One lesson that can be learnt from the coronavirus pandemic is that there remains a constant need to rethink the global intellectual property framework, especially as it relates to its flexibility where access to essential medicine or vaccines is concerned. This need is much more immediate in the context of Africa, especially when considering the continent's developing nature and its political and economic implications.

Intellectual property has always been an essential subject in the context of Africa, especially given Africa's lived history of slavery, colonialism, coloniality and persisting neo-colonialism. The subject is essential because intellectual property rights, unlike other rights in

3 CB Ncube *Science, technology & innovation and intellectual property: Leveraging openness for sustainable development in Africa* (2021) at 119

private or commercial law, directly impact the growth and development of collective society (public interest).

History lends perspective, and in this instance, it allows us to appreciate that no state that is serious about socio-economic development would neglect or ignore its responsibility to actively shape and guide intellectual property law frameworks or legislation. The book's argument could have been enhanced by a stronger critique of the colonial and capitalist chassis upon which the global intellectual property regime is currently based. Such a critique could have highlighted the urgent need to rescue intellectual property rights discourse from capitalist aspirations or desires. To be sure, it is apt to surmise that intellectual property rights development must never be left in the hands of the private or corporate sector. Instead, all stakeholders must have a role in shaping intellectual property rights discourse, and the state must be at the helm.

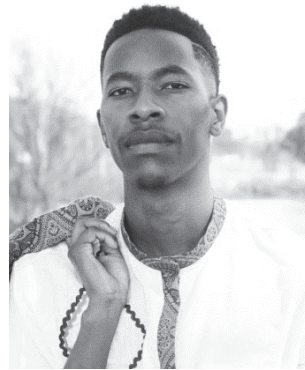
This book comprehensively demonstrates the intricate relationship between intellectual property, science, technology and innovation. One of the book's central arguments or suppositions is that the openness paradigm is the most logical path African lawmakers should embrace in their approach to intellectual property design.

Having carefully punctuated the discourse on science, technology, innovation, intellectual property and sustainable development, Ncube must be commended for the book's impeccable definitional clarity, thorough unpacking of instruments, and exposition of treaties that govern intellectual property globally, and specifically on the continent of Africa. Lawmakers, students, intellectual property law practitioners, university academics (including IP managers), and members of civil society would benefit immensely from the insights proffered in this book.

# POLICE BODY-WORN CAMERAS: A FOURTH INDUSTRIAL REVOLUTION DEMAND FOR SOUTH AFRICA?

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by Dr Llewelyn Curlewis\* & Thabang Sepuru\*\*



## Abstract

*Incidents of police brutality are an increasing concern around the world. South Africa faces its own excessive use of force by police exemplified by the case(s) of Khosa v Minister of Defence and Military Veterans 2020 7 BCLR 816 (GP) as well as that of Nathaniel Julies. Countries such as the United Kingdom (UK) and the United States of America (US) have seen positive results from leveraging advancements in technology to provide detailed, firsthand accounts of what happens during a police encounter. In light of the fourth industrial revolution, which brings together with it advancements in data processing and storing, the purpose of this paper is to investigate what value can such advancements in technology can bring to the South African criminal justice system and what possible barriers there could be in its implementation. This paper analyses the effects of Body-Worn Cameras in UK and US jurisdictions on improved police-citizen encounters and overall quality of policing. Body-Worn Cameras have been found to have value in improving police-citizen encounters. However, adoption may be slow because of budgetary constraints related to Information Technology (IT) infrastructure.*

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# 1 Introduction

The term ‘Industry 4.0’ has become a buzzword in recent years. It refers to the fourth industrial revolution, which is characterised by a range of new technologies that fuse the digital, physical, and biological worlds. The fourth industrial revolution (4IR) has an impact on all disciplines, economies, and industries by integrating new methods of data collection and analysis in order to provide decision makers with comprehensive information. This is only just the beginning, and it is important for the criminal justice system to not be left behind.

Some of the advancements in modern technology that form part of the foundation of Industry 4.0 include ‘big data’ and ‘cloud computing’. Big data refers to the ability of 4IR technologies to turn large amounts of collected facts and statistics into useful insights, which can then be converted into useful and actionable knowledge. This may include the identification of trends or patterns and the relationships between inputs, processes, and outputs. Cloud Computing, on the other hand, refers to networks of remote servers which store, manage and process data.<sup>1</sup>

Fighting crime effectively requires 21st Century technology to take centre stage. These two advances in technology i.e., big data and cloud computing, together with advancements already brought about by the digital revolution can be instrumental in improving police-citizen encounters, as well as the overall quality of policing. Body-Worn Cameras, in particular, are fast becoming necessary equipment for police forces all around the world. This has revolutionised the way state police forces engage with their citizens by addressing issues surrounding poor supervision and a general absence of accountability for police misconduct. The South African Police Services, however, has yet to introduce Body-Worn Cameras as part of their official uniform. But just what are Body-Worn Cameras, and are they necessary for South Africa?

Body-Worn Cameras (hereafter BWCs) are video recording evidence capture systems. They are typically used by law enforcement to record interactions with the public, gather video evidence at crime scenes, and have been reported to increase both officer and citizen accountability. BWC footage provides a detailed, first-hand account of what happens during a police encounter, increasing transparency. The technology can be mounted on an officer’s eyeglasses or chest area and offers real-time information

1 University of Liverpool ‘The Nine Pillars of Industry 4.0’ <https://www.virtualengineeringcentre.com/news-views/2017/the-nine-pillars-of-industry-4-0/> (accessed 30 August 2022).

when used by officers on patrol or other assignments that bring them into contact with members of the community.

Former President of the United States of America, Barack Obama, embraced Body-Worn Cameras, proposing a ‘Body Worn Camera Partnership Program,’ in which the federal government would spend \$75 million to help local governments purchase 50,000 Body-Worn Cameras.<sup>2</sup> As of November 2017, thirty-four US states have enacted laws regarding the use of body cameras<sup>3</sup> and over one-third of the 18,000 law enforcement agencies in the United States are already using this technology.<sup>4</sup> In South Africa, Parliament has shown support for the implantation of BWCs. *The South African* reported in 2019 that ‘a Parliamentary Portfolio Committee on Police has recommended that lawmakers adopt a rule which would provide all frontline police officers in [South Africa] with their own bodycams’.<sup>5</sup>

This technology is the ‘latest and perhaps most tangible answer to complex social questions regarding the use of force, state legitimacy, and the proper role of police in a liberal democracy’.<sup>6</sup> The judge in *Floyd v City of New York*<sup>7</sup> explained that ‘Body-Worn Cameras are uniquely suited to addressing the constitutional harms of abusive policing’.<sup>8</sup>

This article aims to investigate whether BWCs should be worn by officers to ensure that law enforcement uphold and respect rights when engaging with citizens. This study comes in the wake of various events involving high emotional face-to-face engagement with South African Police Services (SAPS) as well as the South African National Defence Force (SANDF). These include the student-led #FeesMustFall

2 The Washington Post ‘President Obama wants to spend \$75 million to buy police bodycams’ <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/01/president-obama-wants-to-spend-75-million-to-buy-police-bodycams/> (accessed 19 March 2021).

3 National Conference State Legislatures Blog ‘What does the latest research say about Body-Worn Cameras?’ <http://www.ncsl.org/blog/2017/11/20/what-does-the-latest-research-say-about-body-worn-cameras.aspx>[<https://perma.cc/SRV5-6EWT>] (accessed 19 March 2021).

4 CNN Wire Service ‘One-third of United States police departments using body cameras: They’re expensive, so are they worth it?’ <http://fox6now.com/2015/03/02/one-third-of-united-states-police-departments-using-body-cameras-theyre-expensive-so-are-they-worth-it/> (accessed 15 February 2021).

5 The South African ‘SA police officers set for bodycams: These are the main pros and cons’ <https://www.thesouthafrican.com/technology/police-officers-body-cams-pros-cons-south-africa/> (accessed 15 November 2020).

6 I Adams & S Mastracci ‘Police Body-Worn Cameras: Development of the perceived intensity of monitoring scale’ (2019) 3 *Criminal Justice Review* at 44.

7 *Floyd v City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

8 J Bellin & S Pemberton ‘Policing the admissibility of body camera evidence’ (2019) 87(4) *Fordham Law Review* at 1425. Id.; accord *Leadholm v City of Commerce City*, No. 16-cv-02786-MEH, 2017 WL 1862313, at \*3 (D. Colo. May 9 2017) (noting that the implementation of body cameras may assist victims of police civil rights violations).

protests,<sup>9</sup> the enforcement of lockdown regulations by SANDF together with SAPS, as well as the deaths of Nathaniel Julies<sup>10</sup> and Collins Khosa - which was witnessed by neighbours, and although some of the onlookers attempted to record the incidents, their recording devices were confiscated, and they were threatened with violence by SANDF members.<sup>11</sup>

This article will also discuss what stakeholders should consider before implementing a BWC program. BWCs offer several benefits, one of them being better engagements between citizens and law enforcement. Both the UK and US have introduced BWCs to their police forces and there have since been multiple reports of reductions in citizen complaints in areas and interactions where BWCs were present.<sup>12</sup> The presence of BWCs during police-citizen encounters causes participants to become more cautious in their actions and behaviour when they are alert to possible scrutiny of video records.<sup>13</sup>

This element is crucial for South Africa considering how often citizens report abuses of power by police to the Independent Police Investigative Directorate (IPID). IPID is an independent and impartial investigating and oversight body which acts in the public interest by conducting independent and impartial investigations of criminal offences allegedly committed by members the Municipal Police Services (MPS) and SAPS.

IPID has reported that it is 'concerned about the complaints received from the public on the alleged use of excessive force by members of SAPS and MPS'.<sup>14</sup> BWCs can be very useful in facilitating relief to these types of issues. BWCs have solid theoretical support for being able to influence the behaviour of those under observation and

- 9 The Guardian 'South African police fire teargas as university fees protests spread' <https://www.theguardian.com/world/2016/sep/22/south-african-police-fire-teargas-as-university-fees-protests-spread> (accessed 29 August 2022); Daily Maverick 'In pictures: Police take on Wits students' (accessed 29 August 2022); <https://www.dailymaverick.co.za/article/2016-09-21-in-pictures-police-take-on-wits-students/#.V-P2WzYrJdA> (accessed 29 August 2022).
- 10 Mail & Guardian 'Tombstone and wall of remembrance unveiled for slain teenager Nathaniel Julies' <https://mg.co.za/news/2022-08-29-tombstone-and-wall-of-remembrance-unveiled-for-slain-teenager-nathaniel-julies/> (accessed 29 August 2022); Ivan Pijoo reporting for News24 "'He was killed by his heroes": Special tombstone for Nathaniel Julies unveiled in Eldorado Park' (accessed 29 August 2022).
- 11 *Khosa v Minister of Defence and Military Veterans* 2020 7 BCLR 816 (GP).
- 12 Goodall M 'Guidance for the Police Use of Body-Worn Video Devices' (2007) *London: Home Office* at 47; L Miller & J Toliver 'Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned' 2014 *Washington DC: Office of Community Oriented Policing Services* 5 [https://pmg.org.za/files/200508PCP\\_Lockdown\\_presentation\\_26\\_March\\_-\\_5\\_May\\_2020\\_Final.pptx](https://pmg.org.za/files/200508PCP_Lockdown_presentation_26_March_-_5_May_2020_Final.pptx)
- 13 A Braga et al 'The benefits of Body-Worn Cameras: New findings from a randomized controlled trial at the Las Vegas Metropolitan Police Department' (2017) *Final report to the National Institute of Justice* at 15.
- 14 P Setshedi 'Joint meeting of the PCP and SCSJ presentation on police misconduct cases' (2020) *Independent Police Investigative Directorate* at 22.

act as prevention mechanisms.<sup>15</sup> The presence of BWC on officer uniforms may make them more conscious of their actions and consequently see them more seriously respect and uphold the constitutional rights of citizens.

The benefits of BWCs are not limited to just better officer behaviour. In the next section, a further impact of Body-Worn Cameras will be discussed, and will take a closer look at some of the perceived benefits of this technology. The following section will discuss whether there is a need for South Africa to invest in BWCs by briefly discussing the events mentioned above.

## **2 Impact of Body-Worn Cameras**

The full impact of BWCs is still to be realised. In general, however, the introduction of BWCs to police units sees an improvement in performance. Funding research at Arizona State University in 2014 noted by the United States Bureau of Justice Assistance's Smart Policing Initiative that officers with BWCs were more productive making arrests, and had fewer complaints lodged against them than those without. Officers equipped with BWCs also had higher numbers of citizen complaints resolved in their favour.<sup>16</sup>

The research on this technology and its application is still novel, however, the UK and the US have observed similar benefits in various studies. The four main benefits identified as relevant for this study are (i) evidentiary benefits, (ii) improved officer (and citizen) behaviour, (iii) expedited resolution of citizen complaints/lawsuits, and (iv) identifying training opportunities. These perceived benefits will now be briefly discussed.

### **2.1 Perceived benefits**

#### **2.1.1 Evidentiary**

Body-Worn Cameras create a real-time, permanent record of what transpires during an encounter between the police and citizens. The captured footage can be used as evidence in arrests for prosecution and may also be used for corroborating evidence in officer complaints for IPID.

Admissible video evidence will reduce the amount of time it takes to write reports and give a clear(er) account of the events that transpired. While the reliability of eyewitness accounts can be

15 Braga et al (n 13) 15.

16 C Katz et al 'Evaluating the impact of officer worn body cameras in the phoenix police department' (2015) *Arizona State University* at 32.

affected by the psychological limits of human attention,<sup>17</sup> BWCs are able to capture and preserve evidence for trial better than the naked eye. They further provide a more holistic picture, and record details that would otherwise be unavailable to or ignored by the human mind.<sup>18</sup>

Although BWC video is far from perfect in that it relays visuals from an officer's point of view, eye-witness testimony bears a similar risk in that it may also be skewed by emotions or personal loyalties. Whereas the accused can challenge the oral testimony of a witness to provide a more favourable account of events for themselves, the availability of video evidence forces the accused to frame his narrative in accordance with the recording.<sup>19</sup> BWCs can also help make a significant impact in instances of domestic violence. The UK Home Office guide commented in this regard, saying:

the evidence gathered using [Body-Worn Cameras] at the scene of a domestic abuse incident has assisted greatly in supporting reluctant witnesses through the court process. In providing an exact record of the demeanour and language of the accused, the disturbance throughout the scene and the emotional effect on the victim, the use of [Body-Worn Cameras] can significantly strengthen the prosecution case.<sup>20</sup>

Domestic and gender-based violence is a major problem in South Africa. BWCs can be the technology which motivates victims and witnesses to report such crimes, knowing that a police unit will arrive to assist and be able to document the scene. This video evidence will also strengthen prosecution cases resulting in more convictions and hopefully begin to work as a deterrence.

### 2.1.2 Police use of force

Most research reveals that the presence of a body-worn camera seems to have a 'civilising effect' on all those present.<sup>21</sup> This is influenced by the officer's awareness that their actions are being monitored, who is then more likely to comply with set procedures and less likely to abuse their powers when engaged with citizens. The implementation of BWCs can, in this way, be used to demonstrate law enforcement's dedication to transparency and be used to restore community trust by demonstrating a commitment to interacting with

17 J Blitz 'Police Body-Worn Cameras: Evidentiary benefits and privacy threats' (2015) *American Constitution Society* at 5.

18 Bellin & Pemberton (n 8) 1439.

19 Blitz (n 17) 6.

20 M White 'Police Officer Body-Worn Cameras: Assessing the evidence' (2014) *National Institute of Corrections* at 24.

21 J Maskaly et al. 'The effects of Body-Worn Cameras (BWCs) on police and citizen outcomes: A state-of-the-art review' (2017) *Policing: An International Journal of Police Strategies & Management* at 672; C Lum et al 'Existing and ongoing body camera research: Knowledge gaps and opportunities' (2015) *New York: The Laura and John Arnold Foundation*.



citizens in a way that is fair and just. This can then improve perceptions of police legitimacy.<sup>22</sup>

When there is a visual record of what occurred during a police encounter, it is much more difficult for an officer to deny excessive use of force or other abuse, so it is better to steer clear altogether. It works both ways as it will also be more difficult for accusers to fabricate police abuse or misconduct where video footage is absent.<sup>23</sup>

The 'civilising effect' present may prevent some situations from escalating to levels requiring the use of force and improve interactions between officers and citizens. The Las Vegas Metro Police Department did just that and introduced BWCs as a way to increase police accountability and a remedy to resolve issues surrounding community trust.<sup>24</sup>

### **2.1.3 Training opportunities**

The use of BWCs also offers potential opportunities to advance policing through training. By monitoring officers in the field, superiors are able to identify areas of poor performance and can distil causes for poor performance. With such information available, superiors are able to structure appropriate training programs to address areas of concern. Areas of concern include the disregard of human rights. This was identified by Gumede in a statement critiquing members of SANDF in their engagement with South African citizens during the COVID-19 national lock down. He believes:

After 26 years since the end of apartheid, the South African police appear still not to have been trained, neither have they inculcated a culture of human rights-policing ... In the long-term, the training curriculum of the police and army must be overhauled to make it more human rights based.<sup>25</sup>

Had BWC technology been available, superiors would have had the opportunity to review the actions of their subordinates and address the issues of excessive force appropriately. White agrees that 'body-worn camera technology could hold great promise both as a training tool for police and as a mechanism for more thorough and fair review of officer behaviour during critical incidents'.<sup>26</sup>

22 T Tyler 'Procedural justice, legitimacy, and the effective rule of law' (2003) 30(6) *Crime and Justice the University of Chicago Press* at 283.

23 Blitz (n 17) 1.

24 Braga (n 13) 11.

25 Associate Professor W Gumede of Witwatersrand University 'Complaints against SANDF' <https://www.wits.ac.za/news/latest-news/general-news/2020/2020-04/complaints-against-sandf.html> (accessed 20 February 2021-).

26 White (n 20) 26.

#### **2.1.4 Expedited resolution of citizen complaints**

BWCs may lead to a faster resolution of citizen complaints and lawsuits that allege excessive use of force or other forms of officer misconduct. IPID may find BWCs extremely convenient as police complaints may involve an officer fitted with BWC. Although there may be many hours of footage to sit through in order to ascertain the details of what transpired, it is far better than going through various inconsistent reports, often without any evidence, trying to find the truth.

IPID is a statutory oversight body with a mandate to investigate cases involving the police. During the early stages of the lockdown period – 26 March-5 May 2020 – over 800 cases were reported to IPID.<sup>27</sup> In the previous year, 26 March-5 May 2019, this number was less than 200. While COVID-19 may have played a role in increasing cases, the IPID office often has its hands full. IPID has also admitted that it is possible that other community members might have been unable to report cases due to movement restrictions, which might result in IPID receiving more cases after the lockdown period.<sup>28</sup> Generally, the complaints were about the excessive use of force and the physical abuse of civilians by law enforcement. Such a plethora of cases presents a number of problems during investigations, especially if the evidence is often not reliable.

The investigation of cases involving inconsistent accounts of encounters between officers and citizens are often found to be ‘not sustained’ and are subsequently closed when there is no video footage, nor independent or corroborating witnesses. This is because the complaint is reduced to the officer’s word against that of the citizen. The availability of video evidence can change this position, allowing complaints to be investigated to their conclusion and grant relief to wronged citizens.

BWCs are not just beneficial for citizens; officers can benefit from them as well when confronted with a false accusation. The UK Home Office guide has noted that ‘in a number of cases the complainants have reconsidered their complaint after [the video] review, thus reducing investigation time for unwarranted complaints’.<sup>29</sup>

Additionally, there are several reports which indicate that there is a higher percentage of (earlier) guilty pleas and convictions when video evidence is readily available and presented.<sup>30</sup> This could assist greatly with relieving an overburdened court as matters will be resolved quicker. It is not, however, clear from the reports whether

27 Setshedi (n 14) 9.

28 Setshedi (n 14) 22.

29 Goodall (n 12) 7.

30 Maskaly et al (n 21) 679.

it is indeed the video evidence which directly results in guilty pleas. More research is required in this regard.

### 3 Does South Africa need Body-Worn Cameras?

One of the biggest motivators for BWC programs in the US is that body cameras can cultivate an environment of better transparency and accountability which then improves law enforcement's legitimacy and increases the quality of policing in communities. Precincts often implemented this 'in response to increased community criticism after several controversial police use of force incidents'.<sup>31</sup>

South Africa has had its fair share of controversial use of police force, most notably the deaths of Nathaniel Julies and Collin Khoza, as well as the Marikana Massacre. These incidents have all caused quite the civilian outcry and 'while public opinion alone does not assure that laws or government policies will change, it is often a necessary precondition to provoke such change'.<sup>32</sup>

There is a growing lack of trust in the police force by citizens. This lack of trust is echoed by community members of Eldorado Park. Community leader, Bishop Robinson, and residents accuse police members of colluding with criminals and drug dealers, saying:

[T]he main concern in our area is that the police are incompetent, they are eating with the criminals. Now the community wants to burn down the police station. What is happening in Eldos is very painful ... We are tired of constantly talking about crime, we want all the corrupt officers to leave our area with immediate effect.<sup>33</sup>

Mr Robinson is not alone. Sandra Foster, a 38-year-old Eldorado Park resident, said 'police must do their work right if they want to be respected by the Eldorado Park community. Right now, they are shooting at us and are failing to provide answers.'<sup>34</sup> Without question, community trust in law enforcement is very low in Eldorado Park. The community has no faith in law enforcement's legitimacy and there is a poor quality of policing in this community. This article will now address a few controversial incidents of police force that result in the violations of important constitutional rights.

31 Braga (n 13) 1.

32 Blitz (n 17) 7.

33 Daily Maverick 'Community protests after boy with down syndrome allegedly shot by police' <https://www.dailymaverick.co.za/article/2020-08-28-community-protests-after-boy-with-down-syndrome-allegedly-shot-by-police/> (accessed 19 February 2021).

34 As above.

### 3.1 South African Police Services use of force and the violation of Constitutional rights

The Bill of Rights is the cornerstone of democracy in South Africa, underpinning the democratic values of human dignity, equality and freedom which must be respected, protected, promoted and fulfilled by the State.<sup>35</sup> However, the culture of law enforcement in South Africa appears to be in direct conflict with the Constitution.<sup>36</sup> This is according to Gumede, who writes that ‘the organisational culture of the police and army, which clearly is based on humiliation, aggression and abuse, should be thoroughly shaken up to focus on compassion, human rights and decisions based on common sense’.<sup>37</sup> It is hard to argue with his analysis given what has transpired during the early stages of the national lockdown.

The lockdown period provided a unique opportunity to observe police and civilian interactions. Police and civilians engaged often as the SAPS and SANDF were patrolling, tasked with enforcing the COVID-19 regulations. Unfortunately, plenty of the encounters were unpleasant. IPID reported a 32% increase in complaints against the police during the first 41 days of lockdown compared to the same period last year.<sup>38</sup> From these arrests, 828 cases were reported to IPID in terms of its mandate to investigate incidents of wrongdoing by police officers, including deaths as a result of police actions or in custody, rapes by police officers, or alleged assault by police officers.<sup>39</sup> The constitutional offences range across the board, however, this article will touch briefly on (a) the right to dignity, (b) the right to freedom and security of the person, and (c) the right to life.

#### 3.1.1 Human Dignity – section 10

The constitution provides everyone with inherent dignity and the right to have their dignity respected and protected. An individual’s human dignity is impaired if that person is subjected to treatment that is degrading, humiliating, or treats them as subhuman. This was echoed in *Minister of Home Affairs v Watchenuka*, where the Supreme Court

35 *Khosa* (n 11).

36 Constitution of the Republic of South Africa, 1996.

37 Witwatersrand University ‘Complaints against SANDF’ <https://www.wits.ac.za/news/latest-news/general-news/2020/2020-04/complaints-against-sandf.html> (accessed 20 February 2021).

38 Institute for Security Studies ‘Police abuses during lockdown reflect deep accountability problems’ <https://issafrica.org/iss-today/police-abuses-during-lockdown-reflect-deep-accountability-problems> (accessed 29 August 2022).

39 Independent Police Investigative Directorate ‘Joint Meeting of the PCP And SCSJ Presentation Police Misconduct Cases’ (2020) at 4.

of Appeal expressed the right to human dignity as ‘the ability to live without positive humiliation and degradation’.<sup>40</sup>

However, within the first few weeks of lockdown, there were already multiple reports of abuse of power and excessive use of force by SAPS and SANDF. Citizens and a few news houses reported the witnessing of soldiers coercing members of the public to do push-ups<sup>41</sup> and other forms of physical exercise. This was done as a form of punishment for those who violated the lockdown regulations. This was undoubtedly a violation of the citizen’s right to human dignity as such actions only served to humiliate and degrade.

In an uproar, citizens took to social media and submitted to news houses captured footage of these gross violations of their rights and the rights of others. Admittedly, not all online footage has been verified to be true and authentic. The national SAPS spokesman, Brig Vish Naidoo, also made sure to point out that SAPS has ‘noted these videos with serious concern but the authenticity of these videos would need to be verified’.<sup>42</sup> However, this article is prepared to accept the videos identified herein as a prima facie true reflection or account of events, given the multitude of videos from multiple sources alleging similar events – both official and unofficial – with official police and military uniforms identifiable in the videos, as well as the visible wearing of masks which indicates that these events transpired during COVID-19.

However, video evidence needs to be admissible to have any evidentiary value. This was the case when an NGO tried to take the government to court over alleged SAPS and SANDF brutality and use of force when enforcing the COVID-19 lockdown measures. The NGO soon withdrew its case after President Cyril Ramaphosa accused it of failing to provide admissible evidence.<sup>43</sup> The admissibility of evidence clearly cannot be overlooked because of the mere existence of potential evidentiary material, even if it does relate to a fundamental human right. The case was withdrawn, presumably to ‘[secure] sworn evidence confirming the veracity of social media footage and media reports about the alleged brutality, which it had relied on to make its

40 2004 4 SA 426 (SCA).

41 Twitter ‘Push-ups in Soweto’ [https://twitter.com/ProsperShezi/status/1244304346986287105?refsrc=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1244304346986287105%7Ctwgr%5E%7Ctwcon%5Es1\\_&ref\\_url=https%3A%2F%2Fcityzen.co.za%2Fnews%2Fsouth-africa%2Fsocial-media%2F2262188%2Fwatch-police-and-sandf-force-soweto-residents-to-do-hard-exercise-as-punishment%2F](https://twitter.com/ProsperShezi/status/1244304346986287105?refsrc=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1244304346986287105%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fcityzen.co.za%2Fnews%2Fsouth-africa%2Fsocial-media%2F2262188%2Fwatch-police-and-sandf-force-soweto-residents-to-do-hard-exercise-as-punishment%2F) (accessed 26 February 2021).

42 Times Live ‘Defence minister slams soldiers for punishing civilians during lockdown’ <https://www.timeslive.co.za/politics/2020-03-30-defence-minister-slams-soldiers-for-punishing-civilians-during-lockdown/> (accessed 14 February 2023).

43 Business Live ‘NGO withdraws shutdown brutality case’ <https://www.businesslive.co.za/bd/national/2020-04-06-fair-and-equitable-society-withdraws-shutdown-brutality-case/> (accessed 20 February 2021).

original case'.<sup>44</sup> Seemingly, the lack of BWC evidence allowed for abusive police conduct and public humiliation to go unpunished.

Respect for due process and procedural fairness demands the use and reliance of legally admissible evidence, and rightly so. However, it is still disheartening that such an important case which sought to defend the right of citizens to human dignity was halted because the available evidence was not admissible. One might wonder how the case would have progressed had some officers been fitted with BWCs, allowing both the state and the NGO access to admissible video evidence. Perhaps the court would have instructed the state to draft a plan or policy to ensure that such infringement to the dignity does not happen again or is at least substantially reduced.

Had it been available, BWC footage would have assisted in increasing community trust as citizens would see law enforcement's commitment to transparency by exposing delinquent conduct violating the human dignity afforded to all South African citizens.

### **3.1.2 Freedom and security of the person – section 12(1)(c) - (e)**

The right to freedom and security of the person is contained in section 12 of the Constitution and it consists of two subsections, subsection (1)(c) and (e). The section provides that: Everyone has the right to freedom and security of the person, which includes the right (c) to be free from all forms of violence from either public or private sources; and (e) not to be treated or punished in a cruel, inhumane or degrading way.

Although this right protects the physical and psychological integrity of the individual, it was not too long after the beginning of lockdown that incidents of law enforcement violating section 12 rights were reported. On just the second day of lockdown, while citizens were queuing at a popular store in Yeoville 'police arrived in 10 patrol vehicles and started firing rubber bullets towards the shoppers ... [and] ... later the police used whips to get the shoppers to observe social distancing rules'.<sup>45</sup> It is apparent that the shoppers are not immune to violence from the state, infringing on section 12(1)(c).

In another incident, a SANDF member confiscated and shattered a beer bottle while another member assaulted a citizen by slapping and kicking them in a derogatory manner. A video of this encounter was reported by *The Citizen*.<sup>46</sup> Such treatment is in clear violation of section 12(1)(e). To exacerbate matters, members of SAPS were

<sup>44</sup> As above.

<sup>45</sup> The Citizen 'SA police fire rubber bullets at shoppers during lockdown, and whip them' <https://www.citizen.co.za/news/south-africa/crime/2261939/sa-police-fire-rubber-bullets-at-shoppers-during-lockdown-and-whip-them/> (accessed 26 February 2021).

present on the scene but instead of protecting the citizen and his constitutional rights, they acted as mere onlookers.

### **3.1.3 Life – section 11**

Section 11 of the Constitution guarantees the right to life. This places a duty on the state to not act in a way which would deprive someone of their life. The two matters below highlight a failure by the state to respect this right.

#### ***Eldorado Park shooting of Nathaniel Julies***

In August of 2020, ‘the community of Eldorado Park erupted with protest action following the death of 16-year-old Nathaniel Julies, who was allegedly shot by police after they allegedly became frustrated with his responses to their questions. Nathaniel had down syndrome’.<sup>47</sup>

Netshiongolo is an Eldorado Park police station sergeant and the third accused in the matter. He faces charges of being an accessory to murder after the fact and defeating the ends of justice. Gauteng NPA spokesperson Phindi Mjonondwane explained that ‘the state alleges that after the third accused, Netshiongolo, was alerted to the crime he then tried to assist in concealing the crime’.<sup>48</sup> Sergeant Netshiongolo allegedly planted bullets at the scene of Julies’ death to make it look as if there had been an earlier shooting in a confrontation between police and local gangs.<sup>49</sup>

In its most basic form, section 11 provides citizens with a guarantee that they have the right to ‘be alive’. This means that no citizen should be arbitrarily deprived of his or her life. However, there are varying accounts of the circumstances which led to the death of Nathaniel Julies. The allegation that the officers staged the scene,<sup>50</sup> can only make matters worse as the truth of what really transpired

46 The Citizen ‘WATCH: Army members break beer bottle, slap and kick member of the public’ <https://www.citizen.co.za/news/south-africa/crime/2261827/watch-army-members-break-beer-bottle-slap-and-kick-member-of-the-public/> (accessed 26 February 2021).

47 Daily Maverick ‘Community protests after boy with down syndrome allegedly shot by police’ <https://www.dailymaverick.co.za/article/2020-08-28-community-protests-after-boy-with-down-syndrome-allegedly-shot-by-police/> (accessed 19 February 2021).

48 Daily Maverick ‘Another postponement in Nathaniel Julies murder case against cops – as victim’s family faces eviction’ <https://www.dailymaverick.co.za/article/2021-01-27-another-postponement-in-nathaniel-julies-murder-case-against-cops-as-victims-family-faces- eviction/> (accessed 19 February 2021).

49 As above.

50 Daily Maverick ‘Community protests after boy with down syndrome allegedly shot by police’ <https://www.dailymaverick.co.za/article/2020-08-28-community-protests-after-boy-with-down-syndrome-allegedly-shot-by-police/> (accessed 25 July 2022).

will be harder to ascertain. The confusion will only deprive the community and especially the parents of the victim peace and/or closure. Such a situation demonstrates the value of BWCs.

It is hard to say with absolute certainty whether Sergeant Netshiongolo would have tried to tamper with the scene if BWC evidence had been readily available. The BWCs of the officers would have revealed whether the alleged shooting between the officers and gang members had actually occurred. Equipped with this knowledge, the BWCs would act as a deterrent and the sergeant would have thought twice about staging a crime scene, especially as it was revealed during the accused's bail hearing that he had reported sick on the day and should not have been anywhere near the murder scene.<sup>51</sup>

No right is absolute and can be limited, including the right to life. In instances where this right is limited, the killing must be a proportionate response in the circumstances. Had standard policy required officers to be fitted with BWCs during the encounters, footage of what exactly transpired would have been easily and readily available, shedding light on the circumstances which led to the infringement of this right. If the BWCs were turned off, a reasonable and acceptable explanation of why this was would have had to be provided. Failure thereof could have had the court or IPID draw a negative inference from such conduct.

The right to life and dignity are the most important of all human rights, and as Chaskalson P stated in *S v Makwanyane*, they are the source of all other personal rights. This explains why they are to be protected at all costs, and BWCs can assist in this regard. Given the extent of the community outcry, the footage could have even been made public to allow the parents and community to receive closure having witnessed the true account of the events which led to Julies' death.

BWCs can prove their worth by revealing the truth when a situation proves to be tricky such as in case of a crime scene being (allegedly) tampered with. BWCs have the power and potential to remove the inconsistent accounts of an incident and calm the public outrage by providing a single narrative.

### ***Collins Khosa***

Briefly the facts are as follows: On 10 April 2020, members of the SANDF entered the premises of Mr Khosa and accused him of violating the Lockdown Regulations. During this time, Mr Khosa was within the confines of his residential premises. The SANDF members then raided

51 As above.



the house and confiscated liquor, ordering Mr Khosa and another to leave the property and go into the street. Shortly after, more law enforcement personnel arrived on the scene, including the Johannesburg Metropolitan Police Department (the JMPD) and armed SANDF members. It was at this point that the contents of the confiscated liquor were emptied over Mr Khosa, after which he was assaulted.<sup>52</sup> Mr Khosa succumbed to his injuries shortly after.<sup>53</sup>

The Constitution offers a guarantee of freedom from state brutality – there is no general license for the use of force. Use of force is only justifiable in very limited cases.<sup>54</sup> In general, the SAPS may not use force except for when it is necessary.<sup>55</sup> When it does become necessary, only the bare minimum force is to be applied and deadly force may be used only where there is a threat to life.<sup>56</sup>

From the facts, there is nothing to suggest that the (deadly) use of force was ever necessary. The rights contained in Chapter 2 of the Constitution must always be respected by the government and security forces. As organs of state, members of the police services and the national defence force are under section 7(2) of the Constitution obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>57</sup> The SANDF and JMPD officers ignored all of these provisions. They infringed on the freedom of security and of bodily integrity resulting in the ultimate infringement on the right to life.

State security forces appear comfortable abusing power. It is not unreasonable to assume the trained officers knew their actions were unconstitutional. Attempts at actively ensuring that no video evidence of their actions could be recorded, including use of threats of violence against concerned citizens, further suggests as much. These are however exactly the type of instances that proponents of BWCs wish to remedy. Civilians may be less intimidated when recording the actions of security forces if they know their supervisors can monitor them. Of course, rotten apples can always turn off the camera when they intend to offend the Constitution, but then they will have to provide a convincing account of why their cameras were turned off.

Ultimately, what happened to Mr Khosa was a tragedy. IPID reports reveal that Mr Khosa was not the only citizen to die at the hands of security forces. Although the introduction of BWCs will not magically stop such deaths, they will go a long way to deter such conduct, and that is an important first step to ensure security forces

52 *Khosa* (n 11).

53 As above.

54 See Defence Act 42 of 2002; South African Police Service Act 68 of 1995; Criminal Procedure Act 51 of 1977.

55 Criminal Procedure Act 51 of 1977, sec 49(2)

56 *Khosa* (n 11).

57 Constitution of South Africa, 1996, sec 7(2).

do not abuse their powers, and not only respect, but protect the rights in the Bill of Rights.

## 4 Considerations before implementation of Body-Worn Cameras

While BWCs may be on the agenda for SAPS top management, there has yet to be an official date for implementation. The reasons advanced by the Department of Police spokesperson suggests that the department is awaiting more information and funding.<sup>58</sup>

Seemingly, the idea of BWCs has already crossed the minds of those in the SAPS leadership. BWCs were set to make their first appearance as a pilot project with the National Traffic Department in April of 2021. BWC implementation must be done carefully. As Professor Wasserman writes, the ‘ultimate effectiveness of Body-Worn Cameras depends on the hard details of implementation’.<sup>59</sup> This article has identified the following as factors for the national government to consider as it introduces this technology.

### 4.1 Implementation fees

BWCs provide many potential benefits to law enforcement, but they do come at a considerable financial cost. Fees are not just limited to the initial purchasing cost; in addition ‘agencies must devote funding and staffing resources toward storing recorded data, managing videos, disclosing copies of videos to the public, providing training to officers, and administering the program’.<sup>60</sup> The type of resources needed for storing and managing data include the transmission type of footage – whether live or not, and the associated carrier costs if it is live – and how the data will be captured and stored. Staffing resources speaks to the personnel required for the administrative workload of downloading and categorising at the end of each shift.

Many United States precincts are being held back by the costs of BWC programmes. The Police Executive Research Forum’s (PERF) survey revealed that 39 percent of the respondents that do not use Body-Worn Cameras cited cost as a primary reason. Chief amongst these are the crippling storage costs. These costs have been identified

58 Business Tech ‘South African police officers to wear body cameras’ <https://businesstech.co.za/news/technology/324999/south-african-police-officers-to-wear-body-cameras/> (accessed 10 November 2020).

59 Blitz (n 17) 7; quoting H Wasserman ‘Moral panics and Body-Worn Cameras’ (2015) 93(3) *Washington University LawReview* at 10.

60 Police Executive Research Forum et al ‘Implementing a Body-Worn Camera Program: Recommendations and lessons learned’ (2014) *Washington DC: Office of Community Oriented Policing Services* at 31.

as one of the greater costs and often the main reason for not implementing BWC programmes.<sup>61</sup>

It is true that BWCs can have high implementation fees, but it is remedied by a reduced cost in gathering evidence and securing convictions, thereby decreasing overall litigation costs. The Las Vegas Metro Police Department estimated the cost of labour required to investigate an average complaint, with and without BWC evidence. According to data provided by LVMPD, BWCs save over \$6,200 in officer time spent investigating an average complaint, compared to complaint investigations for officers without BWCs.<sup>62</sup>

With such high fees, it should also be obvious that not every SAPS precinct will be fitted with BWCs at one go. Rather, SAPS can pilot BWCs in high crime areas, collecting data from there and learning how to improve the system before implementing it elsewhere or more broadly.

## 4.2 Policy considerations

Body-Worn Cameras are potential game changers for law enforcement, from evidence collection to building community trust. To truly be successful in the implementation of a BWC programme, clear guidelines and policies on how officers and other members of SAPS are to collect, store and access footage must be established. All members of SAPS involved with BWCs will need to be trained appropriately.

A successful BWC program will need considerable groundwork before camera deployment. This includes selecting a vendor for the cameras; overcoming officer and union objections; and developing training and policy that covers a wide range of critically important issues, from when to turn the cameras on and off to supervisor review and video redaction.<sup>63</sup>

Spencer identifies a few elements which can help the smoother integration of BWC programmes.<sup>64</sup> Firstly, the operational policy on the use of BWC should be developed around the officer's experience in the field. This will assist in making sure the policies are not only practical, but officers will feel included as a part of the process. Secondly, pertaining to the use of BWC video, saving and transferring data should be simple and quick. Finally, information technology (IT) infrastructure is a significant consideration. Download speeds, in

61 As above.

62 Braga (n 13) 10.

63 White (n 20) 36.

64 D Spencer & R Cheshire 'Ten years of body worn video in Northamptonshire police' (2017) 12(1) *Oxford University Press* at 4.

particular, should be quick to not cause unnecessary delay or abstraction from other duties.

When implementing BWCs, SAPS leadership needs to take special consideration of key decisions such as when officers ought to activate their cameras; who has access to the recorded footage; how long the recordings should be retained and how internal and external requests for disclosure will be processed.<sup>65</sup> Designing a clear policy displays a commitment to transparency for police operations, accurate documentation of events, and evidence collection. A few policy considerations are discussed below.

#### **4.2.1 Determining when to record**

Some authors argue that BWCs should remain on during an officer's entire shift, otherwise the whole aim of the program is defeated. This is not a sound argument as sometimes shifts can be long and uneventful. It will be time consuming to go through so many hours of footage when uploading and categorising. Such lengthy videos will also have a detrimental impact of storage and the associated costs. It is then important to identify the instances when an officer will be required to start recording. These instances should be made as clear as possible as this will be very important for the purposes of legitimacy.

In determining which instances officers should start recording, the most common approach observed is to require officers to activate their cameras when responding to calls for service and during law enforcement-related encounters and activities, such as traffic stops, arrests, searches, interrogations, and pursuits. In many cases, the department's written policy defines what constitutes a law enforcement-related encounter or activity, and some policies also provide a specific list of which activities are included.<sup>66</sup> The rule of thumb, however, is that when in doubt, record.

It is accepted that recording will not be possible at all times, even if policy requires it. Recording may be unsafe, impossible, or impractical and in such cases, the officers should be afforded some discretion. For example, an officer may be taking a statement of an abuse or rape victim. Such victims may be uncomfortable with being recorded and the officer should have the discretion to be able to deactivate the camera. To avoid misuse and abuse of said discretion, as part of its policy, SAPS can require officers to explain the reason for deactivation prior to such deactivation. If they are unable to do so at the time, at the end of his or her shift, the officer must record or report why they chose to deactivate the camera.

65 Police Executive Research Forum et al (n 60) 11.

66 Police Executive Research Forum et al (n 60) 13.

Although digital technology can be very useful, it does not find relevance in all areas of policing. The demand for BWCs is to combat defective and unsatisfactory policing. In instances where there is a failure to observe the guidelines, this should result in a hearing to ascertain why the camera was not activated and to allow for any relevant disciplinary steps. The aim of this technology is to improve police-citizen encounters, not impede them.

#### **4.2.2 Access, storage, and retention of data**

An issue which may present itself in the implementation of this technology is the routine storage and management of collected video footage.<sup>67</sup> This demands considerations that relate to where data will be stored (i.e., internal or external hard drives) through third-party cloud services. However, when making these decisions, Chief of Police Ken Miller emphasises that ‘protecting the data and preserving the chain of custody should always be a concern’.<sup>68</sup> What is vital here is the creation of a system that ensures that one is unable to tamper with a video.

Essentially, however one decides to store and manage the video footage, the integrity of the recordings should not be compromised. A clear policy guideline as to who can access the data is of paramount importance. The policy should explicitly state who has access to the data and under which circumstances. In this way, an auditing system is created to monitor access. This can be done in consultation with the National Prosecuting Authority.

With regards to storage, the policy should specify how data will be downloaded from the camera and onto the system. This process should include protection against the tampering of data prior to downloading. The uploaded videos should be categorised properly and according to the type of event contained in the footage to ensure easier access when it is searched for.

### **4.3 Admissibility concerns**

Body-Worn Cameras present a cognitive bias in evidence as one is seeing the events that transpired from an officer’s point of view. Accordingly, Bellin and Pemberton wrote that ‘in light of police officers’ unilateral control of body cameras, many of the scenarios courts encounter will raise important normative concerns about the reliability and fairness of the introduction of this evidence against criminal defendants’.<sup>69</sup>

67 White (n 20) 36.

68 Police Executive Research Forum et al (n 60) 15.

69 Bellin & Pemberton (n 8) 1446.

Bellin and Pemberton continue to warn that ‘police body camera statements can be manipulated to create a one-sided and potentially misleading account – an account that can be uniquely persuasive’.<sup>70</sup> This can happen when the camera conveniently ‘gets switched off’ and fails to record the whole incident, forming a certain narrative which does not truly represent the true state of affairs. As knowledgeable consumers of the criminal justice system, ‘police officers may be tempted to shape [the] evidence as arrests and cases unfold’.<sup>71</sup>

As mentioned in 4.2 above, clear policy guidelines, as well as disciplinary measures are necessary and should be established to deter officers from committing such acts. SAPS must train its officers with the proper use of BWCs technology as well as teaching and explaining any BWC related policy in order to facilitate proper collection of admissible reliable evidence.

Even though ‘cameras do not provide a neutral window into reality, they do provide visual evidence that is often far better than what fact-finders would have [had] otherwise’.<sup>72</sup> Even when body-worn camera evidence is flawed, it is often far better than written officer reports and eye-witness accounts which are usually given long after the event has occurred.

#### 4.4 Addressing officer concerns

An effective body-worn camera program needs the support of everyone, from the highest level of law enforcement to the frontline officers who will be wearing these cameras. It is vital to introduce the technology in a way which does not imply that supervisors do not trust their subordinates as this may erode the relationship between officers and higher management, which would frustrate the implementation process.

To achieve harmonious implementation, senior management must include officers in the implementation process and allow them to provide meaningful input. There should be ongoing engagement between officers and senior management, where the parties communicate programme goals, management’s expectations of the officers, the benefits, and the challenges of using Body-Worn Cameras.

A ten-year study in Northamptonshire in the UK found that ‘a significant piece of learning was that the users need to recognise the need for [BWC] and want to use it’.<sup>73</sup> In view of that, SAPS should

70 Bellin & Pemberton (n 8) 1441.

71 Bellin & Pemberton (n 8) 1427.

72 Blitz (n 17) 2.

73 Spencer & Cheshire (n 64) 2.

present the technology as a tool to help create evidence and ensure public safety, and not as a means to check on their performance. This can be done by evidencing examples of cases where officers have been exonerated of false charges because of the readily available BWC evidence. This can make the officers more welcoming of the technology and encourage voluntary use. SAPS will have to show that the technology can be used as teaching tools, rather than disciplinary ones, where supervisors review footage together with the officer and provide constructive feedback. Videos of exemplary performances can also be shown at training and award ceremonies to highlight impressive officers and encourage acceptance.

Though implementation may be a bit challenging, there is room for South Africa to adopt BWC technology and the evidenced complaints to IPID demands its expeditious implementation. As a way of encouraging speedy application, SAPS should identify ‘champions’ to help the rest of the force accept the idea of BWC. Spencer describes these champions as ‘positive advocates of [BWCs], promoting and demonstrating its use to colleagues, providing credibility and reassurance to colleagues arousing their interest in using the devices’.<sup>74</sup> These SAPS champions would receive training ahead of the launch of the technology to explain to the rest of the force how new additions work.

## 5 Conclusion

While research into the use of BWCs is still novel, there has been a clear correlation between its implementation and improved police-citizen encounters. It must be kept in mind that Body-Worn Cameras are just tools and have their limits. While there has been steady growth in the research on the impact of BWCs on officers’ use of force, citizen complaints and community perceptions, more research is needed still to fully understand the breadth of BWCs’ impact on policing and the criminal justice system.<sup>75</sup>

With the fourth industrial revolution upon us, it would be wise for South African law enforcement to embrace new technology, especially ones which could go a long way in protecting and promoting Constitutional rights. Gradual implementation will assist agencies to learn which policies, practices, and camera systems are the best fit for their departments. Local Municipalities which support research and development should consider providing funding streams for comprehensive research and evaluation of body-worn camera systems.

<sup>74</sup> As above.

<sup>75</sup> Braga (n 13) 13.

Importantly, Blitz highlights that ‘while it is important not to treat Body-Worn Cameras as a “magic bullet” that will solve all problems in police interaction with citizens, it is equally important not to overstate their disadvantages’.<sup>76</sup> BWCs will increase public confidence in policing – and possibly the justice system – as it demonstrates a police agency’s commitment to transparency and accountability. This is very important in the South African climate where faith in law enforcement is eroding, and abuse of power is seemingly increasing. An incremental approach can be applied when introducing this technology, and this can be a good enough first step to rebuild the community’s trust in SAPS.

76 Blitz (n 17) 2.



# A PROPOSED LIABILITY REGIME FOR AUTONOMOUS VEHICLES IN INSTANCES OF PERSONAL LIABILITY AND DEATH

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by Arno Erasmus\*



## Abstract

*This article aims to determine the most appropriate liability regime for accidents caused by Autonomous Vehicles (AVs) resulting in personal injury or death. The motivation for this research lies in the fact that AVs are currently not adequately regulated within South African legislation. Seeing as the regulation of AVs should begin sooner rather than later, it is essential to examine the capability of the Road Accident Fund (RAF) to provide for AVs and consider other possible liability regimes. The article will focus on the RAF Act and the possibility of including the definition of AVs under section 1 thereof. The RAF Act currently defines a motor car as a motor vehicle designed or adapted for the conveyance of not more than ten persons, including the driver. The article will analyse the Civil Aviation Act (Aviation Act) to propose a regime where the owners of AVs are required to have private insurance. Section 8(5) of the Aviation Act will form the basis for the proposed regime change as this section holds that a registered owner or operator of an aircraft must have insurance as prescribed for any damage or loss that is caused by an aircraft to any person or property on land or water.*

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# 1 Introduction

Autonomous vehicles ('AVs'), also known as self-driving cars, are becoming more prevalent as we adopt new and advancing technologies within the world of transportation. Many automotive manufacturers, such as Daimler, believe autonomous driving will become 'a vital part of the mobility of the future'.<sup>1</sup>

With the increasing use of AVs on South African roads, one would assume that policymakers and legislatures have adopted regulations to govern the use and liability of AVs in the event of personal injury and death. Unfortunately, the South African legislature as well as policymakers worldwide are currently overwhelmed by fast-changing and evolving technologies to such an extent that they respond reactively, as opposed to proactively.<sup>2</sup>

Currently, the Road Accident Fund Act ('RAF Act')<sup>3</sup> and the Road Accident Fund Amendment Act ('RAF Amendment Act')<sup>4</sup> provide for the Road Accident Fund ('RAF') to cover the loss or damage caused by negligent driving on South African roads. Loss or damage in this context is limited to patrimonial loss resulting from injuries and non-patrimonial loss.<sup>5</sup> The latter is limited to accommodating claims from accident victims only in cases of serious injuries.<sup>6</sup> These strict legislative measures fail to sufficiently limit the RAF's financial liabilities, and the increase in claims, coupled with rife fraud and incompetence, has led to the RAF's bankruptcy.<sup>7</sup> The RAF is insolvent; the liabilities of the fund exceed its assets by around R 262 billion.<sup>8</sup> The fund has sought to change its operational model to save litigation fees by handling claims in-house. However, the retaliation from the legal firms who served on the RAF's legal panel could cost the RAF further unnecessary expenditure as they seek to liquidate the fund and sell its movable property to enforce payments.<sup>9</sup>

1 'Automated and Autonomous driving. Legal framework' <https://www.daimler.com/innovation/case/autonomous/legal-framework.html> (accessed 24 September 2020).

2 G Mordue and others 'The looming challenges of regulating high level autonomous vehicles' (2020) 132 *Transportation Research Part A: Policy and Practice* at 174-175.

3 Road Accident Fund Act 56 of 1996 (the RAF Act).

4 Road Accident Fund Amendment Act 19 of 2005 (the RAF Amendment Act).

5 The RAF Act (n 3) secs 17(1) & 17(4).

6 The RAF Act (n 3) secs 17(1)(b) & 17(1A).

7 T Broughton *Daily Maverick* 'Damning judgment: Court calls for Road Accident Fund to be liquidated' 17 November 2020 <https://www.dailymaverick.co.za/article/2020-11-17-damning-judgment-court-calls-for-road-accident-fund-to-be-liquidated/> (accessed 3 April 2020).

8 L Claasen 'Move to shut down Road Accident Fund' 4 September 2020 <https://www.moneyweb.co.za/news/south-africa/move-to-shut-down-road-accident-fund/> (accessed 25 September 2020).

9 *Business Insider SA* 'Road Accident Fund says lawyers are refusing to hand over 183,000 cases' 21 July 2020 <https://www.businessinsider.co.za/claims-road-accident-fund-2020-7> (accessed 13 February 2021).

Because of the abovementioned concerns, it would be unwise to add AVs to the already struggling RAF scope. Thus, a new liability regime should be considered to regulate AVs, specifically. This article will focus on the capability of the RAF to include losses caused by AVs, and the possibility of a regime that explicitly regulates AVs.

## 2 Autonomous vehicles and their potential effect on South African roads

### 2.1 Defining ‘autonomous vehicles’

Undoubtedly, the latest innovations and technological developments have drastically transformed the automotive industry. One of these innovations is the development of ‘self-driving’ cars or AVs. According to the electronic design automation company Synopsys, an AV is a vehicle capable of sensing its surrounding environment and operating without human intervention.<sup>10</sup> A human is not required to take control of the vehicle, and the AV can do what a qualified human driver could do.<sup>11</sup>

The International Society of Automotive Engineers (‘SAE’) uses the ‘Levels of Driving Automation’ standard to describe the degree of automation of a vehicle.<sup>12</sup> There are currently six levels of automation ranging from Level 0 to Level 5. This article will focus on driving automation levels 3 to 5, where the automated system monitors the driving environment and requires little or no human interaction. These levels can be described as follows:<sup>13</sup>

Level 3 – Conditional Automation: The vehicle can drive autonomously and perform most driving tasks, but the driver would always be able to intervene and take control of the vehicle.

Level 4 – High Automation: The vehicle can perform all driving tasks under specific circumstances, but the driver has an option to override and take control of the vehicle.

Level 5 – Full Automation: The vehicle will perform all the driving tasks under all conditions, and zero human attention or interaction is

10 Synopsys ‘What is an autonomous car?’ <https://www.synopsys.com/automotive/what-is-autonomous-car.html#:~:text=An%20autonomous%20car%20is%20a%20vehicle%20capable%20of,to%20be%20present%20in%20the%20vehicle%20at%20all> (accessed 6 March 2021).

11 As above.

12 SAE International ‘SAE International releases updated visual chart for its “levels of driving automation” standard for self-driving vehicles’ 11 December 2018 <https://www.sae.org/news/press-room/2018/12/sae-international-releases-updated-visual-chart-for-its-%E2%80%9Clevels-of-driving-automation%E2%80%9D-standard-for-self-driving-vehicles> (accessed 6 March 2021).

13 P Coppola & F Silvestri ‘Autonomous vehicles and future mobility solutions’ in P Coppola & D Esztergár-Kiss (eds) *Autonomous vehicles and future mobility* (2019) at 4.

required. However, the driver may have an option to take control of the vehicle.

An AV will only be termed ‘autonomous’ if the vehicle’s automated system can do all driving tasks in all driving environments – thus level 5 and above.<sup>14</sup> Most AVs will be equipped with advanced communication technologies, enabling them to communicate and exchange information with other AVs, allowing for autonomous functioning.<sup>15</sup> Thus, if a vehicle is equipped with driving functions such as localisation, planning, control, management, and perception, the vehicle may be referred to as an AV.<sup>16</sup>

## 2.2 The possible effect of AVs on South African roads

The development of AVs is happening fast, and the commercial use of AVs is to be expected in the near future. Car manufacturers such as Volvo are running ongoing tests on their software for AVs on Swedish highways. The first phase for introducing AVs to the international market commenced in 2021.<sup>17</sup> As of 2022, Volvo introduced their Level 3 autonomous driving system called ‘Ride Pilot’ which allows the vehicle to drive without input from the owner.<sup>18</sup> Similarly, Google started their development of AVs in 2009, and as of 2020, the Google AV fleet, Waymo, has driven 20 million miles (32186880 kilometres) autonomously on public roads in 25 cities.<sup>19</sup> These developments show that the AV is becoming a reality. According to the marketing firm Allied Business Intelligence (‘ABI’), there could be around 8 million AVs on the roads by 2025.<sup>20</sup>

14 A Faisal et al ‘Understanding autonomous vehicles: a systematic literature review on capability, impact, planning and policy’ (2019) 12 *The Journal of Transport and Land Use* at 49.

15 Faisal et al (n 14) 49.

16 Faisal et al (n 14) 55.

17 E Vaish Automotive news Europe ‘Volvo’s self-driving car venture gets approval to test on Swedish roads’ 28 January 2019 <https://europe.autonews.com/automakers/volvos-self-driving-car-venture-gets-approval-test-swedish-roads> (accessed 10 March 2021).

18 Tina Pavlik ‘When Volvo will have its first autonomous vehicle might surprise you’ 12 February 2022 <https://www.motorbiscuit.com/volvo-first-autonomous-vehicle-might-surprise/> (accessed 13 October 2022).

19 K Wiggers *VentureBeat* ‘Waymo’s autonomous cars have driven 20 million miles on public roads’ 6 January 2020 <https://venturebeat.com/2020/01/06/waymos-autonomous-cars-have-driven-20-million-miles-on-public-roads/> (accessed 10 March 2021).

20 ABI Research ‘ABI Research forecasts 8 million vehicles to ship with SAE Level 3, 4 and 5 Autonomous Technology in 2025’ 17 April 2018 <https://www.abiresearch.com/press/abi-research-forecasts-8-million-vehicles-ship-sae-level-3-4-and-5-autonomous-technology-2025/> (accessed 10 March 2021).

The question then is, what are the possible effect of having AVs on our roads? The anticipated benefits of AVs include less traffic congestion, reduced travel times, lower carbon dioxide emissions and possibly lower insurance rates.<sup>21</sup> However, these benefits will only occur if proper planning interventions exist to introduce AVs on South African roads.

We must accept that there will still be a mix of traditional vehicles and AVs on the roads – especially as AVs are gradually introduced. A study that tested the effect of AVs in real-life traffic situations showed that the overall traffic flow did not become more effective in the transition period where both AVs and traditional vehicles used the road simultaneously.<sup>22</sup> However, it is bound to improve as the share of ordinary human drivers decreases.<sup>23</sup> Still, there is a concern about how AVs will behave and respond in unexpected situations on South African roads, i.e. safely navigating around potholes without putting the public or passengers at risk.

The South African road infrastructure might also require new design criteria. For instance, the lateral and longitudinal capacity and lane width might need to be changed by the South African National Roads Agency (SANRAL). Factors to take into account are lane keeping, platooning, and more accuracy in maintaining lateral alignment.<sup>24</sup> The implementation of AVs might also significantly impact the minibus taxi and transport industry in South Africa. Traditional car ownership might be discouraged because it could be much more cost-effective and easier to use a driverless taxi or car-sharing program, such as Uber or Bolt. This reduction in travel costs will be achieved at the expense of individuals employed in the transport sector, like taxi or bus drivers.<sup>25</sup>

When looking at the future of AVs on South African roads, one must also assess the possibility of mandatory third-party vehicle insurance, which this article aims to do. Using a car with a totally new type of technology poses an inherent risk for the owner and others. This risk extends to the use of AVs. It is suggested that the owner of an AV bears the responsibility of any consequences that may flow from using the vehicle equipped with a new type of driving technology. The AV owner takes the risk to use a new type of vehicle on the same road used by other conventional motor vehicles. As such, the owner should share this responsibility with other people in the country who take the

21 T Verster & E Fourie 'The good, the bad and the ugly of South African fatal road accidents' (2018) 114 *South African Journal of Science* at 67.

22 E Olausson Ryeng et al 'Traffic flow with autonomous vehicles in real-life traffic situations' in Coppola & Esztergár-Kiss (n 13) 40.

23 Olausson Ryeng et al (n 22) 40.

24 B Walker Smith 'Managing autonomous transportation demand' (2012) 52 *Santa Clara Law Review* at 1412.

25 Faisal et al (n 14) 56.

same risk.<sup>26</sup> This does not mean that the owners of AVs did something wrong or blameworthy but that it is their responsibility to bear the burden and not rely on the Road Accident Fund. This responsibility should take the form of mandatory insurance for AV users or owners.<sup>27</sup>

### 3 The Road Accident Fund Act and autonomous vehicles

#### 3.1 The scope and intent of the Road Accident Fund Act 56 of 1996

The RAF Act repealed the Multilateral Motor Vehicle Accident Fund Act of 1989<sup>28</sup> ('MMF Act'), save for the sections provided for by section 28 of the RAF Act.<sup>29</sup> In this section, all claims before 1 May 1997 must be dealt with as if the MMF Act had not been repealed.<sup>30</sup> Thus, the MMF Act applied to the claims that arose before 1 May 1997.<sup>31</sup> The RAF Act contains 29 sections. Section 1 deals with the definitions, while sections 2 to 16 contain objectives and operational aspects. Sections 2-16 also deal with the succession of the MMF Act. Sections 16 to 29 contain the material provisions related to liability, exclusion of liability and other related matters.<sup>32</sup>

The RAF Act provides for the creation of a statutory fund, namely, the Road Accident Fund ('RAF'). Claims against the RAF are financed by fuel levies, as prescribed by the Act.<sup>33</sup> Section 3 of the RAF Act states that the object of the fund is the payment of compensation per the provisions of the RAF Act for the loss or damage that was wrongfully caused by the driving of motor vehicles.<sup>34</sup> The RAF does not cover material damages claims, such as the repair of the vehicle, but covers claims for injury and death as a result of such a vehicle crash.<sup>35</sup> Kempen argues that the RAF thus provides the country and its economy with a social security safety net in the sense that the RAF compensates drivers of motor vehicles, passengers and other

26 A Hevelke & J Nida-Rümelin 'Responsibility for crashes of autonomous vehicles: An ethical analysis' (2015) 21 *Science and Engineering Ethics* at 626.

27 As above.

28 Multilateral Motor Vehicle Accident Fund Act 93 of 1989.

29 HB Klopper *The law of third-party compensation: In terms of the Road Accident Fund Act 56 of 1996* (2012) para 5.1.

30 Klopper (n 29) para 5.2.

31 As above.

32 Klopper (n 29) para 5.2.2.

33 Klopper (n 29) para 5.3.

34 Klopper (n 29) para 6.2.

35 A Kempen 'The story of the Road Accident Fund – it's about more than money ... it's about making a difference' (2020) 113 *Servamus Community-Based Safety and Security Magazine* at 10.

members of society, including the poor, children and foreigners visiting the Republic, for loss or damage.<sup>36</sup> This is essential because most of the South African population would not be in a position to pay for damages caused by negligent driving.<sup>37</sup> This would have left the injured parties and the wrongdoer in a position where no money could be paid to help with the consequences of the incident, such as an inability to work or expensive medical bills.

The RAF Act exists for the benefit and protection of the victims of motor vehicle accidents, and not to protect motor vehicle drivers or owners who have acted unlawfully or with negligence.<sup>38</sup> Claiming in terms of the RAF Act is limited to a driver, passenger, pedestrian, motorcyclist, cyclist or a dependent of a deceased person who was involved in an accident – except when the injured or deceased person is fully to blame for the accident.<sup>39</sup> It should also be noted that the RAF only considers a claim for general damages if a road accident is the direct cause of a severe injury.<sup>40</sup>

### 3.2 Defining ‘motor vehicle’ under the RAF Act

#### 3.2.1 Interpretation of section 1 of the RAF Act

When interpreting the provisions of the RAF Act, the interpretation is usually extensive so as to afford the third party the broadest possible protection, that is, in favour of the liability of the RAF.<sup>41</sup> One of the primary considerations to consider when ambiguity or doubt exists is the object of the Act.<sup>42</sup>

The South African courts adopted this view when they interpreted the predecessor of the RAF Act, namely the ‘MMF Act’, and the RAF Act, respectively.<sup>43</sup> Klopper believes that in order to interpret the provisions of the RAF Act, you would have to also determine to what degree the said provisions are *in pari materia* with its predecessors, that is, to what extent does the provision in the RAF Act relate to provisions on the same subject matter in the MMF Act.<sup>44</sup> This interpretative method should then be followed when interpreting

36 As above.

37 *BusinessTech* ‘Drunk and negligent drivers could be paid out along with victims under new accident claims laws’ <https://businesstech.co.za/news/motoring/199424/drunken-and-negligent-drivers-could-be-paid-out-along-with-victims-under-new-accident-claims-laws/> (accessed 12 October 2022).

38 Klopper (n 29) para 6.3.

39 Claims ‘Road Accident Fund FAQ’ <https://claims.co.za/road-accident-fund/raf-faq/> (accessed 22 August 2021).

40 Claims ‘Road Accident Fund: How to claim’ <https://claims.co.za/road-accident-fund/how-to-claim/> (accessed 22 August 2021).

41 Klopper (n 29) para 6.3.

42 As above.

43 Multilateral Motor Vehicle Accident Fund Act 93 of 1989; Klopper (n 29) para 6.4.

44 Klopper (n 29) para 6.4.

current provisions of the MMF Act and the RAF Act, while also adhering to the principle that the interpretation ought to be extensive to afford the broadest protection possible.<sup>45</sup>

Although the South African courts usually follow a comprehensive approach, they have, from time to time, deviated from this approach and followed a more restrictive interpretation. An example of the latter is to be found in the matter of *Road Accident Fund v Vogel*.<sup>46</sup> In this case, the court had to decide on whether a mobile Hobart ground power unit supplying electricity to a jumbo jet aircraft while on the ground qualified as a ‘motor vehicle’, as defined in section 1 of the RAF Act.<sup>47</sup>

One of the essential elements of a third-party claim is that a specific instrument must cause bodily injury or death.<sup>48</sup> The claim in respect of the RAF is restricted to driving a motor vehicle, and if another object causes bodily injury or death, there will be no third-party claim.<sup>49</sup> However, in the latter situation, the option of a claim in terms of the common law principles of delict would be available to the injured party.

The RAF Act defines a ‘motor vehicle’ in section 1 of the Act. This statutory definition provides us with two possible elements to assess when determining whether something would qualify as a ‘motor vehicle’ for the purposes of the Act.<sup>50</sup> The first element is that the vehicle has to be propelled using fuel, gas or electricity.<sup>51</sup> The second element is that the motor vehicle is designed or adapted for propulsion or haulage on the road and includes objects such as trailers, caravans or any other implement designed to be drawn by a motor vehicle.<sup>52</sup> The second element, design, will only be realised if the instrument is objectively examined and if the ‘instrument’ was adapted for general use on the roads while also meeting the requirements for features that would sufficiently qualify it as a motor vehicle.<sup>53</sup>

The court in the *Vogel* case had to decide whether the item in question, the mobile Hobart ground power unit, would comply with the design element in section 1 of the RAF Act.<sup>54</sup> The court decided to apply the test formulated in the case of *Chauke v Santam Ltd*.<sup>55</sup>

45 As above.

46 2004 (5) SA 1 (SCA) (*Vogel* case).

47 M Mokotong ‘Third Party Compensation Law: Definition of a “motor vehicle” in terms of section 1 of the Road Accident Fund Act 56 of 1996’ (2006) 47 *Codicillus* at 82.

48 Mokotong (n 47) 81.

49 As above.

50 As above.

51 The RAF Act (n 3) sec 1(xi).

52 As above.

53 Mokotong (n 47) 81.

54 Mokotong (n 47) 82.



This test proposes that the word ‘designed’ in the definition of a ‘motor vehicle’ entails both an objective and a subjective test.<sup>56</sup> These tests can assist in determining whether an AV will fall under the definition of a ‘motor vehicle’ as contemplated by section 1 of the RAF Act. The subjective test holds that one should examine ‘the purpose for which the vehicle was conceived and constructed’.<sup>57</sup> The objective test is when ‘a reasonable person would see its ordinary, and not some fanciful, use on a road’.<sup>58</sup>

The court in *Vogel* applied the above tests. It concluded that the item’s objective suitability for use is the ultimate yardstick for determining whether an item in question qualifies as a ‘motor vehicle’ as defined in section 1 of the Act.<sup>59</sup> Based on the above criteria, the court in *Vogel* concluded that a mobile Hobart ground power unit was not a motor vehicle as defined by section 1 of the RAF Act.<sup>60</sup>

### **3.2.2 *Would an AV fall under the definition of ‘motor vehicle’ as per section 1 of the RAF Act?***

One issue with the implementation of AVs on South African roads is that there is no clear and specific set of rules that deal with the unique challenges for establishing liability in an AV accident.<sup>61</sup> The former Minister of Transport, Blade Nzimande, stated that although there are currently no self-driving cars on the country’s roads, there are plans for their introduction.<sup>62</sup> However, it would not be immediate, as policy and legislative amendments are needed.<sup>63</sup>

One possible solution is that AVs can fall under the definition of a ‘motor vehicle’ as per section 1 of the RAF Act. This would mean that the victim may claim from the RAF in an AV accident if all other requirements are met. When considering whether or not an AV will fall under the definition of a ‘motor vehicle’ as per the RAF Act, we can use the subjective and objective test set out in the *Chauke* case.<sup>64</sup>

55 1997 (1) SA 178 (A) (*Chauke* case).

56 Mokotong (n 47) 82.

57 *Road Accident Fund v Mbendera and Others* [2004] 4 All SA 25 (SCA) para 10.

58 *Chauke* case (n 55) para 183.

59 *Vogel* (n 46) para 12.

60 *Vogel* (n 46) para 26.

61 C Chengalroyen ‘Navigating the legal regulatory issues with self-driving cars in South Africa’ (2021) 616 *De Rebus* at 19.

62 *Businessstech* ‘South Africa has plans for self-driving cars – but the law needs to change first’ 7 April 2019 <https://businessstech.co.za/news/motoring/309052/south-africa-has-plans-for-self-driving-cars-but-the-law-needs-to-change-first/> (accessed 4 July 2021).

63 As above.

64 Chengalroyen (n 61) 19.

As already stated, the RAF Act defines a ‘motor vehicle’ as ‘any vehicle designed or adapted for propulsion or haulage on the road using fuel, gas or electricity’.<sup>65</sup> When applying the subjective test, it appears as though an AV would fall under this definition as commercial AV manufacturers build these vehicles for daily use on public roads.<sup>66</sup> Thus, the ‘design’ element of this definition is fulfilled.

Some difficulties arise when applying the objective test, such as examining whether an AV is objectively suitable for use in the manner contemplated in section 1 of the RAF Act.<sup>67</sup> The RAF Act defines ‘driving’ as ‘a motor vehicle [...] propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle’.<sup>68</sup> What is disputatious here is whether a person in an AV would be in ‘control’ of the AV, and what would qualify as negligent or wrongful conduct by the driver.<sup>69</sup> Usually, level 3-5 AVs would have a safety feature that would allow for human intervention and control when needed. For example, a human taking control of the steering wheel, which causes the autonomous mode to be turned off.<sup>70</sup> It can thus be argued that the failure of the driver or passenger to take control of the AV in an emergency would amount to a wrongful or unlawful act as held by the RAF Act.<sup>71</sup> It is submitted that, under these circumstances, a reasonable person would foresee the AV’s ordinary use on the road by a driver.

Huneberg and Millard share the same outlook and thus believe that the definition of a ‘motor vehicle’ in section 1 of the RAF Act will include an AV unless there is a statutory regime change to expressly exclude AVs from the definition.<sup>72</sup> However, although an option, the inclusion of AVs under the RAF Act might not be the proper course of action if one considers the RAF’s dire financial situation. A better option might be to have AVs privately insured to cover material damage and personal injury and death caused to passengers and victims.<sup>73</sup>

65 The RAF Act (n 3) sec 1(xi).

66 Chengalroyen (n 61) 19.

67 Mokotong (n 47) 82.

68 The RAF Act (n 3) sec 20(1).

69 Chengalroyen (n 61) 19.

70 Robson Forensic ‘Human factors behind autonomous vehicles – expert article’ 25 April 2018 <https://www.robsonforensic.com/articles/autonomous-vehicle-human-factors-expert> (accessed 7 July 2021).

71 Chengalroyen (n 61) 19.

72 D Millard & S Huneberg ‘South African Report – new technologies’ (2020) 4.

73 Millard & Huneberg (n 72) 5.

## 4 Regulating autonomous vehicles under a new proposed liability regime

### 4.1 Reasoning for a new liability regime for AVs

As previously mentioned, the Road Accident Fund ('RAF') is financially troubled, despite having a regular source of income in the form of the RAF fuel levy of R 2.07 per litre.<sup>74</sup> In 2019 the Auditor-General noted with concern that the RAF had accumulated a deficit of R 262 billion.<sup>75</sup> The RAF's maladministration and problematic legal management has resulted in these severe liquidity constraints.<sup>76</sup> They have led to the point where some of the fund's bank accounts and movable assets have been attached through writs of execution.<sup>77</sup>

Efforts were made to replace the current 'unsustainable and corrupt' system with a no-fault-based scheme, the Road Accident Benefit Scheme ('RABS'), which would cater for monthly disbursements paid to road accident victims. However, the Bill that was meant to introduce this scheme was rejected by the National Assembly on 3 September 2020 and criticised for not being in touch with reality.<sup>78</sup> Innocent parties could not claim against the responsible parties, and blameworthy motorists would get the same benefits as innocent victims. As such, it incentivised accidents, especially by the poor.<sup>79</sup>

It is clear that something is fundamentally wrong with the administration of the RAF and that the system needs to change. The government cannot continue to increase the fuel price to alleviate financial pressure on the RAF, as such increases have a devastating effect on road users – especially the poor – and results in overall higher transport and food costs.<sup>80</sup> It is submitted that the RAF is not

74 LG Mpedi *Daily Maverick* 'Fundamental reform of the Road Accident Fund is urgently needed' 12 April 2021 <https://www.dailymaverick.co.za/opinionista/2021-04-12-fundamental-reform-of-the-road-accident-fund-is-urgently-needed/#:~:text=Despite%20its%20regular%20source%20of%20funding%2C%20the%20Road,tweaked%20to%20E2%80%9Ca%20meme%20is%20worth%201%2C000%20words%E2%80%9D> (accessed 2 October 2021).

75 *South African Finance News* 'The Road Accident Fund is hopelessly insolvent' 24 October 2019 <https://www.safinancenews.com/news/the-road-accident-fund-is-hopelessly-insolvent/> (accessed 2 October 2021).

76 X Phillip *Daily Maverick* 'Greed and maladministration collide: How the Road Accident Fund was bled dry' 19 August 2021 <https://www.dailymaverick.co.za/opinionista/2021-08-19-greed-and-maladministration-collide-how-the-road-accident-fund-was-bled-dry/> (accessed 2 October 2021).

77 As above.

78 Mpedi (n 74).

79 A desperate beggar on the street corner might intentionally get someone to run him over in order to qualify for an annual national income as held in the RABS.

80 SABC 'Higher fuel prices to impact households: economists' 4 August 2021 <https://www.sabcnews.com/sabcnews/higher-fuel-prices-to-impact-households-economists/> (accessed 2 October 2021).

in a position to include AVs under its scope, and that the best course of action would be mandatory insurance for AV owners.

## 4.2 Private insurance required for the owners of AVs as part of a new liability regime

### 4.2.1 *The current situation pertaining to private insurance for owners of motor vehicles in South Africa*

Car insurance, including third-party insurance, is currently not a requirement in South Africa, and may only become necessary when a car is financed by a financial institution that requires insurance for the agreement.<sup>81</sup> Most third-party motor vehicle insurance in South Africa only covers claims from the person (third-party) who has suffered a loss because of the actions of the driver of the motor vehicle (first-party).<sup>82</sup> With third-party insurance, the first-party would usually be the person who caused the accident and/or the owner of the vehicle. Third-party insurance in South Africa does not cover liability when a third-party is injured, as the RAF deals with this. Third-party insurance only covers the other party's material damage (i.e. damage to property).<sup>83</sup>

Prior to the inception of the RAF in 1997, compulsory motor insurance was a requirement in South Africa, subject to specific situations. It was governed by legislation, such as the Motor Vehicle Insurance Act<sup>84</sup> and the Compulsory Motor Vehicle Insurance Act,<sup>85</sup> amongst others.<sup>86</sup> The reason for the discontinuation of such legislation is uncertain. However, the unaffordability of this type of mandatory insurance by the broader public was probably one of the main issues.<sup>87</sup>

As stated above, the RAF was promulgated on 1 May 1997 and acted as a compulsory social insurance cover that aims to rehabilitate and compensate persons or dependants who were injured or died due to negligent driving on South African roads.<sup>88</sup> The RAF consequently makes it unnecessary for the owners of motor vehicles to carry third-party liability insurance in South Africa.

81 Dialdirect <https://www.dialdirect.co.za/products/vehicle/car-insurance/car-insurance-calculator/> (accessed 8 October 2021).

82 Santam 'Third-party vehicle cover: what clients need to know' <https://www.santam.co.za/blog/intermediary-advice/third-party-vehicle-cover-what-clients-need-to-know> (accessed 8 October 2021).

83 As above.

84 Motor Vehicle Insurance Act 29 of 1942.

85 Compulsory Motor Vehicle Insurance Act 56 of 1972.

86 E Zingwevu & AB Sibindi 'Is compulsory third-party motor insurance the panacea for the south African insurance industry?' (2014) 11 *Corporate Ownership & Control* at 662.

87 As above.

88 As above.

#### **4.2.2 Proposal for a new liability regime with consideration of the Civil Aviation Act 13 of 2009**

The initial use and introduction of AVs on the roads should be considered high-risk and dangerous, seeing as the behaviour of the AVs on the road with other human drivers will still be relatively unknown. Consequently, the operators should be obliged to be appropriately insured. The long-term objective of introducing AVs on the roads is to reduce crashes with fewer injuries and deaths.<sup>89</sup> However, there are many uncertainties regarding the ways in which AVs will react on South African roads with obstacles such as potholes, pedestrians, and reckless drivers.

Hancock states that AVs are good at the usual tasks, such as staying in the car's lane and not following another car too closely, and AVs do not get tired, angry or drunk as regular drivers do.<sup>90</sup> Nevertheless, AVs cannot react to uncertain and ambiguous situations with the same skill and anticipation as an attentive human driver. AVs still require continuous development, and it will take some time before they will be able to cover as many kilometres and circumstances as human drivers presently do.<sup>91</sup>

This, in essence, is why there is an argument that using an AV will pose a risk. As such, it should be the responsibility of the owner of an AV to be adequately insured for the accidental causing of damage, injury or death to another person.<sup>92</sup> This responsibility stems from the fact that the owner should shoulder the burden, to an extent, for opting to participate in using AVs, given that the technology is still in a developmental phase.<sup>93</sup> As already stated, this would require a scheme like a tax or mandatory insurance policy applicable to all who participate in the use of AVs.

A comparable situation can be seen in the aviation industry. Thus, an analogy can be drawn to the mandatory insurance required for airline companies to operate.<sup>94</sup> The flying of an aeroplane is viewed as an inherently dangerous activity, and as a result, it is heavily regulated by various lawmakers. This is evident from section 8(2) of the Aviation Act, which states that,

89 P Hancock 'The conversation' 3 February 2018 <https://www.scientificamerican.com/article/are-autonomous-cars-really-safer-than-human-drivers/> (accessed 9 October 2021).

90 As above.

91 As above.

92 Hevelke & Nida-Rümelin (n 26) 626.

93 Hevelke & Nida-Rümelin (n 26) 627.

94 Cover 'Aircraft insurance: How much liability insurance is enough?' 26 September 2012 <https://cover.co.za/aircraft-insurance-how-much-liability-insurance-is-enough/> (accessed 9 October 2021).

... where loss or damage is caused by an aircraft to any person or property on land or on water, damages may be recovered from the registered owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his or her wilful act, neglect or default.<sup>95</sup>

Section 8(5) of the Aviation Act further holds that the owner and operator of a registered aircraft must have insurance as prescribed for any damage or loss caused by such aircraft to any person or property on land or water.<sup>96</sup> Moreover, according to section 19(e) of the Air Services Licensing Act ('ASL Act'),<sup>97</sup> an air service license will only be issued if the licensee is insured as prescribed.<sup>98</sup>

The importance of aviation insurance is understood when looking at the Lockerbie aviation disaster. In this accident, Pan American World Airways Flight 103 exploded over the town of Lockerbie, Scotland, resulting in the death of 259 passengers and 11 people on the ground.<sup>99</sup> The disaster was attributed to a bomb on the aircraft and was regarded as one of the costliest insured aviation losses in history. The liability losses, in this case, added up to US\$527 million, where more than 150 lawsuits were filed, each seeking between US\$5 million and US\$25 million for compensatory and putative damages.<sup>100</sup> Pan American Airways was found guilty of wilful misconduct by a federal court jury in July 1992 for not adhering to the Federal Aviation Administration ('FAA') regulations relating to unaccompanied baggage.<sup>101</sup>

In that sense, if an AV was involved in a major collision resulting in millions of rands in liability damage on South African roads, it is doubtful whether the RAF can afford such claims or whether the RAF would be able to provide compensation in a reasonable period, having regard for the injured parties and the dependants of the deceased.<sup>102</sup> Further litigation and compensation disputes against the RAF regarding the use of AVs and the determination of negligence would be foreseeable and only add to the growing costs of the RAF.

It is thus submitted that South Africa should institute a new liability regime in the form of compulsory motor insurance for the owners and users of AVs in South Africa, akin to how the aviation industry requires insurance for the use of aeroplanes. The concept of

95 Civil Aviation Act 13 of 2009 (Aviation Act) sec 8(2).

96 The Aviation Act (n 95) sec 8(5).

97 Air Services Licencing Act 115 of 1990 (ASL Act).

98 The ASL Act (n 97) sec 19(e).

99 S Goddard Business Insurance 20 December 1998 'Lessons from Lockerbie' <https://www.businessinsurance.com/article/19981220/STORY/10006716/LESSONS-FROM-LOCKERBIE> (accessed 9 October 2021).

100 As above.

101 As above.

102 Zingwevu & Sibindi (n 86) 658.

compulsory motor insurance is not novel, and most governments in developed and developing countries have legislated for compulsory motor insurance.<sup>103</sup> Usually, it is stipulated in legislation that all users of road vehicles must have liability insurance.<sup>104</sup>

This can be achieved by amending the RAF Act, expressly stipulating that AVs fall outside the scope of 'motor vehicle' as described within the RAF Act and inserting a section detailing that the use of AVs should require private liability insurance.<sup>105</sup> Alternatively, and most appropriately, the government should adopt a new Act of Parliament detailing and specifying the use and ownership of AVs on South African roads with special consideration to the requirement of compulsory motor liability insurance for injury and death.

#### **4.2.3 Implications of compulsory motor insurance**

Compulsory motor insurance for AVs would mean that the parties involved in the accident would at least have some form of basic protection and will ensure a more equitable distribution of the financial burden resulting from motor accidents.<sup>106</sup> Compulsory motor insurance for AVs would prevent further financial strain on RAF, and help protect victims against the insolvency of a blameworthy party.<sup>107</sup>

Other benefits of compulsory motor insurance for AVs include the incentive for the users to be more attentive and careful to avoid liability and an increase in premiums.<sup>108</sup> The competitive market would motivate users to take optimal care to ensure that AVs do not make mistakes. The idea is that the competitive market will encourage discipline and attentiveness in the owners of AVs through the pricing system.<sup>109</sup>

It can also be said that when AVs become more common on the roads and start to outnumber regular motor vehicles, the implementation of this scheme would drive down the price of the insurance due to the economy of scale, and, therefore, be more affordable to the general public.<sup>110</sup> This arrangement would also

103 Zingwevu & Sibindi (n 86) 657.

104 For example, in the UK the Road Traffic Act of 1930, in the Netherlands the Motor Vehicles Liability Act (WAM) and in Zimbabwe the Road Traffic Act [Chapter 13:11].

105 Huneberg & Millard (n 72) 4.

106 Debt Busters 'Compulsory third party motor insurance crucial for SA motorists' <https://www.debtbusters.co.za/compulsory-third-party-motor-insurance-crucial-for-sa-motorists/> (accessed 9 October 2021).

107 Zingwevu & Sibindi (n 86) 660.

108 As above.

109 As above.

110 Zingwevu & Sibindi (n 86) 668.

allow the RAF to continue in its current form, but pre-empt the liability regime as AVs become the norm.

## 5 The regulation of AVs in foreign law

### 5.1 Regulation of AVs in the United States of America

The testing and licensing standards of AVs in the United States of America ('USA') are continuously being developed on a state level, rather than federally, with instructions to their respective Department of Motor Vehicles ('DMV') for the fleshing out of details, which results in inconsistencies amongst the various states.<sup>111</sup> Although the states tend to formulate their own regulations regarding AVs, there are certain essential similarities in the various raft of legislation.<sup>112</sup> Most enacted policies and legislation similarly define AVs as motor vehicles that can drive themselves without having to be actively monitored or controlled by a human driver or operator and exclude the motor vehicles equipped with active safety measures such as driver-assist systems.<sup>113</sup> Concerning the inconsistencies in the various states, Fagnant and Kockelman believe that the US Department of Transportation ('USDOT') should assist with developing a framework that sets national guidelines for AV certification at the state level.<sup>114</sup>

Owing to these inconsistencies across the various states, this article will only focus on the state of California, as it is at the forefront of the legal development of AVs in the USA.<sup>115</sup> AV legislation in California was enacted in September 2012 (Cal. Veh. Code, Division 16.6) for the testing of AVs.<sup>116</sup> This legislation detailed the definitions, requirements for insurance, the operator and the procedures for the failure of AVs. Further, it mandated a 'Manufacturer's Testing Permit' for testing AVs on public roads.<sup>117</sup> California also extended the scope of AV testing when its Governor signed off on a Bill that would allow for the testing of AVs without

111 DJ Fagnant & K Kockelman 'Preparing a nation for autonomous vehicles: opportunities, barriers and policy recommendations' (2015) 77 *Transportation Research Part A* at 167.

112 JM Anderson et al *Autonomous Vehicle Technology: A Guide for Policymakers* (2014) at 41.

113 Anderson et al (n 112) 41.

114 Fagnant & Kockelman (n 111) 179.

115 NE Vellinga 'From the testing to the deployment of self-driving cars: Legal challenges to policymakers on the road ahead' (2017) 33 *Computer Law & Security Review* at 852.

116 Anderson et al (n 112) 47.

117 Vellinga (n 115) 852.



safety equipment like a steering wheel, accelerator, or brake pedal.<sup>118</sup>

Vellinga holds that liability legislation in California for AVs post-testing will focus more on product liability.<sup>119</sup> The Californian draft of Autonomous Vehicle Express Terms contains a provision stating that AV manufacturers will have to arrange for, and prove their ability to respond to, judgments for damages in relation to personal injury, death, or property damage that arise from AV collisions.<sup>120</sup> The manufacturers will be able to do this by presenting a form of an instrument of insurance, a surety bond, or proof of self-insurance.<sup>121</sup> This holds especially true in the case of an SAE level 5 vehicle, where the manufacturer is held to be responsible for the safe operation of the vehicle at all times.<sup>122</sup>

It is clear from the policies and test legislation that the state agencies are trying to ensure a safe introduction and operation of AVs on the roads in any situation where they might be driven. However, many regulatory issues still need to be dealt with.<sup>123</sup> The test legislation and policies also bring to the fore that manufacturers need to be insured and be able to deal with liability claims.<sup>124</sup> This shows that the use of private insurance for AV liability would be viable and a legislative option for South Africa, albeit for the owners of AVs.

## 5.2 Regulation of AVs in the United Kingdom

The United Kingdom ('UK') is in a unique position where the government aims to be at the forefront of the development, construction and use of AVs to spearhead a way forward that other countries and jurisdictions may follow.<sup>125</sup> The government has already established a Centre for Connected and Autonomous Vehicles ('CCAV') intending to support research, development, and fund driverless car projects in four cities, as well as publish a code of good practice for the on-road testing of AVs.<sup>126</sup> CCAV also highlighted the

118 P Alto Ford Media Center 'Ford targets fully autonomous vehicle for ride sharing in 2021; invests in new tech companies, doubles Silicon Valley team' 16 August 2016 <https://media.ford.com/content/fordmedia/fna/us/en/news/2016/08/16/ford-targets-fully-autonomous-vehicle-for-ride-sharing-in-2021.html> (accessed 10 October 2021).

119 Vellinga (n 115) 860.

120 As above.

121 As above.

122 As above.

123 Fagnant & Kockelman (n 111).

124 As above.

125 S Claus et al 'Potential impacts of autonomous vehicles on the UK Insurance Sector' (2017) *Bank of England Quarterly Bulletin 2017 Q1* at 41.

126 D Metz 'Developing policy for urban autonomous vehicles: Impact on congestion' (2018) 2 *Urban science* at 33.

gaps in the liability insurance for AVs and proposed regulatory changes to the Department for Transport ('DfT').<sup>127</sup>

The UK already has compulsory liability insurance, which was introduced by the Road Traffic Act of 1930 and has undergone various amendments. However, with the development of AVs, there will be even further amendments.<sup>128</sup> The DfT has extended the compulsory motor insurance requirements to provide for the inclusion and use of AVs.<sup>129</sup> This was done by providing for AVs in the Vehicle Technology and Aviation Bill and extending the compulsory insurance requirements to AVs.<sup>130</sup>

This approach provides the claimant with a natural right against the motor vehicle insurer, and allows the insurer the right to recover costs from the vehicle manufacturer where there is evidence that the incident was caused by a product error, and not human error.<sup>131</sup> Thus, an innocent victim can claim directly from the insurer if, at the time of the incident, the self-driving technology was operative, regardless if he or she was inside or outside the vehicle.<sup>132</sup>

The UK provides a great example for what could be introduced into South African legislation for the use and operation of AVs. The view that mandatory motor insurance for liability should be the norm when dealing with AVs is echoed in the policies and legislation of the UK.

## 6 Conclusion

This article first introduced the concept of an 'autonomous vehicle' and suggested that it would be appropriate to introduce a regime change in instances of personal liability and death. Secondly, this article defined AVs and elaborated on the possible effects of AVs on South African roads. Thirdly, this article explored the scope and intent of the RAF Act with special consideration of the definition of a 'motor vehicle' as described in the Act. The latter addressed the possibility of having AVs fall under this definition. Fourthly, this article considered the regulation of AVs under a new proposed liability regime, analogous to the mandatory insurance required for airline companies to operate in accordance with the Aviation Act. And finally, this article examined the regulation of AVs in the USA and UK, giving examples for how regulation could be implemented in South Africa.

127 Metz (n 126) 33.

128 Vellinga (n 115) 860.

129 Claus (n 125) 43.

130 Vellinga (n 115) 861.

131 Claus (n 125) 45.

132 Vellinga (n 115) 861.

The wide adoption and use of AVs seem to bring on inevitable and imminent changes to the transport industry. There is still much uncertainty and speculation about how it will be regulated in South Africa. However, if there is a regime change where mandatory motor insurance is required for using AVs on South African roads, it would ease the minds of prospective AV owners in South Africa. This could also encourage a much more widespread adoption of the technology and allow for continued development. This article submits that the inclusion of AVs under the RAF would not be the most suitable way forward and that compulsory motor insurance is the most appropriate option, keeping in mind the advancement of technology and the financial burdens on both the RAF and AV owners. South Africa will be able to consider the legislation of foreign jurisdictions, and more easily implement the necessary measures. Regulators should adopt the necessary legislative framework sooner rather than later.

# A CASE FOR PERSONS WITH DISABILITIES: USING DIGITAL COURTS TO PROMOTE THE RIGHT TO ACCESS TO JUSTICE AND THE RULE OF LAW

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## Abstract

*Access to justice is an essential human right and a cornerstone of the rule of law. The 2030 Agenda for Sustainable Development seeks to, amongst other things, promote the rule of law and ensure equal access to justice, promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions. As a marginalised group, persons with disabilities are often spectators to their grievances when accessing justice, notwithstanding the strong protection afforded by the Convention on the Rights of Persons with Disabilities ('the CRPD'). Under the CRPD, the right to access justice requires justice to be accessible, practical, and without discrimination. Nevertheless, research indicates that persons with disabilities are most likely to be left out of the legal system as there are numerous barriers that prevent them from accessing justice. In 2020, while the world faced an outbreak of COVID-19 cases, courtrooms worldwide had to review their operational methods. Initially aimed at hearing cases remotely and prevent a backlog of cases, the question arises as to whether digital courts could not be adapted to promote the right to access to justice for persons with disabilities. Article 13 of the CRPD contains essential*

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*provisions on the right to access justice. If designed, tested, and implemented correctly, digital courts could alleviate the inequalities faced by persons with disabilities. In essence, digital courts have the potential to make justice accessible and less hostile whilst also improving the communication and information barriers to the right to access justice. However, the advantages should not outweigh the potential exclusionary risk that digital courtrooms could create. Such courtrooms should be carefully implemented in close consultation with persons with disabilities.*

## 1 Introduction

As the COVID-19 pandemic struck heavily in 2020, the world had to adapt to what would now be known as ‘the new normal’. However, from the chaos emerged a new and revolutionary court system that allowed matters to be heard remotely, without the need for face-to-face hearings; introducing so-called ‘digital courts’.<sup>1</sup>

Digital courts have transformed legal proceedings by making it possible to hear cases remotely and facilitating the entire process for all involved. They are arguably cheaper and more convenient for all concerned, reducing delays in hearing matters.<sup>2</sup> While most countries are slowly removing all restrictions imposed as a response to COVID-19,<sup>3</sup> the question arises as to whether digital courts could not be used, improved, and adapted for persons with disabilities to give effect to their right to access justice, as set out by the United Nations Convention on the Rights of Persons with Disabilities (‘CRPD’). Persons with disabilities, as a marginalised group, face numerous challenges accessing justice as a result of, amongst others, physical barriers, a lack of access to information and communication, and attitudinal stigma.

This article will analyse the right to access to justice in relation to persons with disabilities, as set out in article 13 of the CRPD, to examine whether digital courts can be used to promote this right and, by extension, the rule of law, in accordance with Sustainable Development Goal No. 16 (‘SDG 16’), titled ‘Peace, Justice and Strong Institutions.’<sup>4</sup> This article will first briefly discuss the relationship between the rule of law and the right to access to justice, followed by the concept of digital courts, before examining the relevant

1 JP Gauteng Division of the High Court ‘Directive 1 of 2020’; JP Gauteng Division of the High Court ‘Directive 1 of 2021’; JP Gauteng Division of the High Court ‘Revised Directive 1 of 2021’.

2 D Menashe ‘A critical analysis of online courts’ (2018) 39 *University of Pennsylvania Journal of International Law* at 926.

3 Government Notice R. 2190 *Government Gazette* of 22 June 2022.

4 CRPD art 13; Transforming our world: the 2030 Agenda for Sustainable Development, United Nations General Assembly (21 October 2015), UN Doc A/RES/70/1 (2015) at 25.

provisions of the CRPD. It will then discuss the most common barriers that persons with disabilities currently face when accessing justice and how digital courts could potentially remove those obstacles. Finally, it will consider how digital courts also have the potential to exclude persons with disabilities; arguing that it is necessary to ensure that this system is carefully designed to facilitate the inclusion of persons with disabilities, as opposed to supplementing their exclusion and segregation in society.

## 2 Access to justice: A cornerstone of the rule of law

### 2.1 The rule of law in context

The rule of law is an ancient concept that can be traced back to the 4th century BCE<sup>5</sup> and is a foundational element of the South African constitutional dispensation.<sup>6</sup> In its simplest form, the rule of law can be defined as a system whereby the relationships between the government and citizens, on the one hand, and between citizens, on the other, are governed by laws as opposed to men and are implemented accordingly.<sup>7</sup> This concept has evolved over the years and today it incorporates essential values and principles that constitute the very basis of societies.<sup>8</sup> It can be summarised as a concept according to which all people, institutions and entities – public and private, including the state – are answerable to laws.<sup>9</sup> Such laws must be compatible with international human rights standards and publicly promulgated, enforced equally, and independently adjudicated.<sup>10</sup> The rule of law necessitates the implementation of measures which guarantee the observance of the various principles by which it is governed, including; the supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in

5 R Stein 'What exactly is the rule of law?' (2019) 57 *University of Minnesota Law School* at 187; J Waldron 'The rule of law' in EN Zalta (ed) *The Stanford encyclopedia of philosophy* (2020) at 3.

6 Section 1(c) of the Constitution of the Republic of South Africa 1996 provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of the supremacy of the constitution and the rule of law.

7 Public Law for everyone 'Lord Neuberger on the rule of law and access to justice' 16 October 2013 <https://publiclawforeveryone.com/2013/10/16/lord-neuberger-on-the-rule-of-law-and-access-to-justice/> (accessed 17 April 2022).

8 JKM Ohnesorge 'The rule of law' (2007) 3 *Annual Review of Law and Social Science* at 109.

9 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Secretary-General (23 August 2004) UN Doc S/2004/616 (2004) at para 6.

10 As above.

decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.<sup>11</sup>

In essence, the rule of law must be equally applied to everyone and adequately enforced to provide citizens with fundamental rights.<sup>12</sup> In effect, it is a mechanism which enacts and implements human rights: there can be no rule of law within societies if human rights are not respected.<sup>13</sup> It plays an essential role in the promotion of economic, social and cultural rights, and provides a course for redress when those rights have been infringed.<sup>14</sup>

For the purposes of this article, the rule of law can broadly be summarised in the words of former United States Supreme Court justice, Justice Anthony Kennedy, at the annual meeting of the American Bar Association in 2006, as a system:

- (a) Whereby laws are known and equally binding to everyone;
- (b) Which affirms, respects, and preserves the dignity, equality and human rights of all citizens; and
- (c) Where all persons are advised of their rights, are empowered, and are entitled to seek redress of their grievances without fear.<sup>15</sup>

## 2.2 Relationship between the rule of law and the right to access justice

For a society to be based on the rule of law, access to justice must be fostered unequivocally.<sup>16</sup> Indeed, access to justice is a foundational principle of the rule of law.<sup>17</sup> For the law to prevail, it must be able to rectify wrongs and provide remedies whenever rights are violated.<sup>18</sup> There is growing evidence that justice systems and the rule of law contribute to sustainable development and inclusive growth.<sup>19</sup> The two concepts appear to be mutually inclusive, such that one cannot survive without the other. In truth, the rule of law and human rights have been considered paramount in attaining and

11 As above.

12 Stein (n 5) 344.

13 United Nations and the Rule of Law 'Rule of law and human rights' <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> (accessed 17 April 2022).

14 As above.

15 C-Span 'Justice Kennedy Address' 5 August 2006 <https://www.c-span.org/video/?193757-1/justice-kennedy-address> (accessed 13 August 2022); Stein (no 5) at 345.

16 United Nations 'Access to justice critical in ensuring rule of law, speakers stress as Sixth Committee continues deliberations on Principle' 10 October 2014 <https://www.un.org/press/en/2014/gal3478.doc.htm> (accessed 1 May 2022).

17 CP Sabatino 'Access to justice: The people's principle' (2019) 43 *Generations: Journal of the American Society on Aging* at 6.

18 G Sharp 'The right of access to justice under the rule of law: Guaranteeing an effective remedy' 7 July 2016 <https://ciaj-icaj.ca/wp-content/uploads/page/2016/05/the-rule-of-law-and-the-right-to-effective-access.pdf> (accessed 1 May 2022).

19 Open Society Foundations 'Understanding effective access to justice, workshop background paper' at 2.

preserving world peace and achieving the Sustainable Development Goals of 2030.<sup>20</sup> According to the United Nations, promoting the rule of law and ensuring equal access to justice for all could be one of the ways to realise SDG 16, 'Peace, Justice and Strong Institutions'.<sup>21</sup>

The following section will dissect the relationship between the rule of law and access to justice to show that where access to justice is adequately implemented and adhered to, the rule of law is also enhanced.

### 2.3 The right to access justice

As a core human right, access to justice forms an integral part of the rule of law: everyone must be provided with appropriate mechanisms and remedies to enforce their rights, and they must be able to do so by having physical access to courts.<sup>22</sup> The rule of law would be an empty ideal if courts were not readily accessible when seeking justice. Accessibility is thus crucial for enabling the public to seek redress where their rights have been violated.

In its narrowest form, the right to access justice is the ability to seek and obtain a remedy for one's grievances<sup>23</sup> and the right to litigate or defend a claim.<sup>24</sup> It is universally recognised under several human rights treaties as a vital human right.<sup>25</sup> It is not only a fundamental stand-alone right but also plays an essential role in

20 United Nations and the Rule of Law 'Sustainable Development Goal 16' <https://www.un.org/ruleoflaw/sdg-16/> (accessed 6 May 2022).

21 Transforming our world: the 2030 Agenda for Sustainable Development (n 4) para 35.

22 Stein (n 5) 196.

23 United States Institute of Peace 'Necessary condition: Access to justice' <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice#:~:text=Access%20to%20justice%20involves%20normative,resolving%20personal%20and%20political%20disputes> (accessed 14 August 2022).

24 Alberta Civil Liberties Research Centre 'What is access to justice? Five different ways of considering access to justice' <https://www.aclrc.com/what-is-access-to-justice/> (accessed on 17 April 2022).

25 See the Universal Declaration of Human Rights arts 7, 8, 10 & 11 which provides for the right to equality and non-discrimination of the law; the right to an effective remedy by a competent tribunal; the right to a fair and public hearing by an independent and impartial tribunal; and the principles of a fair trial. The International Covenant on Civil and Political Rights ('ICCPR') art 2 similarly makes provision for the right to be provided with an effective remedy by a competent authority without discrimination, for any person whose right or freedoms have been violated. Art 14 ICCPR caters for the right to a fair trial, including equality before the courts; the right to a public hearing by a competent, independent and impartial tribunal established by law; the need for a judgment to be made public, except in some limited circumstances, listed therein; the principle of presumption of innocence; minimum guarantees in criminal cases, including the right to be informed promptly and in an understandable language the nature and cause of the charge against him, being provided with adequate time and facilities for the preparation of his defence, the right to be tried without undue delay, the right to legal assistance, the right to challenge evidence, the right to an interpreter, and prevention of self-incrimination. Art 14 ICCPR further sets down



protecting and promoting other human rights.<sup>26</sup> It encompasses various recognised principles, such as the right to a fair trial, having access to adequate and timely remedies, and the principle of equality before courts.<sup>27</sup>

According to Lord Neuberger of Abbotsbury, former President of the United Kingdom Supreme Court, the right to justice generally consists of several components, including; accessible and properly administered courts, effective procedures and an effective legal process, effective execution of a claim, and affordable justice.<sup>28</sup> Guaranteeing the right to access justice is crucial to the rule of law and democratic governance and to reduce social and economic marginalisation.<sup>29</sup>

From the above, it is clear that the rule of law and the right to access justice go hand-in-hand and that one cannot be adequately realised without the other. In conclusion, promoting and protecting the right to access to justice can equally enhance the rule of law and, by implication, the realisation of SDG 16.

How, then, can the new system of digital courts promote the right to access justice, especially as far as marginalised groups and, more significantly, persons with disabilities are concerned? The following section will introduce the concept of digital courts and their numerous advantages before analysing their viability under the provisions of the CRPD.

### 3 Digital Courts

As a result of the rapid spread of the highly contagious COVID-19 virus that forced courts to shut their doors to reduce its devastating effects, the world saw the emergence of a new type of court system

25 important provisions governing juvenile persons; the right to appeal; and the prohibition of double-jeopardy, amongst others. Art 26 ICCPR specifically deals with the issue of equality before the law and the right to equal protection of the law, irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See also The Convention on the Elimination of All Forms of Discrimination against Women arts 2 & 15; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts 13 & 14; The Convention on the Rights of the Child arts 12, 23, 37 & 40; the European Convention of Human Rights articles 6, 7 & 14; and the African Charter on Human and Peoples' Rights art 7.

26 Access to justice for children: Report of the United Nations High Commissioner for Human Rights (16 December 2013) UN Doc A/HRC/25/35 (2013) at para 3.

27 Equality and Human Rights Commission 'Following Grenfell: Access to justice' <https://www.equalityhumanrights.com/sites/default/files/following-grenfell-briefing-access-to-justice.pdf> (accessed on 17 April 2022).

28 As above.

29 Thematic report on the right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, Office of the United Nations High Commissioner for Human Rights (27 December 2017), UN Doc A/HRC/37/25 (2017) at para 3.

to provide alternative ways of delivering court services.<sup>30</sup> In the interests of justice and to avoid the backlogging of cases, many countries resorted to conducting cases remotely through videoconferencing and telephonic conferences.<sup>31</sup>

Digital courts, remote courts, virtual courts, and online or electronic courts can generally be described as platforms where online technologies are used to shift all proceedings to an online platform.<sup>32</sup> This entails the electronic submission of court files; an entirely digital and wireless courtroom, including electronic hearings and trials; access to video conferencing and transcripts, displaying court information and connectivity; remote appearances; electronic case management; managing and sharing information; and online scheduling.<sup>33</sup> Ultimately, all court-related processes are executed electronically and is accessible to all concerned on a virtual platform, including litigants, judges, and lawyers.<sup>34</sup>

According to a study conducted in eight Nordic countries,<sup>35</sup> digital courts present various advantages for court proceedings and administration.<sup>36</sup> The digitalisation of court systems can make the handling of cases more efficient by providing a cheaper and speedier resolution process. It can also assist with administrative tasks such as case management, including the service of documents, when tasks can be performed electronically.<sup>37</sup> This, in turn, can contribute to increased legal certainty.<sup>38</sup> In addition, digital courts can generate savings in terms of the use of paper, cheaper services, and low transportation costs; provide more security as far as archiving, misfiling and theft is concerned; and increase transparency in court proceedings.<sup>39</sup>

30 R Susskind 'The Future of Courts' <https://thepractice.law.harvard.edu/article/the-future-of-courts/> July 2020 (accessed 8 May 2022).

31 T Sourdin, B Li & DM McNamara 'Court innovations and access to justice in times of crisis' (2020) 9 *Health Policy and Technology* at 447.

32 British Columbia Ministry of Attorney General 'Court Digital Transformation Strategy 2019-23' at 6.

33 ADGM 'Digital Approach: Unique fully digital courts' <https://www.adgm.com/adgm-courts/digital-approach> (accessed 8 May 2022).

34 D Juvekar 'Can e-courts help speeding up justice delivery?' (17 January 2017) <https://www.businesstoday.in/opinion/columns/story/can-ecourts-help-speeding-up-justice-delivery-73854-2017-01-17> (accessed 9 July 2022).

35 The project investigated the court systems in eight Nordic countries and Baltic states, namely Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden.

36 Nordic Council of Ministers 'Digitalization at the courts: A report on the state of digitalization at the courts in the Nordic countries and the Baltic states' <https://pub.norden.org/temanord2022-518/> (accessed 9 July 2022).

37 As above; LR Amofah 'Electronic Court Case Management System (For Law Court Complex)' (2016) at 1.

38 Nordic Co-Operation 'New report: Digitalization of courts strengthen the rule of law' <https://www.norden.org/en/news/new-report-digitalization-courts-strengthen-rule-law> (accessed 9 July 2022).

39 J Vilquin & E Bosio 'Improving court efficiency: the Republic of Korea's e-court experience' in World Bank (ed) *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises* at 68.

Digital courts can contribute greatly to the rule of law since they can substantially increase the availability of courts and justice.<sup>40</sup> They not only provide a 24/7 filing, application and registration system but are also more convenient and efficient by saving costs and providing full remote access to justice.<sup>41</sup> Some features, such as accessing documents and information, may be available offline.<sup>42</sup> Digital courts are particularly beneficial where geographical distance makes it difficult for parties to attend, allowing those concerned to fully participate via videoconferencing and reducing long waiting times and travel costs.<sup>43</sup>

From the above, it can generally be concluded that digital courts present several advantages for accessing justice. The question then arises as to whether digital courts can be adapted and enhanced to the needs of persons with disabilities, and whether such changes could not be the solution to numerous barriers they face when accessing justice. The following section will focus on the right to access to justice concerning persons with disabilities to demonstrate how digital courts can promote their access to justice and simultaneously promote the rule of law.

## **4 The CRPD and the right to access justice.**

### **4.1 Overview**

For years, the notion of disability was seen as a medical construct requiring ‘a cure’ due to the incorrect belief that an impairment automatically limited one’s participation in society.<sup>44</sup> A revolutionary development in respect of disability rights was the coming into force of the CRPD, which is based on eight founding principles: (i) the respect for inherent dignity, individual autonomy and independence; (ii) non-discrimination; (iii) full and effective participation and inclusion in society; (iv) respect for differences and acceptance of persons with disabilities as part of human diversity and humanity; (v) equal opportunities; (iv) accessibility; (vii) equality; and (viii) respect for children with disabilities.<sup>45</sup> It also covers various civil, political, economic, social and cultural rights<sup>46</sup> and provides State Parties with the necessary steps to achieve the CRPD objectives.<sup>47</sup>

40 As above.

41 As above.

42 British Columbia Ministry of Attorney General (n 32) 12.

43 As above.

44 P Harpur ‘Embracing the new disability rights paradigm: The importance of the CRPD’ (2012) 27 *Disability and Society* at 2.

45 CRPD art 3.

46 CRPD arts 5 to 30.

47 CRPD arts 4 & 31-35.

Ultimately, the object and purpose of the CRPD is to protect and promote the rights of persons with disabilities by seeking to realise the full and equal enjoyment of their rights and promoting their right to inherent dignity.<sup>48</sup> For purposes of this article, focus will be on the right to access justice, as set out in article 13.

## 4.2 Article 13 of the CRPD

The CRPD was the first international treaty to expressly address and make specific provisions for the right to access justice by restating and applying existing principles in various other treaties.<sup>49</sup> It contains important and innovative elements which seek to put persons with disabilities on an equal footing with others.<sup>50</sup>

The CRPD aims to ensure the full and effective participation of persons with disabilities in courts, both as direct and indirect participants and as witnesses.<sup>51</sup> It also emphasises that this right shall prevail at all stages of proceedings. This is in addition to the implementation of procedural and age-appropriate accommodations during the process to facilitate the participation of persons with disabilities.<sup>52</sup> The CRPD further requires the appropriate training of all those involved in the administration of justice for the effective participation of all persons with disabilities.<sup>53</sup>

It should also be noted that the wording of article 13 is mandatory, and there is, therefore, an obligation on all Member States to effectively take all necessary steps to ensure its implementation accordingly. The following sections will review the requirements of article 13.

### 4.2.1 Effective access to justice

Firstly, Article 13(1) of the CRPD requires the right to access justice to be 'effective'.<sup>54</sup> Fundamentally, the effectiveness of a justice system will generally depend on whether redress can be obtained in a

48 CRPD art 1.

49 E Flynn 'Article 13 Access to justice' in I Bantekas, M Ashley Stein & D Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* at 383.

50 P Weller 'The CRPD and the social model of health: new perspectives' (2011) 21 *Journal of Mental Health Northumbria University* at 74.

51 CRPD art 13(1).

52 CRPD art 13(1).

53 CRPD art 13(2).

54 Article 13(1) of the CRPD which reads as 'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'.

fair, proactive, cost-effective, and efficient manner.<sup>55</sup> Flynn suggests that under this limb of article 13 and for a justice system to be effective, persons with disabilities must be provided with legal representation and legal aid.<sup>56</sup>

The prerequisites thereof can be gathered from the case of *Munir Al Adam v Saudi Arabia*,<sup>57</sup> where the Committee on the Rights of Persons with Disabilities ('CRPD Committee')<sup>58</sup> held in respect of a person whose hearing impairment was made permanent through torture while he was in detention in Saudi Arabia, that under article 13(1) of the CRPD, persons with disabilities are entitled to a fair trial; to be represented, and to not be subjected to any physical or undue psychological pressure from investigating authorities.<sup>59</sup> Similarly, under article 13, a person must be effectively assisted in capital punishment cases at all stages of proceedings.<sup>60</sup>

Considering the case of *Munir Al Adam*, it can be generally concluded that, to be effective, access to justice must meet the usual criteria as set out by international law, such as the right to a fair trial;<sup>61</sup> the principle of the presumption of innocence;<sup>62</sup> the right to a public hearing by an independent and impartial tribunal;<sup>63</sup> the right to be told and explained the charges as early as possible and in an understandable language;<sup>64</sup> the right to defend a case;<sup>65</sup> the capacity to challenge evidence;<sup>66</sup> the right to have the assistance of an interpreter, if necessary;<sup>67</sup> the prohibition of self-incrimination;<sup>68</sup> and the right to appeal.<sup>69</sup>

55 Open Society Foundations (n 19) 2.

56 Flynn (n 49) 390.

57 *Munir Al Adam v Saudi Arabia*, Communication 38/216, CRPD Committee (24 October 2018) UN Doc CRPD/C/20/D/38/2016.

58 The CRPD Committee is a body consisting of 12 independent experts, aimed at monitoring the implementation of the CRPD by States Parties. The seat of the CRPD Committee is in Geneva. See United Nations Department of Economic and Social Affairs Disability 'Committee on the Rights of Persons with Disabilities' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html> (accessed 14 August 2022).

59 *Munir Al Adam v Saudi Arabia* (n 57) para 11.4.

60 As above.

61 The Universal Declaration of Human Rights ('UDHR') art 10; International Covenant on Civil and Political Rights ('ICCPR') arts 2, 14, & 26; The Convention on the Rights of the Child ('CRC') art 12; European Convention of Human Rights ('ECHR') art 6(1).

62 UDHR art 11; ICCPR art 14(2); CRC art 40(2)(i); African Charter on Human and Peoples Rights ('ACHPR') art 7(2); ECHR art 6(2).

63 UDHR arts 8 and 11; ICCPR art 14(1); ACHPR art 7(4); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 13; CRC arts 12(2), 37(d) & 40(2)(b)(iii); ECHR art 6(1).

64 ICCPR art 14(3); ECHR art 5(2); art 6(3)(a); CRC art 40(2)(b)(ii).

65 UDHR art 11; ICCPR art 14(3); ACHPR art 7(3); CRC art 37(d) & 40(2)(b)(ii); ECHR art 6(3)(b) & 6(3)(c).

66 UDHR art 8, 10, and 11; ICCPR art 14(3)(e); CRC art 40(2)(b)(iv); ECHR art 6(3)(d).

67 CRC art 40(2)(b)(vi); ECHR art 6(3)(e).

68 ICCPR art 14(3)(g); CRC art 40(2)(b)(iv); ECHR art 6.

69 CRC art 40(2)(b)(v); ACHPR art 7(1)

### 4.2.2 Equality

At the heart of the CRPD also lies the right to equality and protection from discrimination.<sup>70</sup> The requirement of non-discrimination is a founding principle of the CRPD under article 3, a general obligation of State Parties under article 4, and a stand-alone right under article 5 of the CRPD.<sup>71</sup>

The requirement of equality under article 13 encompasses the need for persons with disabilities to be placed on equal footing as persons without disabilities in legal proceedings.<sup>72</sup> This means that persons with disabilities are entitled to the same rights governing legal proceedings as everyone else, including, for example, the right to a fair trial, the right to defend their case, or the right to be tried in person.<sup>73</sup> Beyond that, it also means that justice must be accessible and that reasonable accommodations ought to be made where necessary, such as frequent breaks where a disability so requires; making it possible for persons with disabilities to testify using sign language or other alternatives; or changing a courtroom's environment for persons with sensory impairments.<sup>74</sup> It also encompasses the right to access information and communication in alternative ways.<sup>75</sup>

The requirement of equality under article 13 thus seeks to place persons with disabilities on an equal terms with others so that they can participate fully in legal proceedings without difficulty or obstacles.

### 4.2.3 Procedural and age-appropriate accommodations

Article 13 of the CRPD also obligates State Parties to make procedural and age-appropriate accommodations for persons with disabilities in the justice system. The concept of procedural accommodation is not to be confused with 'reasonable accommodation' as set out under article 2 of the CRPD.<sup>76</sup> Unlike the test for reasonable accommodation, which must satisfy the criteria of undue burden and

70 General Comment 6 on equality and non-discrimination, CRPD Committee (26 April 2018) UN Doc CRPD/C/GC/6 at paras 5 & 7.

71 CRPD arts 3(b), 4(b) & 4(e). Article 5 of the CRPD makes provision for the scope of non-discrimination, including equal protection and equal benefit of the law; the prohibition of discrimination and the provision of effective legal protection; the concept of reasonable accommodation; and the adoption of specific measures in view of making persons with disabilities equals in society.

72 Special Rapporteur on the rights of persons with disabilities *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020) at 11.

73 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) 6; Flynn (n 49) 391.

74 As above.

75 As above.

progressive realisation, the requirement of procedural and age-appropriate accommodations is broader. It is neither subject to the test of undue burden nor progressive realisation.<sup>77</sup>

The requirement of procedural accommodation simply requires the implementation of steps which are necessary to facilitate access to justice, including through the provision of sign language interpretation; supplying information in accessible formats; delivering communication which considers the diversity of persons with disabilities, such as easy-to-read documents, braille, or video-link testimony; the implementation of existing legislation concerning access to justice; access to legal aid; and the provision of legal assistance and information in accessible formats.<sup>78</sup> Such accommodations must be provided free of charge and must be readily available.<sup>79</sup>

Procedural accommodations must also be age-appropriate, meaning that courtrooms have to be adapted or other similar age-appropriate assistance must be provided where a case so requires.<sup>80</sup>

#### **4.2.4 Direct and indirect participation**

Although not explicitly defined under the CRPD, direct participants, on the one hand, have been generally deemed to encompass those actively involved in the proceedings, such as the parties themselves, witnesses, victims, jurors, legal representatives, judges, magistrates, members of the tribunal, and court staff, among others.<sup>81</sup> On the other hand, indirect participants will typically include those playing a more passive role in the proceedings, such as the court's staff members, members of the public, or reporters.<sup>82</sup>

On several occasions, the CRPD Committee has reiterated that the failure of State Parties to include persons with disabilities in the justice system and to adapt the system accordingly amounts to a breach of article 13(1). For example, in *Gemma Beasley v Australia*<sup>83</sup>

76 Article 2 of the CRPD defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

77 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 25.

78 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 24; Flynn (n 49) 394.

79 As above.

80 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 27.

81 Flynn (n 49) 397,

82 As above.

83 *Gemma Beasley v Australia*, Communication 011/2013, CRPD Committee (25 May 2016) UN Doc CRPD/C/15/D/11 (2013).

it was found that a failure to make accommodations for persons requiring Australian Sign Language to participate in jury duty breaches article 13(1).<sup>84</sup> The same could be inferred from the case of *AM v Australia*,<sup>85</sup> which was also based on a failure of the State Party to provide Australian Sign Language insofar as jury duty was concerned. However, in this matter, the CRPD Committee concluded that the communication was inadmissible since it considered the author's claim hypothetical and insufficient to meet the requirements of article 1(1) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.<sup>86</sup> A specific reference is made to witnesses under article 13(1), which implies that all necessary conditions required under article 13 equally applies to witnesses, making allowances for witnesses to understand and actively participate in proceedings.

#### **4.2.5 All legal proceedings, including investigative and preliminary stages**

Additionally, article 13(1) imposes a duty on State Parties to facilitate the right to access to justice in all legal proceedings, including at the investigative and preliminary stages. This requirement is particularly pertinent since research has demonstrated that persons with disabilities are more likely to experience violence than their peers without disabilities.<sup>87</sup> Similarly, victims with disabilities are more likely to be prejudiced at the preliminary stages of proceedings, especially when reporting crimes, due to the mistaken belief that they may not be competent witnesses and are unfit to testify.<sup>88</sup> Communication problems may equally affect victims and offenders at the preliminary stages, which may arise from their vulnerabilities.<sup>89</sup>

Considering these barriers, article 13(1) of the CRPD requires constant support and assistance in the justice system for persons with disabilities to ensure fairness and equal treatment for all parties involved, at all times.<sup>90</sup> From the outset of the case, fairness must be maintained throughout the proceedings until the case is closed.

84 *Gemma Beasley v Australia* (n 83) para 8.9.

85 *AM v Australia*, Communication 12/2013, CRPD Committee (29 May 2015) UN Doc CRPD/C/13/D/12 (2013).

86 *AM v Australia* (n 85) para 8.7.

87 RM White et al 'Transformative equality: Court accommodation for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* at 2; World Health Organization 'WHO Global Disability Action Plan 2014-2021: Better Health for All People With Disability' at para 25.

88 N Archer & EA Hyrley 'A justice system failing for the autistic community' (2013) 4 *Journal of Intellectual Disabilities and Offending Behaviour* at 54; White et al (n 87) 2.

89 C Capri et al Intellectual disability rights and inclusive citizenship in South Africa: What can a scoping review tell us?' (2018) 7 *African Journal of Disability* at 396; White et al (n 87) 2.



Similarly, persons with disabilities must be afforded all the support they require to access justice promptly and efficiently.

#### **4.2.6 Appropriate training for all workers**

Finally, the CRPD Committee highlighted that attitudinal barriers negatively impact the right to access justice for people with disabilities.<sup>91</sup> According to the Committee, these barriers emanate from the court staff's lack of awareness as it pertains to the rights and practices of persons with disabilities in the justice system, including police officers, prosecutors, and similar professionals working in the field.<sup>92</sup>

To eliminate these barriers, article 13(2) places an additional obligation on State Parties to provide training programmes in relation to all legal proceedings and raise awareness accordingly.<sup>93</sup> This seeks to ensure that all officers dealing with persons with disabilities in the justice system are suited and qualified to do so in order to avoid any miscarriage of justice or discrimination that may result from ignorance.

## **5 Barriers to the right to access justice**

Notwithstanding the strong protection envisaged by the CRPD, persons with disabilities experience many difficulties and barriers when exercising their right to access justice, whether in criminal proceedings or civil claims.<sup>94</sup> A lack of accessibility mainly concern obstacles like physical access to courts or information and communication, as well as attitudinal barriers<sup>95</sup> to be discussed below.

90 K L Salekin, J G Olley & K A Hedge 'Offenders with intellectual disability: Characteristics, prevalence, and issues in forensic assessment' (2010) 3 *Journal of Mental Health Research in Intellectual Disabilities* at 97; White et al (n 87) 2.

91 Flynn (n 49) 400.

92 As above.

93 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 59; General comment 1, art 12: Equal Recognition before the law, CRPD Committee (19 May 2014), UN Doc CRPD/C/GC/1 (2014).

94 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 4.

95 E Flynn *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (2015) at 49.

## 5.1 Physical barriers

Accessibility is an underlying principle of the CRPD, as well as a central requirement to fully and effectively realise all the rights of persons with disabilities.<sup>96</sup> It represents the equal access and participation of persons with disabilities in any environment without barriers.<sup>97</sup> Under article 9 of the CRPD, environments include ‘buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces’.<sup>98</sup> According to article 13, these environments include the buildings where law-enforcement agencies and the judiciary are located.<sup>99</sup>

Physical barriers can generally be described as physically entering certain areas, such as police stations or courts, which may be impossible or strenuous.<sup>100</sup> The most common barriers in this regard are generally the architectural features of certain buildings, such as steps and no ramps at a building’s entrance or the absence of lifts in multifloored buildings.<sup>101</sup> They have also been extended to prisons and detention centres by the CRPD Committee in *X v Argentina*,<sup>102</sup> where it found a State Party to be in breach of article 9 if it fails to remove barriers in the prison setting insofar as the bathroom, shower, recreation yard and nursing services were concerned.<sup>103</sup>

These barriers prevent persons with disabilities from enjoying equal physical access or use of the justice system. Although there appear to be positive changes worldwide, the accessibility requirement remains confined to new buildings, with little progress insofar as detention facilities and their staff members are concerned.<sup>104</sup>

96 General Comment 2, Article 9: Accessibility, CRPD Committee (22 May 2014) UN Doc CRPD/CGC/2 at para 4.

97 R Sestranetz & L Adams ‘Free movement of people with disabilities in southeast European: An inaccessible right?’ (2006) *Handicap International Regional Office for South East Europe* at 11.

98 CRPD art 9(1)(a).

99 General Comment 2 (n 96) para 37.

100 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 20.

101 E Flynn et al ‘Final Report Access to Justice of Persons with Disabilities December 2019’ at 4.

102 *X v Argentina*, Communication 8/2012, CRPD Committee (18 June 2014), UN Doc CRPD/C/11/D/8 (2012).

103 *X v Argentina* (n 102) para 8.5.

104 Flynn et al (n 101) 10.

## 5.2 Lack of access to information

Access to information also significantly ensures full, equal, and effective participation in court proceedings.<sup>105</sup> Indeed, there can be no efficient access to justice if services, communication and information are inaccessible to persons with disabilities.<sup>106</sup> Court proceedings are formal and complex; without the appropriate information available, persons with disabilities can be left as ‘mere spectators’ to their grievances.<sup>107</sup> In effect, a lack of access to information inevitably leads to a significant gap in understanding legal proceedings and any communication or exchanges between judges, lawyers and other interlocutors.<sup>108</sup>

Adequate access to information allows persons with disabilities to know and defend their rights.<sup>109</sup> Article 21 of the CRPD caters for the right to seek, receive and impart information and ideas on an equal basis with others through all forms of communication, and impose on State Parties an obligation to ensure that such freedom of choice is respected.<sup>110</sup> State Parties should then act accordingly by accepting and facilitating the use of all means of accessibility, which includes modes and formats of communication by persons with disabilities in official interactions.<sup>111</sup>

However, the right to access information is not consistently implemented as envisaged by the CRPD and many persons with disabilities remain unaware of their legal rights or how to seek redress under the law, resulting in prejudice.<sup>112</sup> These prejudices lead to many persons with disabilities being left uninformed of their rights and the appropriate route of redress when their rights are violated.<sup>113</sup> These barriers usually emanate from a problem of illiteracy, a lack of awareness on the part of State Parties concerning the various modes of communication of persons with disabilities, a failure to make laws

105 E Varney ‘Disability and information technology: A comparative study in media regulation’ (2013) *Cambridge University Press, Cambridge Disability Law and Policy Series*; E Varney ‘Article 21 Freedom of Expression and Opinion, and Access to Information’ in I Bantekas, MA Stein & D Anastasiou (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2018) at 392.

106 General Comment 2 (n 96) para 37.

107 Y Ghai & J Cotrell *Marginalized communities and access to justice* (2010) at 232.

108 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 20.

109 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 21.

110 CRPD art 21.

111 E Varney ‘Article 21 Freedom of Expression and Opinion, and Access to Information’ in Bantekas, Stein & Anastasiou (n 105) 595; *JH v Australia* Communication 35/2016, CRPD Committee (31 August 2018), UN Doc CRPD/C/20/D/35 (2016).

112 Ghai & Cotrell (n 107) 232.

113 Division for Social Policy Development & Department of Economic and Social Affairs ‘Toolkit on Disability for Africa: Access to justice for persons with disabilities’ at 3.

available, a failure to simplify or translate proceedings or to write or publish judgments, or a failure to provide information in accessible formats.<sup>114</sup>

In this context, the CRPD Committee has provided examples of how to ensure that persons with disabilities have the necessary access to information in proceedings, including: the provision of information in accessible formats, i.e. in braille, sign language, easy-to-read format, or video guides;<sup>115</sup> by providing jurors with the format of communication of their choice to perform their duties;<sup>116</sup> by translating judgments concerning the rights of persons with disabilities into easy-to-read formats;<sup>117</sup> by creating an accessible governmental website;<sup>118</sup> or by supplementing the legal knowledge or information on legal proceedings.<sup>119</sup>

### 5.3 Attitudinal barriers and lack of complaint mechanisms

As highlighted above, article 13 applies to court proceedings and preliminary investigations. It is, therefore, paramount that persons with disabilities are provided with the appropriate complaint mechanisms to protect their rights.<sup>120</sup> In this context, persons with disabilities usually deal with the administrative arm of government as alleged offenders, victims, or witnesses to a crime.<sup>121</sup> However, several attitudinal barriers prevail, impeding the full and effective participation of persons with disabilities in the justice system.<sup>122</sup>

For example, it is often automatically assumed that persons with disabilities will not meet the necessary standard of a competent witness when reporting a crime.<sup>123</sup> Communication barriers prevent victims from reporting crimes or seeking redress for a wrong, while others are not deemed credible.<sup>124</sup> Similarly, alleged offenders with

114 United Nations Development Programme 'The rule of law and access to justice: Overview, status and trends' (2013) at 45.

115 Flynn et al (n 101) 11.

116 See *JH v Australia* (n 111); *Gemma Beasley v Australia* (n 83); *AM v Australia* (n 85).

117 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 22.

118 As above.

119 Flynn et al (n 101) 12.

120 Flynn et al (n 101) 21.

121 Royal Commission into Violence, Abuse, Neglect, and Exploitation of persons with disability 'Report Research: Police Responses to people with disability' October 2021 <https://disability.royalcommission.gov.au/system/files/2021-10/Research%20Report%20-%20Police%20responses%20to%20people%20with%20disability.pdf> (accessed 8 May 2022).

122 As above.

123 White et al (n 87) 2.

124 E Wright & C Edmonds 'Disability royal commission turns spotlight on women's stories of abuse and violence' *News* (Australia) 1 April 2022 at <https://www.abc.net.au/news/2022-04-02/disability-royal-commission-hobart-hearings-of-abuse-violence/100956366> (accessed 4 May 2022).

disabilities are also at risk of being exploited or influenced following their arrest.<sup>125</sup>

The CRPD Committee has suggested several measures to remedy the situation, including the creation of accessible complaint mechanisms such as phone lines and e-services;<sup>126</sup> or by making information, communication and support services, such as hotlines, shelters, victim support services and counselling fully accessible to persons with disabilities.<sup>127</sup> Similarly, as envisaged by article 13(2), all concerned officers must be trained to support complaints and respect confidentiality.<sup>128</sup>

## 6 Digital court for the effective enforcement of the right to access justice

### 6.1 Reconciling digital courts with the CRPD

As experienced during the COVID-19 pandemic, digital courts present various advantages concerning court proceedings but can also be highly beneficial to persons with disabilities. Although the CRPD does not make express reference to such types of proceedings, it is possible to reconcile the intention of the drafters of the CRPD in relation to the right to access justice with digital courts.

Firstly, article 9(2)(g) of the CRPD requires State Parties to promote access for persons with disabilities to new information and communication technologies.<sup>129</sup> This entails that all new objects, infrastructure, goods, products, and services must from the outset be readily accessible for persons with disabilities.<sup>130</sup> Secondly, article 9(2)(h) of the CRPD requires State Parties to promote the design, development, production and distribution of accessible information and communication technologies and systems at an early stage and to be readily available at minimum costs.<sup>131</sup>

125 White et al (n 87) 2.

126 Concluding observations on the combined second and third periodic reports of El Salvador, CRPD Committee (1 October 2019), UN Doc CRPD/C/SLV/CO/2-3 (2019) at para 33.

127 Flynn et al (n 101) 21.

128 As above.

129 Art 9(2)(g) of the CRPD provides that 'States Parties shall also take appropriate measures to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet'.

130 General Comment 2 (n 96) para 24.

131 Article 9(2)(h) of the CRPD provides that 'State Parties shall also take appropriate measures to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost'.

The broad definition of ‘communication’ under article 2 of the CRPD should also be noted, which includes a broad spectrum of means of communication, including, but not limited to, traditional types of communication (braille, etcetera), as well as alternative modes, means, and formats of communication.

It is submitted that article 2 and article 9, read together, indicate that digital courts seem to fall squarely within the ambit of the CRPD to qualify as ‘new information and communication technologies’. If used appropriately, they can also reduce and eliminate the barriers persons with disabilities currently face.<sup>132</sup>

## 6.2 How can smart courts promote the right to access justice for persons with disabilities?

To illustrate the many advantages that digital courts can potentially bring to persons with disabilities, a simple example is extended: The case of *Boris Makarova v Lithuania* brought before the CRPD Committee in 2015.<sup>133</sup> The communication before the CRPD concerned a road accident on 12 June 2005 in Lithuania, which caused Boris Makarova’s wife to suffer multiple bodily injuries, including a head injury.<sup>134</sup> As of January 2006, she was diagnosed with a disability ratio of 60%, which had increased to 80% by January 2007.<sup>135</sup> According to Mr Makarova, his wife’s condition deteriorated until her death in November 2011.<sup>136</sup>

Due to her condition, the victim could not visit the police station in person, which was communicated to the prosecutor through letters.<sup>137</sup> However, she was not informed of the defendant’s indictment in May 2006, violating her right to challenge the prosecutor’s decisions and conclusions.<sup>138</sup> Likewise, Ms Makarova could not take part in the court proceedings.<sup>139</sup> This was also communicated to the judge who had a duty under article 118 of the Constitution of Lithuania to ensure that the prosecutor defended the position of the victim. This obligation was ignored, thereby denying the victim her rights to legal assistance and equal protection under the law.<sup>140</sup>

In May 2008, the defendant was found guilty of committing a traffic violation before the first district court of Vilnius and was given

132 See para 6.2.

133 *Makarova v Lithuania*, Communication 030/2015, CRPD Committee (7 October 2017) UN Doc CRPD/C/18/D/30/15.

134 *Makarova v Lithuania* (n 133) para 2.1.

135 As above.

136 *Makarova v Lithuania* (n 133) para 2.2.

137 *Makarova v Lithuania* (n 133) para 2.3.

138 As above.

139 *Makarova v Lithuania* (n 133) para 2.4.

140 *Makarova v Lithuania* (n 133) para 2.5.

a fine based on the judge's finding that the victim's disability was unrelated to the accident.<sup>141</sup> According to Mr Makarova, the judgment was never communicated to the parties, and it was only in November 2008 that he became aware of the judgment after a personal visit to the court.<sup>142</sup> However, given the delay, the period for appeal had lapsed.<sup>143</sup> He nonetheless appealed to the Regional Court of Vilnius, where his appeal was dismissed in December 2008 as he could not prove that he had missed the statutory deadline because of the problems with his health.<sup>144</sup> He also failed to appeal to the Supreme Court of Lithuania and other instances. In the circumstances, Mr Makarova sought for the CRPD Committee to intervene.<sup>145</sup>

The CRPD Committee found that the concerned State Party had violated the right to access to justice under article 13 because the victim was unable to participate in the proceedings effectively and was not provided with legal representation, despite her request to that effect.<sup>146</sup> As a result, the Committee held that she was denied the opportunity to test the evidence before her, pose questions to witnesses, challenge the findings of expert examinations or testify by giving her account of the accident.<sup>147</sup> The CRPD Committee went on to conclude that having been the direct victim of the accident, she was a 'direct participant' for purposes of Article 13(1), and ought to have had been accommodated in a manner that enabled her participation in the proceedings, especially in light of her various requests to that effect.<sup>148</sup> The CRPD Committee ultimately found that the facts before it amounted to an *inter alia* breach of article 13 of the CRPD by Lithuania.<sup>149</sup>

This case is possibly the best illustration of how digital courts could enhance the right to access justice for persons with disabilities. Had digital courts been an option for Mrs Makarova, it could have drastically aided her participation in the proceedings. Firstly, there would have been no need to be personally present in the courtroom, and this could have easily been made possible via the internet. Similarly, she would have been able to lodge and file the complaint and claim online. The concerned parties would also have had access to all the required documents online, including the verdict.

Similarly, in the case of *X v Argentina*,<sup>150</sup> the complainant alleged a breach of article 13 by Argentina because, as a prisoner in the Marco

141 *Makarova v Lithuania* (n 133) para 2.8.

142 *Makarova v Lithuania* (n 133) para 2.9.

143 As above.

144 As above.

145 As above.

146 *Makarova v Lithuania* (n 133) para 7.2.

147 As above.

148 *Makarova v Lithuania* (n 133) para 7.6.

149 *Makarova v Lithuania* (n 133) para 7.9.

150 *X v Argentina* (n 102).

Paz Federal Prison Complex II in San Martin, he was obliged to travel to and from the court where oral proceedings against him were taking place, despite suffering from a severe condition as a result of a surgery; only to be then denied entry at his hearing, forcing him to remain on a stretcher in an ambulance.<sup>151</sup> Although the evidence, in this case was not admissible, this case serves as yet another example of how digital courts have the potential to reduce the barriers and alleviate the inequalities experienced by persons with disabilities insofar as access to justice is concerned.

Article 13, read with article 9 and article 5 of the CRPD, requires justice to be accessible to persons with disabilities on an equal scale as others. Digital courts have immense possibilities to offer as far as accessibility to courts are concerned, as will be discussed below.

### 6.1.2 Remote hearings

Digital courtrooms can be helpful for persons with disabilities who may not always have the required infrastructural facilities in conventional buildings, such as lifts or ramps.<sup>152</sup> Digital courts provide the benefit of not having to travel to and from remote areas to attend court proceedings. Proceedings can be readily accessible in the comfort of one's home. Moreover, digital courts save time and costs.<sup>153</sup>

Similar to closed circuit television and in camera proceedings, digital courts can also make proceedings less intimidating and hostile, allowing persons with disabilities to express themselves freely and give a competent and reliable account of their case.<sup>154</sup> For these reasons, remote hearings can also be generally deemed to fall within the purview of the 'procedural and age-appropriate accommodation' requirement of article 13. As discussed above,<sup>155</sup> the scope of this requirement includes, amongst other things, facilitating effective communication through alternative modes; the right to access information in accessible formats; and providing support and accommodation for effective participation.<sup>156</sup> Remote hearings can

151 *X v Argentina* (n 102) para 7.9.

152 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 20.

153 R Sadley Bailey 'Advantages and disadvantages of virtual court hearing' 6 January 2021 <https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/> (accessed on 8 May 2022); Justice Connect 'As remote courts become more common, these are the benefits and pitfalls' 16 September 2020 <https://justiceconnect.org.au/fairmatters/as-remote-courts-become-more-common-these-are-the-benefits-and-pitfalls/> (accessed 8 May 2022).

154 R White et al 'Court accommodations for persons with severe communication disabilities: A legal scoping review' (2021) 27 *Psychology, Public Policy, and Law* at 399.

155 See para 4.2.3 above for a complete description of the 'procedural and age-appropriate' requirement under art 13.

156 Flynn (n 49) 396.



also benefit children with disabilities who may participate fully in the proceedings without fear or pressure, thus meeting the criterion of ‘age-appropriate accommodation’.<sup>157</sup>

### 6.1.3 *Communication and access to justice*

As identified above, a lack of accommodation to facilitate the communication of persons with disabilities remains a significant barrier for proper access to justice. New technologies have the potential to strengthen existing digital courts, especially as far as the ‘effective participation’ of persons with disabilities is concerned. This can enable persons with disabilities to directly and indirectly participate in proceedings.<sup>158</sup>

For example, in *Lockrey v Australia*,<sup>159</sup> the complainant – a deaf person requiring real-time steno-captioning to communicate – was prevented from performing jury duty because of his additional needs. Despite several requests and complaints made to the concerned authorities, he was prevented from participating effectively and on an equal basis in jury duty, arguing that the concerned State Party had breached his right to access justice.<sup>160</sup> The CRPD Committee found that the State Party violated article 13 of the CRPD by failing to provide reasonable accommodations to the complainant and ensuring his effective and direct participation since jury duty forms an integral part of the Australian justice system.<sup>161</sup>

Today, multiple videoconferencing applications, such as Zoom, Microsoft Teams, Google Meet, and Skype, provide innovative ways to meet the accessibility requirements of article 9, including various options for virtual closed captioning during online meetings and webinars that generate subtitles for video conferencing. Likewise, intermediaries and interpreters can use video facilities to assist persons with disabilities during proceedings. Some may even opt for the ‘chat’ or ‘type’ option.

157 See Criminal Procedure Act 55 of 1977 secs 153(1) & 153(4) and Criminal Justice Act 75 of 2008 sec 65(3), which require proceedings involving children to be conducted behind closed doors and restricting the public and media from attending proceedings involving children.

158 See para 4.2.4 above for a complete explanation of the difference between direct and indirect participants.

159 *Lockrey v Australia*, Communication 013/2013, CRPD Committee (1 April 2016) UN Doc CRPD/C/15/D/13 (2013).

160 *Lockrey v Australia* (n 159) paras 3.1 to 3.5.

161 *Lockrey v Australia* (n 159) para 8.9.

Interestingly, persons using augmentative and alternative communication (AAC) to communicate via videoconferencing have reported that it was possible and relatively easy to do so, either by using the screen mirroring option, or by using a projector or purchasing a manufacturer's software.<sup>162</sup> Although some courts have been reluctant to allow the use of AAC, others have successfully acknowledged and implemented it.<sup>163</sup> It is submitted that the digitalisation of courts can thus open new doors to the use of AAC in proceedings, although the whole process will need to be appropriately designed and tested first. If successful, it will help ensure that persons with communication disabilities are actively and equally involved in the justice system, albeit remotely.

The use of accessible information and communications technologies, primarily through digital courts or similar online portals and services, can improve access to justice and information.<sup>164</sup> Like any other electronically designed platform, digital courts can be enhanced to make information relate to court proceedings more readily available, for instance, by designing accessible and inclusive features, such as plain language, content and videos in sign language, captioned text, translation of judgments and similar documents into accessible read formats or documents in large print, as required by article 13(1).<sup>165</sup> With all the information they need readily available to them in a timely and accessible manner, persons with disabilities may be able to engage in legal proceedings on an equal basis with others.

#### **6.1.4 Complaint mechanism**

Digital court systems could equally enable persons with disabilities to have access to complaint mechanisms and investigation bodies.<sup>166</sup> This would not only facilitate the procedural aspects of the proceedings, but will also help ensure the elimination of any attitudinal barriers commonly faced by persons with disabilities. No longer having to appear in person to file a complaint would also alleviate the stringent burden of court proceedings, even at the preliminary stages.

162 AssistiveWare 'Considering all forms of communication' (26 April 2019) <https://www.assistiveware.com/learn-aac/more-than-a-device-considering-all-forms-of-communication> (accessed 9 May 2022); J Schubring 'Modeling AAC Virtually' (24 March 2020) <https://www.buildingaac.com/post/modeling-aac-virtually> (accessed 9 May 2022).

163 White et al (n 154) 24.

164 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 21.

165 As above.

166 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 43.

The services provided by digital courts can also be potentially widened to meet the needs of persons with disabilities. For instance, they can be used not only to initiate proceedings but also to lodge complaints at a preliminary stage. This would mean expanding the capacity of digital courts to include law enforcement agencies, such as the police. This would help ensure that the credibility bias which often prevails in the disability community is lessened, thereby facilitating the participation of persons with disabilities in legal proceedings, including at the investigative and preliminary stages. Moreover, this process can alleviate the attitudinal barriers faced by persons with disabilities by giving them an equal chance to seek redress when their rights have been infringed.

### **6.1.5 Training**

As far as the requirement of article 13(2) is concerned, it is submitted that digital courts can benefit all staff and officers concerned equally. Research has shown that online training is as good as, if not better than, the traditional instructor-led, face-to-face training system.<sup>167</sup>

It will benefit all officers and staff members to partake in online training concerning persons with disabilities to better understand their right to access justice. This would in turn abolish the prevailing attitudinal barriers affecting persons with disabilities. Indeed, the UN Rapporteur suggests that appropriate training and awareness raising can be a powerful tool to eliminate these barriers.<sup>168</sup> Mandatory regular training programmes should be delivered to all officers, public defenders, and professionals working in the justice system.<sup>169</sup>

Much like digital courts, online training has gained considerable popularity during the COVID-19 pandemic and revolutionised the education and tutoring sector.<sup>170</sup> Digital courts could thus be used to meet all the criteria of Article 13. Essentially, the digitalisation of courts to accommodate persons with disabilities can incorporate a variety of services, ranging from lodging complaints, initiating proceedings, seeking legal assistance, remote hearings and training of

167 Continu 'In-person vs. online training: What does the research say?' (8 September 2021) <https://www.continu.com/blog/in-person-vs-online-training> (accessed 29 May 2022). See also SD Johnson, SR Aragon, N Shaik 'Comparative analysis of learner satisfaction and learning outcomes in online and face-to-face learning environments' (2000) 11 *Journal of Interactive Learning Research* at 29; C Neuhauser 'Learning style and effectiveness of online and face-to-face instruction' (2010) 16 *American Journal of Distance Education* at 99.

168 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 59.

169 As above.

170 WebForum 'The COVID-19 pandemic has changed education forever. This is how' <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid-19-online-digital-learning/> (accessed 9 May 2022).

all those concerned – the latter being a paramount condition to ensure the elimination of attitudinal barriers.

## 6.2 Inclusion, not exclusion

While digital platforms have the potential to reduce barriers experienced by persons with disabilities, they should be designed in such a way so as to not exclude persons with disabilities from society. Whilst digital technologies represent numerous advantages for persons with disabilities, they should not underestimate the potential risks of exclusion. Indeed, by confining persons with disabilities to their homes, the risk of exclusion in these cases is relatively easy to foresee. It could even be used as an ‘escape door’ to prevent concerned State Parties from undertaking their obligations as far as accessibility is concerned.

To avoid any prejudicial effects in this regard, persons with disabilities should be closely consulted in designing digital courts, as required under article 4 of the CRPD.<sup>171</sup> In order to ensure that the accessibility and inclusion requirements are met, it is recommended that persons with disabilities be involved and consulted in the designing and testing process.<sup>172</sup> This would ensure that the system is crafted to meet all of their needs, which may be otherwise overlooked.<sup>173</sup> This will also ensure that such a platform does not create more challenges and barriers for persons with disabilities.<sup>174</sup>

In any event, State Parties must ensure that their citizens are suited to embrace the promise of digital courts and be sufficiently digitally literate before embarking on such a reform process. In truth, a lack of digital skills to navigate the digital world may result in exclusion in a similar fashion.<sup>175</sup> Finally, it must be ensured that all concerned have equal access to the system, especially regarding costs and internet access. If not, it may well result in exclusion and discrimination.

171 Article 4(3) of the CRPD provides that States Parties have a duty to closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies.

172 J Thurston ‘As courts go digital, will persons with disabilities have access to justice?’ (30 January 2020) <https://g3ict.org/blogs/as-courts-go-digital-will-persons-with-disabilities-have-access-to-justice> (accessed 14 August 2020).

173 McKinsey and Company ‘Accessible design means better design’ <https://www.mckinsey.com/business-functions/mckinsey-design/how-we-help-clients/design-blog/accessible-design-means-better-design> (accessed 9 May 2022)

174 Inclusion Hub ‘Making your website more accessible for people with physical disabilities’ J Howard (8 September 2021) <https://www.inclusionhub.com/articles/making-website-accessible-physical-disabilities> (accessed 10 May 2022)

175 R Sanders ‘Digital inclusion, exclusion and participation’ 9 April 2020 ‘[\(https://www.iriss.org.uk/resources/esss-outlines/digital-inclusion-exclusion-and-participation#:~:text=Digital%20literacy%20must%20be%20looked,world%20\(ONS%2C%202019\)](https://www.iriss.org.uk/resources/esss-outlines/digital-inclusion-exclusion-and-participation#:~:text=Digital%20literacy%20must%20be%20looked,world%20(ONS%2C%202019)) (accessed 9 May 2022).

Training and empowerment must therefore be considered before embarking on this new process.

## 7 Conclusion

SDG 16 aims to promote just, peaceful and inclusive societies.<sup>176</sup> To do so, one of its objectives is to promote the rule of law and ensure everyone's the right to access justice. SDG 16 illustrates the vital role of the rule of law in attaining this objective.<sup>177</sup>

As a marginalised group, persons with disabilities are often left behind when accessing justice. This article has reviewed how digital courts, which have emerged from the COVID-19 pandemic, can potentially eliminate the many barriers faced by persons with disabilities as it pertains to access to justice.

Firstly, remote hearings can eliminate the physical barriers that may often prevent persons with disabilities from accessing law-enforcement agencies, buildings, and the judiciary. Secondly, online platforms, such as digital courts, can further be adapted to meet all the communication needs of persons with disabilities and, in the same vein, reinforce their right to access to information in alternative and accessible formats, including but not limited to, closed captions; subtitles plain language; content and videos in sign language; translation of judgments and other documents in easy-to-read formats or in large print. Thirdly, digital courts can make legal proceedings more effective for persons with disabilities by affording them an easy and accessible complaint mechanism through one simple click. They can also considerably reduce stress and fear, eliminating any attitudinal barriers that sadly prevail to this day. Finally, they can serve as an training platform, in line with article 13(2) CRPD.

Since digital courts also present an exclusionary risk insofar as persons with disabilities are concerned, they should be fully involved in the process. The costs implications and training thereof should also be closely monitored before embarking on such a process.

Ultimately, and if used correctly, digital courtrooms could potentially promote the right to access to justice for persons with disabilities and, by implication, the rule of law, in line with SDG 16. All the guidelines of the CRPD, especially those that relate to accessibility, equality, and non-discrimination, must prevail at all material times to ensure that the advantages outweigh the potential risks of exclusion.

176 Sustainable Development Goals 'Goal 16: Promote just, peaceful and inclusive societies' <https://www.un.org/sustainabledevelopment/peace-justice/> (accessed 14 August 2022).

177 Transforming our world: the 2030 Agenda for Sustainable Development (n 4) 25.

# WIN-WIN OR WIN LOSE? AN EXAMINATION OF CHINA'S SUPPLY OF MASS SURVEILLANCE TECHNOLOGIES IN EXCHANGE FOR AFRICAN'S FACIAL IDS

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## Abstract

*The use of Facial Recognition Technologies (FRT) has become increasingly prevalent. While these technologies have been applauded for their many benefits, their use have been criticised for problems relating to accuracy. More particularly, FRT technologies have demonstrated low accuracy when identifying people of colour. This has led to the call for diversification of data, which has been intensified by major corporations and nations competing to lead in Artificial Intelligence development (the AI race). In an attempt to diversify its data sets, China, as a significant player in the AI race, has entered into an agreement with Zimbabwe. The agreement is meant to benefit both parties mutually as a 'win-win' agreement, which entails the collection of African facial IDs in exchange for high-end mass surveillance technologies. This article questions whether this agreement can genuinely be a win-win. To demonstrate this, the article will discuss and analyse China's viewpoint on this 'win-win' in light of the AI race and take a closer look at how this agreement places China one step ahead of others in the race to lead facial recognition technologies. As such, the article examines that which is hidden in China's win-win perspective by delving deeper into the biometric data and the underlying principles of its Regulation to determine whether the collection of Facial IDs is in line with these principles. Finally, I attempt to redefine the meaning of what is truly a 'win-win' in this context.*

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# 1 Introduction

Facial recognition technology (FRT) has quickly entered the public domain. With various advantages over previous biometric surveillance techniques, such as the ability to survey at a distance, FRT has entered the worldwide market as the purported be-all and end-all of twenty-first-century surveillance technology.<sup>1</sup> Its success has been fuelled by advances in machine learning, dramatic declines in hardware and processing prices, and an ever-increasing desire for surveillance and security in both the public and private sectors. Facial recognition is unquestionably the most commonly used artificial intelligence ('AI') technology in China, used in a wide range of sectors for several purposes, ranging from identification to boosting efficiency.<sup>2</sup> Recognising the efficiency gains that facial recognition may generate in the public and private sectors, the Chinese government has prioritised the study, development, implementation, and commercialisation of this technology.<sup>3</sup> As a result, facial recognition affects practically every area of a person's life in China – for example, facial recognition was widely employed in suppressing the COVID-19 outbreak by validating identity without person-to-person interaction.<sup>4</sup>

China is presently the world's second-biggest economy,<sup>5</sup> with forecasts to overtake the United States as the world's largest economy by 2030. China unveiled its 'One Road and Belt Initiative' (BRI) in 2013, consisting of a land and a sea route connecting China to the rest of the world.<sup>6</sup> This project has piqued the interest of many experts, who regard it as a new geopolitical strategy for China to expand not just its economic cooperation but also its influence

1 S Curtis 'Inflection points: Facial recognition technology in the United States and China' (2020) 1 *The Asia Society Northern California Team* at 1.

2 L Dudley 'China's ubiquitous facial recognition tech sparks privacy backlash' *The Diplomat* 7 March 2020 <https://thediplomat.com/2020/03/chinas-ubiquitous-facial-recognition-tech-sparks-privacy-backlash/#:~:text=One%20of%20the%20most%20public, facial%20recognition%20scan%20for%20admission> (accessed 27 March 2020). According to World Economic Forum 'A framework for responsible limits on facial recognition use case: Flow management' 2020 at 4, facial recognition is a biometric software application 'capable of uniquely identifying or verifying a person by comparing and analysing patterns based on the person's facial contours.'

3 Y Luo & R Guo 'Facial recognition in China: Current status, comparative approach and the road ahead' (2021) 25(2) *University of Pennsylvania Journal of Law and Social Change* at 155.

4 Luo & Guo (n 3) 155.

5 J Woetzel et al 'China and the world: Inside the dynamics of a changing relationship' 2019 at 1.

6 Ž Koboević et al 'The maritime silk road and China's belt and road initiative' (2018) 65(2) *Naše More* at 113-114.

throughout the world.<sup>7</sup> China's BRI is majorly motivated by the concept of 'win-win,' which is based on traditional Chinese cultural ideals of 'peace and collaboration' and adheres to the concepts of peaceful coexistence and mutual gain.<sup>8</sup> It's also strongly tied to and promotes the notion of peaceful development, with cooperation and mutual gain as the foundations of win-win solutions.<sup>9</sup>

As China gains power in global markets as a significant contributor to the FRT industry, there are rising concerns about the extensive use of this technology.<sup>10</sup> According to numerous media reports, FRT, as employed in the commercial sector, is prone to problems such as a lack of transparency and cybersecurity risks such as data leaking.<sup>11</sup> Concerns have also been raised from a legislative perspective; a report from a multi-agency task force recently published an article exposing significant privacy vulnerabilities identified in a review of mobile applications that use face recognition in China. Forcing users to disclose facial information, a lack of clear guidelines for information collection, and the difficulty for data subjects to withdraw consent to the collection and use of facial information have all been noted as issues.<sup>12</sup> Civil-society advocates have questioned the fundamental reasons advanced by the companies and governments that develop and promote these technologies, noting the actual harms caused by their use. Increasingly, research shows that these systems perform poorly when employed in real-world contexts, even when the system fulfils the industry's restricted assessment standards that are used to back up promises of accuracy. Even systems with great accuracy rates have unevenly spread errors. They perform worse in certain categories, with exceptionally high failure rates for Black women, gender minorities, young and old individuals, disabled people, and manual labourers. This is mainly because the data sets used to train these kinds of technology are mostly Caucasians.<sup>13</sup> Research has shown that FRTs trained in China

7 Associated Press 'Belt and road's real aims? Expanding China's global influence and military presence, US study says' *South China Morning Post* 18 April 2018 <https://www.scmp.com/news/china/diplomacy-defence/article/2142266/belt-and-roads-aim-promote-chinese-interests-and> (accessed 29 March 2022).

8 C Xulong 'Win-win cooperation: Formation, development and characteristics' China Institute of International Studies 17 November 2017 [https://www.ciis.org.cn/english/ESEARCHPROJECTS/Articles/202007/t20200715\\_3604.html](https://www.ciis.org.cn/english/ESEARCHPROJECTS/Articles/202007/t20200715_3604.html) (accessed 29 March 2022).

9 As above.

10 Luo & Guo (n 3) 155; China Youth Daily, 'Jingti! Ren Lian Shibie Biehou de "Mangqu" ((警惕!人脸识别背后的"盲区")) (Alert! The "Blind Spot" of Facial Recognition)' *China Youth Daily* 7 January 2020 [http://www.xinhuanet.com/2020-01/07/c\\_1125428533.htm](http://www.xinhuanet.com/2020-01/07/c_1125428533.htm) and <https://perma.cc/T63F-BEQA> (accessed 29 March 2022).

11 Luo & Guo (n 3) 162.

12 As above.

13 A Donkor 'The race to build facial recognition tech for Africa is being led by this award-winning engineer' *Quartz Africa* 17 September 2020 <https://qz.com/africa/1905079/facial-recognition-tech-in-africa-boosted-by-ghana-ai-startup/> (accessed 25 July 2021).



have more accurately identified Asian faces than those developed in the West.<sup>14</sup> This is attributed to the fact that the data sets – in this case, photos of Asian faces – have been available to China, which was subsequently used to train its FRT AI.<sup>15</sup> This means that for China to improve the accuracy of their FRT AI's in recognising people of colour, they need to diversify the data sets that they use to train them.

In 2018, CloudWalk, a Chinese start-up through BRI, signed a strategic partnership deal with the Zimbabwean government. China has described this agreement as a win-win as both parties will benefit mutually. The agreement is that Cloudwalk will give high-end mass surveillance technologies in exchange for the Facial IDs<sup>16</sup> of Zimbabweans, which will be crucial in training these technologies' algorithms to further improve their accuracy. Even though this arrangement has raised concerns in the media for being a form of digital colonialism and risking the privacy rights of Zimbabweans, there has yet to be any academic analysis.

This article will examine whether the collection of facial IDs of Africans in exchange for high-end mass surveillance technologies can genuinely be considered a 'win-win'. To demonstrate this, the second part of the article will discuss and analyse China's viewpoint on this 'win-win'. In this part, the AI race, which is crucial in this context, is explained to demonstrate how major corporations and states are in a race to lead AI developments, and closer attention is given to how this agreement places China one step ahead of others in the race to lead facial recognition technologies. The third part looks at the other side of the coin, which is what China's win-win viewpoint leaves out. Here, the article delves deeper into the biometric data and the underlying principles of its Regulation. The facial IDs of Africans are the commodity of exchange in this agreement, which means that to ensure that it is a gain for Africans (Zimbabweans), it is then crucial to determine whether principles of biometric data regulation, especially with regards to consent, have been observed. This research looks at Zimbabwe as a case study. The fourth section looks at the way forward by redefining what a genuine win-win is, and the final part concludes the article.

14 R Noorden 'The ethical questions that haunt facial recognition research' *Nature* 18 November 2020 <https://www.nature.com/articles/d41586-020-03187-3> (accessed 1 August 2021).

15 As above.

16 Face ID or Facial Recognition is a type of biometric authentication that identifies users based on the structure, contours, and heat patterns present in their faces.

## 2 China's View of Win-Win

### 2.1 The AI Race

Sundar Pichai, CEO of Google,<sup>17</sup> believes that Artificial Intelligence (AI) is 'arguably the most important thing humanity has ever worked on that is deeper than electricity or fire'. In recent years, there has been a surge of interest in AI, and as a result, it has become more integrated into business and daily life processes, and AI-powered tasks are transforming enterprises, markets, and industries. Regarding AI's ability to impact the economy and society, experts and observers equate this trend to a new industrial revolution. AI has the potential to change not simply how we think about productivity or our relationship with the environment, but also aspects of national power. Artificial intelligence is projected to be one of the most disruptive emerging technologies.<sup>18</sup> Just as previous industrial revolutions boosted the power and influence of governments that exploited technology more broadly, AI has the same potential to change the game on a global scale.

Global leadership in several areas of fundamental and applied artificial intelligence research has emerged as a strategic aim for both major corporations and nation-states.<sup>19</sup> As for significant corporations, the past few years have seen increased competition between industry research groups for talented researchers and start-ups.<sup>20</sup> Different states have also established their own AI strategic aims.

China, for example, announced its 'Next Generation AI Development Plan' in 2017 to become a world leader in the field by 'expanding on China's first-mover advantage in AI development'.<sup>21</sup>

17 C Parker 'Artificial intelligence could be our saviour, according to the CEO of Google' World Economic Forum 24 January 2018 <https://www.weforum.org/agenda/2018/01/google-ceo-ai-will-be-bigger-than-electricity-or-fire> (accessed 26 March 2022).

18 AJW Gevel & C Noussair 'The nexus between artificial intelligence and economics' (2013) *Springer Heidelberg* at 39.

19 S Cave & S ÓhÉigeartaigh 'An AI race for strategic advantage: Rhetoric and risks' 2018 at 1.

20 KA Stiftung, 'Comparison of national strategies to promote artificial intelligence: Part 1' 2019 at 14-15 & 21.

21 G Webster et al 'Full translation: China's 'New Generation Artificial Intelligence Development Plan' (2017)' *New America* 1 August 2017 <https://www.newamerica.org/cybersecurity-initiative/digichina/blog/full-translation-chinas-new-generation-artificial-intelligence-development-plan-2017/> (accessed 27 March 2022).

The European AI plan, launched in 2018, outlines the EU's ambition to 'lead the way in creating and using AI for good and all'.<sup>22</sup> Furthermore, the American AI policy, announced in early 2019 via executive order, wants to accelerate the nation's leadership in AI.<sup>23</sup> This terminology can also be seen in the AI strategies of other countries, such as Canada and Japan.<sup>24</sup> Africa is no exception, as the African Commission's Resolution 473 recognises the need to create conditions for harnessing the benefits of AI.<sup>25</sup> To summarise, while each strategy emphasises its specific assets, all countries want to be first, and claim to be first, in at least one component of the race.

Winning the 'race to AI' appears to be motivated not just by the need to secure a competitive position on the global market, but also as an almost existential imperative, whereby – in addition to the conventional concerns about national security<sup>26</sup> – economic security is invoked. Indeed, not only do the tremendous gains that potentially result from the deployment of AI<sup>27</sup> appear to bolster the race

- 22 European Commission 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions: Artificial Intelligence for Europe' 2018 at 2.
- 23 The US national AI strategy is found in Vought R 'Guidance for regulation of artificial intelligence applications (draft memorandum)' US White House 2019 at 2 <https://www.whitehouse.gov/wp-content/uploads/2020/01/Draft-OMB-Memo-on-Regulation-of-AI-1-7-19.pdf> (accessed 28 March 2022).
- 24 See for example the focus on 'leadership' in Canada's AI strategy in CIFAR 'Pan-Canadian AI strategy' 2022 <https://cifar.ca/ai/> (accessed 30 March 2022) or in Japan's national strategy in Strategic Council for AI Technology 'Artificial Intelligence Technology Strategy: Report of Strategic Council for AI Technology' 2017 <https://www.nedo.go.jp/content/100865202.pdf> (accessed 30 March 2022).
- 25 African Commission on Human and Peoples' Rights '473 Resolution on the need to undertake a Study on human and peoples' rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa' ACHPR/Res. 473 (EXT.OS/ XXXI) 2021.
- 26 Notably, the 'race to AI' is often also raised in the context of a so-called 'arms race' to AI, the military sector being one of the application fields where AI is both booming and of strategic importance for countries. See in this regard, T Rabesandratana 'Europe moves to compete in global AI arms race' (2018) 360(6388) *Science* at 474; See also AA Hunter et al 'Artificial Intelligence and national security: The importance of the AI ecosystem' (2018) *Centre for Strategic and International Studies* at 3.
- 27 See for instance, PwC 'Sizing the price: What's the real value of AI for your business and how can you capitalise' 2017 at 8. 'See also' Deloitte 'Artificial Intelligence innovation report' 2018 at 2-8. J Bughin et al 'Notes from the AI frontier: Modeling the impact of AI on the world economy' McKinsey Global Institute 4 September 2018 at 1-2 <https://www.mckinsey.com/featured-insights/artificial-intelligence/notes-from-the-ai-frontier-modeling-the-impact-of-ai-on-the-world-economy> (accessed 31 March 2022).

rhetoric, but so does the high cost of non-adoption,<sup>28</sup> as no country wants to ‘miss the [AI] train’.<sup>29</sup>

## 2.2 One step ahead for China’s facial recognition technologies

The race to dominate AI technologies does not exclude surveillance. Facial recognition systems are a subfield of AI technology that can identify people from photos and videos by analysing their facial traits.<sup>30</sup> Deep learning, a type of AI that processes information by sending inputs through numerous stacked layers of simulated neurons, is now used to fuel facial recognition systems.<sup>31</sup> These neural networks are trained on thousands, if not millions, of datasets that the system is likely to meet, allowing the model to ‘learn’ how to accurately identify patterns in data.<sup>32</sup>

For years now, the use of FRTs have faced challenges with accuracy. An increasing body of research reveals disparities in error rates across demographic categories, with female, black, and 18-30-year-old individuals having the consistently lowest accuracy. An intersectional method was used to evaluate three gender classification algorithms, including those produced by IBM and Microsoft, in the seminal 2018 ‘Gender Shades’ research. Darker-skinned females, darker-skinned men, lighter-skinned females, and lighter-skinned males were divided into four groups. All three algorithms fared poorly on darker-skinned females, with error rates of up to 34% greater than on lighter-skinned males. The National Institute of Standards and Technology (NIST) validated these findings, discovering that facial recognition systems across 189 algorithms are the least accurate for women of colour. These intriguing findings elicited quick replies, starting an ongoing debate over equity in face recognition. IBM and Microsoft announced plans to reduce bias in

28 In High-Level Expert Group on AI ‘Policy and Investment Recommendations on AI’ 26 June 2019 at 43 [https://www.europarl.europa.eu/italy/resource/static/files/import/intelligenza\\_artificiale\\_30\\_aprile/ai-hleg\\_policy-and-investment-recommendations.pdf](https://www.europarl.europa.eu/italy/resource/static/files/import/intelligenza_artificiale_30_aprile/ai-hleg_policy-and-investment-recommendations.pdf) (accessed 27 March 2022) the European Commission’s High-Level Expert Group on AI noted: ‘If no action is taken the EU28 will suffer a deterioration of its innovation capital, which would result in a loss of €400 billion in cumulative added value to GDP by 2030’. See also Bughin ‘Notes from the AI frontier: Tackling Europe’s gap in digital and AI’ 2019 at 6-1; L Probst ‘Harnessing the economic benefits of artificial intelligence’ 2017 at 6-7; V Mahidhar & T Davenport ‘Why companies that wait to adopt AI may never catch up’ *Business Review* 6 December 2018 <https://hbr.org/2018/12/why-companies-that-wait-to-adopt-ai-may-never-catch-up> (accessed 1 April 2022).

29 European Commission (n 22) 4.

30 W Crumpler ‘How accurate are facial recognition systems – and why it does it matter?’ *Center for Strategic & International Studies* 14 April 2020 <https://www.csis.org/blogs/technology-policy-blog/how-accurate-are-facial-recognition-systems-%E2%80%93-and-why-does-it-matter> (accessed 31 March 2022).

31 As above.

32 As above.

testing by changing testing groups and improving data gathering on key demographics.

In light of the AI race, when it comes to FRTs, especially those that use facial recognition, the superior technologies are those that can identify people with accuracy, or accurately verify identities regardless of race. There have been attempts to diversify the datasets used to train facial recognition algorithms to improve the accuracy of these technologies. As a result, superior facial recognition technologies will be the most accurate and have the slightest margin for error, and states are competing to achieve this goal.

To diversify data sets, major corporations and nations have been accused of illegal collection of biometric data, especially that of people of colour. A case in point is that Google offered US\$5 gift cards to its contractors in exchange for completing a demographic survey and consenting to play 'a selfie game'.<sup>33</sup> The contractors failed to mention that while individuals were playing, the phone was recording photographs of them, which would eventually be used to train a facial recognition algorithm. In California, four *Black Lives Matters* activists sued Clearview AI Company, which had illegally collected and stockpiled the facial IDs of 3 billion people, mostly Black people.<sup>34</sup>

China is keen to build the world's best AI, and Chinese corporations are looking to Africa to speed up the diversity training of their algorithms. By implementing the technique in a mainly African population, we will be able to more accurately detect other ethnicities, potentially putting the Chinese company ahead of US and European developers. For example, CloudWalk employs 3D light facial processing, which reads dark-skinned faces better than other facial recognition technologies. CloudWalk will be able to train its algorithms on data collected from Zimbabweans based on this agreement. The gathered data is intended to assist China in developing one of the world's most inclusive and racially diverse facial recognition databases.

### 2.3 The 'win-win' notion

China's view that exchanging facial IDs for high-end mass surveillance technologies is a win-win situation originates from the concept of 'win-win' cooperation. It is based on traditional Chinese cultural ideals of 'peace and collaboration' and adheres to the concepts of

33 K Jeremy 'Why did Google Pay black people \$5 to harvest their faces?: Eye on A.I' *Fortune* 8 October 2019 <https://fortune.com/2019/10/08/why-did-google-offer-black-people-5-to-harvest-their-faces-eye-on-a-i/> (accessed 1 April 2022).

34 'Facial recognition company sued by California activist' *AP News* 10 March 2021 <https://apnews.com/article/san-francisco-law-enforcement-agencies-lawsuits-california-biometrics-0f7642d1f9222d8a3047f7062c91c0e7> (accessed by 1 April 2022).

peaceful coexistence and mutual gain.<sup>35</sup> It is also strongly tied to and promotes the notion of peaceful development with cooperation and mutual gain as the foundations of win-win solutions.<sup>36</sup>

China's 'win' is having access to a large pool of diverse data sets to train their algorithms, which will enable them to produce accurate facial recognition technologies, potentially putting the Chinese companies ahead of US and European developers. This is a tremendous economic benefit as these technologies are becoming employed in public safety applications such as surveillance systems, tracking offenders, and identifying fugitives.<sup>37</sup> It has also been used to combat human trafficking, track down kidnappers, and reuniting families with long-lost children.<sup>38</sup> Facial recognition is becoming a more common choice in payment and courier services in business and finance, as it maximises security and reduces fraud.<sup>39</sup> In the transportation industry, facial recognition has been used in airports and train stations to save passengers time at check-in, assist passengers in paying their fares, and identify unlicensed drivers and jaywalkers.<sup>40</sup>

Africa's gain is having access to high-end mass surveillance technologies. Carnegie's 2019 report on *The Global Expansion of AI Surveillance* deduced that Africa is lagging in expanding AI

35 Xulong 'Win-win cooperation: Formation, development and characteristics', China Institute of International Studies 17 November 2017 [https://www.ciis.org.cn/english/ESEARCHPROJECTS/Articles/202007/t20200715\\_3604.html](https://www.ciis.org.cn/english/ESEARCHPROJECTS/Articles/202007/t20200715_3604.html) (accessed 29 March 2022).

36 As above.

37 Y Zeng et al 'Responsible facial recognition and beyond' Chinese Academy of Sciences, 2019 at 2; L Moon 'China's facial recognition cameras apprehend third fugitive Jacky Cheung concertgoer in two months' *South China Morning Post* 22 May 2018 <https://www.scmp.com/news/china/society/article/2147245/chinas-facial-recognition-cameras-apprehend-third-fugitive-jacky> (accessed 30 March 2022); K Lo 'In China, these facial-recognition glasses are helping police to catch criminals' *South China Morning Post* 7 February 2018 <https://www.scmp.com/news/china/society/article/2132395/chinese-police-scan-suspects-using-facial-recognition-glasses> (accessed 30 March 2022).

38 F Jenner 'Face search is the new facial recognition tool used to fight human trafficking' *Tecli* 10 July 2018 <https://tecli.com/face-search-is-the-new-facial-recognition-tool-used-to-fight-human-trafficking/54617/> (accessed 30 March 2022); Z Yan 'Police using AI to trace long-missing children' *China Daily* 4 June 2019 <http://www.chinadaily.com.cn/9000/a/201906/04/WS5cf5c8a8a31051914270/index.html> (accessed 30 March 2022); A Cuthbertson 'Indian police trace 3,000 missing children in just four days using facial recognition technology' *Independent* 24 April 2018 <https://www.independent.co.uk/tech/india-police-missing-children-facial-recognition-tech-trace-find-reunite-a8320406.html> (accessed 30 March 2022).

39 A Lee 'Alipay rolls out world's first 'Smile to Pay' facial recognition system at KFC outlet in Hangzhou' *South China Morning Post* 1 September 2017 <https://www.scmp.com/tech/start-ups/article/2109321/alipay-rolls-out-worlds-first-smile-pay-facial-recognition-system-kfc> (accessed 30 March 2022); Xinhua 'Facial recognition comes to express delivery in Chinese cities' *ChinaDaily* 12 April 2019 <http://www.chinadaily.com.cn/a/201904/12/WS5cb07c72a3104842260b5f0a.html> (accessed 30 March 2022); M Roux 'Why facial recognition is important for banking services' *SightCorp* 19 March 2019 <https://sightcorp.com/blog/why-facial-recognition-is-important-for-banking-services/> (accessed 30 March 2022).

surveillance technologies, with less than one-quarter of its countries investing in AI monitoring. This is mainly attributed to technological underdevelopment.<sup>41</sup> Moreover, the report also acknowledges that these figures are sure to climb in the coming years as there is an increase in Chinese enterprises entering the African Market to supply these technologies. This can be seen as mutually advantageous for African countries as they reap the benefits of high-end technologies.

### 3 What China's viewpoint leaves out

#### 3.1 The regulation of biometric data as a yardstick

To truly understand whether this kind of agreement mutually benefits both parties, this part of the article discusses the value of biometric data. Depending on the situation, the definition of biometric data may differ.<sup>42</sup> However, in a broader sense, biometrics refers to 'unique and measurable human biological and behavioural features that can be utilised for identification, or automated techniques of recognising an individual based on those qualities'.<sup>43</sup> While regulatory definitions vary, popular 'biometric identifiers' include retina or iris scans, fingerprints, voice prints, and scans of hand or face IDs, which is the focus of this article.<sup>44</sup> The inherent characteristics of biometric data necessitate protection and Regulation of this type of data since the features that uniquely identify a person are part of a person's body, and their collection and use interfere with a human's autonomy and dignity.<sup>45</sup>

- 40 S Liao 'Facial recognition scans are expanding to Delta flights in Atlanta International Airport' *The Verge* 20 September 2018 <https://www.theverge.com/2018/9/20/17884476/facial-recognition-scan-delta-flight-atlanta-international-airport> (accessed 27 March 2022); S Liao 'A Chinese subway is experimenting with facial recognition to pay for fares' *The Verge* 13 March 2019 <https://www.theverge.com/2019/3/13/18263923/chinese-subway-facial-recognition-fares-pay-ai> (accessed 31 March 2022); Xinhua 'Facial recognition identifies unlicensed drivers in Shanghai' *ChinaDaily* 6 December 2017 <http://global.chinadaily.com.cn/a/201712/06/WS5a279db4a3107865316d4d6c.html> (accessed 31 March 2022); L Tao 'Jaywalkers under surveillance in Shenzhen soon to be punished via text messages' *South China Morning Post* 27 March 2018 <https://www.scmp.com/tech/china-tech/article/2138960/jaywalkers-under-surveillance-shenzhen-soon-be-punished-text> (accessed 31 March 2022).
- 41 S Kemp 'Digital 2019: Internet trends in Q3 2019' *Datareportal* 19 July 2019 <https://datareportal.com/reports/digital-2019-internet-trends-in-q3> (accessed 28 March 2022).
- 42 F Nguyen 'The standard for biometric data protection' (2018) 7(1) *Journal of Law & Cyber Warfare* at 63.
- 43 Nguyen (n 42) 63.
- 44 As above.
- 45 C Wendehorst & Y Duller 'Biometric recognition and behavioural detection: Assessing the ethical aspects of biometric recognition and behavioural detection techniques with a focus on their current and future use in public spaces' (2021) *European Parliament* at 9.

Biometric systems have primarily been governed by data-protection legislation. Biometric data is often recognised as a susceptible category of personal data and is governed by regulations on its collection, keeping, and dissemination.<sup>46</sup> There are underlying principles that are present in most data protection and privacy. These principles include purpose limitation, proportionality and minimisation, fairness and transparency, accountability, and consent.<sup>47</sup>

The most relevant principle concerning the collection of biometric data is that an individual's data should only be gathered and used with their consent. When consent is used as the basis for the collection, open disclosure to the individual of the nature of their data gathered and the intended uses of such data is required for consent to be meaningful. For example, the EU's Article 19 of the GDPR provides that when processing unique category data like biometric data, an individual's 'explicit' consent is acquired.<sup>48</sup> In Australia, one of the 'Privacy Principles' of the federal Privacy Act 1988 (as modified) is that personal information about an individual gathered for one reason may not be used or disclosed to another without the individual's consent.<sup>49</sup> Where no consent is necessary nor obtained, transparency can, at the very least, provide clear and understandable answers to ensure public trust and avoid misunderstandings. Individuals can be advised about which information is public and which is kept private. For instance, unlike the GDPR, the California Consumer Privacy Act of 2018 does not need consent prior to gathering personal information in most situations. Consumers must, however, be informed 'as to the categories of personal information to be collected and the objectives for which the categories of personal information shall be used' at the time of information collection.<sup>50</sup>

One of the driving forces behind worldwide agreement on the core principles of data protection has been the security of personal data transported across national borders. For example, one of the principles established in the OECD Privacy Framework governing transborder flows of personal data is that a data controller 'remains accountable for personal data under its control regardless of where the data is located'.<sup>51</sup> Many governments, however, ban the

46 A Kak 'The state of play and open questions for the future' in A Kak (ed) *Regulating biometrics: Global approaches and urgent questions* (2020) at 16-17.

47 World Bank Group 'Data protection and privacy laws' The World Bank 15 July 2018 <https://id4d.worldbank.org/guide/data-protection-and-privacy-laws> (accessed 29 March 2022).

48 General Data Protection Regulation (EU) 2016/679, hereafter 'the GDPR'.

49 See The Privacy Act 119 of 1988 Schedule 1.

50 California Consumer Privacy Act Senate Bill 1121 of 2018 sec 1798.100(b).

51 Organization for Economic Cooperation and Development: OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980 art 17.



extraterritorial transfer of personal data due to uncertainties about data protection laws in foreign countries. Such transfers may be approved in specific circumstances or when a third country's data protection regulations are appropriate. For example, in some cases, the EU's GDPR restricts transfers of personal data outside the European Economic Area.<sup>52</sup> In accordance with article 45, such transfers are permitted if the European Commission rules that the receiving country 'provides an acceptable degree of protection'. Such a move necessitates a thorough examination of the country's data protection structure, including personal data protections and oversight and recourse mechanisms.

### 3.2 The Zimbabwean case: win-lose

This section will illustrate that the agreement to collect the facial IDs of Zimbabweans to be used to train facial recognition algorithms in China in exchange for high-end mass surveillance technologies is a loss for Zimbabwe. Following the discussion on the underlying principles that govern biometric data, this collection violates both the principle of consent and that of cross-border data transfer.

On 3 December 2021, Zimbabwe gazetted the much-anticipated Data Protection Act, which attempts to regulate a technology-driven business environment and to protect data subjects in cyberspace by assuring the authorised use of technology.<sup>53</sup> Regarding consent when collecting biometric data, section 12(1) of Zimbabwe's Data Protection Act prohibits the processing of biometric data unless the data subject has granted a written agreement to the processing.<sup>54</sup> The requirement of consent is further elaborated in section 5.1 of the same Act as any specific, unequivocal, freely given, informed expression of will by which the data subject or their legal representative, judicial or legally appointed representative authorises the processing of their data.<sup>55</sup> Additionally, where the processed information is sensitive or involves genetic, biometric, or health data, section 11 of the Act states that the data subject must be informed of their right to withdraw consent at any time, without reason, and without cost.<sup>56</sup> Most people in Zimbabwe are not fully aware that their facial IDs are being collected, meaning, their consent was not sought.<sup>57</sup>

52 The GDPR (n 48), art 45.

53 See Data Protection Act 5 of 2021 ('the Act').

54 The Act (n 53), sec 12.

55 The Act (n 53), sec 5.1.

56 The Act (n 53), sec 11.

57 WH Gravett 'Digital colonisers: China and artificial intelligence in Africa' (2020) 62(2) *Global Politics and Strategy* at 164.

While the potential argument that the government of Zimbabwe can give consent on behalf of its citizens could arise, this still does not meet the threshold since the Zimbabwean Parliament has to approve international agreements entered into by the Zimbabwean President or with his authority.<sup>58</sup> As a result, there appears to be no intra- and inter-governmental checks and balances to establish or regulate any relevant rights Zimbabweans may have to such data and who is accountable for securing it.<sup>59</sup> Such an act can be exploitative and tokenising of the humans contributing to the improvement of the system for which their data is used if it is not done with the active consent of those affected and in the spirit of mutual benefit. When asked how she felt about the agreement, Natasha Msonza, the co-founder of the Digital Society of Zimbabwe, said ‘it feels like CloudWalk is looking for guinea pigs,’ adding that she does not ‘believe that the Zimbabwe government gave this proposition much thought before volunteering its citizens to be subjected to racial facial recognition experiments’.<sup>60</sup>

Regarding cross-border transfer, Part VII of the Act provides that transferring personal information to a third party in a foreign country by a data controller is prohibited unless an adequate level of protection is ensured in the country of the recipient and the data is transferred solely to allow tasks covered by the data controller’s competence to be carried out.<sup>61</sup> What constitutes an adequate level of protection per section 28(2) is determined by the circumstances of a data transfer operation or set of operations, including the nature of the data and the purpose and duration of the proposed processing operation, among other factors.<sup>62</sup> The recipient country, in this case, is China, where Cloudwalk is situated and has a record of disregarding data protection and privacy principles. In China, cases keep rising regarding the challenges of using FRTs in the commercial sector with major risks being transparency and cybersecurity.<sup>63</sup> Legal concerns arising from these technologies are no exception as a task force comprised of multiple agencies recently published an article highlighting significant privacy flaws discovered in a review of FRT-enabled mobile apps in China. These include the requirement for users to provide facial information, the lack of clear rules for information gathering, and the difficulty in withdrawing consent for the collection and use of facial information.<sup>64</sup>

58 ‘Constitution of the Republic of Zimbabwe, 2013’ (as set out in sec 1 of the Constitution of Zimbabwe Amendment Act 20 of 2013) sec 327(3).

59 Gravett (n 57) 164.

60 A Hawkins ‘Beijing’s big brother tech needs african faces’ *Foreign Policy* 24 July 2018 <https://foreignpolicy.com/2018/07/24/beijings-big-brother-tech-needs-african-faces/> (accessed 30 July 2021).

61 n 53, Part VII.

62 n 53, sec 28(2).

63 Luo & Guo (n 3) 162.

64 As above.

## 4 Redefining a win-win situation

This section explores ways in which this type of agreement can be mutual – a win-win situation. The first option explored is the ‘ban option’ and the second is the data protection route.

As it concerns the ban option, this involves countries that have opted to ban the use of facial recognition technologies until there is adequate protection of biometric data. Wojciech Wiewiorowski, the European Data Protection Supervisor, remarked at the Biometrics Institute’s 2020 Congress that he supports the idea of a moratorium on the deployment of biometrics in public areas in the EU to allow for an informed and democratic debate.<sup>65</sup> Other countries are pressing for a moratorium or even outright bans. For example, the Australian Human Rights Commissioner has advocated for a moratorium until adequate legislation is enacted.<sup>66</sup> Similarly, in 2019, California became the first state in the United States to prohibit the use of FRT by law enforcement organisations.<sup>67</sup> In 2020, the city of Portland banned FRT not only for all governmental departments, including local police, but also for private businesses, such as hotels and restaurants.<sup>68</sup> Even in China, there has been some backlash towards the use of facial recognition, especially concerning who has access to this data. Most individuals feel like they are constantly being watched.<sup>69</sup> In the 2019 case of Guo Bing, a professor at Hangzhou’s Zhejiang University filed a lawsuit against a nearby wildlife park when it tried to subject him to additional, required facial scans months after he purchased a yearlong permit. This was the first case of its kind and indicated the discomfort many citizens feel with the mass surveillance they have been subjected to.<sup>70</sup> Following this case, Hangzhou, the eastern Chinese city, home to the Chinese tech giant Alibaba, has issued a draft rule prohibiting property managers from

65 W Wiewiórowski ‘The state of biometrics: Update from the European data protection supervisor’ Centre for Strategic & International Studies, 2020 at 4.

66 J Bajkowski ‘Human Rights Commission wants moratorium on expanding facial recognition’ *IT News* 17 December 2019 <https://www.itnews.com.au/news/human-rights-commission-wants-moratorium-on-expanding-facial-recognition-535684> (accessed 2 April 2022).

67 G Kostka et al ‘Between security and convenience: Facial recognition technology in the eyes of citizens in China, Germany, the United Kingdom and the United States’ (2021) 30(6) *Public Understanding of Science* at 672; T Greene ‘California bans law enforcement from using facial recognition software for the next 3 years’ *TNW* 10 October 2019 <https://thenextweb.com/news/california-bans-law-enforcement-from-using-facial-recognition-software-for-the-next-3-years> (accessed 2 April 2022).

68 Kostka et al (n 67) 672.

69 Human Rights Watch, ‘China’s global threat to human rights’ 25 March 2014 <https://www.hrw.org/world-report/2020/country-chapters/global> (accessed 1 September 2021).

70 A Kerry, ‘China facial recognition: Law professor sues wildlife park,’ *BBC News* 8 November 2019, <https://www.bbc.com/news/world-asia-china-50324342> (accessed 8 November 2015).

installing facial recognition cameras in residential compounds without first obtaining consent from local inhabitants.<sup>71</sup> The proposed legislation follows a first-of-its-kind lawsuit over facial recognition technology in Hangzhou. At a national level, African countries can opt to ban the adoption of mass surveillance technologies from China until there are policies protecting their citizens' data. This may be considered an extreme option as such a decision will disregard some of the benefits of surveillance in developing countries, such as security and border control.

The second option is the data protection Route. This option entails states providing data protection laws that regulate biometric data. According to David Kaye, UN Special Rapporteur on the Promotion and Protection of the Right to Free Expression, these technologies operate in a 'free for all' environment, spreading 'technology that is causing immediate and regular harm to individuals and organisations that are essential to democratic life'.<sup>72</sup> He advocates for creating worldwide norms and publicly owned procedures to regulate domestic and foreign usage of private monitoring technology.<sup>73</sup> When it comes to facial recognition technologies, one of the most significant concerns is the protection of an individual's privacy and, more precisely, people's consent when it comes to collecting and using their facial IDs. When it comes to issues arising from the use of facial IDs, the GDPR has already provided the EU with tight regulations for the protection of personal data.

The European Commission also intends to establish severe limitations on facial recognition technology to provide EU residents specific control over how their data is used. For Africa, at a continental level, the AU's Convention on Cyber Security and Personal Data Protection seeks to tighten existing information and communication technology legislation in its member countries.<sup>74</sup> Personal data processing is only considered valid under the convention if the subject has given his or her consent.<sup>75</sup> States are required to prevent data collection and processing of racial, ethnic, or geographical origin.<sup>76</sup> Notably, an AU member state cannot transfer personal data to a non-member state unless the latter state

71 CGTN 'Facial recognition in the spotlight: Hangzhou targets' 2 November 2020 <https://news.cgtn.com/news/2020-11-02/Hangzhou-targets-partial-ban-of-facial-recognition-technology-V5vZD8UaGc/index.html>.

72 United Nations 'Moratorium call on surveillance technology to end 'free-for-all' abuses: UN Expert' United Nations News 25 June 2019 <https://news.un.org/en/story/2019/06/1041231> (accessed 31 August 2021).

73 As above.

74 See African Union Convention on cyber security and personal data protection 2014, hereafter 'AU Convention' Preamble.

75 AU Convention (n 74) chap II sec 3 art 13(1).

76 AU Convention (n 74) chap II sec 3 art 14(1).

guarantees the privacy, freedoms, and fundamental rights of the individual or persons whose data is transferred.<sup>77</sup> Individuals also have the right to be notified before their data is shared with third parties for the first time and to object to such disclosure expressly.<sup>78</sup> The convention has fourteen signatories and has only been ratified by eight countries.<sup>79</sup> The ratification of this convention by more African countries can strengthen the Act to promote more nuanced data protection.

Concerning national regulations of biometric data, as of 2022, 33 out of the 54 African countries have passed specific rules and regulations to protect personal data, and this number is steadily increasing. Many of these countries' laws have been motivated by the EU GDPR, which has set an example for many.<sup>80</sup> Current trends show that many African countries have passed comprehensive data privacy legislation and established fully functional data protection authorities. This is in reaction to the growing need for states to protect people's data by giving individuals data rights, implementing rules on how businesses and governments use data, and establishing authorities to enforce these laws. Some of these emerging tendencies are discussed below.<sup>81</sup> This is a positive trajectory with prospects of strengthening data protection laws, especially concerning biometric data.

## 5 Conclusion

The article examined whether China's view that exchanging African Facial IDs for high-end mass surveillance technology is a win-win situation. At the surface level, the notion that this agreement is mutually beneficial to both China and Africa has not only been perpetuated by China, but Africa has also bought into this idea. However, a closer examination of what the agreement means for each party reveals that it is, in fact, a 'win-lose' agreement. To demonstrate this, the article had three objectives. The first objective was to discuss China's view of 'win-win', and the findings are that this agreement is a win for China as access to African Facial IDs will contribute to diversifying their data sets. As a result, this will lead to

77 AU Convention (n 74) chapter II sec 3 art 14(6)(a) & 14(6)(b).

78 AU Convention (n 74) chapter II sec 3 art 18.

79 African Union 'List of countries which have signed, ratified/acceded to the African Union Convention on Cyber Security and Personal Data Protection' 2020.

80 Privacy International Organisation '2020 is a crucial year to fight for data protection in Africa' 3 March 2020 <https://privacyinternational.org/long-read/3390/2020-crucial-year-fight-data-protection-africa> (accessed 1 August 2021).

81 B Daigle 'Data protection laws in Africa: A pan-African survey and noted trends' *Journal of International Commerce and Economics* 2021 at 2-3 <https://www.usitc.gov/journals> (accessed 3 April 2022); T Hadebe 'Trends' *Data Protection Africa* 31 March 2020 <https://dataprotection.africa/trends/> (accessed 3 April 2022).

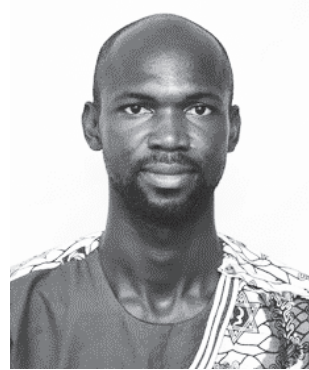
the production of FRTs that are more accurate and inclusive, which puts China one step ahead in the AI race.

As for the second objective, the article analysed what is obscured by China's viewpoint. Facial IDs, which qualifies as biometric data, are sensitive data regulated by biometric data principles. The findings in this section show that the collection of facial IDs goes against the principles of biometric data, such as consent, and this makes Africans (in this case, Zimbabweans) vulnerable to data violation practices. The third objective was to redefine a genuine 'win-win' for both China and Zimbabwe, and the article recommends two paths. The first is a ban option of FRT until there are laws to protect biometric data, and the second option looks to the data protection route. Since the global rise and adoption of data protection laws, African countries have also welcomed the incorporation of these laws. Data protection laws seem to be the most promising solution to levelling the playing field and ensure a *truly* win-win situation.

# REALISING THE RIGHT TO DEVELOPMENT IN GHANA THROUGH ITS PARLIAMENT

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## Abstract

*The right to development (RTD) remains a controversial subject at the international level due to disagreements over its nature as a collective and a people's right. This notwithstanding, the RTD is recognised by the African human rights system as a collective right encompassing all fundamental rights and freedoms. Besides, the ratification of the African Charter on Human and Peoples' Rights (ACHPR), which recognises the RTD coupled with the implicit recognition of the RTD in the 1992 Constitution of the Republic of Ghana, makes the RTD an entitlement for Ghanaians. However, its realisation by the state through the executive appears challenging, considering the level of development in Ghana. This article, therefore, explores an alternative focused on legislative measures. The article seeks to demonstrate the extent to which the RTD can be realised in Ghana through its Parliament. It argues that removing the constitutional constraints on Parliament will potentially make the institution contribute significantly towards the realisation of the RTD.*

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# 1 Introduction

The Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights on 25 June 1993 reaffirmed the right to development (RTD) ‘as a universal and inalienable right and an integral part of fundamental human rights,’ settling the controversy as to whether the RTD is a human right.<sup>1</sup> This is corroborated by Navi Pillay’s – the former United Nations (UN) High Commissioner for Human Rights – submission that the RTD is neither superior nor inferior to other existing rights but is of the same standard as other rights.<sup>2</sup> This viewpoint is, however, rejected by Donnelly and Vandenbogaerde, who perceive the RTD as redundant and unnecessary.<sup>3</sup> In contrast, Sengupta argues that the RTD is of a higher standard than other rights and freedoms.<sup>4</sup> Similarly, Bedjaoui sees the RTD as the ‘alpha and omega of human rights, the first and the last, the beginning and the end, the means and the goal of human rights; in short, it is the core right from which all others stem’.<sup>5</sup> This may be inspired by the composite nature of the RTD, where its fulfilment implies the realisation of other rights and freedoms. Suppose all human rights are treated equal, and the RTD is an inalienable right. States must then, as a matter of urgency, ensure their citizens’ socioeconomic, cultural, and political development.

Globally, the UN must concretely ensure the exercise of such a fundamental right by encouraging states to consider ratifying the revised Draft Convention on the RTD.<sup>6</sup> This would bring about development, particularly in Africa where ‘poverty, hunger, malnutrition, inequality, suppression, decrepit infrastructure, debilitating educational services, and socioeconomic *cum* political turmoil’<sup>7</sup> are the order of the day. In other words, it is universally

1 Vienna Declaration and Programme of Action (1993) at para 10.

2 United Nations Human Rights, *Realizing the right to development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) at Foreword.

3 J Donnelly ‘The right to development: How not to link human rights and development’ in CE Welch Jr & RI Meltzer (eds) *Human rights and development in Africa* (1984) at 261-283 quoted in CC Ngang; SD Kanga, & V Gumede, (eds) *Perspectives on right to development* at 2; A Vandenbogaerde ‘The right to development in international human rights law: A call for its dissolution’ (2013) 31(2) *Netherlands Quarterly of Human Rights* at 187-209.

4 A Sengupta ‘The human right to development’ (2004) 32 *Oxford Development Studies* at 183.

5 M Bedjaoui ‘The right to development’ in Bedjaoui (ed) *International Law: Achievements and prospects* (1991) quoted in PA Ejembi ‘Decrypting the approaches of eastern and western geo-political blocs in Africa’s quest for development under international law’ (2017) 8 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* at 58.

6 United Nations Human Rights ‘Revised Draft convention on the right to development’ May 2022 <https://www.ohchr.org/en/events/events/2022/23rd-session-working-group-right-development> (accessed 30 August 2022).

7 Ejembi (n 5) 56.



known that many developing countries are deplorable as they wrestle with poverty, disease and the many other problems that confront our generation.<sup>8</sup> For Sen, even wealthier countries are not shielded from the lack of necessities and services of life and ‘the longevity of substantial groups is sometimes not higher than that in much poorer economies of the so-called Third World’.<sup>9</sup> In this case, making the RTD a universally binding treaty, as suggested by Teshome, would be a remarkable achievement.<sup>10</sup>

As a developing country, Ghana is no exception. Ghana gained independence on 6 March 1957, and in more than 60 years since independence, the country has had four republican constitutions – 1960, 1969, 1979 and 1992.<sup>11</sup> The 1992 Constitution, the cornerstone of Ghana’s Fourth Republic,<sup>12</sup> has been in force for the longest period yet.<sup>13</sup> Essentially, Ghana shifted from authoritarian to democratic rule by adopting a liberal constitution and holding multiparty elections in 1992, ending a sustained period of military rule.<sup>14</sup> Ghana is a unitary state with a hybrid or semi-presidential system of government; that is, the Head of State has a constitutional mandate of four years and is obliged to select the majority of the ministers from the elected Parliament.<sup>15</sup>

Regionally, Ghana is a member of the African Union (AU) and has ratified the African Charter on Human and Peoples’ Rights (African Charter),<sup>16</sup> pending domestication.<sup>17</sup> Although Ghana is a dualist state where the execution of treaties requires domestication,<sup>18</sup> its

8 NJ Udombana ‘The Third World and the right to development: Agenda for the next millennium’ (2000) 22 *Human Rights Quarterly* at 753.

9 A Sen ‘Development as freedom’ in JT Roberts; AB Hite & N Chorev (eds) *The Globalization and development reader: Perspectives on development and global change* (2014) at 525.

10 RG Teshome ‘The draft convention on the right to development: a new dawn to the recognition of the right to development as a human right?’ (2022) *Human Rights Law Review* at 6.

11 R Stapenhurst & M Alandu ‘The accountability function of the Parliament of Ghana’ at 2 <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.519.6887&rep=rep1&type=pdf> (accessed 29 August 2022).

12 E Gyimah-Boadi ‘A peaceful turnover in Ghana’ (2001) 12 *Journal of Democracy* at 103.

13 Stapenhurst & Alandu (n 11).

14 Westminster Foundation for Democracy & Ghana Centre for Democratic Development ‘The cost of politics in Ghana’ at 7 [https://www.wfd.org/sites/default/files/2022-02/Cost\\_Of\\_Politics\\_Ghana.pdf](https://www.wfd.org/sites/default/files/2022-02/Cost_Of_Politics_Ghana.pdf) (accessed 25 July 2022).

15 Constitution of the Republic of Ghana 1992 art 78(1).

16 CH Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) at 429; the African Charter on Human and Peoples’ Rights (ACHPR) was adopted on 1 June 1981 and entered into force on 21 October 1986.

17 CN Okeke ‘The use of international law in the domestic courts of Ghana and Nigeria’ (2015) 32 *Arizona Journal of International and Comparative Law* at 399; K Appiagyei-Atua ‘Ghana at 50: The place of international human rights norms in the courts’ in H Bonsu et al (eds) *Ghana Law since independence: History, development and prospects* (2007) at 16; M G Nyarko ‘The impact of the African Charter and the Maputo Protocol in Ghana’ in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) at 100.

18 Constitution of Ghana art 75.

Constitution allows for the invocation of fundamental human rights not mentioned in the statute, provided they are inherent to a democracy and protect freedom and human dignity.<sup>19</sup> In this way, the African Charter binds Ghana.<sup>20</sup> Moreover, chapter 5 and articles 34(2), 35(6)(d), 36, 37, 38 and 39 of the Constitution of Ghana implicitly guarantee the RTD.<sup>21</sup> What remains is its realisation to benefit the people.

Although efforts to realise the RTD may involve other branches of government, such as the executive and the judiciary, this article focuses on the potential role of the Legislature of Ghana. It is worth pointing out what the Parliament of Ghana can do to facilitate the realisation of the RTD. Indeed, the Parliament of Ghana can help realise the RTD through its critical functions of law-making, executive oversight and citizenry representation.<sup>22</sup> It can serve as a check on administrative activities, represent and give voice to all citizens, control the public funds through the budget process, and create a platform for debating issues and policies of national interest.<sup>23</sup> Accounting for the important role of Parliament will significantly improve Ghanaians' socioeconomic, cultural and political well-being, helping to make the RTD a reality. This article argues that the Parliament of Ghana can significantly contribute to the realisation of the RTD.

## 2 The RTD in Ghana

It can be said that the composite nature of the RTD implies the existence of the RTD in any constitution that contains a bill of rights or recognises human rights since its implementation can lead to the full realisation of all human rights and fundamental freedoms.<sup>24</sup> The RTD does not have to be mentioned expressly, as is the case in the constitutions of Cameroon and Uganda and the Democratic Republic of Congo, to name a few.<sup>25</sup> Human rights are interdependent and interrelated,<sup>26</sup> and the enjoyment of the RTD can lead to the

19 Constitution of Ghana art 33(5).

20 African Charter on Human and Peoples' Rights (ACHPR) art 22.

21 ALP Kwame 'The justiciability of the right to development in Ghana: Mirage or possibility?' (2016) 1 *Strathmore Law Review* at 92.

22 National Commission for Civic Education 'Assessing the effectiveness of Parliament in Ghana's democracy' (2015) at 1 [http://eeas.europa.eu/archives/delegations/ghana/documents/press\\_corner/2015/230423\\_ncce\\_report\\_parliament.pdf](http://eeas.europa.eu/archives/delegations/ghana/documents/press_corner/2015/230423_ncce_report_parliament.pdf) (accessed 07 October 2020).

23 As above.

24 UNDRTD art 1(1).

25 Constitution of the Republic of Cameroon 1972 Preamble; Constitution of the Republic of Uganda 1995 Objective IX; Constitution of the Democratic Republic of Congo 2005 art 58.

26 United Nations Population Fund 'Human rights principles' <https://www.unfpa.org/resources/human-rights-principles> (accessed 21 September 2020).

realisation of all human rights and fundamental freedoms.<sup>27</sup> In this regard, the Constitution of Ghana, which contains a bill of rights,<sup>28</sup> can be said to recognise the RTD. Article 1(1) of the United Nations Declaration on the Right to Development (UNDRTD) describes the RTD as

... an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realised.<sup>29</sup>

The RTD, as explained above, finds expression in the Constitution of Ghana, which ‘provides a legal basis for a just, equitable and inclusive development of the country’.<sup>30</sup> The Constitution mandates all successive governments to

[...] take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and secure the maximum welfare, freedom, and happiness of every person in Ghana and provide adequate means of livelihood and suitable employment and public assistance to the needy.<sup>31</sup>

And to achieve this, it is the mandate of the President of Ghana to

[...] within two years after assuming office, present to Parliament a coordinated programme of economic and social development policies, including agricultural and industrial programmes at all levels and in all the regions of Ghana.<sup>32</sup>

The above mandate of the government is carried out by the executive branch in collaboration with the National Development Planning Commission (NDPC), which serves as an advisory body to the President on development matters.<sup>33</sup> For instance, the NDPC has prepared on behalf of the President a development programme labelled the Coordinated Programme of Economic and Social Development Policies (CPESDP).<sup>34</sup> This programme captures the United Nations 2030 Agenda<sup>35</sup> for Sustainable Development, the African Union’s Agenda

27 United Nations Declaration on the Right to Development (UNDRTD) art 1.

28 Constitution of Ghana chap 5.

29 UNDRTD art 1(1).

30 Kwame (n 21); Constitution of Ghana art 26.

31 Constitution of Ghana art 36(1).

32 Constitution of Ghana art 36(5).

33 National Development Planning Commission Act of Ghana Act 479 of 1994 sec 2(1).

34 United Nations ‘Sustainable Development Partnership 2018–2022, between the Government of the Republic of Ghana and the United Nations in Ghana’ June 2018 at 2 <https://ghana.un.org/sites/default/files/2019-07/UNCT-GH-UNSDP-2018.pdf> (accessed 30 August 2022).

35 NAD Akufo-Addo ‘The Coordinated Programme of Economic and Social Development Policies, an agenda for jobs: Creating prosperity and equal opportunity for all’ 20 October 2017 at 101-102 [https://s3-us-west-2.amazonaws.com/new-ndpc-static1/CACHES/PUBLICATIONS/2018/04/11/Coordinate+Programme-Final+\(November+11,+2017\)+cover.pdf](https://s3-us-west-2.amazonaws.com/new-ndpc-static1/CACHES/PUBLICATIONS/2018/04/11/Coordinate+Programme-Final+(November+11,+2017)+cover.pdf) (accessed 30 August 2022).

2063<sup>36</sup> and the Paris Agreement on Climate Change,<sup>37</sup> which all promote the RTD.<sup>38</sup>

Indeed, at the request of the President, the NDPC *inter alia* devises development plans for the districts by considering the available funds, overseeing the development process, conducting research and offering suggestions on development and socioeconomic matters. This is done without losing sight of the national and global political and socioeconomic conditions which inform the 'national development plans'.<sup>39</sup> To ensure the participation of Ghanaians in the development process, the NDPC employs a decentralisation system which involves various state bodies at different levels, from the district to the national level.<sup>40</sup> This system facilitates the work of the NDPC in its business to deliver development, allowing the Commission to reach out to all geographical sectors of Ghana. Moreover, it allows all Ghanaians to participate in this development process, which to a more considerable extent exemplifies the enjoyment of their RTD as postulated by article 1 of the UNDRTD.<sup>41</sup> In this respect, Kanga considers public participation to be the cornerstone of the RTD.<sup>42</sup>

Furthermore, the Bill of Rights of Ghana, coupled with the Directive Principles of State Policy, sufficiently provides evidence of the RTD as an entitlement in Ghana. It is worth noting that the Directive Principles are justiciable and enforceable, mainly when they are in tandem with the substantive rights mentioned in the Bill of Rights.<sup>43</sup> They generally serve as a guide for judicial interpretation. This pronouncement of the Supreme Court flows from the earlier position of the drafters of the 1992 Constitution of Ghana, where they indicated that:

By tradition Directive Principles are not justiciable; even so, there are at least two good reasons for including them in a Constitution. First, Directive Principles enunciate a set of fundamental objectives which a people expect all bodies and persons that make or execute public policy

36 As above.

37 As above.

38 Like the RTD, all these treaties seek to ensure the realisation of the human rights of all.

39 National Development Planning Commission Act of Ghana Act 479 of 1994 secs 2(2)(d), (e), (f) & (i).

40 National Development Planning Commission System Act of Ghana Act 480 of 1994 sec 1(2).

41 UNDRTD art 1. This article presents the RTD as an inalienable human right, a process of economic, social, cultural and political development and an entitlement to participate, contribute and enjoy the development process; United Nations 'Report of the Independent Expert on the Right to Development, Arjun Sengupta submitted per Commission resolution 2000/5' 2001 at 3 <https://digitallibrary.un.org/record/431577?ln=en#record-files-collapse-header> (accessed 30 August 2022).

42 SAD Kanga, 'Human rights in Africa: prospects for the realisation of the right to development under the new partnership for Africa's development', unpublished PhD thesis, University of Pretoria, 2011 at 188-190.

43 *New Patriotic Party v Attorney-General* (1997-98) 1 GLR 378-461.

to strive to achieve. In the present proposals, one novelty is the explicit inclusion of political parties among the bodies expected to observe the principles. The reason for this is that political parties significantly influence government policy. A second justification for including Directive Principles in a constitution is that, taken together, they constitute, in the long run, a sort of barometer by which the people could measure the performance of their government. In effect, they provide goals for legislative programmes and a guide for judicial interpretation.<sup>44</sup>

Additionally, the Constitution of Ghana mandates the President to report to Parliament at least once a year on all measures adopted to implement the policy objectives of said Principles, particularly concerning the realisation of 'basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.'<sup>45</sup> To this end, the Directive Principles seek to reinforce the Bill of Rights. In this context, the Constitution of Ghana aligns with the UNDRTD in that it sets out the framework for the 'economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised'.<sup>46</sup>

Economically, every Ghanaian has the right to work under satisfactory conditions and earn a decent income without discrimination.<sup>47</sup> This ensures their participation and contribution to the country's economy, as well as their enjoyment of the outcome. Besides this, every worker has the right to rest, leisure and reasonable working hours and enjoys paid leave.<sup>48</sup> Most importantly, Ghanaians can create a trade union to promote and protect their socioeconomic rights<sup>49</sup> – some of which depend on state resource availability.<sup>50</sup> Such participation, which is key to the RTD, allows Ghanaians to contribute to the economy of the country and provides the financial capacity to afford the necessities of life.

As outlined in the Constitution of Ghana, Ghanaians are entitled to equal educational opportunities.<sup>51</sup> The state is to make facilities and provisions available to ensure that basic education is free, mandatory and accessible to all.<sup>52</sup> All forms of secondary education, including technical and vocational education, are to be progressively made accessible.<sup>53</sup> Free secondary education was implemented in

44 SY Bimpong-Buta 'The role of the supreme court in the development of constitutional law in Ghana' unpublished PhD thesis, University of South Africa, 1992 at 349-350; Constitution of Ghana art 34(1).

45 Constitution of Ghana art 34(2).

46 UNDRTD art 1.

47 Constitution of Ghana art 24(1).

48 Constitution of Ghana art 24(2).

49 Constitution of Ghana art 24(3).

50 Constitution of Ghana art 38(3).

51 Constitution of Ghana art 25.

52 Constitution of Ghana art 25(1)(a).

53 Constitution of Ghana art 25(1)(b).

2017, casting the objective of free higher education as the next step in creating equal education opportunities.<sup>54</sup> Article 25 of Ghana's Constitution further highlights the importance of developing functional literacy<sup>55</sup> and an adequately equipped school system.<sup>56</sup> Moreover, every Ghanaian can establish and run educational institutions at all levels and categories subject to the terms and conditions of the law.<sup>57</sup> Considering that education is a vital requirement for development, the preceding holistically enables Ghanaians to participate in the development process by which their RTD can be realised.

Culturally, the legal framework is structured to accommodate diversity since every Ghanaian can freely practise and promote their cultural and religious preferences.<sup>58</sup> Given the negative effect of certain cultural activities and practices such as the Trokosi and female genital mutilation in Ghana, 'practices which dehumanise or are injurious to the physical and mental wellbeing of a person are prohibited'.<sup>59</sup> Trokosi is a cultural and religious practice where young virgin girls (also referred to as Trokosi) in Ghana are put under servitude as enslaved people to a fetish priest to be punished for the alleged past offences of a family member.<sup>60</sup> The objective of the constitutional text in this regard is to protect Ghanaians from harmful and inhumane cultural practices which can affect their dignity and compromise their future.

Politically, every Ghanaian is entitled to the right to freedom of speech and expression, including freedom of the press and other media,<sup>61</sup> which allows individuals and groups to channel their grievances and concerns to the government, debate policies and share their views on national matters. Through this medium, they take part and influence decisions that affect their lives. As one might observe, the Constitution of Ghana guarantees fundamental rights and freedoms, and their enjoyment gives effect to the RTD.

Furthermore, the African Charter, to which Ghana is a state party, is a binding instrument that mandates member states to 'individually or collectively ensure the exercise of the RTD'.<sup>62</sup> Additionally, Ghana is a party to the International Bill of Rights,<sup>63</sup> which enjoins states to

54 Constitution of Ghana art 25(1)(c).

55 Constitution of Ghana art 25(1)(d).

56 Constitution of Ghana art 25(1)(e).

57 Constitution of Ghana art 25(2).

58 Constitution of Ghana art 26(1).

59 Constitution of Ghana art 26(2).

60 ANK Botchway 'Abolished by Law – Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana (2008) 3 *Florida International University Law Review* at 369.

61 Constitution of Ghana article 21(1)(a).

62 ACHPR art 22(2).

respect, protect and fulfil human rights, including the RTD. More importantly, the Constitution of Ghana mandates the government to ‘promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means’.<sup>64</sup> Article 40(d)(v) further admonishes the country to adhere to the principles, aims and ideals of any international organisation of which it is a member. Thus, the RTD, as reflected in any human rights treaty to which Ghana is a party, is to be respected, promoted, and fulfilled. Although the recognition of the RTD is not doubted in Ghana, it appears necessary to know whether it is justiciable.

### 3 The Justiciability of the RTD in Ghana

A right is deemed justiciable when it can be invoked in courts for its alleged violation.<sup>65</sup> In this case, a competent court can provide a remedy for the alleged violation of this right. Thus, in light of the above recognition of the RTD by the Constitution of Ghana, its justiciability can hardly be in doubt. This is because the RTD is not only implied in the Bill of Rights of Ghana, but also the Directive Principles when read together with the Bill of Rights.<sup>66</sup> Notably, the Directive Principles have some presumption of justiciability but become largely enforceable when read together with the Bill of Rights.<sup>67</sup>

The case of *Commission on Human Rights and Administrative Justice & 2 others v Ghana National Fire Service & Attorney-General* is important in the context of the Bill of Rights and was a landmark decision.<sup>68</sup> In this case, the rights to have a family and to work were defended by the Commission on Human Rights Administrative Justice (CHRAJ).<sup>69</sup> Two officers of the Ghana National Fire Service (GNFS), Grace Fosu and Thelma Hammond, were dismissed for falling pregnant within the first three years of service.<sup>70</sup> Their pregnancies ran contrary to Regulation 33(6) of the Conditions of Services of the GNFS, which stated that ‘a female employee shall not be dismissed on the ground that she is pregnant, provided she has served the first

63 Ghana ratified the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Political Rights on 7 September 2000; see Republic of Ghana Treaty Manual 2009; the Universal Declaration of Human Rights is now considered customary international law.

64 Constitution of Ghana art 40(c).

65 D McGoldrick ‘The boundaries of justiciability’ (2010) 59(4) *The International and Comparative Law Quarterly* at 983.

66 Chapters 5&6, Constitution of Ghana.

67 *New Patriotic Party v Attorney-General* (1997-98) 1 GLR 378-461.

68 Commission on Human Rights and Administrative Justice Ghana ‘Twenty-fifth annual report’ 2018 at 25–27 <https://chraj.gov.gh/wp-content/uploads/2021/05/CHRAJ-ANUAL-REPORT-2018.pdf> (accessed 31 August 2022).

69 As above.

70 As above.

three years'.<sup>71</sup> Following the petition of the two firewomen to CHRAJ, the Commission sued the GNFS and the Attorney-General on the grounds that Regulation 33(6) of the Conditions of Services of the GNFS not only discriminates against the complainants based on their gender but further violates their right to have a family and their right to work – with a particular focus on equal employment opportunity.<sup>72</sup> To make their case, CHRAJ did not only rely on the Constitution of Ghana but referred to human rights treaties ratified by Ghana, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Covenant on Economics, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the ACHPR and the Protocol to the African Charter on the Rights of Women in Africa.<sup>73</sup>

The CHRAJ subsequently petitioned the court to abolish Regulation 33(6) from the conditions of services since it violates the fundamental rights and freedoms of the two complainants.<sup>74</sup> The Human Rights High Court granted all the reliefs endorsed on the application by the Commission as the 1st Applicant therein.<sup>75</sup> It is worth stating that the two firewomen were reinstated.<sup>76</sup> As observed above, the civil, political, and socioeconomic rights that form part of the RTD were enforced. Moreover, though not domesticated into Ghanaian law, provisions from CEDAW, ICCPR, ICESCR and the ACHPR were invoked. This strongly exemplifies the application of human rights treaties not domesticated by Ghana, as stated by article 33(5) of the Constitution of Ghana. This provision provides that

[t]he rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.<sup>77</sup>

This provision unambiguously recognises human rights instruments, including the UNDRTD in Ghana. It further reinforces the recognition of the RTD in Ghana as enshrined in the African Charter. According to the Supreme Court, although Ghana is a dualist state, non-domesticated treaties can still be invoked where necessary and proper.<sup>78</sup> Though international law is not recognised as part of the

71 As above; Regulation 33(6) did not allow women in the Ghana National Fire Service to get pregnant within their first three years of service.

72 As above.

73 As above.

74 As above.

75 As above.

76 As above.

77 Constitution of Ghana art 33(5).

78 MG Nyarko 'The impact of the African Charter and the Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) at 189.



sources of Ghana's law,<sup>79</sup> it is implicitly recognised by article 33(5) of the Constitution. This is corroborated by the statement of Atuguba JSC which states that the application of international instruments can be effected through article 33(5). This empowers national courts to refer to other instruments in dealing with cases related to fundamental human rights provided that they are 'inherent in a democracy and intended to secure the freedom and dignity of man'.<sup>80</sup> Article 33(5), therefore, assists national courts in enforcing international human rights law recognising the RTD. In this case, the RTD enjoys the same status as all other human rights in the Constitution of Ghana. Although there is no case law on the RTD in Ghana which would have allowed the Ghanaian courts to pronounce on its justiciability or otherwise,<sup>81</sup> its implication in the Bill of Rights makes it justiciable. Furthermore, article 33(5) allows Ghanaian courts to apply human rights treaties that Ghana has not domesticated where necessary and proper. Therefore, considering Ghana's voluntary ratification without reservations of the African Charter, it can be argued that the RTD is not only guaranteed in Ghana but a justiciable right.<sup>82</sup> This sets the tone for the discussion on the role of the Parliament of Ghana in realising the RTD.

#### 4 The role of Parliament in Ghana

According to Ghai, 'the legislature is the first organ of government' because the business of government starts with 'law-making and is followed up by law-enforcement and adjudication functions'.<sup>83</sup> This recognition of Parliament as an institution of utmost importance in a democracy implies that a democratically elected Parliament is the only authentic voice that serves and accounts to the people, as is to be expected from a democratic system.<sup>84</sup>

As a democratic state, the government of Ghana is formally made up of the executive, the legislature and the judiciary, known as the three arms of government or *trias politica*.<sup>85</sup> According to Montesquieu, the arms of government are independent of one another, ensuring the separation of powers and a system of checks and balances.<sup>86</sup> As postulated by Montesquieu, the principles of

79 Constitution of Ghana art 11.

80 Nyarko (n 78).

81 Kwame (n 21).

82 Kwame (n 21) 96.

83 KK Ghai 'Legislature: Meaning, functions and types of legislature' 15 May 2014 <http://www.yourarticlelibrary.com/constitution/legislature-meaning-functions-and-types-of-legislature/40337> (accessed 31 August 2022).

84 United Nations Economic Commission for Africa 'The role of parliament in promoting good governance' <https://archive.uneca.org/publications/role-parliament-promoting-good-governance> (accessed 31 August 2022).

85 Articles 58, 93 & 125 Constitution of Ghana.

86 CLSB Montesquieu *The spirit of laws* (1949) at 173.

separation of powers allow each arm of government to perform their constitutional duties independently.<sup>87</sup> Thus, the legislature enacts laws enforced by the executive and interpreted by the judiciary.<sup>88</sup> In Ghana, however, there is no evident separation of powers between the executive and legislature.<sup>89</sup> In the Ghanaian hybrid system, most Members of Parliament are appointed ministers of state. This carries far-reaching implications on the powers and functions of the legislature since the principle of separation of powers cannot be upheld, which, in turn, hampers the functioning of the system of checks and balances. The effect is that Parliament cannot effectively exercise its oversight function in holding the executive accountable for the realisation of the RTD.

The Parliament of Ghana is the only institution in Ghana vested with the power to enact laws.<sup>90</sup> For an effective performance of its functions, Parliament is enjoined by the Constitution to form standing committees and other select committees, when necessary.<sup>91</sup> A further requirement is that every Member of Parliament must belong to a standing committee.<sup>92</sup> This measure allows Members of Parliament to thoroughly discuss matters that affect their constituencies before getting to the floor of the House to vote. Besides serving as a law-making body, the functions of Parliament include its representational and deliberative functions, as well as the oversight of the public coffers and the executive.<sup>93</sup>

First, the legislative function vests solely in Parliament.<sup>94</sup> Parliament is therefore mandated to pass Bills, scrutinise statutory instruments and decide whether or not these are to stay in effect with the 'effluxion of time'.<sup>95</sup> This permits Members of Parliament to debate laws and policies comprehensively. This process includes considering the implications and ramifications of legislation explicitly proposed in the interests of development and the RTD. A notable example is the Right to Information Act which has been enacted by Parliament and enables citizens to be informed and thus influence decision-making in Ghana.<sup>96</sup> Through this Act, Parliament has thus created a participatory environment that empowers people to

87 As above.

88 As above.

89 Constitution of Ghana art 78(1).

90 Constitution of Ghana art 93(2).

91 Constitution of Ghana art 103(1).

92 Constitution of Ghana art 103(4).

93 Constitution of Ghana article 93(2); see The Parliament of Ghana 'The Mandate of Parliament' <https://www.parliament.gh/mandate> (accessed 30 August 2022).

94 As above.

95 As above.

96 ARA Shaban 'Ghana parliament passes right to information law after long delays' 27 March 2019 <https://www.africanews.com/2019/03/27/ghana-parliament-passes-right-to-information-law-after-long-delays/> (accessed 30 August 2022).

participate in decisions affecting their lives and demands accountability where necessary.

In addition, Parliament has passed the Criminal Offence Amendment Bill to prevent corruption.<sup>97</sup> According to the Attorney-General, corruption has become pervasive among public office holders in the country and criminalising it will strengthen Ghana's commitment to the fight against corruption.<sup>98</sup> To the Attorney-General, corruption does not only affect economic development but stagnates infrastructural and social development and smears Ghana's international image.<sup>99</sup> This amendment can promote development by holding public officers accountable, punishing offenders and serving as a deterrent.

Secondly, Parliament controls the finances of Ghana in various ways. For instance, 'no tax can be imposed without the authority of Parliament,' and it remains the only body that can authorise the 'waiver/exemption or variation of taxes'.<sup>100</sup> Except for 'moneys charged directly on the consolidated Fund by the Constitution, no money can be withdrawn from the Fund without the authority of Parliament'.<sup>101</sup> In addition:

Parliament has the power and duty to monitor the expenditure of public funds to ensure that monies it has authorised are used for the purposes for which they are intended by taking appropriate action on the Auditor-General's Reports.<sup>102</sup>

With this, the House ensures accountability in using state financial resources to benefit the people of Ghana. Additionally, Parliament's control of the public coffers includes authorising the granting or receiving of loans,<sup>103</sup> 'monitoring the country's foreign exchange receipts and payments or transfers',<sup>104</sup> and 'appointing an auditor to audit and report on the accounts of the Auditor-General's office'.<sup>105</sup> These measures give value to taxpayers' money and ensure that it is used for projects that are inured to their benefit. Though the executive is free to propose various expenditure levels and how revenue should be raised to meet them, Parliament holds power 'to control the expenditure of public funds'.<sup>106</sup> The authority of Parliament was affirmed by the Supreme Court's unanimous decision

97 JY Petetsi 'Parliament passes criminal offences (amendment) bill to make corruption felony' Ghanaian Times (Accra) 19 October 20 <https://www.ghanaian-times.com.gh/parliament-passes-criminal-offences-amendment-bill-to-make-corruption-felony/> (accessed 30 August 2022).

98 As above.

99 As above.

100 The Parliament of Ghana (n 93); Constitution of Ghana art 174.

101 The Parliament of Ghana (n 93); Constitution of Ghana art 178.

102 The Parliament of Ghana (n 93); Constitution of Ghana art 187(5) & (6).

103 The Parliament of Ghana (n 93); Constitution of Ghana art 181.

104 The Parliament of Ghana (n 93); Constitution of Ghana art 184.

105 The Parliament of Ghana (n 93); Constitution of Ghana art 187(15).

106 The Parliament of Ghana (n 93).

in ordering Wayome, a businessman in Ghana, on 29 July 2014, to refund GH¢51.2 million to the state because he acquired the money unconstitutionally by circumventing the approval of the Parliament.<sup>107</sup>

Thirdly, the Parliament of Ghana oversees the activities and spending of the executive to ensure that they are carried out lawfully and for the intended purposes. This role of Parliament includes its mandate to approve or reject the appointment of state officials such as ‘Ministers, Deputy Ministers, Chief Justice and other Justices of the Supreme Court, Members of the Council of State and other public offices specified by law’.<sup>108</sup> It must be noted that the President’s appointees can be rejected if deemed unfit by the parliamentary vetting committee.<sup>109</sup> This occurred during the first two Parliaments of the Ghanaian Republic.<sup>110</sup> Parliament is also empowered to impeach the President and Vice-President, the Speaker of Parliament, and censure Ministers of the State where necessary and proper.<sup>111</sup> The President has no right to dissolve Parliament. Neither the President nor the courts may interfere with Parliament’s internal affairs since Members of Parliament enjoy a broad scope of immunity – even from the court processes.<sup>112</sup>

Furthermore, parliamentary committees are ‘charged with functions, including investigations and inquiry into the activities and administration of ministries and departments as Parliament may determine’.<sup>113</sup> Effective parliamentary oversight in a semi-presidential political system like Ghana calls for using parliamentary tools, including debates and hearings, to hold the executive accountable. Parliamentary committees of inquiry which are used to investigate a particular issue of public interest, and budget oversight, which is a post-budget approval process, are critical tools used to monitor how budgetary allocations are managed – a task mainly performed by the Public Account Committee (PAC).<sup>114</sup>

Fourthly, the Parliament of Ghana also plays a deliberative function where the House deliberates and debates national issues.

107 *Martin Alamisi Amidu v The Attorney General, Waterville Holdings (BVI) Ltd and Alfred Agbesi Woyome* (2012-2013) JI/15 GHASC 49. See also Ghana Anti-Corruption Coalition ‘A-G chases Woyome Ghc51 million’ [http://www.gaccgh.org/details.cfm?corpnews\\_scatid=7&corpnews\\_catid=7&corpnews\\_scatlinkid=28](http://www.gaccgh.org/details.cfm?corpnews_scatid=7&corpnews_catid=7&corpnews_scatlinkid=28) (accessed 30 August 2022); Constitution of Ghana article 181.

108 E Darfour ‘The Parliament of Ghana: A countervailing force in the governance process?’ at 3 [https://www.psa.ac.uk/sites/default/files/Ghana%20-%20Overview\\_EDarfour.pdf](https://www.psa.ac.uk/sites/default/files/Ghana%20-%20Overview_EDarfour.pdf) (accessed 30 August 2022).

109 Constitution of Ghana art 78(1).

110 S Brierley ‘Party unity and presidential dominance: Parliamentary development in the fourth republic of Ghana’ (2012) 30 *Journal of contemporary African studies* at 429.

111 Constitution of Ghana art 69, 95(2)(d) & 82.

112 Constitution of Ghana art 113(1).

113 Constitution of Ghana art 103.

114 As above.

This enables the institution to tackle myriad policy issues, often resulting in resolutions that may calm ‘tensions in society and help foster consensus, compromise and reconciliation’.<sup>115</sup>

Lastly, Parliament plays the citizenry representation role, making it the supreme forum for expressing grievances, concerns, and problems aimed at seeking redress. In this capacity, a Member of Parliament serves as a ‘communication link between his constituents and the government’.<sup>116</sup> Thus, through parliamentary mechanisms and procedures, Members of Parliament can draw attention to developments in their constituencies and explore avenues for socioeconomic development.<sup>117</sup> The foregoing shows *de jure* the vital role of Ghana’s Parliament in the country’s body politic. It is therefore not surprising that a 2008 survey conducted by Afrobarometer, a pan-African, non-partisan research network conducting public attitude surveys, indicated that Ghanaians consistently perceive Parliament as a significant democratic institution with authority to supervise the executive and restrain it from abusing its powers.<sup>118</sup> I now move on to explore the extent to which the above capacities of Parliament can help realise the RTD in Ghana.

## 5 The potential role of Parliament in realising the RTD in Ghana

Thus far, this paper has argued that the RTD is a recognised right in Ghana and is justiciable. Thus, Parliament is expected to help realise the RTD through its aforementioned capacities and *modus operandi*. The parliamentary mechanisms and tools used to discharge its functions should ensure that Ghanaians ‘participate in, contribute to and enjoy economic, social, and cultural development in which all human rights and fundamental freedoms can be fully realised’.<sup>119</sup> To emphasise, the Parliament of Ghana can contribute to the realisation of the RTD through law-making, control of the national treasury, executive oversight, deliberative function, and citizenry representation.

In performing its duty to create laws, Parliament can ensure that Bills or legislation that enter the House for approval or review reflect the interests and wishes of Ghanaians. Though Members of Parliament are unable to table a Bill unless a private member Bill,<sup>120</sup> this does

115 The Parliament of Ghana (n 93).

116 The Parliament of Ghana (n 93).

117 The Parliament of Ghana (n 93).

118 Stapenhurst & Alandu (n 11).

119 UNDRD art 1(1).

120 Constitution of Ghana art 108; This article implies that the Parliament of Ghana must bear the cost of any bill it tables.

not affect their legislative function since they hold the power to make any necessary amendment to any Bill introduced to the House by or on behalf of the executive.<sup>121</sup> In such an instance, Parliament can affect public participation by engaging the general public in reviewing draft laws that appear before the House for consideration.<sup>122</sup> Since a draft law within Parliament typically goes through many stages of review, including readings or debates within the plenary sessions of the House, parliamentary committees may organise a public hearing for interested people, stakeholders, subject experts and civil society to make inputs on specific aspects of the entire content of a draft law.<sup>123</sup> In Ghana, this legislative process is called the ‘crystallisation of ideas’<sup>124</sup> underlying the thoughts, efforts and ideas involved in the law-making process that ‘crystallise to form a larger, more cohesive unit, which can then be drafted into law’.<sup>125</sup> This process demonstrates the participation of Ghanaians in decisions that affect their lives which can lead to the fulfilment of the RTD since participation remains a critical element of the right.

Aside from its legislative function, Parliament can contribute to the realisation of the RTD by controlling the public coffers. As a key accountability institution which scrutinises, debates and approves the national budget, Parliament has ‘the opportunity to review and debate the economic policies of the government, the assumptions underlying the budget as well as the annual estimates of the Ministries, Departments and Agencies (MDAs)’.<sup>126</sup> Here, Parliament can ensure that the funds to be approved are directed towards implementing policies that will benefit Ghanaians. Although the duty of drafting and presenting the budget rests on the Executive,<sup>127</sup> Ghana’s hybrid system allows Members of Parliament who double as Ministers of State to influence the budget process to realise the RTD. Considering the centrality of accountability to the rights-based approach to development,<sup>128</sup> which by extension amounts to the RTD, Parliament can also adopt accountability mechanisms to ensure that where there is a failure to exercise the RTD, duty bearer(s) are held accountable. This means that a lack of accountability measures will

121 Constitution of Ghana art 106(6).

122 K Deveaux & C Rodrigues *Parliament’s role in implementing the sustainable development goals* (2017) at 48 <https://www.undp.org/publications/parliaments-role-implementing-sustainable-development-goals> (accessed 30 August 2022).

123 As above.

124 Discussions with Justice Crabbe, Statute Law Revision Commissioner Attorney-General’s Office quoted in Human Rights Advocacy Centre & Friedrich-Ebert-Stiftung Ghana, *the law-making process in Ghana: Structures and procedures* (2011).

125 As above.

126 A Kan-Dapaah ‘Parliament’s role in the fight against corruption’ file:///C:/Users/user/Downloads/Parliaments\_role\_in\_the\_fight\_against\_corruption-DEC.2015-1.pdf (accessed 1 September 2022) at 11; Constitution of Ghana art 179(1).

127 Constitution of Ghana art 179(1).

128 SR Osmani ‘The human rights-based approach to development in the era of globalization’ in United Nations (n 2) 123.

significantly hamper the realisation of the RTD.<sup>129</sup> According to Gready, a lack of accountability negates the importance of human rights – including the RTD. However, Gready argues that constitutional and human rights provisions equip citizens to hold the state accountable.<sup>130</sup> As the representative of the citizenry, Parliament is thus expected to hold duty bearers accountable for exercising the RTD.

The oversight of Parliament over the executive also appears crucial in realising the RTD. Given that the implementation of policies and legislation remains a prerogative of the executive, Parliament, in its oversight role, is to ensure that the monies released to MDAs are spent on the intended projects to bring development to the people. In addition, Parliament can monitor and evaluate the financial activities of the MDAs and ensure that projects and programmes undertaken by the MDAs are done with due regard to economy, efficiency, and effectiveness.<sup>131</sup> This intervention of Parliament appears critical in realising the RTD in that it can ensure that the projects for which the national budget was approved are physically executed to alleviate poverty and satisfy the people's basic needs. The importance of the supervisory role of Parliament to ensure that resources for development are allocated judiciously cannot be overstated. Indeed, the Auditor-General's report draws 'attention to any irregularities in the accounts audited and to any other matter which in his opinion ought to be brought to the notice of Parliament'.<sup>132</sup> In debating the said report, Parliament can appoint 'where necessary' and 'in the public interest, a committee,' the PAC, to deal with any matters arising from the report.<sup>133</sup> This exercise of Parliament through the PAC may ensure accountability and lead to effective financial management to make development a reality in Ghana.

Furthermore, the Parliament of Ghana deliberates on matters that affect the citizenry. The deliberative function engulfs the legislative process by highlighting the thinking and discussion involved in enacting or amending laws. This process by which the Parliament of Ghana contributes to the realisation of the RTD in Ghana serves as a testament to their function of citizenry representation. The section that follows considers the challenges Parliament might face in realising the RTD.

129 As above.

130 P Gready 'Rights-based approaches to development: What is the value-added?' (2008) 18(6) *Development in Practice* at 741.

131 Kan-Dapaah (n 126) 17.

132 Constitution of Ghana art 187(5).

133 Constitution of Ghana art 187(6).

## 6 The challenges of Parliament in realising the RTD in Ghana

Despite its constitutional powers, 'Parliament has in practice not developed into that autonomous, independent and vital institution capable of asserting its authority and discharging its constitutional functions'.<sup>134</sup> While this shows the difference between theory and practice, it is worth noting that both the powers and challenges of Parliament stem from the Constitution of Ghana. The weakness of Parliament is a result of constitutional, political, financial and technical resource constraints owing to a continuing executive dominance.<sup>135</sup> For instance, while Parliament remains the only institution vested with the power to enact laws,<sup>136</sup> the Constitution bars Members of Parliament from introducing any legislation that will commit the government to spend public funds, thereby preventing the legislature from initiating Bills.<sup>137</sup> This situation discourages Parliament from making laws that will bring about development for their constituents.

Though Members of Parliament can initiate a private member Bill,<sup>138</sup> this alternative not only incurs costs to them when introducing a Bill but has also been unsuccessful. An example is the case of the late honourable Lee Ocran of the National Democratic Congress, who, through a private member Bill, urged the government to take appropriate measures to remove the algae in the marine waters of the Jomoro District, which greatly affected the livelihood of the people of this area.<sup>139</sup> Even though the opposition admitted the international dimension of the situation, 'like many Private Member Motions,' it 'died prematurely due to lack of support'.<sup>140</sup> The people of the district could therefore not enjoy the benefits of an Act that would have brought about development. Although Parliament holds the power to authorise 'public expenditure, impose and waive taxes,' authorise, 'grant and receive loans'<sup>141</sup> and approve the national budget, a Bill to that effect, following article 108 of the Constitution, can only be introduced by or on behalf of the President, excluding

134 Constitution Review Commission 'Report of the Constitution Review Commission' (2011) at 136. [http://constitutionnet.org/sites/default/files/crc\\_research\\_report\\_final.pdf](http://constitutionnet.org/sites/default/files/crc_research_report_final.pdf) (accessed 30 August 2022).

135 T Anthony & H Alan 'Parliamentary strengthening and the Paris Principles Ghana case study' 1 January 2009 at 24 <https://odi.org/en/publications/parliamentary-strengthening-and-the-paris-principles-ghana-case-study/> (accessed 30 August 2022).

136 Constitution of Ghana art 93(2).

137 Constitution of Ghana art 108.

138 As above.

139 Human rights Advocacy Centre & Friedrich-Ebert-Stiftung *Law-making process in Ghana: Structures and procedures*(2011) at 18.

140 As above.

141 Constitution of Ghana arts 174, 178, 18.



private member Bills, since article 108 does not allow Parliament to increase public spending or call on the Ministry for Finance to reallocate funds from one sector to another.<sup>142</sup> Parliament may, however, reduce public spending but rarely opts to effect such a reduction. The legislature's budget is determined and allocated by the executive through the Minister for Finance,<sup>143</sup> a practice that affects the financial autonomy of the legislature and limits its resources.

Parliament can, however, cooperate with the executive to ensure that resource allocation meets the needs of the people and ensure development. Additionally, through the Auditor-General's report, Parliament can hold the executive accountable in case of misappropriation or embezzlement of funds meant for developmental projects.

Besides, the constitutional requirement that allows the selection of a majority of Members of Parliament to be Ministers severely affects parliamentary oversight responsibilities.<sup>144</sup> Not only does the President influence Members of Parliament to owe him allegiance, but such an appointment also takes some of its best legislators away from the Parliamentary benches.<sup>145</sup> A survey has shown that the combination of executive and parliamentary duties makes Members of Parliament less productive in the legislature.<sup>146</sup> Though the Parliament of Ghana under the Fourth Republic has been influential in law-making and citizenry representation,<sup>147</sup> its oversight of the executive is less commendable due to 'constitutional and logistical constraints'.<sup>148</sup> This challenge, which undermines the oversight role of Parliament, seems to make the principle of separation of powers and checks and balances unfeasible in Ghana. This violates the principle of separation of powers and checks and balances as postulated by Montesquieu in *The Spirit of Laws*, and prevents the House from effectively performing its mandate and realising the RTD in Ghana.<sup>149</sup> For Ninsin, this hybridisation of 'the presidential and parliamentary systems of government has not only reduced the legislature's independence but has given the unequivocal executive

142 Stapenhurst & Alandu (n 11).

143 The North-South Institute 'African legislative effectiveness' October 2013 <http://www.nsi-ins.ca/wp-content/uploads/2013/10/2013-African-Legislative-Effectiveness1.pdf> (accessed 30 August 2022).

144 United Nations Economic Commission for Africa 'The role of parliament in promoting good governance' <https://archive.uneca.org/publications/role-parliament-promoting-good-governance> (accessed 30 August 2022).

145 Stapenhurst & Alandu (n 11).

146 E Sakyi 'A survey of MPs' opinions about the challenges of blending executive and legislative functions of government under Ghana's 1992 Constitution' (2010) 4 *African Journal of Political Science and International Relations* at 271.

147 Darfour (n 108).

148 As above.

149 Montesquieu (n 86).

influence upon legislators'.<sup>150</sup> This influence is further deepened by the fact that since 1992, the ruling party has always had the majority of Members of Parliament in the House.<sup>151</sup> This majority gives the President's party the ability to control debate and overpower committees – including the PAC<sup>152</sup> – making it difficult for legislators to check the extravagances of the executive. In this case, Members of Parliament that double as Ministers of State should influence executive decisions to promote policies that will contribute to the realisation of the RTD in Ghana.

## 7 Operational considerations of the RTD in Ghana

Given the foregoing, it is recommended that the autonomy of Parliament be enhanced by amending article 108 of the Constitution of Ghana, which places all financial charges on Parliament in case it tables a bill. As it currently stands, this provision does not allow Members of Parliament to introduce any Bill at the expense of the government, thereby preventing the House from initiating Bills and limiting them to private member Bills.<sup>153</sup> An amendment will enhance Parliament's legislative powers and give Members of Parliament the platform and power to introduce Bills that may bring about development for their constituents. Further, such an amendment may encourage the introduction of private member Bills whose usage is rare and perfunctory.

Additionally, Parliament should be given the privilege to determine its budget independently of the executive. Parliament's financial autonomy is paramount here because an institution's financial and human capacities are fundamental to its functional efficiency. Parliament would then be adequately resourced to sponsor Bills to help implement the RTD. Moreover, the Committee on Constitutional, Legal and Parliamentary Affairs would be equipped to supervise policies implemented by the executive that ensure the realisation of the RTD.

There ought to be a clear separation of powers to prevent Members of Parliament from doubling as cabinet ministers or deputy

150 KA Ninsin (ed) 'Executive-parliament interface in the legislative process (1993-2006): a synergy of powers?' quoted in E Sakyi 'A survey of MPs' opinions about the challenges of blending executive and legislative functions of government under Ghana's 1992 Constitution' (2010) 4 *African Journal of Political Science and International Relations* at 263.

151 Westminster Foundation for Democracy & Ghana Centre for Democratic Development (n 14).

152 The North-South Institute (n 143).

153 Apart from a private member bill, any other bill is to be submitted by the President or on his behalf. However, Parliament can amend any bill that is tabled.

ministers. This will not only enhance executive oversight and the autonomy of Parliament, but also reduce the executive's influence on Members of the House by making the latter more committed, effective, and dedicated to parliamentary work, thereby enhancing their leverage to realise the RTD.

Furthermore, to avoid any controversy or difficulty concerning the justiciability of non-domesticated international and regional human rights instruments, the Supreme Court of Ghana is expected to be uniform in their judgments on whether or not instruments of such a nature are applicable in Ghana. It is also recommended that ratified treaties by Ghana be domesticated into national legislation. The government of Ghana should endeavour to domesticate all signed and ratified treaties to prevent any conflict between the Constitution of the country and these treaties. This would remedy any doubts pertaining to the RTD in Ghana and encourage citizens to claim and enjoy development.

As far as the RTD is concerned, the current contention, which revolves around its implementation at the global level, seems to discourage and slow its implementation at a national level. Therefore, considering the role of national parliaments, particularly the Parliament of Ghana, they should ensure that policies and legislation on the floor of Parliament aids the realisation of the RTD domestically, and end the controversy at the global level. Legislative measures may not be the only effective means of exercising the RTD, but they serve a pivotal function.

## **8 Conclusion**

Though the government comprises several institutions for its operations, this article focused on the Parliament of Ghana and how it can help realise the RTD. The RTD appeared as a means by which Ghanaians can participate in and enjoy development outcomes. Though not expressly mentioned in the Constitution, the RTD is recognised in Ghana and ought to be exercised to bring about development. The Parliament of Ghana, in this case, appeared to be an essential institution whose constitutional role of citizen representation, law-making and financial control can help realise the RTD. This is sanctioned by the assumption that the well-being of a person is the focus of the RTD, then Parliament, which represents the people, can significantly help realise this right. The RTD is not only recognised in Ghana but is also justiciable. In addition to its implicit recognition in the country's Constitution, which is reinforced by the Directive Principles, Ghana's ratification of the African Charter gives credence to this reality. Thus, the Parliament of Ghana is expected to use its constitutional functions of law-making, executive oversight, citizenry representation, its considerable control of the public funds

and the making of deliberations to contribute to the exercise of the RTD in Ghana.

# THE APPRAISAL OF THE ‘MARKET OVERT’ PRINCIPLE VIS-À-VIS SALE OF GOODS IN ZAMBIA: A COMPARATIVE STUDY OF NIGERIAN AND SOUTH AFRICAN COMMERCIAL LAW

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by Mainess Goma\*



## Abstract

*This article is inspired by a need to clarify and appraise the law relating to the sale of goods with particular attention to the market overt principle in Zambia. This will be done by conducting a comparative study between Zambia, South Africa, and Nigeria. The article investigates methods for constructing a preferable legal regime for individuals and businesses, particularly economic transactions. It further assesses the Zambian Sale of Goods Act of 1893 (56 & 57 Vict. c.71) as it relates to the market overt principle. I also highlight weaknesses in the current law requiring remedial action.*

## 1 Introduction

Britain Zambia is a common law jurisdiction like most other formerly colonised countries. This is supported by Zambia’s history, current statutory guidelines, and judicial declarations. As a result of its colonial legacy, Zambia has a dual legal system comprised of general law, including the Constitution, statutes, case precedents, subsidiary legislation, English common law, principles of equity and selected

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statutes and customary law.<sup>1</sup> Although Britain has amended some of the same legislation, Zambia continues to utilise various old British statutes, such as the Sale of Goods Act (56 & 57 Vict. C. 71). The Sale of Goods Act, which came into force in 1893, is the principal law regulating the sale of goods in Zambia.<sup>2</sup> The rules of common law supplement this Act.<sup>3</sup> The primary aim of the Act is to provide clear guidelines for transactions involving the buying and selling of certain goods. After its enactment, it was hailed as a convenient answer to the problems and malpractices encountered when buying and selling goods at the market.<sup>4</sup> Among the many principles, the market overt principle deals with buying and selling goods.

Although the Act was a convenient solution to obstacles associated with buying and selling goods, it still has many shortcomings. It is for this reason that this paper endeavours to examine the shortcomings of the market overt principle as contained in the Sale of Goods Act of 1893 in Zambia. South Africa and Nigeria have been selected as countries of comparison as they share similarities in their relationship with Zambian commercial law.

## 2 The sale of goods

In commercial transactions, not everyone who agrees to buy or sell goods is fortunate enough to conclude a valid and enforceable transaction. In many cases, those disappointed with a transaction often seek legal recourse to enforce the rights created by their agreement, as the law protects the interest of both the seller and the buyer.<sup>5</sup>

The Sale of Goods Act defines ‘goods’ as ‘all chattels personal other than things in action and money’.<sup>6</sup> By this definition, the Act covers the sale of chattels which are personal and moveable possessions. This includes the sale of goods agreements, which can be defined as contracts in which the seller transfers or agrees to transfer their property rights in the goods to the buyer for a monetary consideration, such as ‘the price’.<sup>7</sup>

From this definition, salient characteristics may be observed. First, the seller and buyer are the parties to this sale of goods

1 H Chuma & T Banda ‘Customary law in Zambia’s new Constitutional dispensation: A tale of lost opportunities’ (2022) *Inequality in Zambia* at 239.

2 M Malila *Commercial law in Zambia: cases and materials* (2006) at 5.

3 See, J Coetzee ‘The role and function of trade usage in modern international sales law’ (2015) 2(20) *Uniform Law Review* at 243-270. The traditional position is that trade usage operated as implied terms of the contract where more emphasis was placed on the requirement of knowledge.

4 Chuma & Banda (n 1) 222.

5 *Mweempe v Attorney General International Police & Another* (2012) ZMSC 29.

6 The Sale of Goods Act of 1893 sec 62.

7 Sale of Goods Act (n 6) sec 1.

agreement. Second, two kinds of transactions are recognised from the sale of goods, namely, a sale where the property rights in the goods are transferred from the seller to the buyer; and an agreement to sell, in which the transfer of the property rights in the goods takes effect in the future or upon the fulfilment of certain conditions.<sup>8</sup> An agreement to sell becomes a sale when time elapses or conditions are fulfilled, upon which the property rights in the goods are to be transferred.<sup>9</sup> The 'property in the goods' refers to ownership of the goods.<sup>10</sup>

### 3 Relevance of the market overt exception in Zambia

As Zambian commercial law has developed, two main principles have become apparent: The first is the property protection principle, meaning, no one can give a better title than he possesses.<sup>11</sup> The second is the protection of commercial transactions, meaning, the person who takes good faith and for value without notice should get a better title. It must be noted that selling any property or chattel is the most decisive act of dominion by the seller and is incidental to ownership.<sup>12</sup> It does not merely imply the transfer of possessory rights by the seller to the buyer but relates to the true change of ownership.

In everyday sale transactions, the seller asserts that he is the owner of the article he has offered for sale by the act of selling to the buyer.<sup>13</sup> Thus, a person must first acquire, own, and, in most instances, possess property before they can legitimately sell, convey, or transfer ownership or title of the property to another person.<sup>14</sup>

However, some cases arise where the title in the goods is purportedly passed or transferred to a buyer by a non-owner of the goods.<sup>15</sup> Such circumstances raise the common law principle expressed in the Latin maxim *nemo dat quod non habet* (no one can give what he does not have or transfer a right that he does not

8 ME Nwocha 'Law of Sale of Goods in Nigeria: Interrogating key elements of the Sale of Goods Act relating to the rights of parties to a Sale of Goods Contract' (2018) 9 *Beijing Law Review* at 211.

9 Nwocha (n 8) 218.

10 This is the phrase used in the Sale of Goods Act of 1893.

11 Malila (n 2) at 56.

12 H Weinberg 'Market overt, voidable titles and feckless agents: Judges and efficiency in the Antebellum Doctrine of Good Faith' (1981) 56 (1) *Tulane law review* at 141.

13 A Perzanowski & J Schultz 'The end of ownership: Personal property in the digital economy' (2016) *MIT Press* at 32.

14 Perzanowski & Schultz (n 13) 27.

15 C Roisin '*Nemo dat quod non habet* (no one can give what they do not possess): the faith development needs of the authentic and authoritative Catholic teacher' unpublished PhD thesis, University of Glasgow, 2008 at 47.

possess).<sup>16</sup> The *nemo dat*-rule embodies the idea that the transferee cannot acquire a better title to the goods than his transferor.<sup>17</sup> Hence, it favours the original owner over any other purchaser.

Various exceptions to the *nemo dat*-rule, as contained in the Zambian Sale of Goods Act of 1893, have been formulated to maintain a balance between the original owner and the innocent purchaser. The exceptions include the entrenchment of the defence of estoppel, sale by an agent, sale under voidable title and sale in a market overt. Estoppel is where the owner is precluded from denying the seller's authority to sell.<sup>18</sup> However, there are two distinct cases where the owner is so precluded. First, by his words or conduct, he has represented to the buyer that he as the seller is the true owner or that the owner has the authority to sell; this is called estoppel by representation. The second relates to where the negligent owner fails to act and allows the seller to appear as the owner or as having the owner's authority to sell.<sup>19</sup>

The term 'sale by an agent' refers to a seller that is a mercantile agent. A 'sale under the voidable title' refers to a seller of goods that has a voidable title, but his title was not void at the time of the sale.<sup>20</sup> The buyer acquires a good title to the goods provided that he buys them in good faith and without notice of the seller's defective title.<sup>21</sup> 'Disposition by a seller' is when a person, having sold goods, remains in possession of the goods. Thus, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods under any sale to any person receiving the goods has the same effect as when the person making the delivery or transfer were expressly authorised by the owner of the goods to make the sale.<sup>22</sup> The final exception is the 'sale in a market overt', which will be discussed in the section below.<sup>23</sup>

With regards to the aforementioned, an innocent purchaser faced with a claim for a return of the goods from the original owner could argue that one of these exceptions to the *nemo dat*-rule applies to his or her situation, enabling and allowing them to retain ownership over the goods.<sup>24</sup> In other words, an innocent purchaser whose title to the goods has been challenged by the original owner could bring the

16 Malila (n 2) 43.

17 Sale of Goods (n 5) sec 21.

18 Malila (n 2) 43.

19 Malila (n 2) 56.

20 Malila (n 2) 53.

21 Sale of Goods (n 6) sec 23.

22 Nwocha (n 8) 218.

23 Malila (n 2) 63.

24 JL Yap 'Appraising the Market Overt Exception' (2008) 3(4) *Journal of International Commercial Law and Technology* at 25.



transaction under any one of these exceptions in order to retain said ownership.<sup>25</sup> This article will focus mainly on the market's overt rule.

## 4 Background of the market overt principle

The term market overt – or *marche ouvert* in French – originates from mediaeval times.<sup>26</sup> Market overt governs the subsequent ownership of stolen goods and, thus, deals with the conflict between a *bona fide* purchaser of a chattel and the person whose rights in the property are injured by the sale.<sup>27</sup>

Schematically, the three people involved are the original owner, the seller, and the purchaser. The actual term 'market overt' has not been legally defined by the Sale of Goods Act, but the court in *Lee v Bayes and Robinson* provided a helpful description.<sup>28</sup> Jervis J defined market overt as 'a public and legally constituted market that is open between sunrise and sunset and where goods are openly displayed'. Hence, if one buys an item or good in an open market and it later transpires that the person who sold the item does not have a valid good title, the title passes to the *bona fide* purchaser as long as they show that they bought it in good faith and without notice.<sup>29</sup>

It is noteworthy that the market overt principle has its roots in English law, dating back to Anglo-Saxon times when transportation had not yet advanced.<sup>30</sup> Scholars have pointed out that the market overt principle has been generalised by practical considerations, born out of a desire to encourage and facilitate commercial activity by protecting purchasers of goods who bought openly in places authorised for buying and selling goods.<sup>31</sup> Additionally, the owner of goods was expected to look for his goods in the market, and if he did not intervene at the market prior to the sale of the goods, the *bona fide* buyer was given an assurance of good title.<sup>32</sup>

25 A Ekpouido 'Appraising the Market Overt Exception in the Sale of Goods Law: The Nigerian Perspective' (2020) 2(1) *International Journal of Comparative Law and Legal Philosophy* at 138.

26 Weinberg (n 12) 27.

27 R Goode *Commercial law 3rd edition* (2004) at 233.

28 (1856) 18 CB 599 para 601.

29 Ekpouido (n 25) 119.

30 Goode (n 27) 165.

31 Weinberg (n 12) 23.

32 Goode (n 22) 231.

## 5 The market overt principle in practice

An important question to consider at this point: What constitutes a market overt in Zambia? A market overt may be constituted by statute, prescription or custom.<sup>33</sup> There are many market overt in Zambia, some of which have arisen by prescription and some established via the local government, such as the Common Market For Eastern And Southern Africa (hereinafter referred to as COMESA) market situated in the central business area of Lusaka, which commonly goes by the name of 'town'. One may be tempted to think that every place where goods are sold and bought is a market overt. However, that is not the case. The court's interpretation has delineated the scope of the market overt principle. Only markets legally constituted are recognised as markets overt.<sup>34</sup> Thus, a place does not take up the term market overt merely because it is accessible to the public; and not all shops, supermarkets and minimarts are market overt.<sup>35</sup> Below, I elaborate on why the market overt principle has become irrelevant in the 21st century.

### 5.1 Advanced transportation

The rationale for the market overt exception is poorly suited to modern times in Zambia, and it is regarded as archaic and quaint. In the past, when transportation was more limited, it would have been feasible for a person whose goods had been stolen to expect to find them sold at a nearby market.<sup>36</sup> However, thieves can more readily dispose of goods globally with the technological age and modern transportation systems such as aeroplanes, cars, and bullet trains. Thus, stolen goods can be sold in different markets.

### 5.2 The internet

The market overt exception seems to be at variance with the internet, as the market has evolved over the years. The internet is a vital part of many people's livelihoods and essential to a country's economic and cultural development. The internet has created a platform where anybody with a computer, who has access to the internet, can sell and buy goods, products, and services.<sup>37</sup> The virtual marketplace has given rise to a wide scale of electronic commercial transactions using different mediums such as websites, e-mails, blogs, and text messages.

33 Ekpoudo (n 25) 138.

34 Goode (n 27) 213.

35 *Lee v Bayes and Robinson* (1856) 18 CB 599 para 601.

36 C Alistair & R Hooley *Commercial law: text cases and materials* (2003) at 94.

37 Yap (n 24) 36.

Internet platforms like Amazon and eBay are examples of global and incorporeally driven businesses without the buyer having to set foot in a physical store. Further, sellers use social media to distribute stock; these include platforms such as Facebook, Twitter, and Instagram, to name but a few. This situation goes directly against the principle laid down in the English case of *George Dunlop and Co. v Earl and Countess of Dalhousie*,<sup>38</sup> where the House of Lords held that: ‘Goods must be sold in a shop accustomed to selling such goods so that the possessor cannot change the property, and the whole must be sold in the open market, not behind a screen or cupboard, but so that passengers passing by could see it.’ This exception has been recognised as promoting trade in stolen goods, which has been exacerbated by increasing internet sales.

## 6 The regulation of the Sale of Goods in Nigeria

As with Zambia, the English Sale of Goods Act of 1893 was assimilated into the Nigerian legal system as a statute of general application.<sup>39</sup> Subsequently, most Nigerian states adopted the Act as a part of their principal Sale of Goods laws.<sup>40</sup> Just as it has become outdated in Zambia, it is also outdated in Nigeria due to the advancement of technology over the years. This problem has been aggravated by increased internet sales, as outlined above. Legislation such as section 23 of the Lagos State Sale of Goods Act does not preclude internet sales.<sup>41</sup> Thus, stolen goods may easily be disposed of via the internet, and offenders can benefit from the relative anonymity and privacy that the internet offers. Over the past few years, there have been many calls to have the principle abolished because of its archaic and impractical nature.

## 7 The regulation of the Sale of Goods in South Africa

Compared to Zambia, South African Courts have developed the common law – comprising of Roman-Dutch law and English law – to protect consumer interests better. The sale of goods contracts in South Africa is generally subject to common law rules unless statutory

38 (1830) HL.

39 F Bamisile ‘What if you innocently buy stolen goods’ <https://pmnewsnigeria.com/2015/03/17/what-if-you-innocently-buy-stolen-goods-2/> (accessed 27<sup>th</sup> June 2022).

40 See El Sagay *Nigerian Law of Contract* (1993) at 33. The term ‘statute of general application’ can be defined as Acts of Parliament which apply to the people at large.

41 Bamisile (n 39).

or other provisions are varied.<sup>42</sup> The Consumer Protection Act<sup>43</sup> (CPA) is the primary legislation regulating consumer rights in South Africa. This Act sets out the threshold required to ensure adequate consumer protection. Generally, laws that provide for consumer protection in particular sectors must be read in tandem with the CPA to ensure a common protection standard.<sup>44</sup> The suppliers of goods and services must, in turn, ensure that they comply with the CPA to the extent that it applies.

Further, lawmakers in South Africa enacted the Second-Hand Goods Act 6 of 2009,<sup>45</sup> which aims to regulate business surrounding trade in second-hand goods and pawnbrokers. This Act directly tackles trade in stolen goods and, in the process, promotes ethical standards in the second-hand goods market. It is a contingent requirement that every person carrying on business in the second-hand goods market is classified as a 'dealer' and must be registered in accordance and compliance with the Act.

## 8 Recommendations and conclusion

It is puzzling that Zambian legislatures, unlike in Britain and South Africa, have failed to amend the Sale of Goods Act to bring it in line with the ever-changing nature of mercantile law due to technological advancement. The drafters of the Sale of Goods Act in the 19th century could not foresee the rapid developments in transport and communication technology of the present day. Thus, the market overt principle has become redundant and irrelevant to modern-day trade of goods and services yet persists as a legal doctrine in Zambia. It is, therefore, submitted that it is an archaic and anomalous rule and repealing it in its entirety may be the best option. If anything is to be done, the demands of consumer protection and the protection of trade in Zambia would require that the market overt exception be replaced with new legislation or that the rule be tinkered with accompanying legislation to enhance consumer protection similar to South African legislation.

Just as the South African Parliament enacted the Consumer Protection Act and the Second-Hand Goods Act, legislation that considers Zambian society's unique nature, challenges, and peculiarities is crucial to the country's development. Thus, Zambia should have legislation that can remain abreast with today's local and international commercial transactions. Legislation that blissfully

42 S Meltzer & C Smith 'Sale and Storage of Goods in South Africa: Overview' (2021) at 64.

43 68 of 2008.

44 Meltzer & Smith (n 42) 127.

45 68 of 2008.

ignores society's dynamism can be described as a 'wet blanket' stifling development.

Lord Justice Lloyd, in the British case of *Shaw v Commissioner of Metropolitan Police*,<sup>46</sup> held that 'it is a frequent occurrence that the courts have to decide which of two innocent parties is to suffer by the fraud of a third'.<sup>47</sup> In this day and age, it is pretty tough to determine contradicting rights between two innocent parties, even if the market overt rule is laudable as it mainly aims to protect an innocent purchaser who has through unfortunate circumstances acquired a defective title. However, a delicate balance must be maintained between the original owner and innocent purchaser's rights.

A key tenant of commerce is that goods should be freely alienable and move in the supply chain with little or no hindrance.<sup>48</sup> However, with the advancement of technology in commerce, commercial transactions have become increasingly complex, hence, the need for the law to develop exceptions to the common law rule of *nemo dat* or merely to enact new legislation altogether. As such, this paper has illustrated that reaching an equilibrium between protecting the interests of contending parties is laborious, complex, incoherent, and susceptible to misconception.

Parties involved in such transactions benefit from some law principles in the Sale of Goods Act, such as the *nemo dat*-rule and its exceptions. However, some of these exceptions were formulated when technology was not as advanced as it is today and, as such, lost relevance with the advent of time. Thus, there is a need for review of the Zambian Sale of Goods Act of 1893 to ensure relevance and avoid persisting injustices. In so doing, the philosophy behind the law must be evaluated while considering modern-day economic and social conditions in Zambia.

46 (2016) QDC 327.

47 (1987) 1 WLR 1332.

48 C Eisenstein *Sacred economics: Money, gift, and society in the age of transition* (2011) at 22.

# THE TAXATION OF IMAGE RIGHTS IN SOUTH AFRICA: VALIDITY OF TAX MINIMISATION SCHEMES

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## Abstract

*Sport undeniably plays a major role in society today. Over the years, it has developed into a free-standing industry and its players have become increasingly valuable and earn income both on and off the field. This article addresses the income generated by sport stars off the field of play through the exploitation of their 'image rights'. The use of someone's image rights can be explained as the practice of appropriating someone's personality. In modern society, people have become transfixed by sport stars. This has led to the image rights of individual sport stars such as Lionel Messi and Cristiano Ronaldo to become commodities exploited by their clubs and other third parties to enhance brand images and promote the sale of products.<sup>1</sup> This use of the image rights of celebrities generates a whole new source of income for these sport stars. Due to the relatively high amounts of income received for the use of a sport star's image, these stars may be tempted to enter into creative schemes in an attempt to reduce high taxes levied against these streams of income. The practice of the commercial exploitation of a sport star's image rights is a relatively new*

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1 R Cloete 'The taxation of image rights: A comparative analysis' (2012) 45 *De Jure* at 556; S Cornelius 'Image rights in South Africa' (2008) 3(4) *International Sports Law Journal* at 71.

development in South Africa and is not yet recognised to the same extent as in other jurisdictions, such as the UK and Spain.<sup>2</sup> This article examines the existing South African sport, intellectual property, and tax laws governing image rights and specifically analyses whether South Africa is sufficiently equipped, under tax legislation, to address these minimisation schemes aimed at reducing the tax liability arising from a South African sport star's image rights.

## 1 Introduction

Cloete defines the term 'image rights' as:

[T]he ability of an individual to exclusively control the commercial use of his name, physical/pictorial image, reputation, identity, voice, personality, signature, initials or nickname in advertisements, marketing and all other forms of media.<sup>3</sup>

Lionel Messi and Cristiano Ronaldo are examples of world-famous sport stars who earn large sums of money for the exploitation of their image rights to promote brands.<sup>4</sup> It, therefore, comes as no surprise that these stars have been advised to structure the receipt of income in relation to the exploitation of their image rights to minimise the tax liability thereof.

Both Messi and Ronaldo have used 'image rights companies' ('IRCs') to manage their image rights and reduce their tax liability.<sup>5</sup> In addition, in a renowned 2006 United Kingdom ('UK') court case, tennis star Andre Agassi was involved in a legal dispute over the taxation of payments relating to his image rights.<sup>6</sup>

2 M Louw 'Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law' (2007) 19 *South African Mercantile Law Journal* at 282.

3 R Cloete (ed) *Introduction to sports law in South Africa* (2005) at 176.

4 *Messi Cuccittini v EUIPO* (T-554/14) EU:T:2018:230; [2018] 4 WLUK 470 (GC) and Supreme Court Criminal Chamber 1729/2016 Judgment (translated to English) Ronaldo cases [https://english.elpais.com/elpais/2018/07/26/inenglish/1532613639\\_389065.html](https://english.elpais.com/elpais/2018/07/26/inenglish/1532613639_389065.html).

5 M Mccann 'Ronaldo's tax fraud charges, the Beckham law and how his case compares to Messi, Neymar' 15 June 2017 <https://www.si.com/planet-futbol/2017/06/15/cristiano-ronaldo-tax-fraud-spain-beckham-law-real-madrid-messi-nyemar> (accessed 5 March 2019); R Wood 'Tax lessons from soccer's Messi & Ronaldo tax evasion cases' 16 June 2017 <https://www.forbes.com/sites/robertwood/2017/06/16/tax-lessons-from-soccers-messi-ronaldo-tax-evasion-cases/#1c8f85856ff4> (accessed 1 March 2018); S Burgen 'Cristiano Ronaldo denies €14.7m tax evasion in Madrid court' 31 July 2017 <https://www.theguardian.com/football/2017/jul/31/cristiano-ronaldo-denies-tax-evasion-madrid-court> (accessed 1 March 2018); AFP 'Ronaldo appears in court over tax evasion claims' 31 July 2017 <https://www.timeslive.co.za/sport/soccer/2017-07-31-ronaldo-appears-in-court-over-tax-evasion-claims/> (accessed 16 February 2018); Sport Staff 'Cristiano Ronaldo claims tax investigations are only because 'he's Cristiano Ronaldo' 1 August 2017 <http://www.independent.co.uk/sport/football/euro-pean/cristiano-ronaldo-tax-investigation-case-prison-jail-real-madrid-a7870516.html> (accessed 1 March 2018).

6 *Agassi v Robinson (Her Majesty's Inspector of Taxes)* [2006] UKHL 23.

Under these minimisation schemes, all income derived from the licensing and use of the image rights of the sport personality is received by the IRC.<sup>7</sup> For tax purposes, these IRCs are generally registered in so-called low-tax jurisdictions where they can secure the most favourable tax treatment.<sup>8</sup> Both Messi<sup>9</sup> and Ronaldo<sup>10</sup> have faced legal problems in recent years for using IRCs to avoid paying income tax.

This article examines South Africa's current legal framework regarding the taxation of image rights, and analyses whether it adequately addresses minimalisation schemes involving the taxation of income arising from professional sport stars' image rights. A brief comparison is drawn with tax legislation in Spain and the UK to establish whether South Africa is positioned to address such schemes when compared to its foreign counterparts.

## 2 The status of image rights in South Africa

### 2.1 Sports law

In the context of sports law, image rights can best be described as an additional source of income for sport stars.<sup>11</sup> The commercialisation of a sport star's image rights is based on a reciprocal relationship where the advertiser promotes the reputation of its brand by associating the product with the sport star and, in return, the sport star receives compensation from the advertiser for the use and exploitation of his or her image rights.<sup>12</sup> Social media takes centre stage in modern-day endorsement deals and the more the star's social

7 P Hackleton *Law in Sport* 'The current legal status of image rights companies in football' 5 July 2016 <https://www.lawinsport.com/topics/articles/item/the-current-legal-status-of-image-rights-companies-in-football> (accessed 7 May 2019).

8 As above.

9 Messi was convicted of tax fraud in 2016 for defaulting on tax payments for his image rights on three occasions between 2007 and 2009. He diverted his image right monies to offshore companies in Belize and Uruguay, which then led to direct tax evasion. See Heimo Grup 14 'Explaining Lionel Messi's problems with the Spanish Tax Agency' 14 July 2017 <https://grup14.com/article/explaining-lionel-messi-s-problems-with-the-spanish-tax-agency> together with 'Express New Service 'How image rights landed Lionel Messi, his father in trouble' 25 May 2017 <http://indianexpress.com/article/sports/football/messi-jail-messi-tax-evasion-how-image-rights-landed-messi-his-father-in-trouble-4672399/> (accessed on 26 February).

10 Messi Cuccittini (n 4).

11 Louw (n 2) 278.

12 S Bosse 'Protecting the image rights of our sport stars' (2008) <https://www.bosse-associates.co.za/protecting-the-image-rights-of-our-sport-stars/> (accessed 16 April 2018 & 23 August 2020).



media followers are engaged in the content that the star posts, the more valuable the endorsement becomes.<sup>13</sup>

As sport stars are generally associated with a club or franchise – apart from individual sports such as golf and tennis – there is also a symbiotic relationship between a sport star and the club for whom he or she plays.<sup>14</sup> On the one hand, the club builds its reputation by having famous stars play for it and thereby attracts large sponsorship deals.<sup>15</sup> On the other hand, the club may already have an established reputation and a large fan base. In this regard, it has been found that football players who play for big and famous clubs are more popular and consequently their image rights are valued higher.<sup>16</sup> For this reason, the practice has been established for football clubs to own a sport star's image rights when he or she signs up to play for them.<sup>17</sup>

A sport star may, however, also manage his or her own image rights. Examples of South African sport stars who have retained exclusive control of their image rights include Springbok rugby players, Siya Kolisi<sup>18</sup> and Pieter-Steph du Toit.<sup>19</sup>

## 2.2 Intellectual property law

Currently, a South African sport star does not hold a specifically recognised proprietary interest or property right in his or her likeness or *persona*, and it can therefore be concluded that current South African legislation does not recognise image rights as stand-alone rights.<sup>20</sup> Therefore, existent intellectual property law is used to understand how a sport star's image rights can be protected and commercially exploited so as to ultimately establish the tax consequences of monies received from the exploitation of the image

13 B Enoch 'How athletes get endorsements and sponsorships' 9 March 2020 <https://opendorse.com/blog/how-athletes-get-endorsements-and-sponsorships/> (accessed 23 August 2020).

14 A Sierra 'Juventus strike new sponsorship deal thanks to Cristiano' 13 February 2020 [https://en.as.com/en/2020/02/13/football/1581584493\\_640286.html](https://en.as.com/en/2020/02/13/football/1581584493_640286.html) (accessed 23 August 2020).

15 Y He 'Predicting market value of soccer players using linear modelling techniques' in University of California, Berkeley 'Technical Report' (2015).

16 As above.

17 N Srivastava *Sportskeeda* 'How are player image rights managed in football?' 23 October 2015 <https://www.sportskeeda.com/football/how-player-image-rights-managed-football/2> (accessed 18 May 2019 & 23 August 2020).

18 J Gous 'Image rights might have kept Springbok star in South Africa' 5 June 2020 <https://www.swart.law/post.aspx?id=69> (accessed 25 October 2020).

19 Sport24 'Daily shot of Express-o –MyTwoCents' 18 May 2020 <https://www.news24.com/sport/OtherSport/daily-shot-of-express-o-mytwocents-20200518-24> (accessed 25 October 2020); S Xabanisa *City Press* 'Pieter-Steph's conundrum to break ranks with pay cuts' 17 May 2020 <https://www.news24.com/citypress/Sport/pieter-steph-conundrum-to-break-ranks-with-pay-cuts-20200516> (accessed 25 October 2020).

20 Bosse (n 12).

right. The two intellectual property laws examined are the Copyright Act<sup>21</sup> and the Trade Marks Act.<sup>22</sup>

The Copyright Act does not define ‘image rights’. There are nine specific classes of work in which copyright can subsist: literary works; musical works; artistic works; cinematograph films; sound recordings; broadcasts; programme-carrying signals; published editions; and computer programmes.<sup>23</sup> Image rights do not fall into any of these categories. Even if image rights were to fall within the ambit of one of the nine classes of work, the work would still need to qualify as ‘original’ work.<sup>24</sup> To qualify as ‘original’, the work must be reduced to material form and the author must be a ‘qualified person’ in terms of the Copyright Act.<sup>25</sup>

If we apply the requirements under the Copyright Act to Messi’s name, for example, his image right would not meet the requirements and would, therefore, not be protected under the Copyright Act.<sup>26</sup> It would in any event be highly impractical to protect the name of someone like Messi under the Copyright Act as every news article written about him would require the author of the article to secure Messi’s permission before publishing his name – failure to do so would infringe on Messi’s copyright.<sup>27</sup> This is because as the ‘author’ of his name, Messi has exclusive statutory rights over his name and the Copyright Act requires that any third party must first obtain the author’s permission before using the work in which he has exclusive statutory rights.<sup>28</sup>

However, under the Trade Marks Act, a trade mark generally includes brand names<sup>29</sup> and has in practice been used by various

21 Copyright Act 98 of 1978.

22 Trade Marks Act 194 of 1993.

23 Sec 2(1) of the Copyright Act 98 of 1978.

24 This can be drawn from the heading of chapter 1 of the Copyright Act 98 of 1978 which refers to copyright in ‘original’ works read together with O Dean et al *Introduction to intellectual property law* (2014) at 16.

25 Sec 2(2) of the Copyright Act 98 of 1978.

26 A name does not fall within any of the nine categories in sec 2(1) of the Copyright Act 98 of 1978. Furthermore, chap 1 of the Act refers to copyright in ‘original’ works. A name cannot be regarded as original. Section 2(2) of the Copyright Act states that ‘a work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to material form’ which is not possible for a sport star’s name.

27 Sec 23 of the Copyright Act 98 of 1978 read together with Dean (n 24) 3; A Copeling ‘The nature and object of copyright’ (1969) 2 *Comparative and International Law Journal of Southern Africa* at 42.

28 As above.

29 D Swart ‘Introduction to the law of trade marks in South Africa’ 13 September 2004 <https://news.wine.co.za/news.aspx?NEWSID=5981> (accessed 22 August 2020); Dean (n 24) 79.

famous sport stars.<sup>30</sup> A trade mark functions to distinguish one person's brand from another and must therefore be inherently distinguishable – it must not be general or be something that may be confused with another mark.<sup>31</sup> The possibility of a trade mark in sport includes, *inter alia*, a sport star's name, catch phrase, nickname, and his or her image rights. For example, former South African Springbok player, Naas Botha, registered his name as a trade mark.<sup>32</sup>

In conclusion, in South Africa, an image right can be registered as a trade mark, but would likely not be protected under the Copyright Act.

### 2.3 Tax Law

Currently, there are no specific taxing provisions regarding the taxation of image rights in South Africa.<sup>33</sup> On 27 May 2016, the South African Revenue Service ('SARS') issued the 'Draft Guide on the Taxation of Professional Sports Clubs and Players'<sup>34</sup> which was updated on 8 March 2018 (first issue of the Guide) and was subsequently replaced by the second issue of the Guide, which was issued on 21 October 2020.<sup>35</sup> SARS explained that the main purpose of the Guide is to set out and explain the tax consequences for professional sports clubs and players in South Africa.<sup>36</sup>

It should be borne in mind that a published SARS Guide is not to be construed as legislation and is also not an 'official publication' as defined in section 1 of the Tax Administration Act.<sup>37</sup> The Guide issued by SARS is therefore not legally binding and a taxpayer may dispute

30 For example, Lionel Messi, Cristiano Ronaldo, and Usain Bolt have registered their names as trade marks. See further PM Cooper *Lexology* 'Lionel Messi finally registers his name as a trade mark following long legal battle' <https://www.lexology.com/library/detail.aspx?g=23638806-354d-4d22-962f-d6310a25a0e5> (accessed 20 August 2020).

31 Sec 9(1) & (2) of the Trade Marks Act 194 of 1993.

32 Bosse (n 12).

33 There is, a specific withholding tax of 15% levied on foreign sportspersons and entertainers in terms secs 47A-47K of the Income Tax Act. These sections specifically address cases where foreign sportspersons have exercised or will exercise a 'specified activity'. A 'specified activity' is defined in sec 47A as any personal activity exercised or to be exercised in the Republic by a sportsperson or entertainer, whether alone or with other persons. A detailed discussion of these taxation regulations falls out of the scope of this paper.

34 SARS *Guide on the taxation of professional sports clubs and players* (2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-Gen-G08-Guide-on-the-Taxation-of-Professional-Sports-Clubs-and-Players.pdf> (accessed 24 January 2022).

35 As above.

36 SARS *Guide on the Taxation of professional sports clubs and players* (2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-Gen-G08-Guide-on-the-Taxation-of-Professional-Sports-Clubs-and-Players.pdf> (accessed 24 January 2022) i.

37 *Marshall and Others v Commissioner, South African Revenue Service* (2018) ZACC 11, para 10 read with sec 1 of the Tax Administration Act 28 of 2011.

the views it expresses. The Guide serves as a reference point for how SARS would typically deal with income generated from image rights; it is merely a practice generally prevailing.<sup>38</sup>

The SARS 'Guide on the Taxation of Professional Sports Clubs and Players' refers specifically to image rights and describes them as 'payments that a player receives from an enterprise that uses such player's image for advertising purposes'.<sup>39</sup> When dealing with the taxation of such payments, the Guide states that image rights cannot be 'sold' to another person as they cannot be separated from the sport star.<sup>40</sup> We disagree: Even though 'image rights' are not yet recognised under any intellectual property legislation, the sport star has exclusive control over these rights which, we submit, can be separated from the sport star by registering his or her image rights as a trade mark.<sup>41</sup> Consequently, as with any other trade mark, the star can assign this registrable trade mark to another person or entity as provided for in section 39 of the Trade Marks Act.<sup>42</sup> The transfer of the image rights is effected by a written deed of assignment executed by the assignor of the trade mark (the sport star). The transfer of ownership will generally be recorded in the Register of Trade Marks.<sup>43</sup>

The Guide further makes it clear that where the image rights are registered as a trade mark in terms of the Trade Marks Act, SARS will view payments received by the sport star as income to be included in the star's gross income and subject to income tax.<sup>44</sup> The definition of gross income in the Income Tax Act<sup>45</sup> is broad enough to include amounts received or accrued by a resident on his other worldwide income. As a result, this would include income received by or accrued to the taxpayer arising from a trademark (irrespective whether the trademark is registered or not), but would exclude income of a capital nature.<sup>46</sup> However, the definition of 'gross income' in section 1 of the

38 Sec 5(1) of the Tax Administration Act 28 of 2011 provides: 'A practice generally prevailing is a practice set out in an official publication regarding the application or interpretation of a tax Act'.

39 SARS *Guide on the taxation of professional sports clubs and players* (2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-Gen-G08-Guide-on-the-Taxation-of-Professional-Sports-Clubs-and-Players.pdf> (accessed 24 January 2022) 33.

40 As above.

41 Sec 12 of the Trade Marks Act read with Bosse (n 12).

42 Sec 39 of the Trade Marks Act 194 of 1993.

43 Secs 11 & 16 of the Trade Marks Act read with O Dean 'Keep the trade mark assignment baby when throwing out the bathwater' (2004) 71 *Encyclopaedia of brands and branding* at 71.

44 SARS *Guide on the taxation of professional sports clubs and players* (2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-Gen-G08-Guide-on-the-Taxation-of-Professional-Sports-Clubs-and-Players.pdf> (accessed 24 January 2022).

45 Income Tax Act 58 of 1962, hereafter 'the Income Tax Act'.

46 Sec 1 of the Income Tax Act definition of 'gross income'.

Income Tax Act specifically includes, in relation to a resident, certain amounts, even if these amounts are generally of a capital nature.<sup>47</sup> In terms of the gross income definition, any amount received or accrued to a person as a premium, or considered in the nature of a premium, for the use or right to use any trade mark, as defined in the Trade Mark Act, is specifically included in the taxpayer's gross income.<sup>48</sup> Therefore, should an entity exploit a sport star's image rights and pay the star premiums for such a right, these premiums will form part of the star's gross income,<sup>49</sup> irrespective of the fact that the image right is registered as a trade mark under the Trade Mark Act or not.

With regards to a non-resident, the definition of 'gross income' provides that the total amount, in cash or otherwise, received by or accrued to or in favour of such a person from a source within South Africa, must be included in that person's gross income.<sup>50</sup> Amounts of a capital nature are, however, excluded.<sup>51</sup> This means that for a non-resident, only income received by or accrued to such a non-resident, which is not of a capital nature, that arises from a source within South Africa would be subject to normal tax in South Africa. The income from the exploitation of a non-resident's image rights will therefore only be taxable in South Africa if the source of such income is within the Republic of South Africa.

The sport star may want to deduct certain expenditure relating to the image rights for tax purposes and one must consider section 11(a) read with section 23(g) of the Income Tax Act in this regard. Section 11(a) sets out the requirements for the general deduction formula for expenditure to qualify for a tax deduction, with the prerequisite in section 23(g) that a deduction will only be allowed where such expenditure is laid out or expended for purposes of carrying on a trade.<sup>52</sup> Addressing relevant permitted deductions, section 11(a)(i) of the Income Tax Act sets out the general deduction formula.<sup>53</sup> The section provides that in determining a person's taxable income derived from carrying on a trade, the person may claim his or her

47 Referred to generally as 'specific inclusions'.

48 Part (g)(iii) of the definition of 'gross income' in sec 1 of the Income Tax Act.

49 As above.

50 Sec 1 of the Income Tax Act definition of 'gross income'.

51 Sec 1 definition of 'gross income', part (ii) of the Income Tax Act. Also see secs 47A-47K of the Income Tax Act.

52 Sec 11(a) read with Sec 23(g) of the Income Tax Act.

53 Sec 11(a) must be read with sec 23H (limitation of certain deductions) in the Income Tax Act; *Port Elizabeth Electric Tramway Company Ltd v CIR* 1936 CPD 241, 8 SATC 13.

expenditure and losses<sup>54</sup> actually incurred<sup>55</sup> in the production of income<sup>56</sup> provided the expenditure and losses are not of a capital nature.<sup>57</sup> Depending on the type of expenses incurred by the sport star in relation to his or her image rights, the expenses incurred may be deductible under the general deduction formula.

However, section 11 also provides for certain specific deductions. For example, section 11(gA)(i) allows for the deduction of expenditure actually incurred by the taxpayer for devising or developing any trade mark as defined in the Trade Marks Act, if the trade mark is used by the taxpayer in the production of his or her income. There is, however, a proviso to this subsection limiting the amount of an allowance permitted as a deduction.<sup>58</sup> Likewise, section 11(gB) allows for a deduction of expenditure, which, first, qualifies as a deduction (partly or in whole) under any of the other provisions of section 11; and second, has actually been incurred in the registration or the renewal of any registration of any trade mark in terms of the Trade Mark Act, if it is used by the taxpayer in the production of his or her income.

We submit that development costs associated with registering the sport star's image rights as a trade mark may be deducted under the provisions of section 11(gA), and the registration costs of the trade mark may be deductible in terms of section 11(gB). Ongoing costs associated with the sport star's image rights may be deductible in terms of section 11(a)'s general deduction formula if all the requirements are met.

A question arises as to whether the sport star can continue to claim a deduction under section 11(a) for expenses incurred in relation to his or her image rights if the image rights have been assigned to the IRC as part of a tax minimisation scheme. In *PE*

54 *CSARS v Labat* (669/10) [2011] ZASCA 157, where the court considered what constitutes 'expenditure' and held that expenditure requires a diminution or movement of assets of the person who expends.

55 *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A); *Port Elizabeth Electric Tramway Company Ltd v CIR* 1936 CPD 241, 8 SATC 13. In the *Caltex* case, the court held that the expenditure 'actually incurred' refers to all expenditure where a liability was incurred in that year of assessment, whether or not that liability had been discharged in that same year.

56 In the case of *Port Elizabeth Electric Tramway Company Ltd* (n 55), the court established a two-pronged test to determine if an expenditure had been incurred 'in the production of income'. The court asked: (1) What action gave rise to the expenditure and what was the purpose of the action? (2) Is the action so closely connected with (or a necessary concomitant of) the income-earning business activities from which the expenditure arose as to form part of the cost of performing it?

57 In *SIR v Cadac Engineering Works (Pty) Ltd* 1965 (2) SA 511 (A) the court held that there must be a sufficiently close link to the expenditure that had been incurred and the taxpayer's income earning operations. In other words, the expenditure should not be a cost to expand the taxpayer's income-earning operations (which would make it capital in nature).

58 Sec 11(gA) of the Income Tax Act.

*Electric Tramway*<sup>59</sup> the court held that the expense must be ‘closely linked’ to the operation of the business for it to be incurred ‘in the production of income’.<sup>60</sup> We submit that if the image rights are transferred to the IRC under a minimisation scheme, any costs incurred personally by the sport star in relation to his or her image rights after such a transfer will not give rise to correlating, non-contingent income in his or her hands as it is rather generating income for the operation of the business of the IRC and the required ‘close link’ between the operation of business and the expense incurred by the sport star will have been broken.

In 2001, a South African court in *ITC 1735*<sup>61</sup> had the opportunity to assess whether monies received for the use of a sport star’s name, likeness, and biographical material (i.e., image rights) were to be regarded as an ‘income’ or a ‘capital receipt’ for taxation purposes. The Appellant (a golfer) argued that the income received fell within the ambit of the now repealed section 9(1)(b) of the Income Tax Act, read with the now repealed section 35, which provided that where a non-resident received an amount referred to in section 9(1)(b) or (bA) of the Income Tax Act from a South African source, the non-resident is deemed to have derived taxable income that is equal to thirty percent (30%) of that amount received.<sup>62</sup> The Appellant therefore argued that if the income constituted gross income, only 30% of the income received by the Appellant should have been subjected to tax. In terms of section 9(1)(b), patents, designs, trademarks, and copyrights are all rights designed to protect the creators of original intellectual works.<sup>63</sup> The court found that the golfer’s name, likeness and so on is not a product of his own creative effort and are of an entirely different nature to the rights listed in section 9(1)(b)(i).<sup>64</sup> The result of the use of the image rights not forming part of section 9(1)(b)(i) was that section 35(1) also did not apply to the income received by the Appellant. The court found that the Commissioner of SARS had, therefore, correctly disallowed the objection and that the US \$100 000 failed to be assessed in terms of section 35(1) of the Act as the receipt was part of his ‘gross income’ and was received from a source within the Republic.<sup>65</sup> It should be noted, however, that Tax Court judgments do not create a precedent but has persuasive value in future matters.<sup>66</sup>

59 *Port Elizabeth Electric Tramway Company Ltd* (n 55).

60 *Port Elizabeth Electric Tramway Company Ltd* (n 55) para 16.

61 *ITC 1735 64 SATC 455*.

62 *ITC 1735 64 SATC 458* para 10.

63 *ITC 1735 64 SATC 458*.

64 *ITC 1735 64 SATC 459* para 11.

65 As above.

66 Part D of Chapter 9 of the Tax Administration Act 28 of 2011; *ABC CC v CSARS IT 4036* (14 August 2017) at para 23.

### 3 South African tax regulation of image rights payments

Based on the structuring and holding of a sport star's image rights, different tax implications can be triggered. These different tax implications can be illustrated by two scenarios: In the first scenario, income is received directly by a South African sport star for the exploitation of his or her image rights (i.e., the sport star owns his/her own image rights). In the second scenario, the star enters into an IRC scheme in terms of which he or she assigns his or her image rights to an IRC, which is incorporated in a low-tax jurisdiction and only receives income indirectly for the exploitation of the image rights in the form of a foreign dividend declared by the IRC.

#### 3.1 Scenario one – Sport star receives the income directly

The Income Tax Act regulates all taxes attached to the receipt of income from a third party for the exploitation of the star's image rights. In this article, it is assumed that the star is a South African tax resident either because he or she meets the ordinary residence test under the term 'resident' in section 1(a)(i) of the Income Tax Act,<sup>67</sup> or the physical presence test under section 1(a)(ii) of the Income Tax Act.<sup>68</sup>

To illustrate these two scenarios with an example, a South African sport star, Joe Soap, registered his image rights as a trade mark under the Trade Marks Act. He has exclusive control over his image rights. He then enters into an image rights agreement with a luxury watch brand which exploits his image rights by associating its brand with Joe Soap's trade mark in exchange for payment. The monies received by Joe Soap for the exploitation of his image rights will be revenue in nature and not capital in nature for tax purposes based on the image rights which have been registered as a trade mark, which constitutes the 'capital' (i.e., the tree); and the payment made by the third party for the exploitation of the mark is the 'income' (i.e., the fruit) that the tree produces. This is the simple 'fruit versus tree' analogy in tax.<sup>69</sup>

67 This is where the taxpayer considers his or her 'real home' to be. See *Cohen v CIR* 1946 AD 174, 13 SATC 362 at 372. Section 1 definition of 'resident' in the Income Tax Act.

68 This is when a person is present in South Africa for a period exceeding 91 days in aggregate during the year of assessment and during each five years of assessment preceding the current year of assessment, and for a period exceeding 915 days in aggregate during the five years of assessment preceding the current year of assessment. Section 1 definition of 'resident' in the Income Tax Act.

69 *Visser v CIR* 1937 TPD 82.



Image rights are typically contained in the employment contract concluded by the star with a club or franchise.<sup>70</sup> This part of the agreement will typically stipulate whether payments made by either the club or a third party will constitute payment for services rendered to the club – so qualifying as remuneration and subject to pay-as-you-earn tax<sup>71</sup> – and/or whether this will be a separate source of income for the star which would be included separately in his or her gross income.

It is concluded that in terms of the Income Tax Act, the monies received directly by Joe Soap from the luxury watch brand constitute a profit and form part of his ‘gross income’ as defined in section 1 of the Income Tax Act. In terms of South Africa’s progressive rate structure, the highest rate for an individual is 45%<sup>72</sup>. As mentioned earlier, if the taxpayer retains ownership of his or her own image right<sup>73</sup>s, he or she may also be permitted certain deductions, if all the relevant requirements are met.<sup>74</sup> For purposes of this article, it is accepted that the highest rate will apply and the star’s taxable income (taking into account the income from Joe Soap’s image rights and any relevant deductions and exemptions) will therefore be subject to tax in terms of the 45% tax bracket.<sup>75</sup> This high rate of individual tax is why many stars seek to enter into a tax minimisation scheme by creating an offshore IRC.

### 3.2 Scenario two –The IRC scheme

A very basic depiction of the establishment of an IRC scheme is set out below. This entails a four-step tax-avoidance structure –

**Step 1:** The star assigns his or her image rights to the IRC (incorporated in a low-tax jurisdiction) in which he or she holds shares.

**Step 2:** Third parties enter into image rights contracts with the IRC for the exploitation of the star’s image rights.

**Step 3:** The third parties pay the IRC directly for the exploitation of the star’s image rights.

**Step 4:** The IRC declares and pays the star a foreign dividend.

70 B Strydom & V Sinton ‘Image rights it’s time for clarity and certainty’ (2013) 43 *TAXtalk* at 42.

71 Para 2 of the Fourth Schedule of the Income Tax Act.

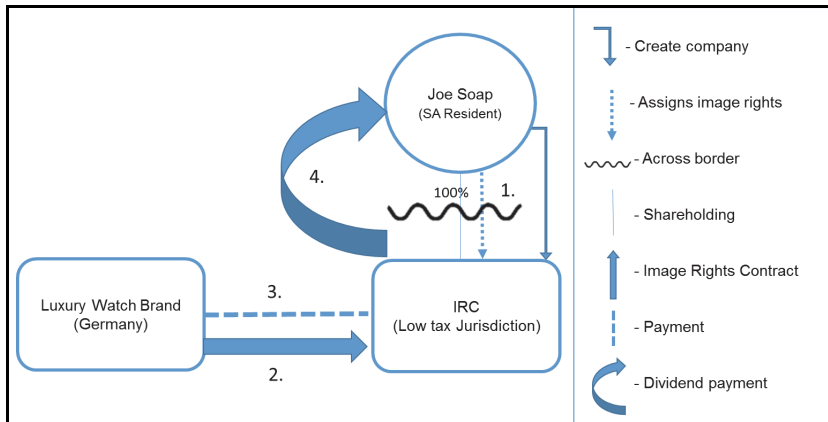
72 <https://www.sars.gov.za/tax-rates/income-tax/rates-of-tax-for-individuals/> (accessed 7 May 2021).

73 See *Port Elizabeth Electric Tramway Company Ltd v CIR* 1936 CPD 241, 8 SATC 13.

74 Sec 11(a), (gA) & (gB) of the Income Tax Act.

75 As an example, for the year of assessment ending 28 February 2021, the rate is tax for someone within the 45% tax bracket would be: R559 464 + 45% of the amount above R1 577 300 (taxable income).

A basic IRC scheme in a 4-step illustration:



This is a simplified structure of what schemes are entered into in practice.

In our example, should Joe Soap assign his image rights to an IRC, he will dispose of an asset in terms of paragraph 11 of the Eighth Schedule to the Income Tax Act. Should a capital gain result from the disposal, Joe Soap will be liable for capital gains tax (to be included in his taxable income for the year of assessment) at an inclusion rate of 40% of the taxable capital gain.<sup>76</sup> The capital gains tax formula is the difference between the proceeds<sup>77</sup> received from the disposal of the asset less the base cost<sup>78</sup> of the asset being disposed of, which gives rise to either a capital gain<sup>79</sup> or a capital loss.<sup>80</sup> However, special anti-avoidance provisions may apply if the parties to the transaction are 'connected persons'<sup>81</sup> and the transaction is not concluded at an arm's length price.<sup>81</sup>

If the image rights are not properly transferred to the IRC, in other words only a right is ceded to the IRC in terms of the exploitation of the image rights, but the ownership of the image rights remains with the sport star or the sport star has a right to regain ownership at a future date, section 7(7) of the Income Tax Act – an anti-avoidance provision – may apply. In terms of this provision, if a cedent (the sport

76 Sec 26A of the Income Tax Act provides that the taxable income of a person for a year of assessment includes the taxable capital gain of that person for that year of assessment as determined in terms of the Eighth Schedule of the Income Tax Act.

77 Part VI of the Eighth Schedule of the Income Tax Act.

78 Part V of the Eighth Schedule of the Income Tax Act.

79 Para 3 of the Eighth Schedule of the Income Tax Act.

80 Para 4 of the Eighth Schedule of the Income Tax Act.

81 Sec 1 definition of 'connected persons' read with paras 38 & 39 of the Eighth Schedule of the Income Tax Act.

star in this example) retains ownership of the asset or has a right to regain ownership of the asset at a later stage and only cedes a right to income by way of donation, settlement or other disposition, the cession agreement is ignored for tax purposes and the income arising from the asset (movable or immovable property) must be included in the hands of the cedent, irrespective of that amount having accrued or received by the cessionary (the IRC). This would most likely be the argument raised by SARS when assessing the sport star, as in the SARS Guide the image rights cannot be separated from the sport star.<sup>82</sup>

The IRC is incorporated in a low-tax jurisdiction and will be regarded as a 'foreign company'<sup>83</sup> for South African tax purposes if its place of effective management is located outside of South Africa. It is, therefore, possible for a company to be incorporated in one jurisdiction but have its place of effective management in another jurisdiction where it will be deemed to be a tax resident.<sup>84</sup> The place of effective management of a company is 'where key management and commercial decisions that are necessary for the conduct of its business as a whole are in substance made'.<sup>85</sup> If these key management and strategic decisions are made in South Africa, the IRC is deemed to be tax resident in South Africa and taxed accordingly.<sup>86</sup>

If the image rights registered as a trade mark are assigned to the IRC,<sup>87</sup> one must consider the royalties tax legislation of the country of the paying party and any relevant double tax agreement ('DTA') concluded between the countries of residence of the IRC and the payer of the royalty. The relevant DTA could reduce the rate of withholding tax or even assign taxing rights in respect of the royalty payment to the Contracting State of the person receiving the royalty payment (the IRC in this case). This means that no withholding tax on

82 SARS *Guide on the taxation of professional sports clubs and players* (2020) <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-Gen-G08-Guide-on-the-Taxation-of-Professional-Sports-Clubs-and-Players.pdf> (accessed 24 January 2022). We disagree and submit that the image rights can be separated from the sport star and in fact sold if they are registered as a trade mark.

83 Sec 1 of the Income Tax Act, definition of 'foreign company'.

84 AW Oguttu 'Resolving double taxation: The concept 'place of effective management' analysed from a South African perspective' (2008) 44 *Comparative and International Law Journal of Southern Africa* at 83. Note that the relevant double tax treaty must be considered in the event of dual residency, but this falls outside of the scope of this paper.

85 *Oceanic Trust Co Ltd NO v CSARS* (2011) 74 SATC 127 para 57; *Customs v Smallwood and Another*. [2010] EWCA Civ 778; Commentary on the OECD Model Tax on Income and on Capital (Full version); SARS Interpretation Note 6 on the Place of Effective Management of Companies (Issue 2); BA van der Merwe 'The phrase "place of effective management" effectively explained' (2006) 18 *South African Mercantile Law Journal* at 123.

86 Sec 1 of the Income Tax Act, definition of 'resident', para (b). Note that this is subject to consideration of the relevant double tax treaty which, however, falls outside of the scope of this paper.

87 The ownership vests in the IRC.

royalties may be levied on the payment being made.<sup>88</sup> An important consideration with the double tax agreements in terms of the royalties withholding tax article, is establishing the beneficial owner<sup>89</sup> of the royalty. In terms of the Organization for Economic Co-operation and Development (OECD) Model Tax Convention (2017):

[A] conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.<sup>90</sup>

If the IRC in our example is not considered the beneficial owner of the royalty, it will not be entitled to the relief provided in Article 12(1) of the relevant DTA. For the purposes of this article's examples, we have assumed that full ownership of the image rights is transferred to the IRC and that the IRC is the beneficial owner of the image rights.

The IRC, having virtually no expenses, will make a profit from the royalty income and will be able to declare and pay dividends to Joe Soap. Because the IRC is a foreign company, the dividend received by Joe Soap constitutes a foreign dividend as defined in section 1 of the Income Tax Act. Section 10B(2)(a) of the Income Tax provides for a 'participation exemption' which exempts a foreign dividend received from a company in which such resident holds at least 10% of the total equity shares and voting rights from a resident's gross income.<sup>91</sup> It is assumed for purposes of this article that Joe Soap will qualify for this participation exemption and will therefore not be subject to dividends tax in South Africa. This, in comparison to the high rate of income tax<sup>92</sup> that is levied when Joe Soap receives the image rights payments directly, clearly constitutes a tax benefit for the sport star.

## 4 South African anti-avoidance provisions in IRC schemes

### 4.1 General anti-avoidance provisions

The scheme entered into in scenario two is a result of careful tax planning. To establish whether South African regulations would regard

88 OECD Model Tax Convention and Commentary (2017), Commentary on art 12 para 4.3.

89 OECD Model Tax Convention and Commentary (2017), Commentary on art 12 para 4.3.

90 OECD Model Tax Convention and Commentary (2017), Commentary on art 12 para 4.2.

91 Alternatively, if the IRC is a CFC, sec 10B(2)(c) (subject to sec 10B(4)), provides that the foreign dividend received by the resident is exempt to the extent that the income of the CFC has been included in the resident's income in terms of sec 9D of the Income Tax Act.

92 ITC 1735 64 SATC 459 para 11.

this scheme permissible or impermissible avoidance, the general legislation as provided for in terms of the General Anti-avoidance Regulations ('GAAR') in terms of sections 80A to 80L of the Income Tax Act is first examined. There are four requirements to be met for the GAAR to apply:

- (a) There must be an arrangement. Section 80L of the Income Tax Act defines an 'arrangement' as 'any transaction, operation, scheme, agreement or understanding, including all steps therein or parts thereof, and includes any of the foregoing involving the alienation of property'.
- (b) There must be a tax benefit. The general definition provided in section 1 of the Income Tax Act includes 'any avoidance, postponement or reduction of any liability for tax'.
- (c) The sole or main purpose of the avoidance arrangement<sup>93</sup> must be to obtain a tax benefit.
- (d) If the anti-avoidance arrangement is business related, one of four requirements must be met in terms of the arrangement –
  - It must be entered into or carried out in a manner not normally used for *bona fide* business purposes.<sup>94</sup>
  - It must create rights or obligations which are not normally created between persons dealing at arm's length.<sup>95</sup>
  - It must lack commercial substance.<sup>96</sup>
  - It must constitute a direct or indirect abuse of provisions in the Income Tax Act.<sup>97</sup>

When the provisions of the GAAR are applied to the basic IRC scheme, it emerges that the provisions are broad enough to conclude that the creation of an IRC constitutes an arrangement which results in a tax benefit for the sport star. The provisions of the GAAR further inquire as to whether such arrangement is abnormal or *bona fide* for business purposes and whether it lacks commercial sense.<sup>98</sup>

We submit that the only reason for a sport star to enter into a scheme in terms of which he or she assigns his or her image rights to an IRC is to create a 'wall' between him- or herself and the income derived from the exploitation of his or her image rights. This will, however, depend on each case's set of facts. This arrangement appears artificial because the star can negotiate with third parties for the exploitation of his or her image rights whilst he or she is still the owner of these rights. The choice of location of the IRC may also lack commercial reasoning if the sport star does not conduct any business

93 An 'avoidance arrangement' is defined in sec 80L to mean any arrangement that, but for this part, results in a tax benefit.

94 Sec 80A(1)(a)(i) of the Income Tax Act.

95 Sec 80A(1)(c)(i) of the Income Tax Act.

96 Sec 80A(1)(a)(ii) read with sec 80C of the Income Tax Act.

97 Sec 80A(1)(c)(ii) of the Income Tax Act.

98 Sec 80C(1) of the Income Tax Act.

there and the choice is based solely on its status as a low-tax jurisdiction. The IRC established by the star will most likely merely be a shell company with perhaps one or two employees and the only business activity of the company will be to receive the passive income in the form of royalty payments. The IRC in our example will clearly lack commercial substance. It is concluded that the general anti-avoidance provisions in South Africa are sufficiently broad to allow the tax authorities to address the tax avoidance arrangement entered into by the sport star.

It is therefore likely that the IRC scheme will be interrogated by the tax authorities and that the courts will very likely conclude that it is an impermissible anti-avoidance arrangement. The provisions of section 80B of the Income Tax Act which detail the punitive measures available to the Commissioner, will then come into play. In the unlikely event of a court finding that the sport star reduced his or her tax liability by structuring his or her affairs in such a manner that he or she committed fraud against the *fiscus*, the star will be guilty of tax evasion.<sup>99</sup>

#### 4.2 Controlled foreign companies

Even if the IRC scheme is not challenged under the GAAR provisions of the Income Tax Act, the Act contains various specific anti-avoidance provisions that would catch this arrangement and tax it accordingly. The applicable anti-avoidance regulations in this case are the Controlled Foreign Company ('CFC') provisions in section 9D of the Income Tax Act.

Although CFC legislation had been implemented in many countries prior to the OECD's Base Erosion and Profit Shifting (BEPS) Project, CFC legislation has been included as an action plan in BEPS<sup>100</sup> to prevent the erosion of the tax base of a jurisdiction through the shifting of profit from the jurisdiction where the profit is received to low-tax jurisdictions.<sup>101</sup> The CFC provisions in the Income Tax Act are very technical and complex, but essentially entail that a foreign company will qualify as a CFC when a resident or residents together hold 50% or more of either the total participation rights,<sup>102</sup> or in absence thereof, voting rights, in the foreign company.<sup>103</sup>

99 Tax evasion differs from tax avoidance in that tax evasion is illegal while tax avoidance makes use of legal ways to reduce tax liability.

100 OECD/G20 Base Erosion and Profit Shifting Project – Action 3: 'Designing Effective Controlled Foreign Company Rules' <https://www.oecd.org/ctp/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report-9789264241152-en.htm> (accessed 7 May 2021).

101 As above.

102 'Participant rights' means the right to participate in the benefits of the rights attaching to a share in the company but excludes voting rights.

103 Sec 9D(1) definition of 'controlled foreign company' in the Income Tax Act.

Returning to Joe Soap, we assume that he, in his personal capacity or along with other South African residents, holds more than 50% of the shares in the IRC (as the sole purpose of the IRC is to indirectly receive income from the exploitation of his image rights in the form of a dividend) and that the IRC will therefore qualify as a CFC. Section 9D(2A)(a)(i) of the Income Tax requires that the net income of the CFC must form part of Joe Soap's gross income in the ratio of the percentage participation right he holds in the CFC.

In our example, the IRC is established with the sole purpose of receiving the passive royalty income<sup>104</sup> from the exploitation of the sport star's image rights. There are two instances in which the net income of the CFC would be deemed to be nil (and the taxpayer would therefore not be required to include any amount in his or her gross income), namely: the high-tax exemption; or the foreign business establishment.<sup>105</sup> These two exemptions are considered briefly.

The high-tax exemption is regulated in terms of section 9D(2A)(i)(aa) of the Income Tax Act. This section provides that where the total tax payable to a foreign government by the CFC – the IRC in a foreign jurisdiction – is equal to or higher than 67.5% of the normal tax that would have been payable by the CFC had it been a South African tax resident, the net income of the CFC is deemed nil.<sup>106</sup> As Joe Soap in our second scenario incorporated the IRC in a low-tax jurisdiction, this exemption will in all likelihood not apply. The second exemption, a foreign business establishment ('FBE') is regulated in terms of section 9D(2A)(i)(bb). An FBE is defined in section 9D to mean, *inter alia*, a business which is suitably staffed and equipped for conducting its primary operations incorporated in a foreign jurisdiction.<sup>107</sup> This exemption applies when all receipts and accruals of the CFC are derived from the FBE and means that the net income of the CFC will be deemed nil.<sup>108</sup> The rationale for this exemption lies in the fact that CFC rules do not target income derived from business activities of substance carried on outside of South Africa.<sup>109</sup> In our second scenario, the IRC is established with the sole purpose of its member(s) contracting with third parties for the exploitation of the image rights held by the IRC in return for the receipt of passive royalty payments. It is therefore clear that the IRC would not require a large number of staff, buildings, or equipment,

104 As mentioned above, a 'royalty' is defined as an amount that is received or accrued in respect of the use or right of use of or permission to use any intellectual property and includes a trade mark).

105 Sec 9D(2A)(i)(aa) & (bb) of the Income Tax Act.

106 Sec 9D (2A)(i)(aa) of the Income Tax Act and Stiglingh et al (eds) 'Cross-border transactions' in Lexis Nexis (eds) *Silke: South African Income Tax* (2021) at 867.

107 Definition of 'foreign business establishment' in part (a)(i)-(v) of sec 9D of the Income Tax Act.

108 Sec 9D (2A)(i)(bb) of the Income Tax Act.

109 Stiglingh et al (n 106) 880.

and would not perform the daily activities expected of an FBE. The IRC is merely a holding company incorporated with the sole purpose of receiving passive royalty payments.

The section also contains clawback provisions, which would see certain amounts included in the determination of the CFC's net income, even if, for example, the FBE exemption applies. An example is section 9D(9A)(v) which specifically addresses income attributable to the FBE of a CFC, which arises from the use or right of use of intellectual property.<sup>110</sup> The section provides that where that amount (attributable to an FBE of a CFC) arises from the use or right of use of or permission to use any intellectual property as defined in section 23I, that amount must be included in determining the net income of the CFC. There is an exemption from this rule if both of the following requirements are met -

- (a) The CFC directly and regularly creates, develops, or substantially upgrades any intellectual property as defined in section 23I, which gives rise to the amount.<sup>111</sup> In the typical IRC scheme this would not be case as the IRC is tasked with acquiring, holding, and managing the sport star's image rights and exploiting them for profit. Given the nature of the image rights, we submit that it would be difficult to prove that the IRC has developed or substantially improved image rights in that they are attached to a specific person (the sport star).
- (b) That the intellectual property is not 'tainted' intellectual property as defined in section 23I.<sup>112</sup>

If neither of these requirements are met, the income arising from the use of intellectual property must be included in the net income of the CFC and be imputed to be taxed in South Africa. The CFC legislation will apply to the scheme at hand and the net income of the IRC – i.e., passive royalty payments – received by the IRC will automatically be included in the star's income unless one of the relevant exemptions applies and none of the clawback provisions apply.

## 5 How do other jurisdictions regulate IRC schemes?

### 5.1 Spain – taxing of IRC schemes

What makes Spain unique in relation to its treatment of image rights, is that image rights in Spain are not only recognised by Spanish law

110 Sec 9D(9A)(v) of the Income Tax Act.

111 Sec 9D(9A)(v)(aa) of the Income Tax Act.

112 Sec 9D(9A)(v)(bb) of the Income Tax Act.



(other than in South Africa where they are not yet recognised), but they also enjoy constitutional protection.<sup>113</sup>

Spain has specific regulations – known as ‘the 85% / 15% rule’<sup>114</sup> in the Spanish Income Tax Act, which deal specifically with income derived from image rights. In basic terms, under this rule a sport star or his or her employer (the club) may only assign 15% of the image rights held to an IRC.<sup>115</sup> The remaining 85% must be held directly by either the club or the sport star, depending on the contractual employment relationship as regards the sport star’s image rights.<sup>116</sup> It therefore allows for a portion of the income from image rights to be exempt from Spanish tax in that it may be assigned and consequently taxed in the IRC’s tax residency jurisdiction.<sup>117</sup> Spain, like South Africa, has CFC legislation in its Income Tax Act. The Spanish CFC legislation is, however, not as overly complicated as that in the South African Income Tax Act.<sup>118</sup>

Given that both Messi and Ronaldo have encountered problems with the Spanish revenue authorities regarding the taxation of their image rights, it is clear that the Spanish tax authorities are inclined to look very closely at sport stars who enter into IRC schemes and that the Spanish Penal Code is sufficiently drafted to apply to an IRC scheme and to impose hefty sanctions, including fines and prison sentences, on taxpayers who enter into such schemes.<sup>119</sup>

## 5.2 United Kingdom – taxing of IRC Schemes

In the UK, the creation of IRCs appears to have developed historically not only for the benefit of the sport star but also for the benefit of the clubs.<sup>120</sup> Over the years, the UK has seen numerous such schemes

113 Art 18(1) of The Spanish Constitution: Fundamental Laws of the State read with E Montejo *Senn Ferrero Sport & Entertainment* ‘Spanish tax situation of image rights’ <http://sennferrero.com/es/opinion/400-spanish-tax-situation-of-image-rights> (accessed 22 September 2020).

114 Art 91 of the Spanish Income Tax Act 35 of 2006.

115 *Senn Ferrero Sport & Entertainment* ‘Spanish tax situation of image rights’ by E Montejo <http://sennferrero.com/es/opinion/400-spanish-tax-situation-of-image-rights> (Accessed on 22 September 2020) and YV Moraga & A Sarrias ‘Sport Image Rights in Spain’ (2010) 3(4) *The International Sport Law Journal* 132.

116 As above.

117 As above.

118 Spanish Income Tax Act 35 of 2006 read with Council Directive (EU) 2016/1164 of 12 July 2016 setting out rules against tax avoidance practices that directly affect the functioning of the internal market [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2016.193.01.0001.01](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.193.01.0001.01). ENG (accessed 7 May 2021).

119 J de Dios et al ‘Spanish tax law: The *Lionel Messi* case’ (2013) 14 *World Sports Law Report* at 16.

120 R Haynes ‘Footballers’ image rights in the new media age’ (2007) 7(4) *European Sport Management Quarterly* 365; C Coors ‘Sports image rights in the UK: Countering tax evasion in the football industry’ (2017) 8(1) *Global Sports Law and Taxation Reports* at 30; P Hackleton & H Julian ‘Image is everything’ (2010) 4262 *LexisNexis*.

which have been tested in the courts more regularly than in South Africa.<sup>121</sup> Her Majesty's Revenue and Customs ('HMRC') published the Guide on 'Tax on payments for use of image rights' in 2017<sup>122</sup> which provided long-awaited guidance on the taxation of income derived from the exploitation of image rights. This Guide is more comprehensive than South Africa's SARS Guide. For example, the UK Guide identifies that payment received by a sport star for the exploitation of his or her image rights can lead to three different tax consequences –<sup>123</sup>

1. Where payment is made to a self-employed sport star it could be taxable as professional income.
2. Where payment is made to a sport star for the duties of the star's employment, it must be taxed as remuneration, subject to tax deductions at source and not as payments for the use of image rights.
3. Image rights payments made to a UK company will give rise to UK corporation tax on the profits of the company. Income then received by the individual from the company will be taxed according to the type of income received, for example, dividends will be subject to dividend tax.

From the Guide, it is clear that HMRC regards commerciality as the main consideration and each case will be reviewed on its own facts, rather than by applying any single accepted principle.<sup>124</sup>

The *Geovanni* case<sup>125</sup> in the UK examined an IRC scheme in detail and concluded that the scheme lacked commercial substance and was created solely to secure a tax benefit. As mentioned earlier, in the *Agassi* case the UK House of Lords extended the scope of the taxation of foreign sport stars participating in sporting events in the UK.<sup>126</sup> Briefly, Andre Agassi participated in UK tennis tournaments, including Wimbledon, during 1998 and 1999.<sup>127</sup> For these years of assessment, the HMRC wanted to tax endorsement payments made by two of Agassi's sponsors (both non-UK tax resident companies) to his IRC –

121 *Hull City AFC (Tigers) Ltd v Revenue and Customs Commissioners* [2019] UKFTT 227 (TC), [2019] SFTD 754, [2019] 3 WLUK 611 (FTT (Tax)); *Agassi* (n 6).

122 Guidance: 'Tax on payments for use of image rights' <https://www.gov.uk/guidance/tax-on-payments-for-use-of-image-rights> (accessed 27 November 2020) read with K Offer 'UK development in the taxation of image rights' (2017) 8 *Global Sports Law & Taxation Reports* 16 and Markel Tax 'Taxation of Image Rights' 16 April 2018 <https://www.markeltax.co.uk/industry-news/https-www-markeltax-co-uk-industry-news-uk-international> (accessed 1 October 2020).

123 Guidance: 'Tax on payments for use of image rights' <https://www.gov.uk/guidance/tax-on-payments-for-use-of-image-rights> (accessed 27 November 2020).

124 Offer (n 122); HMRC Internal Manual – Employment Income Manual EIM00733 <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim00733> (accessed 5 October 2020).

125 *Hull City AFC (Tigers) Ltd v Revenue and Customs Commissioners* [2019] UKFTT 227 (TC), [2019] SFTD 754, [2019] 3 WLUK 611 (FTT (Tax)) para 133 ('*Geovanni* case').

126 *Agassi* (n 6); Cloete (n 3) 556.

127 *Agassi* (n 6) paras 4-7.

Agassi Inc – which was also not a UK tax resident company, for the use of his image rights.<sup>128</sup> None of these companies conducted any trade in the UK during the years of assessment.<sup>129</sup> Agassi himself had also never been a tax resident in the UK and had merely played in the UK tennis tournaments during the relevant years of assessment.<sup>130</sup> HMRC (the appellant in this matter) based its argument in the House of Lords on the statutory provisions which provide for the taxation of ‘payments that had a connection of a prescribed kind’<sup>131</sup> with a ‘relevant activity’<sup>132</sup> performed by Agassi in the UK.<sup>133</sup> The House of Lords upheld the HMRC’s appeal.

Unlike South African and Spanish CFC legislation, in the UK, a foreign entity will only qualify as a CFC if it meets a broad set of standards. The extant UK CFC legislation in place is, in our view, not up to the OECD standard and will currently not apply to a typical IRC scheme as in our example. This is an unsatisfactory position.

There appears to be a new focus in the UK on the taxation of IRC structures and the potential tax loopholes that IRCs create, and in the 2019/2020 tax year it was reported that HMRC is investigating 246 individual football players in this regard.<sup>134</sup>

## 6 Lessons for South Africa from other jurisdictions

The main inquiry by the courts will be whether minimisation schemes have any commercial substance. This is in line with the well-known South African doctrine of ‘substance over form’.<sup>135</sup> The general anti-avoidance regulations contained in the GAAR also entail an inquiry into the commercial substance of an arrangement. It is, therefore, concluded that a South African court will most likely also find that the creation of an IRC will lack commercial substance, as was concluded in the case studies in both Spain and the UK.

However, South Africa does appear to be lacking in a few areas regarding legislation governing image rights. First, South Africa does

128 *Agassi* (n 6) para 5

129 *As above*.

130 *As above*.

131 Reg 3 of the 1987 Regulations; *Agassi* (n 6) para 6.

132 Reg 6 of the 1987 Regulations; *Agassi* (n 6) para 6.

133 The question before the court was if the literal meaning must be given to sec 555(2) of the 1988 Act or a limited effect be applied to exclude from its scope persons who do not reside or carry on any trade in the UK [para 3]. Sec 555(2) of the 1988 Act read with sec 556(1) of the 1988 Act.

134 P MacInnes ‘Tax affairs of 246 footballers being investigated by HMRC in 2019-20’ *The Guardian* 10 August 2020 <https://www.theguardian.com/football/2020/aug/10/tax-affairs-of-246-footballers-being-investigated-by-hmrc-in-2019-20> (accessed 9 October 2020).

135 *CSARS v NWK Ltd* [2011] 2 All SA 347 (SCA).

not have legislation that specifically deals with the taxation of image rights (such as the 85% / 15% rule in Spain) or adequate guidance from SARS that deals in detail with how SARS considers image rights income should be classified and what taxes attach to it (as seen in the UK Guide).

Second, in terms of current intellectual property law, a South African sport star does not hold a specifically recognised proprietary interest or property rights in his or her likeness or *persona*. It can, therefore, be concluded that the current South African legislation does not recognise an image right as a stand-alone right.

It is however satisfying that South Africa has specific legislation that will apply to an IRC scheme as discussed in this paper – e.g., the CFC legislation. Regrettably, the provisions of the South African CFC legislation are overly complex and lead to uncertainties in their application and places an administrative burden on the taxpayer.

In this light, it is suggested that South Africa enact more specific legislation governing the taxation of image rights. This will also enable the Commissioner to adequately prosecute a sport star who enters into an impermissible tax avoidance scheme with greater confidence than the current laws allow.

# THE CHINA-AFRICA JOINT ARBITRATION CENTRE (CAJAC)

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## Abstract

*The People's Republic of China (PRC) continues to consolidate its position as one of the most important trade players on the international market. The PRC has signed cooperation agreements with more than 126 countries. It is also a substantial importer of raw materials, intermediate inputs, and other goods. The PRC has dealings with all 54 countries on the African continent, and today the continent ranks as one of the PRC's most important trading posts. The increasing number of international trade and investment means naturally, that disputes of an international nature will arise between the PRC and African parties. It is for this reason that the China-Africa Joint Arbitration Centre (CAJAC) was established. The formation of CAJAC at the instance of the Forum on China - Africa Cooperation (FOCAC) is to encourage is to administer the resolution of international disputes arising between Chinese and African entities having their principal residence, place of business or nationality located in PRC or a country in Africa. The aim of this article is to examine the salient features of CAJAC which is administer by accredited institutions which include CAJAC Beijing; CAJAC Johannesburg, CAJAC Nairobi, CAJAC OHADA, CAJAC Shanghai and CAJAC Shenzhen.*

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# 1 Introduction

In the last three decades, the People's Republic of China (PRC) has intensified its investment wits, which Zachary Mollengarden persuasively refers to as the 'going up and reform' and the 'going abroad'.<sup>1</sup> The latest investment innovativeness is described as the 'catching up and getting ahead'.<sup>2</sup> In September 2013, the PRC President, Xi Jinping launched the Silk Road Economic Belt and in October 2013, launched the 21st Century Maritime Silk Road initiative.<sup>3</sup> The 'Silk Road Economic Belt' is an initiative based on land based infrastructural development projects such as rail, road and pipelines and the '21st Century Maritime Silk Road' is an initiative based on coastal and port infrastructural development.<sup>4</sup>

The Belt and Road Initiative (BRI),<sup>5</sup> as it is commonly known, has been described as an outbound economic, foreign trade initiative established by the PRC for infrastructural development for the next fifty years.<sup>6</sup> It is not the focus of this article to examine the BRI, its successes or its failures.<sup>7</sup> However, this research highlights the diplomatic efforts between the PRC and Africa to create a medium for the effective resolution of disputes between the PRC and Africa.<sup>8</sup> The China-Africa Joint Arbitration Centre (CAJAC), as will be discussed later in this article, is a manifestation of the Blue Book on the Dispute Resolution Mechanism for the BRI sponsored by the International Academy of the Belt and Road which backed the creation of a uniform dispute resolution mechanism.<sup>9</sup>

1 Z Mollengarden 'One-stop dispute resolution on the belt and road: toward an international commercial court with Chinese characteristics' (2019) 36 *Pacific Basin Law Journal* at 87-93.

2 As above.

3 See P Frankopan *The silk roads: a new history of the world* (2015).

4 A Osman 'China's maritime silk road and the future of African arbitration' in J Chaisse & J Gorski (eds) *The belt and road initiative: Law, economics and politics* (2018) at 734-735.

5 Office of the Leading Group for Belt and Road Initiative *Building the belt and road: concept, practice and China's contribution* (2017) at 1.

6 For a detailed examination of the belt and road initiative agreements, see H Wang *The belt and road initiative agreements: characteristics, rationale, and challenges* (2021) at 24.

7 The Belt and Road Initiative has also attracted criticism. See for example T Lumumba-Kasongo 'China-Africa relations: a neo-imperialism or a neo-colonialism? a reflection' (2011) 1 *African and Asian Studies* at 234-266.

8 Beijing International Arbitration Centre 'The role of arbitration in promoting Sino-African trade and investment' (2017) 14 *Asian-mena Counsel Magazine* at 33.

9 J Crawford 'China and the development of an international dispute resolution mechanism for the belt and road construction' in W Shan et al (eds) *China and international dispute resolution in the context of the 'belt and road initiative'* (2020) at 18.

## 2 The significance of the PRC – Africa relationship

The African continent has ‘the largest number of countries per square area in comparison with other developing regions’.<sup>10</sup> This makes the continent an important trading post for the PRC.<sup>11</sup> In the last three decades, the PRC has had dealings with almost all the countries on the Africa continent.<sup>12</sup> It has supported various causes on the continent,<sup>13</sup> and assisted the liberation struggle against colonialism and racial oppression.<sup>14</sup> The PRC has also been instrumental in providing humanitarian assistance, economic trade, and investments in Africa.<sup>15</sup>

The PRC as an emerging economy,<sup>16</sup> has to date signed cooperation agreements with more than 126 countries, with the PRC committing a ‘total of approximately US\$690 billion’.<sup>17</sup> The PRCs active engagement on the continent has grown in recent years.<sup>18</sup> It has further contributed to the general economic growth, and led to significant improvement in infrastructure.<sup>19</sup> Robert Irwin Rotberg famously said; ‘China and Africa desperately need each other. China cannot easily grow without Africa. Nor can sub-Sahara Africa (a collection of forty-eight disparate countries) subsist, and now prosper, without China’.<sup>20</sup> Unquestionably, the increasing trade and investment initiatives of the PRC, have seen the PRC grow in world trade, and drive the process of globalisation.<sup>21</sup> This makes the PRC

10 HG Broadman *Africa’s silk road: China and India’s new economic frontier* (2007) at 6.

11 Y Chain ‘Regional dispute resolution: An international civil resolution model for East Asia’ in Y Zhao (ed) *International governance and the rule of law in China under the belt and road initiative* (2018) at 269.

12 OM Otele ‘Introduction. China-Africa relations: interdisciplinary question and theoretical perspectives’ (2020) 47 *The African Review* at 280.

13 See S Zhao *China in Africa: strategic motives and economic interests* (2017).

14 C Manyeruke ‘Chinese economic development projects in Zimbabwe’ in SO Abidde & TA Ayoola (eds) *China in Africa: Between imperialism and partnership in humanitarian development* (2020) at 265.

15 CH Vhumbunu ‘Enabling African regional infrastructure renaissance through the China-Africa Partnership: a trans-continental appraisal’ (2016) 77 *International Journal of China Studies* at 277.

16 Brazil, Russia, India, China and South Africa are an important and strategic group of key counties in Africa, Asia, Europe and Latin America of emerging economics referred to as BRICS. See O Hodzi *The end of China’s non-intervention policy in Africa* (2019) at 7.

17 C Bao ‘Negotiating the potholes along the belt and road’ (2019) 21 *Asian Dispute Review* at 154.

18 See W Kidane *China-Africa dispute settlement: The law, economics and culture of arbitration* (2012).

19 G Shelton *The forum on China-Africa. Cooperation: a strategic opportunity* (2008) at 5.

20 RI Rotberg *China into Africa: Trade, aid and influence* (2008) at 1.

21 See DCK Chow & TJ Schoenbaum *International business transactions: Problems, cases and materials* (4 ed) (2020).

the world's largest exporter, the second largest economy,<sup>22</sup> and second largest importer of substantial raw materials and other goods in the world.<sup>23</sup>

There has been an increase in trade and investment in Africa. It can be assumed that this increase in trade and investment in Africa,<sup>24</sup> will lead to an increase in the number of disputes. This in turn will necessitate a mechanism for the resolution of disputes.<sup>25</sup> As Steve Hochfeld said,<sup>26</sup>

[s]ince the dawn of time; humanity has been buying, selling, bartering and trading. As there are at least two parties to every trade, we can assume that ever since the first trade, disputes arose and a method was needed to settle those disputes.

In addition to the aforesaid, information technology has transformed how businesses and people interact.<sup>27</sup> Individuals and entities are able to interact directly with one another and exchange information, ideas and conduct businesses online regardless of their geographical locations.<sup>28</sup> It is not unusual that the typical disputes which are usually referred for arbitration between PRC and African parties are largely contractual disputes.

Disputes largely based on, but not limited to, exploitative agreements or concession agreements and other related documents in respect of project finance, letters of credit, letters of guarantee, intellectual property protection, marine disputes, mergers and acquisitions, the sale and purchase of equipment, transfer of knowledge and in other cases delictual, labour and employment disputes.<sup>29</sup>

22 J Ribeiro & S Teh 'The time for a new arbitration law in China: comparing the arbitration law in China with the UNICTRAL Model Law' (2017) 34 *Journal of International Arbitration* at 459.

23 RC Feenstra & S Wei *China's growing role in world trade* (2020) at 1.

24 O Ajayi & P Rosario 'Investments in Sub-Sahara Africa: the role of international arbitration in dispute settlement' (2009) 6 *Revista Brasileira de Arbitragem* at 70-78.

25 MA Raouf 'Emergence of new arbitral centres in Asia and Africa: competition, cooperation and contribution to the rule of law' in S Brekoulakis and others (eds) *The evolution and future of international arbitration* (2016) at 322.

26 S Hochfeld, 'SACOTA and arbitration's role in our grain and oilseed industries' March 2015 <https://www.grainsa.co.za/sacota-and-arbitration-s-role-in-our-grain-and-oilseed-industries> (accessed 17 May 2022).

27 See M Piers & C Aschauer *Arbitration in the digital world: The brave new world of arbitration* (2018).

28 See J Hörnle *Cross-border internet dispute resolution* (2009).

29 W Zhu 'A brief analysis of the disputes from China-African civil and commercial transactions' (2012) 7 *Journal of Cambridge Studies* at 84. See also G Wang et al (eds) *Dispute resolution mechanism for the belt and road initiative* (2020) at 4.



### 3 The UNCITRAL model law in PRC and Africa

Kanokanga in his seminal work, *Commercial Arbitration in Zimbabwe* lucidly lists the advantages of arbitration. These include, but are not limited to<sup>30</sup> arbitrator expertise, enforceability, simplified procedure and flexibility, reduced costs, confidentiality, privacy, party autonomy, neutral forum, and finality.<sup>31</sup>

The PRC promulgated and adopted the United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration (Model Law) in 1994. The UNCITRAL Model Law on International Commercial Arbitration was established by UNICTRAL (the Commission) to be the basic and uniform law in its interpretation and application with regards to the resolution of disputes.<sup>32</sup>

In essence, the Model Law was conceived out of a desirability to have a uniform international law. This is because there existed numerous disparities in national laws with regards the laws governing international trade.<sup>33</sup> In Africa, the following countries have each adopted the UNCITRAL Model Law: Nigeria in 1990, Tunisia in 1993, Egypt in 1994, Kenya in 1995, Zimbabwe in 1996, Madagascar in 1998, Uganda in 2000, Zambia in 2000, Rwanda in 2008, Mauritius in 2008, and South Africa in 2017.<sup>34</sup> Kanokanga submits that in countries where the PRC is investing requires efficient, effective, simplified and flexible, confidential dispute resolution mechanisms which promote party autonomy.

The conclusion of the adjudication process led to a final and binding arbitral award that is easily enforced. This is the principal reason for the creation of CAJAC Centres.<sup>35</sup> Consequently, the CAJAC

30 D Kanokanga *Commercial arbitration in Zimbabwe* (2020) at 25-28.

31 As above.

32 See P Kanokanga 'Matrimonial arbitration in Zimbabwe: an analysis of section 4 (2)(d) of the Arbitration Act [Chapter 7:15]' (2022) *University of Zimbabwe Students Law Review* at 43-73; P Kanokanga '25 years of UNCITRAL Model Law in Zimbabwe' (2022) *University of Zimbabwe Students Law Review* at 147-187; D Kanokanga & P Kanokanga, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15]* (2022).

33 See G Hermann, *The UNCITRAL Model Law – its background, salient features and purposes* (1985) 1 (1) *Arbitration International* at 6-39; A Broches 'The UNCITRAL Model Law' (1985) 34(1) *International and Comparative Quarterly* at 1-24; HM Holtzmann & JE Neuhaus, *A guide to the UNCITRAL Model Law on international commercial arbitration: Legislative history and commentary* (1989).

34 The 1985 UNCITRAL Model Law is applied in Egypt, Kenya, Madagascar, Nigeria, Tunisia, Uganda, Zambia and Zimbabwe. Whilst the revised 2006 UNCITRAL Model Law is applied in Mauritius, Rwanda and South Africa.

35 H Chen 'China's innovative ISDS mechanisms and their implications' (2018) 112 *American Journal of International Law* at 209.

Centre are important in building and maintaining ‘Sino-African joint dispute resolution mechanisms’.<sup>36</sup>

### 3.1 The arbitration practice in PRC and Africa

Unlike Africa, the PRC is in a single country.<sup>37</sup> Africa is continent which composes of 54 independent and sovereign states and 8 regional economic communities.<sup>38</sup> These states are all at different stages of economic development.<sup>39</sup> Indisputably, there exist legal differences with regards to the dispute resolution mechanisms in the PRC,<sup>40</sup> and the plurality of legal systems in Africa.<sup>41</sup>

There are also plural arbitral laws in PRC and arbitral regimes in Africa.<sup>42</sup> For instance, arbitration in the PRC is predominantly institutional,<sup>43</sup> whereas arbitration in Africa is largely *ad hoc*.<sup>44</sup> The ‘proliferation of African arbitration institutions has also helped with improving the whole ecosystem supporting arbitration’.<sup>45</sup> Arbitration institutions play a crucial role in facilitating international arbitral proceedings.<sup>46</sup> It is for this reason that CAJAC serves as an important

36 See F Kariuki ‘The vision of co-building China-Africa Joint Arbitration Centres indifferent legal systems’ (2018) 6 *Alternative Dispute Resolution* at 28-43.

37 MW Kiggundu ‘China-Africa legal and judicial systems: advancing mutually beneficial economic relations’ (2013) 4 *Beijing Law Review* at 159.

38 See JT Gathii *African regional trade agreements as legal regimes* (2011) at 65.

39 G Areou ‘The African states diverging policies towards international arbitration’ (2020) 17 *Transnational Dispute Management* at 1.

40 For a detailed examination of the arbitration and that of the PRC legal system, see N Kaplan et al (eds) *Hong Kong and China arbitration: cases and materials* (1994); AH Chen *An introduction to the legal system of the People’s Republic of China* (2004); J Toa *Arbitration law and practice in China* (2004); K Fan *Arbitration in China: a legal and cultural analysis* (2013); W Sun & M Willems (eds) *Arbitration in China: a practitioner’s guide* (2015); W Gu *Dispute resolution in China: litigation, arbitration, mediation and their interaction* (2021).

41 For a detailed examination of arbitration in Africa, see E Cotran & ANE Amisshah (eds) *Arbitration in Africa* (1996); R Amoussou-Guenou, ‘The evolution of arbitration laws in Francophone Africa’ (1998) 64 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 62-66; AA Asouzu *International commercial arbitration and African states: practice, participation and institutional development* (2001); E Al Tamimi *The practitioner’s guide to arbitration in the Middle East and North Africa* (2009); B Le Bars *International arbitration and corporate Law: an OHADA practice* (2013); L Bosman *Arbitration in Africa: a practitioner’s guide* (2013); K Shah et al (eds) *Arbitration in Africa: a review of key jurisdictions* (2016); MJV Kodo *Arbitration in Africa under OHADA rules* (2020).

42 KI Laibutu ‘ADR in Africa: contending with multiple legal orders for wholesome dispute resolution’ (2016) 82 *Arbitration: The International Journal of Arbitration: Mediation and Dispute Management* at 63-69.

43 J Yu & L Cao *A guide to the CIETAC Arbitral Rules* (2020) at 1.27.

44 C Namachanja ‘The challenges facing arbitral institutions in Africa’ (2015) 3 *Alternative Dispute Resolution* at 146- 147.

45 J Otto, ‘AFAA and the coming of age of African arbitration’ 24 April 2019 <https://iclg.com/alb/9415-afaa-and-the-coming-of-age-of-african-arbitration> (accessed 5 April 2022).

46 S Hoffbauer et al ‘Survey on scrutiny of arbitral institutions’ in P Habegger et al (eds) *Arbitration institutions under scrutiny: ASA Special Series No. 40* (2013) at 2.

organisation in the resolution of Sino-Africa trade disputes. Put differently, as more significant investments are made in Africa by the PRC, ‘arbitration is the end game’.<sup>47</sup>

### 3.2 The World Trade Organisation

Conventionally, investment arbitration is governed by bilateral and multilateral treaties.<sup>48</sup> Disputes are resolved through the World Trade Organisation (WTO). The WTO functions as the world’s leading multilateral trade system and representative international trade cooperation organisation.<sup>49</sup> China and about 44 African member countries are members of the WTO. Eight African countries have observer status.<sup>50</sup>

In the WTO, dispute settlement is governed by the Dispute Settlement Understanding (DSU).<sup>51</sup> There are four general processes, which include the consultation, the panel process, the appellate process, and the surveillance of the implementation process.<sup>52</sup> The nature of disputes under WTO are between participating state members.<sup>53</sup> Consequently, CAJAC was set up so that disputes are not resolved pursuant to bilateral or multilateral treaties. DSU in the resolution of disputes in the multilateral trade system must consider all the other WTO members in the resolution of the dispute.

The establishment of CAJAC reflects not only PRC interests but it also reflects African interests. African states have generally been hesitant to take issues pertaining to bilateral and multilateral disputes before the DSU.<sup>54</sup> They have for a long time been dissatisfied with the decisions of international tribunals, which have often gone against them.

47 H Ngomane ‘Alternative dispute resolution Africa and China’ (2012) 1 *African Law Review* at 29.

48 See generally Z Weidong ‘Book review: China-Africa dispute settlement: logic reading for choosing arbitration’ (2017) 12 *Cambridge Journal of China Studies* at 77-83.

49 S Jiang ‘Establishment of an international trade dispute mechanism under the belt and road initiative’ in Y Zhao (ed) *International governance and the role of law in China under the belt and road initiative* (2018) at 296.

50 The African countries with observer status include: Algeria, Comoros, Equatorial Guinea, Ethiopia, Libya, Somalia, South Sudan and Sudan. Eritrea and Sao Tome and Principe are the only two countries that are not affiliated to the WTO.

51 For a detailed understanding on WTO law and the WTO dispute system, see *WTO analytical index guide to WTO law and practice* (1 ed) (2003); WTO Secretariat *A handbook on the WTO dispute settlement system* (2 ed) (2017).

52 WJ Davey ‘The WTO dispute settlement system: how have developing countries fared’ in Z Drabek (ed) *Is the WTO attractive enough for emerging economies?* (2020) 295-332.

53 MR Dahlan ‘Envisioning foundations for the law of the belt and road initiative: rule of law and dispute resolution challenges’ (2020) 62 *Harvard International Law Journal Essay* at 5-6.

54 I Taylor *China’s new role in Africa* (2009) at 31.

The PRC is of the view that establishing convenient dispute resolution services facilitates investment in African states.<sup>55</sup> It also furthers the internationalization of China's commercial arbitration services.<sup>56</sup> As should by now be clear, despite the different arbitral regimes in Africa and those in the PRC, the CAJAC initiative is an alternative dispute resolution mechanism established at the making of the Forum on China-Africa Cooperation (FOCAC).

## 4 The forum on China-Africa cooperation

The FOCAC was established in the year 2000. It was established as a multilateral cooperative, pragmatic consultation and dialogue platform for the exchange and cooperation between the heads of states and government of the various African countries and the PRC. FOCAC is evidence of the development of PRC-Africa cooperation.<sup>57</sup> Similarly, PRC's foreign policy and FOCAC are closely linked. The FOCAC can be viewed as a 'one stop shop'<sup>58</sup> for exchange between PRC-Africa, whether economic, cultural, political, or military interaction.<sup>59</sup> Consequently, CAJAC was established and developed under the aegis of FOCAC to administer the resolution of international disputes arising between PRC and African individuals, corporations and authorities.<sup>60</sup>

At the Johannesburg Summit and sixth Ministerial Conference of FOCAC held in 2015, the PRC and 50 African countries represented by their Heads of States and Government accepted a proposal by the China Law Society (CLS) to establish the CAJAC.<sup>61</sup>

### 4.1 The history and development of CAJAC

The idea of a particular dispute resolution mechanism between PRC-Africa was envisioned as early as 2012.<sup>62</sup> However, such an ideal only became a reality in 2015.<sup>63</sup> The creation of the CAJAC came after two

55 H Chen 'The belt & road initiative and the new landscape of China's ISDS policy and practice' in C Cai et al (eds) *The BRICS in the new international legal order on investment: reformers or disruptors* (2020) at 111.

56 Osman (n 4) 744.

57 MG Berhe & L Hongwa *China-African relations: governance, peace and security* (2013) at 2.

58 C Okeke 'Interpreting the dynamics of the belt and road initiative (BRI) in relation to Africa's infrastructural exigency' (2019) 4 *International Journal of Innovative Science and Research Technology* at 822.

59 N Duggan *Competition and compromise among Chinese actors in Africa: a bureaucratic politics study of Chinese foreign policy actors* (2020) at 9.

60 CAJAC Rules 2020, art 1.1.

61 Chen (n 55) 111.

62 <http://inhousecommunity.com/article/role-arbitration-promoting-sino-african-trade-investment> (accessed 20 April 2022).

63 As above.

years of negotiating.<sup>64</sup> This was after the CLS had communicated to the African Foundation of Southern Africa (AFSA) on the possibility of launching the initial CAJAC Centre in Johannesburg.<sup>65</sup> In June 2015, a cooperation agreement was signed by AFSA, the Association of Arbitrators (Southern Africa) NPC (AASA), the Africa ADR,<sup>66</sup> the CLS and the Shanghai International Economic and Trade Arbitration Commission (SIETAC), which is also known as the Shanghai International Arbitration Centre (SIAC) to build a Joint PRC-Africa ADR Centre.<sup>67</sup>

It is noteworthy to highlight that CAJAC also draws its inspiration from the establishment of the Chinese European Arbitration Centre (CEAC).<sup>68</sup> This is a specialised institutional arbitral centre established in September 2008 in Hamburg, Germany.<sup>69</sup> Unlike the CEAC, which provides for the resolution of international disputes from any part of the world so long as such disputes relate to the PRC, the CAJAC initiative, is context and region specific. This is to say that it was formulated to provide for the resolution of international disputes between individuals, corporations and authorities with a principal place of residence, or principal place of business in the PRC or in Africa.

#### 4.2 The Beijing consensus

The FOCAC Beijing Action Plan 2013-2013 (Beijing Consensus) is an alternative economic approach to development for developing countries.<sup>70</sup> In terms of the Beijing Consensus which was adopted at the fifth Ministerial Conference of FOCAC, it was agreed that there would be increased cooperation on 'non-judicial settlement of

64 Z Twala et al 'South Africa: The China-Africa Joint Arbitration Centre' 28 February 2017 <https://mondaq.com/southafrica/arbitration-dispute-resolution/572250/the-china-africa-joint-arbitration-centre> (accessed 5 April 2022).

65 TR Snider 'China Africa Joint Arbitration Centre established in Johannesburg' 18 September 2015 <http://www.gtlawdoingbusinessinafrica.com/2015/09/chinaafricajointarbitrationcentrestablishedinjohannesburg> (accessed 5 April 2022).

66 Africa ADR was launched in October 2009 as an initiative of the Southern African Development Community (SADC). It therefore is a regional dispute resolution forum established with an aim of encouraging the use of alternative dispute resolution mechanisms in the SADC region. See G Rudolph & D Bernstein 'South Africa' in NM Thevenin (ed) *Baker and McKenzie International Arbitration Yearbook: 2012-2013* (6 ed) (2013); G Rudolph & D Bernstein 'South Africa' in L Williams (ed) *Baker and McKenzie International Arbitration Yearbook: 2014-2015* (7 ed) (2015).

67 [http://www.shiac.org/CAJAC/aboutus\\_E.aspx?page=3](http://www.shiac.org/CAJAC/aboutus_E.aspx?page=3) (accessed 15 April 2022).

68 E Brödermann 'The Chinese European arbitration centre: an introduction to the CEAC Hamburg arbitration rules' (2013) 30 *Journal of International Arbitration* at 303-328.

69 As above.

70 W Chen (ed) *The Beijing Consensus? How China has changed western ideas of law and economic development* (2017).

disputes'.<sup>71</sup> On 5 June 2015, the Beijing Consensus on Establishing the China-Africa Joint Dispute Resolution Mechanism initiated by the CLS was signed with more than 30 other institutions.<sup>72</sup>

### 4.3 The Johannesburg consensus

On the 17 August 2015, the Johannesburg Action Plan (Johannesburg Consensus)<sup>73</sup> was signed to 'reaffirm and extend the sentiments and decisions contained in the Beijing Consensus'.<sup>74</sup> Consequently, CAJAC is a creature of legal diplomacy fashioned pursuant to the Beijing Consensus and the Johannesburg Consensus.<sup>75</sup> This is where more than 50 African countries and the PRC committed themselves to non-judicial settlement of disputes and the establishment of CAJAC.<sup>76</sup>

### 4.4 The launch of CAJAC Johannesburg and CAJAC Shanghai

On 25 November 2015, the Guiding Committee of CAJAC Johannesburg and CAJAC Shanghai met for consultative discussion on the CAJAC Model Clause and the CAJAC Johannesburg Rules and the Panel of Arbitrators. These consultative meetings show a commitment to mutual co-operation and development of alternative dispute resolution between the PRC and Africa. On the 26 November 2015, the inauguration of CAJAC took place at the China-Africa Johannesburg Summit and the 6th FOCAC Ministerial Conference at the Hyatt Hotel in Rosebank, Johannesburg, South Africa.<sup>77</sup> This event was attended

71 See Beijing Action Plan (2013-2015), art 2.4.4. See also the Fifth Ministerial Conference on the Forum on China-Africa Cooperation Beijing Action Plan (2013-2015) 23 August 2012 [http://www.focac.org/eng/zywx\\_1/zywj/t954620.htm](http://www.focac.org/eng/zywx_1/zywj/t954620.htm) (accessed 15 April 2022).

72 [http://www.shiac.org/CAJAC/news\\_detail\\_E.aspx?page=12015&tid=600](http://www.shiac.org/CAJAC/news_detail_E.aspx?page=12015&tid=600) (accessed 15 April 2022).

73 Signatories to the Johannesburg Consensus include: Bowman Gilfillan Africa Group, Cape Bar; China Africa Legal Research Centre; China Africa Legal Training Base; China Law Society; China Research Centre of Legal Diplomacy; City of Johannesburg; Cliffe Dekker Hofmeyr; Clyde & Co; Edward Nathan Sonnenberg; Eversheds (SA) Inc; Fluxmans; Geldenhuys Malatji; Gwina Ratshimbilani Inc; Hainan Arbitration Commission; Hogan Lovells; International Integral Reporting Council; Johannesburg Society of Advocates; King Commission on Corporate Governance; KPMG Inc; Mkhabela Huntley Adekeye; Norton Rose; OMS Attorneys; Phukubje Pierce Masithela; Pretoria Society of Advocates; Sefalafala Inc; Shanghai international arbitration Centre; South African Grain Arbitration Service Association; Tshisevhe; Tugendhaft Wapnick Banchetti; Webber Wentzel and Werksmans. See J Ripley-Evans 'South Africa' in JH Carter (ed) *The International Arbitration Review* (7 ed) (2016) at 479.

74 Ripley-Evans (n 73) at 478.

75 <https://www.polity.org.za/article/south-africa-enters-international-arbitration-stage-2015-08-18> (accessed 28 August 2022).

76 <http://www.keatingchambers.com/wp-content/uploads/2017/12/DW-CAJAC.pdf> (accessed 5 April 2022).

77 Chen (n 55) 111.

by 40 delegates from China and more than 100 delegates from South Africa and other countries in Africa.<sup>78</sup>

## 5 The CAJAC centres

The initial CAJAC Centres to be recognised were established on the 26 November 2015. They were established simultaneously in Johannesburg and in Shanghai. That is the CAJAC Johannesburg and the CAJAC Shanghai. Each CAJAC Centre initially had 20 nominated arbitrators. At present, there are six CAJAC Centres, namely, the CAJAC Beijing,<sup>79</sup> CAJAC Johannesburg,<sup>80</sup> CAJAC Nairobi,<sup>81</sup> CAJAC OHADA,<sup>82</sup> CAJAC Shanghai<sup>83</sup> and CAJAC Shenzhen.<sup>84</sup> Each CAJAC Centre has its own Secretariat which administers the arbitral process in each CAJAC Centre seat.<sup>85</sup> The CAJAC Rules are based on international best practices and make provisions for emergency arbitration,<sup>86</sup> consolidation,<sup>87</sup> and joinder.<sup>88</sup> Respectively, each CAJAC Centre operates through an accredited arbitration institution in the PRC and Africa.

The PRC does not provide for ad hoc arbitration.<sup>89</sup> This is because of the fact that arbitration must be by a recognised arbitral institution<sup>90</sup> with the PRC juridical authorities.<sup>91</sup> Consequently, parties are at liberty to refer their disputes to any of the accredited

78 <https://hoganlovells.com/en/publications/cajac/update> (accessed 5 April 2022).

79 CAJAC Beijing was established and is maintained by the Beijing International Arbitration Centre.

80 CAJAC Johannesburg was established and is maintained by the African Foundation of Southern Africa.

81 CAJAC Nairobi was established and is maintained by the Nairobi Centre for International Arbitration.

82 CAJAC OHADA was established and is maintained by the Organization for the Harmonization of African Business Law. In French, the organisation is known as the Organisation pour l'Harmonisation en Afrique du Droit des Affaires, which translates into English as Organisation for the Harmonization for Business Law in Africa. OHADA member states include, Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Niger, Senegal, Togo.

83 CAJAC Shanghai was established and is maintained by the Shanghai International Arbitration Centre.

84 CAJAC Shenzhen was established and is maintained by the Shenzhen Court of International Arbitration which is also known as South China International Economic and Trade Arbitration Commission, or Shenzhen Arbitration Commission).

85 Kanokanga (n 30) 52. See also L Shuangyuan *Private international law* (3 ed) (2011) at 446.

86 CAJAC Rules 2020, art 33.

87 CAJAC Rules 2020, art 17.

88 CAJAC Rules 2020, art 18.

89 Arbitration Law of the People's Republic of China 1994, art 16(3).

90 J Lizhu 'Time to loosen up on ad hoc arbitration in China?' (2019) 15 *Asian International Arbitral Journal* at 43-53.

91 M Utterback et al 'Arbitration in China: an overview' in MJ Moser (ed) *Business disputes in China* (3 ed) (2011) at 19.

CAJAC Centres for the resolution of any dispute.<sup>92</sup> This is done through alternative dispute resolution mechanisms, including conciliation,<sup>93</sup> mediation and arbitration for the resolution of disputes referred by parties to CAJAC.<sup>94</sup> Therefore, each CAJAC centre has excellent legal knowledge and sufficient capacity to deal with international commercial arbitration.<sup>95</sup> As more economic trade and investment deepens, there will be a need to have more CAJAC centres in different geographical locations.<sup>96</sup> These centres are to serve all the geographical regions of Africa, that is East Africa, Central Africa, North Africa, southern Africa and West Africa.<sup>97</sup>

In May 2017, and to further the ‘One Belt One Road Arbitration Initiative,’ cooperation agreements were established in Kuala Lumpur with the Asian International Arbitration Centre (AIAC).<sup>98</sup> They were also established in Cairo with the Cairo Regional Centre for International Commercial Arbitration (CRCICA).<sup>99</sup> As international arbitration is deeply dependent on the neutrality of arbitral institutions, CAJAC aims to be a neutral and affordable arbitral institution.<sup>100</sup>

The Panel of Arbitrations are experts drawn from various professions.<sup>101</sup> CAJAC arbitration seeks to ensure that the arbitrators remain unbiased and neutral as they adjudicate international commercial disputes. Despite their unbiased posture and neutrality, they pay close attention to the differences among the national cultures and the different legal traditions of the parties.<sup>102</sup>

92 CAJAC Rules 2020, art 1.3.

93 Conciliation is not often resolved in investment dispute resolution. See generally S Yee ‘Dispute settlement on the belt and road: ideas on system, spirit and style’ (2018) 17 *Chinese Journal of International Law* at 913.

94 CAJAC Rules 2020, art 1.2.

95 Okeke (n 58) 828.

96 S Sarkar ‘One belt, one law: new dedicated arbitration centers pave the way for greater Sino-African legal synergy’ 01 May 2017 <https://www.chinaafrica.cn/Africa/201705/t20170509-80095638.html> (accessed 5 April 2022).

97 S Habib, ‘Interviews with our editors: interview with Deline Deukes, CEO of the China Africa Joint Arbitration Centre Johannesburg’ 26 November 2018. <https://arbitrationblog.kluwerarbitration.com/2012/11/26/intereviews-with-our-editors-interview-with-deline-deukes-ceo-of-the-china-africa-joint-arbitration-centre-johannesburg>. (accessed 16 April 2022).

98 The Asian International Arbitration Centre (AIAC) previously known as Kuala Lumpur Regional Centre for Arbitration (KLRCA) is a regional arbitration centre which was established by the Asian-African Legal Consultative Organization (AALCO).

99 W Gu ‘Belt and road dispute resolution: new development trends’ in Ying-Jeou Ma *Chinese (Taiwan) Yearbook of International law and Affairs* (2018) at 159.

100 T Hathout et al ‘The role of international commercial arbitration in enhancing foreign direct investment: lessons for Algeria’ (2020) 11 *UUM Journal of Legal Studies* at 231.

101 P Friedland & B Yan ‘Negotiating and drafting arbitration agreements with Chinese parties’ (2011) 28 *Journal of International Arbitration* at 467-488.

102 FD Simoes ‘A dispute resolution centre for the BRICS’ in RJ Neuwirth et al (eds) *The BRICS lawyers guide to global cooperation* (2017) at 304.



If CAJAC is going to be a workable model as the CEAC in Hamburg, Germany, African nations will need to support and ensure the success of CAJAC as an international arbitration mechanism. They must also ensure adequate representation of arbitrators from PRC and China.<sup>103</sup> They must further ensure implementation of courses on the CAJAC initiative through cooperation with regional professional associations and different bar associations and law societies. That way, there will be an increase in knowledge, and more importantly, capacity building for arbitrators and practitioners.<sup>104</sup>

## 6 The CAJAC rules

The CAJAC has developed a uniform set of rules for the resolution of PRC-Africa disputes despite of cross-cultural differences<sup>105</sup>. These rules are between civil law PRC and the plurality of legal systems in Africa in their approaches to procedure<sup>106</sup>s. They further include the Guiding Committee of CAJAC Johannesburg and CAJAC Shanghai which succeeded in making CAJAC a neutral forum for the arbitral tri<sup>107</sup>al. In addition, to the uniform or standard rules, each CAJAC Centre also has supplementary or domestic ru<sup>108</sup>les.

### 6.1 Jurisdiction of CAJAC

CAJAC has the jurisdiction to administer the resolution of international disputes arising between PRC and African entities.<sup>109</sup> These disputes have their principal residence, place of business, nationality located in PRC or a country in Africa.<sup>110</sup> As a result, parties may refer their disputes to any accredited CAJAC Centre identified by them in writing, or to CAJAC without identifying any particular Centre, in which case the CAJAC Centre which accepts the request for arbitration will administer the case.<sup>111</sup>

103 Simoes (n 102) 296.

104 See UE Ofodile 'Africa and international arbitration: from accommodation and acceptance to active engagement' (2015) 2 *Transnational Dispute Management* at 45-46.

105 See I Selim 'The synergy between common law and civil law under UNCITRAL and CRCICA rules' (2017) 83 *Arbitration International* 402-411.

106 Some of the differences in legal culture relate to the differences in oral and written proceedings, discovery, and prehearing procedures as well as the treatment of witnesses. See LM Pair 'Cross-Cultural arbitration: do the differences between cultures still influence international commercial arbitration despite harmonization?' (2000) 9 *ILSA Journal of International and Comparative Law* at 61-66.

107 See TE Carbonneau 'National law and the judicialization of arbitration: manifest destiny, manifest disregard, or manifest error in international arbitration' in RB Lillich & CN Brower (eds) *International arbitration in the 21st century: towards 'judicialization and uniformity?'* (1994) at 123.

108 CAJAC Rules 2020, art 3.

109 CAJAC Rules 2020, art1.1.

110 CAJAC Rules 2020, art1.1.

Where a party approaches a CAJAC Centre to resolve a dispute or the parties to a dispute approach a CAJAC Centre to resolve a dispute, that Centre will have jurisdiction if the matters are arbitrable under the law of the place of arbitration agreed to by the parties or failing which under the mandatory law applicable at the domicile of that Centre.<sup>112</sup>

## 6.2 Filing a request for arbitration

A party applying for the resolution of their dispute in terms of the CAJAC Rules 2020 must submit a Request for Arbitration (RFA) to a designated CAJAC Centre.<sup>113</sup> The RFA should be accompanied by payment of the arbitration fees in terms of the Schedules of Arbitration Fees which is attached to the CAJAC Rules.<sup>114</sup> Arbitral proceedings are deemed to have commenced on the date on which the designated CAJAC Centre receives the RFA.<sup>115</sup> The RFA should contain the names and addresses, telephone and facsimile numbers, electronic mail addresses and other contact details of the parties and of their representatives.<sup>116</sup> Furthermore, the RFA should also contain a copy of the arbitration agreement,<sup>117</sup> the Statement of Claim,<sup>118</sup> the facts, grounds and legal submissions in full of which the claim is based;<sup>119</sup> and the signature or a seal affixed by the Claimant or its authorised representatives.<sup>120</sup> All the evidentiary materials in support of a claim and for the identification of a Claimant must be attached to the RFA.<sup>121</sup>

## 6.3 Acceptance of a case by a CAJAC centre

Once the Claimant has submitted its RFA and its attachments, and paid an advance on the arbitration fees, the CAJAC Centre designated by the parties will accept the case if it finds that the required formalities of the CAJAC Rules have been complied with.<sup>122</sup> CAJAC Centres have a discretion to request that a Claimant complete the RFA within a specific time period. Should the formalities remain incomplete upon the expiry of the specified time period, it is deemed that no RFA was made.<sup>123</sup>

111 CAJAC Rules 2020, art 1.3.

112 CAJAC Rules 2020, art 2.

113 CAJAC Rules 2020, art 10.1.

114 CAJAC Rules 2020, art 10.4.

115 CAJAC Rules 2020, art 10.5.

116 CAJAC Rules 2020, art 10.2 (a).

117 CAJAC Rules 2020, art 10.2 (b).

118 CAJAC Rules 2020, art 10.2 (c).

119 CAJAC Rules 2020, art 10.2 (d).

120 CAJAC Rules 2020, art 10.2 (e).

121 CAJAC Rules 2020, art 10.3.

122 CAJAC Rules 2020, art 11.

123 As above.

#### 6.4 Notice of Arbitration

After a CAJAC Centre has accepted the FRA, the CAJAC Centre has an obligation to send a Notice of Arbitration (NOA) to the parties.<sup>124</sup> They send it together with one copy of the CAJAC Rules and the CAJAC Panel of Arbitrators, and the FRA and its attachments submitted by the Claimant are forwarded to the Respondent simultaneously.<sup>125</sup>

#### 6.5 Appointment of arbitrators

Unless otherwise agreed by the parties, within fifteen days from the date of receipt of the NOA, the Claimant and Respondent must each appoint an arbitrator, or entrust the CAJAC Centre to do so, failing which, an arbitrator will be appointed by the CAJAC Centre.<sup>126</sup> The CAJAC Centres also maintain a shared International Panel of Arbitrators from which the parties are at liberty to select the sole arbitrators or presiding arbitrators, failure of the parties, gives the CAJAC Centre authority to appoint a sole arbitrator or a presiding arbitrator.<sup>127</sup>

Consequently, where there are two or more Claimants and/or Respondents in the arbitral proceedings, each of the parties will jointly appoint an arbitrator, or entrust the CAJAC Centre to appoint one, failing which the appointment will be made by the CAJAC Centre.<sup>128</sup> The above conditions on the appointment of arbitrators equally applies to the appointment of a presiding arbitrator under the CAJAC Rules.<sup>129</sup> However, where any party expressly waives in writing the right to jointly appoint or jointly entrust the CAJAC Centre to appoint a presiding arbitrator, the presiding arbitrator will be appointed by the CAJAC Centre.<sup>130</sup> Parties may also agree that, where the two appointed arbitrators fail to appoint a presiding arbitrator within ten days from the date of determination of the second arbitrator, that a presiding arbitrator be appointed by the CAJAC Centre.<sup>131</sup>

#### 6.6 Party representation

Under the CAJAC Rules the parties and their representatives are expected to conduct the arbitral proceedings in a *bona fide* and cooperative manner.<sup>132</sup> Furthermore, in terms of Article 22 of the

124 CAJAC Rules 2020, art 12.

125 As above.

126 CAJAC Rules 2020, art 26.1.

127 CAJAC Rules 2020, art 24.

128 CAJAC Rules 2020, art 26.1.

129 CAJAC Rules 2020, art 26.2.

130 CAJAC Rules 2020, art 26.2.

131 CAJAC Rules 2020, art 26.3.

CAJAC Rules the parties may represent themselves (*pro se* arbitration) or may be represented by their authorised representatives. The right to be legally represented before a tribunal other than a court of law is a matter that is beyond question.<sup>133</sup> The denial of legal representation constitutes a gross infringement on one's fundamental right to be afforded a fair hearing.<sup>134</sup>

Consequently, under CAJAC arbitration, local and foreign (lawyers and non-lawyers), may act for their respective clients in arbitral proceedings. This is as the parties 'authorised representatives' in the arbitration proceedings.<sup>135</sup> Each party may, prior of to the formation of an arbitral tribunal appoint its representatives.<sup>136</sup> They must also immediately notify the CAJAC Centre of the names and addressed of the party representatives and any other persons assisting the parties.<sup>137</sup>

A CAJAC Centre or an arbitral tribunal, may, on its own initiative, or at the request of any party, require proof of authority granted to a representative or other person assisting the parties in the arbitration.<sup>138</sup> The proof of authority for the representation of a party under CAJAC arbitration may be in a form prescribed by the CAJAC Centre, or arbitral tribunal.<sup>139</sup> Usually the proof of authority is in the form of a Power of Attorney (POA).<sup>140</sup>

A POA is a legally binding document in terms of which one nominates, constitutes, and appoints, a named party to be his or her lawful attorney and agent, in name, place and stead to conclude certain juristic acts in his or her name. The scope of authority of a POA, includes but is not limited to the authorisation to represent a party in the arbitral proceedings, other legal matters related to the dispute, the power to appoint arbitrators, to revoke and replace arbitrators, the authority to attend any hearings and to make representations, and to agree on the place of arbitration, the place of hearings, and the language of the arbitration.

The scope of authorisation also includes power to sign any record of hearings, to negotiate and settle the arbitration proceedings or mediation proceedings the dispute, the power to suspend the arbitration proceedings, or to withdraw the claims and the dispute.

132 CAJAC Rules 2020, art 6.

133 *Nhari v Public Service Commission & Another* 1998 (1) ZLR 574 (H) 578G.

134 *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* 1995 (2) ZLR 353 (S) 358F-359.

135 CAJAC Rules 2020, art 22.

136 CAJAC Rules 2020, art 29(6).

137 As above.

138 As above.

139 CAJAC Rules 2020, art 22.

140 As above.

## 6.7 Time limit for final awards

The writing of an arbitral award is one of the most important functions that an arbitrator performs. The parties must be able to read and understand the award; the clearer it is, the easier it is to understand. A well-reasoned arbitral award helps the parties to appreciate and be satisfied that their cases were heard and considered. A tribunal will state in the arbitral award the claims, the facts of the dispute and the reasons on which the arbitral award is based, including the allocation of the arbitration costs.<sup>141</sup>

In cases which require an oral hearing, arbitral tribunal must decide the matter and render an arbitral award within six months from the date on which the arbitral tribunal was formed.<sup>142</sup> In contrast in cases which do not require an oral hearing, an arbitral tribunal may render an arbitral award within four months from the date on which the arbitral tribunal was formed.<sup>143</sup> Furthermore, in cases conducted under the Expedited Procedure Rules, arbitral tribunals are required under the CAJAC Rules to render arbitral awards within three months.<sup>144</sup>

## 6.8 Settlement, mediation and negotiation

The CAJAC Rules do not only provide for the resolution of disputes by arbitration, but the CAJAC Rules also provide for the resolution of disputes by mediation.<sup>145</sup> It also comprises of the settlement of mediation and negotiation facilitation.<sup>146</sup> It is a well-known fact that arbitration is neither negotiation nor mediation.<sup>147</sup>

Arbitration is contractual in nature<sup>148</sup> and results in a final and binding decision.<sup>149</sup> This distinguishes arbitration from other alternative dispute resolution mechanisms.<sup>150</sup> Unlike arbitration, mediation does not result in a final and binding resolution.<sup>151</sup>

141 CAJAC Rules 2020, art 48.3.

142 CAJAC Rules 2020, art 47.1.

143 CAJAC Rules 2020, art 47.2.

144 CAJAC Rules 2020, art 47.3.

145 CAJAC Rules 2020, art 45.

146 CAJAC Rules 2020, art 46. For more information generally on arbitrator facilitated settlement, see G Kaufmann-Kohler 'When arbitrators facilitate settlement: towards a transnational standard' (2009) 25 *Arbitration International* 187-205.

147 TE Carbonneau *The law and practice of arbitration* (5 ed) (2014) at 1.

148 JL Delvolve et al *French arbitration law and practice: a dynamic civil law approach to international arbitration* (2009) at 1.

149 J Paulsson *The idea of arbitration* (2013) at 1.

150 SM Kroll 'Arbitration' in JM Smits (ed) *Elgar encyclopaedia of comparative Law* (ed) (2006) at 78; SM Kroll 'Arbitration' in JM Smits (ed) *Elgar encyclopaedia of comparative Law* (2 ed) (2012) at 88.

151 AKC Koo 'Enforcing international mediated settlement agreements' MJ Ramaswamy & J Ribeiro (eds) *Harmonising trade law to enable private sector regional development* (2017) at 81.

Nevertheless, the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) which was inspired by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was prepared by the UNICTRAL II Working Group a mechanism to ensure the enforceability of Mediated Settlement Agreements (MSAs).<sup>152</sup>

The Singapore Convention on Mediation is to MSAs what the New York Convention is to arbitral awards. It must be assumed that the CAJAC Rules were drafted taking into account the Singapore Convention on Mediation. In this context, the CAJAC Rules have also incorporated settlement and negotiation facilitation which form part of the PRC culture of dispute resolution.<sup>153</sup> It is, however, critical to highlight that the Singapore Convention does not apply to settlement agreements that have been recorded and are enforceable as arbitral awards.<sup>154</sup>

Furthermore, MSAs based on the local arbitration rules of the CAJAC Centres adjudicating the dispute will not be easily enforced in the PRC or in Africa owing to the fact, that whilst the PRC and African countries such as Chad, Democratic Republic of Congo, Gabon, Ghana, Guinea-Bissau, Mauritius, Nigeria, Rwanda and Uganda are signatories to the Singapore Convention on Mediation, none of these countries have yet to accept, approve or ratify the Singapore Convention on Mediation.

## 7 CAJAC and the New York Convention

The New York Convention is the 'single most important pillar on which the edifice of international arbitration rests'.<sup>155</sup> The New York Convention is an important treaty. This is because as each country that is a party to it agrees to recognize the other country's arbitral awards. They also enforce arbitration awards in accordance with the rules of procedure of the place where the award is to be relied upon. Put differently, the enforcement of arbitral awards based on the New York Convention 'contributes to the world's continuing economic

152 H Meidanis 'International enforcement of mediated settlement agreements: two and a half models - why and how to enforce mediated settlement agreements' (2019) 85 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* at 51.

153 Kaufmann-Kohler (n 146) 96.

154 Singapore Convention on Mediation, art 1(3)(b).

155 JG Welter 'The present status of the international court of arbitration of the ICC: an appraisal' (1990) *American Review of International Arbitration* at 91.

development'.<sup>156</sup> Therefore, the PRC and 42,<sup>157</sup> out of 54,<sup>158</sup> African nations are contracting members of the New York Convention. Arbitral awards granted by CAJAC will be easily recognised and enforced in the PRC or in any one of the 42 African contracting countries to the New York Convention.<sup>159</sup>

## 8 CAJAC International Arbitration Moot

CAJAC is already a success, so much so that at the first CAJAC Conference convened in Cape Town, South Africa in November 2017 a team from the Johannesburg Society of Advocates, together with students drawn from the South West University of Political Science and Law (China), Strathmore University (Kenya) and the University of Pretoria (South Africa) were part of the initial CAJAC moot competition which was sponsored by leading Kenya law firm, TripleOKLaw LLP.<sup>160</sup>

The inaugural moot problem was an adaption of an interlocutory moot problem pertaining to issues of security for costs and discovery which was prepared by the Association for the Organisation and Promotion of the Willem C. Vis International Moot. The CAJAC moot was presided by Honourable Justice Edward Cameron together with his panellists Mr Jimmy Mbabali Muyanja (Uganda) and Mr Zhou Paul (China).<sup>161</sup>

## 9 Conclusion

It is clear that the PRC is an emerging economy which has since 1990 developed aggressive investment initiatives to foster economic trade and investment. The 'catching up and getting ahead' or the BRI initiative is the latest strategic investment initiative of the PRC. As demonstrated above, CAJAC was established at the instance of FOCAC

156 R Seyadi 'Enforcement of arbitral awards annulled by the court of the seat' (2018) 84 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* at 129.

157 The following 42 African countries are contracting states of the New York Convention: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Ethiopian, Gabon, Ghana, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Tunisia, Uganda, Tanzania, Zambia and Zimbabwe.

158 The following 12 African countries are non-parties to the New York Convention: Chad, Congo, Equatorial Guinea, Eritrea, Eswatini, Gambia, Guinea-Bissau, Libya, Namibia, Somalia, South Sudan, Togo.

159 E Onyema 'Enforcement of arbitral awards in Sub-Sahara Africa' (2010) 26 *Arbitration International* at 135.

160 L Nkosi-Thomas et al 'CAJAC conference Cape Town, November 2017' (2018) 31 (1) *Advocate: The General Bar Council of South Africa* at 49.

161 As above.

to administer the resolution of international disputes arising between PRC-Africa parties having their principal residence, place of business, located in the PRC or in a country in Africa.

It is as a result of the Beijing Consensus and the Johannesburg Consensus which reaffirmed and extended the sentiments and decisions of the Beijing Consensus. Consequently, CAJAC is a creature of legal diplomacy formed pursuant to the Beijing Consensus and the Johannesburg Consensus in terms of which more than 50 African countries and the PRC committed themselves to non-judicial settlement of disputes.



# WHAT IS IN A SURNAME? AN ENQUIRY INTO THE UNAUTHORISED NAME CHANGES OF MARRIED WOMEN

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## Abstract

*In recent years there have been reports of the Department of Home Affairs changing women's surnames to that of their husbands upon the conclusion of a marriage without the married women's consent. This conduct by the Department of Home Affairs officials infringes, as this article will argue, not only on the affected women's right to just administrative action but also on the rights to equality and dignity and, in some instances, freedom of movement and universal suffrage. This article enquires into the possibility of taking the conduct of the Department of Home Affairs, which arguably amounts to administrative action, on judicial review seeking systemic relief. It will look at the sexist and patriarchal social norms relied upon to justify the conduct of the Department of Home Affairs and calls for intervening measures that not only result in broader social recognition but also effectively dismantle the systems and frameworks of inequality that continue to marginalise and subjugate women in the socially constructed gender hierarchy.*

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# 1 Introduction

## 1.1 Factual background

This article explores the sexist and patriarchal origins of conduct of the South African Department of Home Affairs (the Department) in changing the names of married women without their consent. It aims to unpack the impact of such conduct on women and the various rights violations caused. Given that the conduct of the officials amounts to public power, specifically, administrative action reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or reviewable in terms of the constitutional principle of legality, this research explores the possibility of taking the conduct of the Department on judicial review to seek systemic relief. It is argued that a court could grant declaratory and injunctive relief to advance women's rights. It is considered herein whether, although the problem lies primarily in the implementation of the law, legislative intervention such as a provision that allows men to similarly change their surnames upon the conclusion of a marriage could normalise the practice of spouses, rather than only wives, choosing a family name.<sup>1</sup> This legislative intervention could be accompanied by directives and internal training workshops that explain why the practice of choosing a family name is necessary and could create a space for the officials to confront their sexist biases constructively.<sup>2</sup> This would hopefully explain to officials why it is important not to impose their views on those people who seek to exercise their constitutional rights.

By way of a qualitative study of primary and secondary sources of law and relevant literature, the enquiry into the unauthorised changes to married women's surnames revolves around the Department's violation of the women's constitutional right to just administrative action as it impacts their lives in significant ways in the context of a society riddled with sexism, misogyny and patriarchy. Exploring the possibility of taking the conduct of the Department on judicial review for systemic relief, this article asks, firstly, on what bases the Department's conduct can be taken on judicial review and, secondly, what type of relief the courts may grant. This article further explores what social and legal transformation may be necessary to accompany the relief granted.

This first section of the article provides social and legal contexts. The second section discusses the constitutionally entrenched right to

1 M Rosensaft 'The right of men to change their names upon marriage' (2002) 5(1) *Journal of Constitutional Law* at 201.

2 Legal Resources Centre 'Minister responds to unauthorised change of women's surnames after marriage' 24 March 2017 <https://m.polity.org.za/article/lrc-minister-responds-to-unauthorised-change-of-womens-surnames-after-marriage-2017-03-24> (accessed 20 October 2020).

administrative justice and the legislation enacted to give effect to it in an effort to determine the bases on which the Department's conduct can be taken on judicial review to seek systemic relief; and what that relief might look like in a society seeking gender equality. Prominent case law will be used to elaborate on the remedies courts are empowered to grant by section 172 of the Constitution and section 8 of PAJA.

Section 26(1) of the Births and Deaths Registration Act 51 of 1992 (BADRA) provides that a married woman may assume her husband's surname or retain her birth surname or a prior surname which she legally bore.<sup>3</sup> BADRA was amended in 2002 to add the option of a woman joining her surname with that of her husband as a double-barrelled surname.<sup>4</sup> Stated otherwise, a married woman may elect to assume her husband's surname, retain her birth surname or a prior surname which she legally bore, or join her surname with that of her husband as a double-barrelled surname. No application to the Department is necessary to effect this change. However, the Department must be notified in writing to enable it to update the national population register, or not, if a woman chooses to retain her surname. This means that a woman's election to change or retain her surname does not require approval from the Department but occurs by operation of law.

Nevertheless, numerous women have reported that their surnames have been changed by officials of the Department, even after they had expressly informed the Department of their election to retain their birth names when registering their marriages.<sup>5</sup> In addition, many of the affected women have been told by officials of the Department that they require their husband or father's consent to retain their birth surnames.<sup>6</sup> One of the effects of the unauthorised surname changes on the registration of their marriages is that women find that their identity documents contradict their registered details. As such, they are prevented from performing various tasks such as opening an account with a mobile service provider, travelling abroad, or voting in local elections. This action by officials of the Department has thus led to the violation of several fundamental rights, including the right to freedom of movement and the right to universal suffrage<sup>7</sup>. One woman could not be registered on her child's birth certificate,

3 Sec 26 amended by sec 3 of Births and Deaths Registration Amendment Act 67 of 1997.

4 Births and Deaths Registration Amendment Act 1 of 2002.

5 LRC (n 2).

6 S Wild 'Home Affairs requires husbands to give women consent to change their names and it's an affront' 24 July 2019 <https://www.news24.com/news24/columnists/guestcolumn/home-affairs-requires-husbands-to-give-women-consent-to-change-their-names-and-its-and-affront-20190724> (accessed 18 October 2020).

7 Secs 19(3)(a) & 21 of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').

and her parental rights and responsibilities were affected<sup>8</sup>. Some women have suffered monetary loss because they have had to take leave from work to rectify this action; some have been asked to pay a fee for this rectification, while others have been unable to claim from the Unemployment Insurance Fund or take maternity leave from their employers.

Consequently, the state has failed in its duty to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>9</sup> Furthermore, the Department's discriminatory requirement to correct the population register of male consent,<sup>10</sup> for which there is no justifiable legal basis, effectively reduces the legal capacity of competent adult women to that of children and people who are mentally disabled. This amounts to unfair discrimination based on sex, gender and marital status, which are listed in section 9(3) of the Constitution,<sup>11</sup> and it constitutes an infringement of these women's right to dignity.<sup>12</sup> The test for discrimination was developed in *Harksen v Lane NO*.<sup>13</sup> In this case, the Constitutional Court held that differentiation between people or categories of people might amount to discrimination if it amounts to discrimination on a specified ground or if the ground of discrimination is based on attributes and characteristics which could potentially impair the fundamental human dignity of persons or adversely affect them in a comparably serious manner. Such discrimination is presumed unfair if it is on one of the grounds specified in section 9(3) of the Constitution.<sup>14</sup> If it is on an unspecified ground, then the complainant must establish unfairness based on the impact of the discrimination on the complainant or others in a similar situation.<sup>15</sup> If discrimination is found to be unfair, then it must be determined whether it is justified under the general limitation clause found in section 36 of the Constitution, which provides that the limitation of any right in the Bill of Rights may only be done by a law of general application that is 'reasonable and justifiable in an open and democratic society based on dignity, freedom and equality'.

With assistance from the Legal Resources Centre (the LRC), some of the affected women have been able to take the Department to task and have their unauthorised name changes reversed.<sup>16</sup> The LRC met with the Deputy Director-General of the Department (the DDG) on behalf of the women who indicated that they would like to be

8 Sec 19 of the Children's Act 38 of 2005.

9 Sec 7(2) of the Constitution.

10 As above.

11 Sec 9(3) of the Constitution.

12 Sec 10 of the Constitution.

13 *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 54; R Krüger 'Equality and unfair discrimination: refining the *Harksen* test' (2011) 128(3) *South African Law Journal* 480 at 481.

14 As above.

15 As above.

16 Wild (n 6).

represented by the LRC in taking steps towards addressing the unauthorised change of their surnames following the conclusion of their respective marriages.<sup>17</sup> The DDG confirmed that the surnames of those women who were represented by the LRC, which were erroneously changed, have been amended to reflect the correct choice and that the Minister of Home Affairs has undertaken an internal review of the systems that led to the unauthorised name changes.<sup>18</sup> The DDG further stated that internal training would be undertaken to eliminate staff biases and prejudice.<sup>19</sup> He also stated that changes would be made to the data-capturing programme, which should address human error, and that directives were issued to staff in October 2016 to ensure compliance.<sup>20</sup>

The Department has rectified the errors and correctly captured the affected women's names in line with their preferred surnames as stated on the marriage register and the population register.<sup>21</sup> The Department has undertaken internal training to eliminate staff biases and prejudice in the capturing of information in the national population register.<sup>22</sup> Additionally, the Department set out to implement a new system which sought to eliminate the unauthorised change of surnames, and directives have been issued to staff to ensure compliance with and adherence thereto.<sup>23</sup> The internal steps taken by the Department thus far have been effective insofar as they have corrected unauthorised name changes so that the population register reflects the correct names of the women. However, they have not proven effective in preventing a reoccurrence of the issue or addressing the systemic causes thereof. As of 2019, women were still reporting surname changes without their consent.<sup>24</sup>

## 1.2 Historical context

Patriarchy refers to the organisation of social life and institutional structures so that men are vested with authority, power and control over women and children in most, if not all, aspects of life.<sup>25</sup> Patriarchy ensures men's supremacy and women's subjugation.<sup>26</sup> The origins of patriarchy were traced to Egyptian and Greek cultures

17 LRC (n 2).

18 As above.

19 As above.

20 As above.

21 LRC (n 2).

22 As above.

23 As above.

24 R Grobler 'Women lash out at home affairs after surname changes' 25 July 2019 <https://www.news24/southafrica/news/p3-we-want-our-surnames-back-women-lash-out-at-home-affairs-20190725> (accessed 20 October 2020).

25 A Roberts 'South Africa: a patchwork quilt of patriarchy' (2010) 3 *Skills at Work: Theory and Practice Journal* 59 at 63.

26 Roberts (n 25) 65.

millennia ago when enslaved people and women were not afforded any status in society other than that ascribed to them by me<sup>27</sup>n. Slavery, colonialism and apartheid proliferated and perpetuated patriarchal oppression and repression.<sup>28</sup> Colonialism and neo-colonialism changed African women's status in a society profoundly.<sup>29</sup> During the colonial era, the colonisers' agenda of recreating societies in their image resulted in the imposition of the patriarchal system on African societies and the erosion of African women's status.<sup>30</sup> Despite the critical role played by women in the struggle for liberation from racial injustice in many African countries, issues pertinent to the subjugation of women were overlooked in favour of national liberation objectives once the countries gained independence.<sup>31</sup> Post-independence African states thus emerged patriarchal by nature, even with constitutions based on human rights.<sup>32</sup> This patriarchal nature perpetuates the subservient gender role ascribed to African women.<sup>33</sup>

Keeping with the trend, the necessities of a nationalist agenda subordinated women's struggles to the anti-apartheid struggle in South Africa.<sup>34</sup> Post-1994, the residue of the patriarchal nature and mode of operation of apartheid has resulted in ambiguous gender positionings – women are simultaneously 'empowered and victimised, seen and unseen, included and excluded in different ways'.<sup>35</sup> Patriarchy remains pervasive in South African society.<sup>36</sup> It has been described as 'the one constant profoundly non-racial institution across all communities'.<sup>37</sup>

The vast experiences, interests and demands of the many different categories of South African women fell by the wayside as racial equality was prioritised in the pursuit of national liberation from white domination.<sup>38</sup> In the 1950s, the Federation of South

27 Roberts (n 25) 63.

28 As above.

29 As above.

30 As above.

31 Roberts (n 25) 63; S Hassim 'Gender, social location and feminist politics in South Africa' (1991) 15 *Transformation* at 65.

32 Roberts (n 25) 64.

33 As above.

34 R Frenkel 'Feminism and contemporary culture in South Africa' (2008) 67 *Africa Studies* at 1.

35 Frenkel (n 34) 2.

36 Frenkel (n 34) 2; C Albertyn 'Law, gender and inequality in South Africa' (2011) 39:02 *Oxford Development Studies* 136 at 156; C Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34(3) *South African Journal on Human Rights* at 444; Roberts (n 25) 63.

37 Frenkel (n 34) 1.

38 C Albertyn 'Women and the transition to democracy in South Africa' (1994) *Acta Juridica* at 39; see also C de la Rey 'South African feminism, race and racism' (1997) 13(32) *Agenda* at 7 for a critical discussion on the axes of difference in the lived experiences of South African women.

African Women (FSAW) wrote the Women's Charter, which demanded formal legal equality with men regarding marriage, property and inheritance. The more substantive demands were not part of the claim for legal equality but 'demand[ed] social services and amenities to protect and sustain women's role as mothers'.<sup>39</sup> In this sense, the separation of legal equality from social and economic equality impedes the transformation of women's position in society.<sup>40</sup> The subordination of gender struggles to the national liberation struggle resulted from the deeply rooted patriarchal attitudes and values structured by the material inequality between men and women.<sup>41</sup> This subordination was echoed in the Freedom Charter, which even excluded the call for social amenities.<sup>42</sup>

Decades later, in the 1990s, the Women's National Coalition was launched with the two-fold aim of engaging in a political campaign that would mobilise and educate women at a grassroots level and influence the national political constitution-writing process.<sup>43</sup> This feminist project sought to advance substantive equality in the Constitution and the law.<sup>44</sup> Women's organisations sought to institutionalise the equality commitments made by the post-1994 government in the formal norms, procedures and institutions of the new democracy to reduce the dependency on political will.<sup>45</sup> The institutionalisation of gender issues had the theoretical effect of requiring the state to consider gender issues in its internal operation and policy formulation.<sup>46</sup> The two forms of state-led transformation collectively termed 'institutional gender responsiveness' that emerged were racial and gender representation in state institutions and reducing social and economic inequalities through public policies.<sup>47</sup> The former required a focus on gender equity within civil service.

In contrast, the latter required an examination of the impact of policies and service delivery on gender relations and the extent to which women are included among the 'publics' served by government agencies.<sup>48</sup> It later became evident that the civil service was resistant to change and had retained the structure and culture of the hierarchical, militaristic organisation of apartheid. Despite the support for gender equity at the highest levels of government, lower-level department officials were resistant and openly hostile to

39 Albertyn (n 48) 44.

40 As above.

41 Albertyn (n 48) 45.

42 As above.

43 Albertyn (n 48) 51.

44 Albertyn (n 48) 52.

45 S Hassim 'The gender pact and democratic consolidation: institutionalising gender equality in the South African state' (2003) 29 *Feminist Studies* at 508.

46 Hassim (n 45) 509.

47 Hassim (n 45) 510.

48 As above.

attempts to mainstream gender.<sup>49</sup> No resources were allocated to gender training programmes for civil servants, resulting in policy implementers and service agencies reverting to conventional and familiar ideological and technical frameworks and tools.<sup>50</sup>

Matrimonial law has evolved so that the legal rules that gave men marital power and placed them in positions as the heads of household and guardians of their children have been abolished.<sup>51</sup> However, social norms and habits that remain assure that wives defer to their husbands the power to make decisions about the family.<sup>52</sup> This patriarchal culture dictates the practice of women adopting their husbands' names.<sup>53</sup> It has been argued that 'patriarchy operates in both the "public" and the "private" sphere of life'.<sup>54</sup> In the public sphere, it manifests as the deprivation of women's rights, which leaves them dependent on men to represent their interests. In contrast, relations in the private sphere often dictate the capacity of women to participate in the public world.<sup>55</sup> The trend of women electing to keep their birth surnames appears to attempt to sever such dependence.

Bonthuys argues that the differential treatment that allows women to exercise the choices to legally retain or change their surnames after marriage appears to favour women but facilitates and reinforces the existing patriarchal social practices.<sup>56</sup> The gender-specific rule reinforces the inequalities in women's and men's abilities to choose to retain their names after marriage, which allows women to assume their husbands' surnames without hindrance.<sup>57</sup> Such a legal rule disguises its practical effect of facilitating and reinforcing expectations that women should assume their husbands' surnames.<sup>58</sup> The differentiation based on gender serves no legitimate government purpose,<sup>59</sup> and it may be hard-pressed to pass constitutional muster.<sup>59</sup>

Although gender equality is constitutionally entrenched, it remains as much an afterthought as it was during the process of drafting the Constitution.<sup>60</sup> Women's initial claims for equality with

49 Hassim (n 45) 511.

50 Hassim (n 45) 513.

51 E Bonthuys 'Equal choices for women and other disadvantaged groups' (2001) 21 *Acta Juridica* at 45.

52 As above.

53 As above.

54 H Barnett *Introduction to feminist jurisprudence* (1998) at 64.

55 Barnett (n 54) 65.

56 E Bonthuys 'Deny thy father and refuse thy name: Namibian equality jurisprudence and married women's surnames' (2000) 117 *South African Law Journal* at 466.

57 Bonthuys (n 56) 467.

58 Bonthuys (n 56) 469.

59 Bonthuys (n 56) 473.

60 Albertyn (n 38) 43-46.



men were demands for formal legal equality ‘in relation to property, marriage and children, and for the removal of all laws and customs that deny women equal rights’.<sup>61</sup> The substantive demands were not part of the legal equality claim but social and economic equality.<sup>62</sup> Very few women were among the delegates at the first round of constitutional negotiations,<sup>63</sup> and the parties that would eventually contest to govern the country had little to no regard for women’s rights in their policy considerations.<sup>64</sup>

The legacy of gender oppression and suppression persists but manifests in different forms. The conventionally gendered ideas of society are sustained by legal and social boundaries that are normative and doctrinal, despite the broad reach of constitutional equality.<sup>65</sup> Gender equality jurisprudence has broadened the net of inclusion without dislodging the underlying social framework of our gendered society.<sup>66</sup> The government must fulfil its constitutional mandate of addressing socio-economic inequalities as part of a progressive realisation of human rights in ways that erode inequalities of race and gender.<sup>67</sup>

## 2 Administrative justice as a constitutional right

Judicial review can be employed to ensure that administrative conduct is exercised within the legislative mandate conferred on officials and to give effect to the constitutional right to administrative action that is lawful, fair and reasonable.<sup>68</sup> During any judicial review of the Department’s conduct, the court would assess such conduct against administrative law standards.<sup>69</sup> Although the exhaustion of all internal remedies is a prerequisite for judicial review,<sup>70</sup> the duty to exhaust internal remedies may be bypassed if there are exceptional circumstances and it is in the interests of justice.<sup>71</sup> This article argues that review proceedings are in the interests of justice and that internal remedies may be bypassed given the systemic nature of sexism evident in the Department’s conduct.

61 Albertyn (n 38) 44.

62 As above.

63 Albertyn (n 38) 54.

64 Albertyn (n 38) 46.

65 C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23(2) *South African Journal on Human Rights* at 254.

66 Albertyn (n 65) 254.

67 S Hassim ‘The gender pact and democratic consolidation: institutionalising gender equality in the South African state’ (2003) 29 *Feminist Studies* at 505-506.

68 Secs 33 & 34 of the Constitution; G Quinot ‘Regulating administrative action’ in G Quinot (ed) *Administrative justice in South Africa: An introduction* (2015) at 107.

69 Quinot (n 68) 109.

70 Sec 7(2) of PAJA.

71 Sec 7(2)(c) of PAJA; Quinot (n 68) 115.

This section explores whether the conduct of changing married women's surnames by the Department amounts to public power that might be administrative action and how the rights violations caused thereby can be vindicated by taking the conduct on judicial review.

## 2.1 What is administrative action?

The Department's conduct constitutes an exercise of public power. Although largely elusive, public powers tend to be associated with conduct and activities that are governmental, i.e., activities 'for which the public, in the shape of the state, have assumed responsibility' or 'linked to the functions and powers of government'.<sup>72</sup>

The rule of law imposes an obligation on the state to exercise its power by the law.<sup>73</sup> This means that public power must comply with the rule of law. Compliance of public power with the rule of law is measured against a continuum of constitutional accountability.<sup>74</sup> Beginning at one end of the continuum, first, are foundational or general legal norms that create the context for applying the more explicit and indirect constitutional norms.<sup>75</sup> The constitutional principle of legality, inherent in the rule of law, lies at this end of the continuum.<sup>76</sup> Second, are those norms found in the Bill of Rights, such as those included in the right to just administrative action in section 33 of the Constitution.<sup>77</sup> Third, are indirect constitutional norms of accountability, such as PAJA, which give effect to the content of the constitutional right to just administrative action and provide guidelines for judicial review of administrative action.<sup>78</sup> At the opposite end of the spectrum are specific empowering provisions in other statutes or subordinate legislation 'that set out standards of accountability demanded of a functionary in a particular situation, and that [are] appropriate to that specific exercise of power'.<sup>79</sup>

The right to just administrative action is constitutionally entrenched.<sup>80</sup> Section 33(1) of the Constitution states that administrative action must be lawful, reasonable, and procedurally fair. In section 33(2) of the Constitution, a person whose rights have been negatively affected by administrative action is entitled to

72 C Hoexter *Administrative law in South Africa* (2018) at 3-4.

73 M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* at 50.

74 Murcott & Van der Westhuizen (n 73) 43.

75 As above.

76 Murcott & Van der Westhuizen (n 73) 44.

77 As above.

78 As above.

79 As above.

80 Sec 33 of the Constitution.

written reasons. Section 33 of the Constitution is given effect to by PAJA.<sup>81</sup> Administrative law, through section 33 of the Constitution and PAJA, regulates ‘incidences of public power or the exercise of public functions’ that involve the day-to-day administrative functioning of the state.<sup>82</sup> The three arms of government and ‘all organs of state’ are bound by section 8(1) of the Constitution to give effect to the Bill of Rights, including the right to administrative justice in section 33.<sup>83</sup> Organs of state making up the executive arm of government are primarily responsible for the administrative functioning of the state. Section 239 of the Constitution defines ‘organs of state’ to include departments of state or administration in the national, provincial, and local spheres of government. The primary source of administrative law, PAJA, enacted to give effect to the rights in section 33 of the Constitution, applies only to exercises of public power that fall within its definition of ‘administrative action’.<sup>84</sup> The Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* discussed the several definitional elements which constitute administrative action.<sup>85</sup> The conduct must be a decision involving the exercise of a discretion or choice, of an administrative nature, by whoever performed, of a public nature, typically involving the implementation of the law, that adversely affects rights and has a direct, external legal effect and which does not fall within any of the exclusions listed in section 1 of PAJA.<sup>86</sup> Corder summarises the listed exclusions thus:

[T]he “executive” and “legislative” functions of government at national, provincial and local levels, the actions of judges, magistrates and traditional leaders when dispensing justice, “a decision to institute or continue a prosecution”, a decision of the Judicial Service Commission in any part of the appointment process of judges, and two other relatively minor but specific acts of administration.<sup>87</sup>

The requirement of a ‘decision’ appears to exclude mechanical acts from the ambit of administrative action.<sup>88</sup> It is, therefore, possible for formal action not to amount to an administrative decision or action.<sup>89</sup> Actions that occur by operation of law without the

81 Sec 33(3) of the Constitution.

82 P Maree ‘Administrative authorities in legal context’ in G Quinot (ed) *Administrative justice in South Africa: An introduction* (2016) at 59.

83 Hoexter (n 72) 125.

84 Sec 1 of PAJA.

85 *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

86 G Quinot & P Maree ‘Administrative action’ in Quinot (n 68) 78.

87 H Corder ‘The development of administrative law in South Africa’ in Quinot (n 82) 20.

88 Hoexter (n 72) 193; *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga* 2003 (1) SA 373 (SCA) paras 20 & 28.

89 As above.

exercising of discretion by a decision-maker also do not amount to administrative action.<sup>90</sup>

Upon the conclusion of a marriage, a woman must notify the Department in writing whether she chooses to retain or change her surname but does not need to apply for approval before any change may be effected. When done correctly, the surname change occurs by operation of law rather than by virtue of a decision, and the Department official who updates the marriage register acts mechanically without exercising any discretion. The Department's conduct of changing the names of married women without their consent shows flagrant disregard for the women's instructions and is reminiscent of the recorded resistance and hostility of lower-level department officials towards gender mainstreaming, as illustrated earlier in this article in the discussion of the historical context.<sup>91</sup>

The conduct by the officials of the Department of changing the married women's names contrary to their election arguably amounts to a decision of an administrative and public nature that has adversely affected the married women whose surnames were changed without their consent by limiting the exercise of their abovementioned rights which, in some instances, had the direct, external legal effect of limiting the women's legal capacity. This conduct does not fall under any of the listed exclusions. Even if the conduct of changing the women's names without their consent does not amount to administrative action but is merely a mechanical, clerical act, it could still be reviewed under the principle of legality, which generally provides for the review of exercises of public power.<sup>92</sup>

## 2.2 When can administrative action be taken on judicial review?

The courts have been tasked with regulating and overseeing all public power, including administrative action.<sup>93</sup> Judicial review is concerned with how a decision was taken rather than the correctness of the decision.<sup>94</sup> The courts ask not whether the decision was the best or most correct but whether the decision was taken in a manner that complies with the law.<sup>95</sup> This means that the courts must ensure that state officials remain within the limits of their authority and comply with the processes prescribed by law when exercising the discretion granted to them.<sup>96</sup>

90 Hoexter (n 72) 202; *Phenithi v Minister of Education* 2008 (1) SA 420 (SCA) para 10.

91 Hassim (n 67) 511.

92 Hoexter (n 72) 121.

93 G Quinot 'Regulating administrative action' in Quinot (n 82) 106.

94 Quinot (n 93) 107.

95 As above.

96 Corder (n 87) 13.

The cause of action for judicial review of administrative action arises from section 6 of PAJA.<sup>97</sup> The grounds of review set out in section 6(2) of PAJA are intended to advance the section 33(1) requirements of administrative justice: lawfulness, reasonableness and procedural fairness.<sup>98</sup> Lawfulness requires that an administrator act within the limits of the powers conferred upon them by law.<sup>99</sup> There must be a valid authorisation in an empowering provision,<sup>100</sup> and the administrator must not be mistaken in either law or fact pertaining to their authorisation.<sup>101</sup> Reasonableness entails examining whether a decision was rationally justified, proportional, or just in the outcome.<sup>102</sup> Procedural fairness requires that an administrator act reasonably in their decision-making towards those affected by informing them of those decisions, allowing them to participate in the decisions, and treating each case on its own merits by taking all decisions impartially.<sup>103</sup> Legality overlaps with section 33 (of the Constitution) requirements as it requires that public power be exercised lawfully and rationally.<sup>104</sup> This means that an authority exercising public power must act within the powers lawfully conferred on it, and the decisions it makes must be rationally related to the purpose for which the power was given.<sup>105</sup> Legality has been expanded to include, under minimal circumstances, procedural fairness as a requirement of rationality.<sup>106</sup> It is proposed, with judicial support, that legality requires giving reasons.<sup>107</sup>

Section 7(2) of PAJA establishes the duty to exhaust internal remedies provided by any other legislation before pursuing judicial review<sup>108</sup>. Only in exceptional circumstances and in the interests of justice may a court exempt a person from the obligation to exhaust internal remedies in section 7(2)(c) of PAJA. The duty to exhaust internal remedies has been supported by the Constitutional Court in *Koyabe v Minister of Home Affairs*,<sup>109</sup> where the court held that 'what constitutes exceptional circumstances will depend on the facts of the case and nature of the administrative action'.<sup>110</sup> However, legality does not have a similar duty to exhaust internal remedies.

97 Quinot (n 93) 111; *Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 113 (CC) para 25.

98 Quinot (n 93) 112.

99 Secs 6(2)(a)(i) & 6(2)(f)(i) of PAJA; Hoexter (n 72) 256.

100 G Quinot 'Lawfulness' in Quinot (n 82) 121.

101 Quinot (n 100) 139.

102 Secs 6(2)(f) and 6(2)(h) of PAJA; Hoexter (n 75) 340-346; M Kidd 'Reasonableness' in Quinot (n 82) 175-185.

103 Hoexter (n 72) 367; M Murcott 'Procedural fairness' in Quinot (n 82) 148.

104 Hoexter (n 72) 122.

105 Hoexter (n 72) 123.

106 As above.

107 Hoexter (n 72) 124.

108 Hoexter (n 72) 539.

109 *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) paras 36-38.

110 Hoexter (n 72) 542.

Any delay or failure to exhaust internal remedies could give rise to procedural barriers to taking the conduct of the Department on judicial review in terms of PAJA. However, these barriers can be overcome given the exceptional and systemic nature of the problem, as demonstrated in *KOS v Minister of Home Affairs*.<sup>111</sup> The court in *KOS* dealt with the refusal of officials of the Department to change some of the applicants' names and sex descriptions as provided for under the Alteration of Sex Description and Sex Status Act (Alteration Act),<sup>112</sup> despite there being no legal prohibition to do so. The six applicants in *KOS* were three married couples whose marriages were solemnised in the Marriage Act.<sup>113</sup> The first, third and fifth applicants (the transgender spouses) were assigned male at birth.<sup>114</sup> After marrying cisgender female spouses, the transgender spouses underwent medical and/or surgical treatment to alter their sexual characteristics from male to female.<sup>115</sup>

The Alteration Act provides that upon application to the Director-General of the Department, a person's sex description may be altered on the birth register, and the concerned person will be provided with an altered birth certificate.<sup>116</sup> The alteration of a person's sex description applies from the date of recording such alteration.<sup>117</sup> The legal consequences of altering a person's sex description are wholly prospective from the recording date. This means that there is no retrospective effect on any of the person's rights and obligations which have accrued to or have been acquired by the affected person before the alteration.<sup>118</sup> The contractual legal character of marriage brings about mutual rights and obligations between spouses. These mutual rights and obligations are unaffected by the recording of a postnuptial sex alteration in respect of either or both spouses.<sup>119</sup> The alteration of the record of a person's gender or sex description on the birth register, once the application in terms of the Alteration Act has been granted, results in the alteration of the person's sex descriptor on the population register by the Department.<sup>120</sup> The population register also includes particulars of a person's marriage.<sup>121</sup>

111 *KOS v Minister of Home Affairs* 2017 (6) SA 588 WCC (*KOS* case); for purposes of this discussion, *KOS* is instructive not for its impact on considerations of gender-inclusivity under the matrimonial law in South Africa but rather for its illustration of an instance in which failure to exhaust internal remedies may be condoned by the court.

112 49 of 2003; *KOS* (n 111) para 2.

113 *KOS* (n 111) para 2.

114 As above.

115 As above.

116 Sec 3(1) of the Alteration Act read with section 27A of BADRA; *KOS* (n 113) para 3.

117 Sec 3(2) of the Alteration Act.

118 Sec 3(3) of the Alteration Act.

119 *KOS* (n 111) para 4.

120 *KOS* (n 111) para 5.

121 *KOS* (n 111) para 6.

The Department maintained ‘that the applications by the transgender spouses under the Alteration Act cannot be granted while their marriages remain registered as having been solemnised in terms of the Marriage Act’<sup>122</sup> instead of the Civil Union Act, as is required for same-sex marriages.<sup>123</sup> Apart from death, divorce is the only manner in which marriage can be dissolved.<sup>124</sup> The Department required that applicants whose marriages were solemnised in terms of the Marriage Act first obtain a divorce before the sex description alteration would be granted.<sup>125</sup> The spouses would only be able to obtain a divorce if it could be proved that there had been an irretrievable breakdown of the marriage relationship or if one of the spouses was suffering from mental illness or continuous unconsciousness.<sup>126</sup> According to the court, even if the Department had a justifiable reason for its requirement, the applicants would not have a legal basis to obtain a divorce.

For two applicants (KOS and GNC), the Department failed to decide on the application for the transgender spouse’s sex alteration. For one other applicant (WJV), the Department granted the alteration of sex description but deleted the particulars of WJV’s marriage from the population register without being asked to do so.<sup>127</sup> The Department even went as far as changing WJV’s spouse’s surname to her birth surname. The court found it appropriate to exempt the applicants from having to exhaust the internal remedies due to the ‘important issues that bear materially on the lives of a section of South African society and matters of public administration’ raised in the application.<sup>128</sup> The conduct by officials of the Department was based on their understanding of the current parallel system for the solemnisation of marriages.<sup>129</sup> Civil marriages may be solemnised in terms of either the Marriage Act or the Civil Union Act, which came into being after the Marriage Act and standard law definitions of marriage were declared unconstitutional because they discriminated against gay and lesbian couples by precluding them from marrying.<sup>130</sup> The misunderstanding of the legislation by the Department is based on a common misconception of transgender identity, which tends to conflate sex, gender and sexuality.<sup>131</sup> In other words, the Department conflated the spouses’ sex, gender and sexuality when it struggled to reconcile the spouses’ marriage relationships with the legislation in terms of which the marriage contracts were concluded. The court also

122 KOS (n 111) para 13.

123 Civil Union Act 17 of 2006.

124 KOS (n 111) para 12.

125 KOS (n 111) para 27(c).

126 Sec 5 of the Divorce Act 70 of 1979.

127 KOS (n 111) para 15.

128 KOS (n 111) para 87.

129 KOS (n 111) para 17.

130 KOS (n 111) para 17; 17 of 2006.

131 KOS (n 111) para 20.

chalked up the misinterpretation of the legislation to the widespread opposition to the amendment of the Marriage Act to permit the formalisation of same-sex marriage and the discrimination suffered by gay and lesbian people due to heteronormative ideas of marriage.<sup>132</sup> The court held that how the transgender spouses were dealt with by the Department was inconsistent with the Constitution and unlawful because it infringed on their rights to administrative justice and the cisgender spouses' rights to equality and human dignity and was inconsistent with the state's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, as set out in section 7(2) of the Constitution.<sup>133</sup>

In a similar vein, exemption from having to exhaust any applicable internal remedies, such as appealing the conduct internally within the Department, could be granted should women challenge the Department's refusal to correct their surnames on the population register due to the material impacts of rights violations and continued discrimination on the lives of married women whose surnames are changed without their consent as a matter of public administration. Much like the misinterpretation of the Alteration Act due to a conflation of sex, gender and sexuality in *KOS*, officials of the Department appear to have once again exceeded the bounds of their authority based on their bounded views of gender relations.

The conduct by the officials of the Department, even if it is found to be mechanical and not amount to administrative action, constitutes an exercise of public power which can be reviewed based on lawfulness – the officials were not authorised to act against the women's instructions and were not authorised to reject the surname that women elect upon the conclusion of a marriage. Section 26(1) of BADRA does not grant the official the authority to deny a woman's retention of her birth surname.

At common law, review proceedings may be refused if the applicant takes too long to bring the application, i.e., if the application is not brought within a reasonable time.<sup>134</sup> The reasonableness of the delay is determined by the circumstances.<sup>135</sup> Furthermore, the court must consider the condonation of the delay.<sup>136</sup> Similarly, section 7(1) of PAJA also stipulates a delay rule. Unlike in common law, under PAJA, review proceedings must be instituted without delay and within 180 days of the exhaustion of internal remedies.<sup>137</sup> A delay may still be unreasonable even if the

132 As above.

133 *KOS* (n 111) para 90.

134 Hoexter (n 72) 532.

135 As above.

136 As above.

137 Hoexter (n 72) 534.



proceedings are brought within the 180-day limit.<sup>138</sup> When there are no internal remedies, the 180-day period starts when the applicant is informed of the administrative action or becomes aware of the action and the reasons for it, or where the applicant might have reasonably been expected to have become aware of the reasons.<sup>139</sup> If the review of the unconsented name changes by the Department is brought based on legality, then the reasonableness of the delay, if any, may be decided by the court. If the review is brought under PAJA, then the 180-day limit will likely start when the outcome of the internal appeal of the decision is communicated.

### 2.3 What could be the appropriate relief?

In general, section 38 of the Constitution grants anyone listed in the section standing to approach a court for appropriate relief when a right in the Bill of Rights is infringed or threatened. The listed persons are anyone acting in their interest, on behalf of another person who cannot act in their name; as a member or in the interest of a group or class of persons; in the public interest; and an association acting in its members' interest.<sup>140</sup> Section 172 provides for the litigation and judicial review of constitutional matters. In *Fose v Minister of Safety and Security*,<sup>141</sup> it was emphasised that appropriate relief must amount to an effective remedy. The Constitutional Court has explained that appropriate relief for the breach of the right to just administrative action usually takes the form of public law remedies, i.e., remedies that balance and protect a broader range of affected interests, including public interest.<sup>142</sup> The remedy must not only be fair to the affected person but also effectively vindicate the right violated by the administrative conduct.<sup>143</sup> The repeated occurrence of unauthorised surname changes, despite the Department's efforts at rectification and prevention, warrants a remedy that will protect the rights of those women who have come forward and those who have not.

The remedies that the court may grant in proceedings for judicial review of administrative action are set out in section 8 of PAJA. Additionally, this section provides that the court may 'grant any just and equitable order'.<sup>144</sup> This article argues that injunctive relief and a declaratory order would be the most equitable relief, similarly to

138 As above.

139 As above.

140 Sec 38(a)-(e) of the Constitution.

141 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

142 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 22 (*Steenkamp* case); J Bleazard & S Budlender 'Remedies in judicial review proceedings' in Quinot (n 82) 239.

143 *Steenkamp* (n 144) para 29.

144 Sec 8 of PAJA.

the court's decision in *KOS*.<sup>145</sup> Section 172 of the Constitution provides that when deciding a constitutional matter, a court must declare that any law or conduct inconsistent with the Constitution is invalid to its inconsistency and may make any order that is just and equitable.<sup>146</sup> The court could declare, in terms of section 172(1)(a) of the Constitution, that how the Department dealt with the registration of the married women's names in the population register, as conduct inconsistent with the Constitution, is unlawful in that it infringed on the women's right to administrative justice; infringed on their right to human dignity; and was inconsistent with the state's obligation in terms of section 7(2) of the Constitution to respect, promote, protect and fulfil the rights in the Bill of Rights. The court could further prohibit the Department from refusing to register women's surnames as per the women's instructions,<sup>147</sup> forcing the Department to perform its statutory duty of registering the women's details as instructed and to correct the register.<sup>148</sup> An order of structural relief where the court not only orders the Department to train its officials to perform their statutory duty without bias but also orders the Department to produce a report detailing the steps it has taken and plans on taking to ensure compliance would also be appropriate as a means of ensuring transparency and accountability.<sup>149</sup> The structural relief sought would be aimed at reducing and ultimately eliminating lower-level department officials' resistance and hostility towards gender mainstreaming efforts.

## 2.4 What are the considerations of substantive equality?

The Department has previously stated that internal training would take place to ensure that the officials' biases are eliminated in capturing information on the population register.<sup>150</sup> It can be inferred from the reporting of new cases of unauthorised name changes by married women since the Department's statement that the internal training that has taken place did not address the biases that are informed by the patriarchal society that we live in.

Section 26(1)(a) of BADRA explicitly provides that *women* may elect to change their surname at marriage by simply informing the Department. This gendered legislative provision leaves formal equality out of the question in hopes of achieving substantive gender equality. Suffice it to say that the legislative provision allowing women to change their surname at marriage with relative ease is based on the assumption that they will choose to take their husband's

145 *KOS* (n 111) para 90.

146 Sec 172(1)(a)-(b).

147 Hoexter (n 72) 560.

148 Hoexter (n 72) 561.

149 As above.

150 LRC (n 2).

surname. In other words, this legislative provision practically facilitates and reinforces the stereotypical expectations that women should assume their husbands' names and effectively sacrifice their identities.<sup>151</sup> Such expectations are based on the marital unity doctrine, i.e., the historical idea that upon marriage, a husband and a wife become one legal person who is represented by the husband in his capacity as the head of the household.<sup>152</sup>

Albertyn argues that substantive equality can address diverse forms of inequality arising from various social and economic causes.<sup>153</sup> She further argues that meaningful social and economic change can be achieved by and through the courts, as illustrated by the legal form of substantive equality adopted by the Constitutional Court, which emphasises context, impact, difference and values.<sup>154</sup> Inequality is rooted in political, social and economic circumstances.<sup>155</sup> It is often complex and systemic and entrenched in social values and behaviours, as well as the institutions of society, the economic system and power relations.<sup>156</sup>

An analysis of *Van Heerden v Minister of Finance* suggests that the courts will largely defer to government measures to avoid encroaching upon executive functions.<sup>157</sup> How far the courts may nudge the government in more transformative, redistributive directions is yet to be determined.<sup>158</sup> What is required is an intervention which results not only in inclusion but also transformation.<sup>159</sup> This is necessary because inclusion 'broadens the umbrella of social recognition but does not address the structural conditions that create and perpetuate systemic inequalities'.<sup>160</sup> Such a process has been described as 'affirmative' change since its remedies seek to correct inequitable outcomes without disturbing the underlying circumstances causing them.<sup>161</sup> A transformative approach which seeks to address inequalities at the root and shift the power relations that maintain the status quo is more desirable.<sup>162</sup> Albertyn puts it succinctly thus:

[A] transformative approach would locate an understanding of women's disadvantage within these systemic inequalities, then seek to dismantle them through new normative interpretations of equality and through remedies that affirm [a] more egalitarian and flexible set of gender

151 Bonthuys (n 56) 469.

152 As above.

153 Albertyn (n 65) 253.

154 Albertyn (n 65) 254.

155 As above.

156 As above.

157 2004 (6) SA 121 (CC).

158 C Albertyn & G Goldblatt 'Equality' in S Woolman et al (eds) *Constitutional Law of South Africa* (2007) at 40.

159 Albertyn (n 65) 256.

160 As above.

161 N Fraser *Justice Interruptus* (1997) at 23.

162 Albertyn (n 65) 256.

roles, and thus dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo.<sup>163</sup>

Appropriate relief seeks to balance the vindication of the infringed rights of an affected person with the protection of the broader range of interests, including public interest. For purposes of this article, it would be appropriate for the court to advance substantive gender equality imperatives to ensure effective and lasting relief through a finding of unlawfulness and the granting of structural relief in a challenge of the Department's conduct.

### 3 Conclusion

Over the decades, women have been active participants in the human rights and equality discourse in South Africa. It is evident that women have long been marginalised, or at times even wholly excluded, from this discourse. This has resulted in the neglect of women's rights and the often-ineffective intervention. The historical marginalisation and total exclusion of women that has gone unaddressed for decades have led to intervention that is often ineffective today, mainly because such intervention fails to dismantle the systems and frameworks that continue to marginalise women.

The unauthorised changes of married women's surnames upon marriage registration amount to an infringement of their right to administrative justice, which can be taken on judicial review to seek systemic relief. The court could grant declaratory and injunctive relief. In doing so, it would be appropriate for the court to keep the constitutional imperative of substantive equality in mind, even though it would not be interacting with the substance of the matter. The historical context of subordinating matters of gender equality and the separation of legal equality from social equality should be borne in mind.

Although the issue of unauthorised name changes of married women primarily arises due to the poor implementation of the law, a legislative intervention by way of a provision that allows men to similarly change their surnames upon the conclusion of a marriage could go a long way in normalising the practice of spouses, rather than wives, choosing a family name. This practice could be reasonably expected to impact the law's implementation positively. It could contribute to eradicating the social structures that create the bias that informs the conduct of the officials when they do not correctly reflect the married women's choices of retaining their birth surnames in the population register.

163 As above.

For this reason, it is worth considering an extension of section 26(1) to husbands, or simply spouses, as this will serve a social purpose, i.e., the selection of a family name. For example, in the United States of America, specifically in the State of New York, there is a legislative provision which states that '[o]ne or both parties to a marriage may elect to change the surname by which he or she wishes to be known after the solemnisation of the marriage'.<sup>164</sup> Progressive legislation necessitates a change in the social context that will facilitate, not hinder, its implementation. Gender neutral, or gender-inclusive, language in the drafting of legislation is supported by the view expressed in *Fourie and Another v Minister of Home Affairs*, where the court stated that 'it is no longer necessary to be able to even distinguish between the "husband" and the "wife" when applying the rules of our matrimonial law'.<sup>165</sup>

<sup>164</sup> Rosensaft (n 1) 201; N.Y. DOM. REL. LAW 15 (West 1999).

<sup>165</sup> *Fourie and Another v Minister of Home Affairs & Others* 2005 (3) SA 429 (SCA); A Boshoff 'Woman as the subject of (family) law' in R Hunter & S Cowan (eds) *Choice and consent: Feminist engagements with law and subjectivity* (2007) at 42.

# THE DEVELOPMENT OF A WESTERN-CENTRIC NOTION OF MODERNITY AND THE INCLUSIVE RECONSTRUCTION THEREOF ACCORDING TO THE TWAIL PRINCIPLES

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## Abstract

*Modernity significantly influences global action regarding social, political, and economic justice and liberation. Because of this, its flawed origins cannot simply be ignored. This article explains the development and current conception of economic, social and political modernity and shows how non-Western thought is excluded from these spheres. The article focuses on problematising the recent construction of modernity by showing how modernity is founded on Western ideals. Additionally, this article tracks the spread and universalisation of modernity by cruel and illegitimate means like colonialism and the othering of indigenous peoples. All these form the basis for an argument that there must be a substantial reconstruction of the concept of modernity, and TWAIL's relationship with international law is offered as inspiration for such a reconstruction.*

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# 1 Introduction

In its simplest form, the concept of modernity is closely related to contemporariness and can be defined as ‘a modern way of thinking’.<sup>1</sup> Though this definition is a starting point, the concept of modernity explored in this article is more extensive and nuanced. There is a lack of convergence amongst scholars on how best to frame modernity because it has been broached in various fields and from various perspectives.<sup>2</sup> Modernity spans most areas of life and knowledge,<sup>3</sup> including but not limited to science, art, politics, and technology.<sup>3</sup> This article will focus on modernity as it pertains to political, social and cultural thought. It will situate modernity as a post-traditional, post-medieval period characterised by social justice, liberal democracy and supposed rational thinking, which collectively profess to represent a civilised modern order.<sup>4</sup>

The idea of modernity is generally thought to carry the positive connotations of evolution and development. While, in some respects, this may be the case, society’s transition into its ‘modern’ system is not without a cost and does not always benefit everyone uniformly. It can be argued that many of the political and social issues and exclusions faced by oppressed peoples find their roots in the concept of modernity and how it is presently defined.

The prime concern of the article will be around modernity’s interaction with the law and how inclusive and transformative legal thought can aid the reconstruction, and reform, of modernity. This reform could help achieve the justice and equity that many nations and societies are fighting for. This paper provides a critique that is integral to the concept of modernity, as seen in the work of Octavio Paz. Paz asserts that criticism is a ‘characteristic feature of modernity’.<sup>5</sup> He also encourages a thought process where ‘what is new is set over and against what is old, and this constant contrast constitutes the continuity of tradition’.<sup>6</sup>

This article aims to show how the current notion of modernity is inherently Western-centric and has, through various measures, actively excluded non-Western peoples and schools of thought. I do this by tracing the historical development of the notion of political,

1 D Sheldon ‘What are the features of modernity and their role in fundamentalism?’ <https://www.enotes.com/homework-help/what-features-modernity-role-fundamentalism-538895> (accessed 30 August 2022).

2 AHR Roundtable ‘Historians and the question of modernity’ (2011) 116 *The American Historical Review* at 631.

3 M Berman *All that is solid melts into air: The experience of modernity* (1982) at 10-15.

4 LS Lushaba ‘Development as modernity, modernity as development’ (2006) 69 *ASC Working Paper* at 16.

5 O Paz *Alternating current* (2011) at 18.

6 Paz (n 5) 20.

economic, social and cultural modernity. Due to the exceptional universalising power of modernity, there is merit in analysing and comparing modernity to international law. The article will do this by putting forth the law and, more specifically, the ideologies held by the Third-World Approaches to International Law (TWAIL). TWAIL is of value in this context for its problematisation of international law. I endeavour to problematise modernity in a similar way.

## 2 The history of the current construction of modernity

The current Western-centric conception of modernity is historically constructed. In order to provide a thorough and well-informed critique of this Western-centric conception of modernity, it is important to first provide a brief background highlighting key historical developments informing the Western idea of modernity. The modern age can be split into two parts, namely: the early and late modern periods. The early modern period began with Gutenberg's invention of the movable type printing press in the late 15th century.<sup>7</sup> This invention was the catalyst for rising literacy rates, educational reform, and the increased spread of knowledge in the Western world. The early modern period also saw advancements in transportation.<sup>8</sup> Politics became more secularised, capitalism became more widespread,<sup>9</sup> and there was a weakening of feudalism and the church, leading to nation-states growing more powerful.<sup>10</sup> The enlightenment era also unfolded during the early modern period and demonstrated a new favour towards the ideals of reason and rationalism. It also expressed faith in scientific inquiry, which slowly began to replace the previously dominant authority of the monarchy and the church.

The industrial revolution took place during the late modern period. First, there was the revolution in England around 1750, which was followed by the American revolution in 1776 and the French revolution in 1789. All these revolutions indicated that the Western world was changing politically, economically, socially, and culturally.<sup>11</sup> Once the power to dictate what was 'true' was no longer in the hands of authorities like the king and the church, individuals had a new thirst for knowledge. They aimed to examine and interact with the world according to their own understanding.<sup>12</sup>

7 'How did we get here? The evolution of culture' [https://saylordotorg.github.io/text\\_understanding-media-and-culture-an-introduction-to-mass-communication/s04-03-how-did-we-get-here-the-evolut.html](https://saylordotorg.github.io/text_understanding-media-and-culture-an-introduction-to-mass-communication/s04-03-how-did-we-get-here-the-evolut.html) (accessed on 22 November 2021).

8 JP Rodrigue *The geography of transport systems* (2020) at 4.

9 'How did we get here? The evolution of culture' (n 7).

10 'The formation of modern nation states' <https://study.com/academy/lesson/the-formation-of-modern-nation-states.html> (accessed on 22 November 2021).

11 'How did we get here? The evolution of culture' (n 7).

12 As above.



## 2.1 Political modernity

Modernity's earliest political roots can be traced back to the initial rejection of medieval and Aristotelian styles of analysing politics by Niccolò Machiavelli.<sup>13</sup> He rejected the method of politics that compared ideas about how things should be and favoured a realistic analysis of how things were. Machiavelli also suggested that politics aimed to control one's chance or fortune and that relying upon providence eventually leads to evil.<sup>14</sup> Machiavelli's ideas of realism would inspire succeeding politicians and philosophers who theorised and advocated for many principles that still underpin the political structures of modern nations.<sup>15</sup>

Political ideology has developed and evolved drastically since Machiavelli's initial rebellion. However, the call to abolish totalitarianism was a common theme throughout Western history.<sup>16</sup> Under modernity, there was growing preference for a liberal democratic order and the renunciation of monarchies to create sovereign republics.<sup>17</sup> It can be concluded that political modernity can be described as a state committed to individual and collective self-determination.<sup>18</sup> This also includes personal freedom and democracy.<sup>19</sup> These thoughts may have begun in the Western world but have spread across the globe. Many nations still consider the ideals of liberty and democracy to be characteristic of modernity, and therefore, the ultimate goal to strive towards.<sup>20</sup>

## 2.2 Economic modernity

Economic freedom is central to modernity.<sup>21</sup> Modernity is inextricably linked to the economic system of capitalism.<sup>22</sup> Capitalism can be

13 L Strauss 'Niccolò Machiavelli' in L Strauss & J Cropsey (eds) *In history of political philosophy* (1987) at 296-317.

14 As above.

15 P Rahe 'Machiavelli's liberal republican legacy' (2006) *Cambridge University Press* xxvi.

16 C Hayes 'The novelty of totalitarianism in the history of western civilization' (1940) 82 *Proceedings of the American Philosophical Society* at 91.

17 D Scott 'The aftermaths of sovereignty: Postcolonial criticism and the claims of political modernity' (1996) 48 *Social Text* 17.

18 G Rosich & P Wagner 'Introduction: Re-interpreting political modernity for our time' in G Rosich & P Wagner (eds) *The trouble with democracy: political modernity in the twenty-first century* (2016) at 3.

19 As above.

20 P Wagner 'Liberty and discipline: Making sense of postmodernity, or, once again, toward a sociohistorical understanding of modernity' (1992) 21 *Theory and Society* at 477.

21 'Economic modernity in the XXIst century: Markets, solidarity, democracy' <http://www.ub.edu/cecups/en/events/economic-modernity-xxist-century-markets-solidarity-democracy> (accessed on 23 November 2021).

22 R Inglehart & W Baker 'Modernization, cultural change, and the persistence of traditional values' (2000) 65 *American Sociological Review* at 22.

traced back to the emergence of agrarian capitalism and mercantilism in the early Renaissance.<sup>23</sup> It was a response to the fall of feudalism. Feudalism was the dominant mode of economic relations in medieval society.<sup>24</sup> Capitalism divides society into classes: the bourgeoisie or wealthy ruling class and the proletariat, or the poor working class.<sup>25</sup> Within these two classes, the central economic concerns are private ownership of the means of production and their operation for profit.<sup>26</sup> Capitalism includes capital accumulation, competitive markets, a price system, private property and the recognition of property rights, voluntary exchange and wage labour.<sup>27</sup> Significantly, capitalism also facilitated the emergence of urban manufacturing, which is another fundamental aspect of economic modernity.<sup>28</sup>

To conclude, a society can be deemed modern if economic actions and exchange is pursued according to the individual intentions and capacities of economic actors, and not according to a set of strict rules.<sup>29</sup> This echoes the attitude articulated in the description of political modernity. This is where there is a more significant concern for the individual and their wishes and excellent support for individual autonomy<sup>30</sup> and subjectivity.<sup>31</sup>

### 2.3 Social and cultural modernity

It is difficult to define social and cultural modernity concisely. The thoughts around what is socially and culturally acceptable are constantly evolving with the views and values of societies.<sup>32</sup> The societies of Western Europe have been cited as the historical origin of social and cultural modernity. This is because they developed from

23 'Cradle of Capitalism' <https://www.economist.com/books-and-arts/2009/04/16/cradle-of-capitalism> (accessed on 29 August 2022).

24 'Feudalism' <https://courses.lumenlearning.com/atd-herkimer-westerncivilization/chapter/feudalism/> (accessed on 29 August 2022).

25 E Andrew 'Class in itself and class against capital: Karl Marx and his classifiers' (1983) 16 *Canadian Journal of Political Science* at 584.

26 'Cradle of capitalism' <https://www.economist.com/books-and-arts/2009/04/16/cradle-of-capitalism> (Accessed on 23 November 2021).

27 'Capitalism' <https://policycommons.net/topics/capitalism/> (accessed on 27 January 2023).

28 G Fields 'City systems, urban history, and economic modernity. Urbanization and the transition from agrarian to industrial society' (1999) 13 *Berkeley Planning Journal* at 123.

29 'Economic modernity in the XXIst century: Markets, solidarity, democracy' <http://www.ub.edu/cecupa/en/events/economic-modernity-xxist-century-markets-solidarity-democracy> (accessed on 23 November 2021).

30 S Benhabib 'Autonomy, modernity, and community: Communitarianism and critical theory in dialogue' in A Honneth & T McCarthy (eds) *Cultural-political interventions in the unfinished project of enlightenment* at 41.

31 D Sayer *Capitalism and modernity. An excursus on Marx and Weber* (1991) at 9.

32 'Introduction to culture' <https://opentextbc.ca/introductiontosociology/chapter/chapter3-culture/> (accessed on 23 November 2021).

the medieval base, which emerged after the Roman Empire's decline.<sup>33</sup>

Social and cultural modernity are often a product of the changes brought on by political and economic modernity.<sup>34</sup> The increased access to information and resources has the effect of opening up the minds of individuals to various social and cultural possibilities.<sup>35</sup> Examples include the ever-changing views on sexuality, gender roles and race relations.<sup>36</sup> The most effective way to summarise social and cultural modernity is; the commitment of a society or cultural group to self-renewal and transformation.<sup>37</sup>

## 2.4 The common thread

The brief history of modernity pertains to the different sectors of life and knowledge and concludes that there are three defining characteristics of societies that embody modernity. These are political systems based on personal freedom and democracy, economic policies in line with capitalism, and cultural and social systems in a constant state of liberal progression and evolution. Logically, this means that societies that did not hold and embody the ideals and characteristics mentioned above as prescribed by the Western world, could not be considered modern.

In the present day, these factors still seem to constitute the requirements for what we consider to be modernity. The critique of this paper in these requirements is that they are significantly narrow and biased as they only cater to the history and developments that took place in the Western world. It completely ignores many crucial innovations, thoughts and ideologies that were simultaneously produced in non-Western nations. This leads to the assertion that the definition of modernity in the introduction is problematic and may directly hinder struggles for justice and wide-scale equity for non-Western nations.<sup>38</sup>

33 A Mouzakitis 'Modernity and the idea of progress' (2017) *Frontiers in Sociology* at 5.

34 'Reading: Social change and modernization' <https://courses.lumenlearning.com/alamo-sociology/chapter/reading-social-change/> (accessed on 23 November 2021).

35 M Combi 'Cultures and technology: An analysis of some of the changes in progress – digital, global and local culture' in K Jan Borowiecki & N Forbes (eds) *Cultural Heritage in a Changing World* at 6.

36 'Human sexuality and culture' <https://courses.lumenlearning.com/boundless-psychology/chapter/sexuality/> (accessed on 23 November 2021).

37 G Delanty *Social theory in a changing world: Conceptions of modernity* (1999) at 3.

38 D Linehan 'Modernity' <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/modernity> (accessed on 24 November 2021).

### 3 The exclusionary features of modernity

The first section of this essay provides the historical background and definitions for various aspects of modernity. What is evident in this summary is its Western-centric origins. When setting the parameters for modernity, the focus consistently seems to be on what the thoughts, revolutions and cultures in the Western-first world were, and currently are. There is then an explicit exclusion of non-Western thought. This paper argues that this exclusion needs to be corrected to achieve justice, equity and representation. To provide solutions and have an inclusive reconstruction of modernity requires an understanding of the methods initially used to create this exclusion.<sup>39</sup>

#### 3.1 Colonialism and ‘othering’

This article asserts that colonialism is arguably the most significant and pervasive measure employed by the Western world to exclude non-Western societies from the present construction of modernity. Colonialism refers to the combination of territorial, juridical, cultural, linguistic, political, mental, and economic domination of one group of people or groups of people by another external group of people.<sup>40</sup> The Western colonial era began around 1500, following the European ‘discoveries’ of North America and a sea route around Africa’s southern coast.<sup>41</sup> By ‘discovery’, exploration, conquest, and settlement, these nations expanded and colonised large parts of the world, spreading European institutions and culture.<sup>42</sup>

Colonialism consists of various organised crimes of devastating proportions and is responsible for the persisting oppression of many indigenous peoples.<sup>43</sup> For a country to be prosperous in its colonial endeavours, there must be a pervasive psychological element of social and cultural supremacy over a conquered society. This is based on an ethnocentric belief that the morals and values of the coloniser are superior to those of the colonised. Colonisers successfully promoted their ‘superior’ societies through a process of ‘othering’, which explains the exclusionary nature of modernity.<sup>44</sup>

39 M Nielsen & L Robyn *Colonialism is crime* (2019) at 1.

40 A Murrey ‘European colonialism(s)’ <https://www.sciencedirect.com/topics/social-sciences/colonialism> (accessed on 24 November 2021).

41 H Magdoff et al *Western colonialism* (2020) <https://www.britannica.com/topic/Western-colonialism> (accessed on 29 August 2022).

42 C Nowell ‘Western colonialism’ *Encyclopedia Britannica* <https://www.britannica.com/topic/Western-colonialism> (accessed on 24 November 2021).

43 Nielsen & Robyn (n 39) 1.

44 ‘Colonial discourse of otherness: Stereotyping and fetishism’ [https://www.brown.edu/Departments/Joukowsky\\_Institute/courses/materialworlds/1857.html](https://www.brown.edu/Departments/Joukowsky_Institute/courses/materialworlds/1857.html) (accessed on 24 November 2021).

Othering is a broad term that refers to a set of dynamics, processes, and structures that engender marginality and inequality based on different group identities.<sup>45</sup> Otherness is, therefore, central to creating majority and minority identities.<sup>46</sup> It first calls for categorising groups of people according to perceived differences. Secondly, it identifies one of these groups as inferior and isolates them by adopting an ‘us vs them’ mentality.<sup>47</sup> Othering a group of people negates their existence and intrinsic human value.<sup>48</sup> This makes them easier to dominate<sup>49</sup> and disregard their ideals and practices.

Throughout the history of colonisation, the indigenous people were actively othered with violence and brutally. Their othering was also passive by way of indoctrination and the gradual degradation of indigenous cultures. In the creation and construction of modernity, this othering by a dominant group of Western descent produced an environment in which it was acceptable to ignore non-Western thought. This is because non-Western people were not seen as human beings, and therefore, having nothing of value to contribute.<sup>50</sup>

Apart from the process of othering, colonialism also contributed to modernity’s exclusionary nature by assigning state sovereignty and juridical control over the conquered lands to the coloniser.<sup>51</sup> As a result, many self-governing and independent areas and groups were entirely controlled by Western nations. By taking away the conquered peoples’ sovereignty, they could no longer be considered autonomous, which, as explained above, is one of the essential characteristics of political modernity.<sup>52</sup>

To conclude this section, modernity travelled and was universalised worldwide in a non-consensual, forceful and violent manner that rejects any other construction of being and, through various means, purposefully and blatantly excludes non-Western peoples and schools of thought.

45 J Powell & S Menendian ‘The problem of othering: Towards inclusiveness and belonging’ <https://www.otheringandbelonging.org/the-problem-of-othering/> (accessed on 24 November 2021).

46 Z Zevallos ‘What is otherness?’ <https://othersociologist.com/otherness-resources/> (accessed on 24 November 2021).

47 ‘The process of othering.’ <https://museeholocauste.ca/en/resources-training/the-process-of-othering> (accessed on 24 November 2021).

48 M Davies ‘Exclusion and the identity of law’ (2005) 5 *Macquarie Law Journal* at 6.

49 A Jones & DL Manda ‘Violence and “othering” in colonial and postcolonial Africa. Case study: Banda’s Malaŵi’ (2006) 18 *Journal of African Cultural Studies* 1 at 98.

50 S Ocheni & B Nwankwo ‘Analysis of colonialism and its impact in Africa’ (2012) 8 *Cross-Cultural Communication* at 46-54.

51 ‘Settler colonialism’ <https://globalsocialtheory.org/concepts/settler-colonialism/> (accessed on 24 November 2021).

52 P Wagner & D Casassas ‘Modernity and capitalism: Conceptual retrieval and comparative-historical analyses’ (2016) 19 *European Journal of Social Theory* at 4.

## 4 TWAIL as a reference for the reconstruction of modernity

To suggest that the world is going through its second era of enlightenment would not be a farfetched claim. The past 50 years have seen not only individuals but entire nations and organisations becoming more aware of the severe flaws in our current conceptions of justice and equity. This heightened awareness has motivated actions to address the numerous inequalities and exclusions in society, politics, and the economy.<sup>53</sup>

Because modernity informs the current state of social, political, and economic life and knowledge,<sup>54</sup> reforming these areas would be futile without challenging the inherently Western-centric foundations of modernity. This is where the post-modernist movement becomes relevant. Postmodernism is an intellectual stance and mode of discourse that expresses an attitude of scepticism towards the current grand narratives of modernism.<sup>55</sup> The views expressed in this paper affirms post-modernist thought. It has done so by showing how Western intellectual and cultural norms and values are, to an important extent, a product of a dominant or elite group's ideology which (directly and indirectly) serve their interests.<sup>56</sup>

The current construction of modernity has a considerable sense of universality. This universality warrants understanding modernity in terms of, and in comparison to, international law.<sup>57</sup> The solutions for its reconstruction will thus also be considered in terms of the transformative approaches to international law and, more specifically, TWAIL. TWAIL is relevant to the discussion of reconstructing modernity because it problematises international law in the same way this paper has problematised modernity.

TWAIL describes international law as a 'predatory system that legitimises, reproduces and sustains the plunder and subordination of the Third World by the West'.<sup>58</sup> The critique in this paper has similarly

53 'Social Justice in an Open World The Role of the United Nations' <https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf> (accessed on 24 November 2021).

54 D Boyd 'Reflections on the impact of modernity in evolving a multi-faceted individual identity' (2001) <http://www.danah.org/classes/modernity/ModernityFinalPaperSubmission.pdf> (accessed on 24 November 2021).

55 G Aylesworth 'Postmodernism' *The Stanford encyclopedia of philosophy* (2015) EN Zalta (ed) <https://plato.stanford.edu/archives/spr2015/entries/postmodernism/> (accessed on 23 July 2022).

56 B Duignan 'Postmodernism' 2020 *Encyclopedia Britannica* <https://www.britannica.com/topic/postmodernism-philosophy> (accessed on 23 July 2022).

57 Q Tong 'Global modernity and linguistic universality: The invention of modern Chinese language' (2010) 43 *Eighteenth-Century Studies* at 328.

58 A Anghie & M Mutua 'What is TWAIL?' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* at 32.

shown how modernity has allowed for the normalisation of western domination. Additionally, in line with the assertions arising from TWAIL, this paper has questioned the legitimacy of modernity's universality. A parallel can be drawn to international law because it also claims universality. However, its creators have unambiguously asserted its European and Christian origins.<sup>59</sup> This comparison shows that just as colonialism was integral to the spread of modernity; it is also peripheral to the discipline of international law because international law is a Western creation.<sup>60</sup>

TWAIL is a transformative dialogue that rejects the legitimacy of international law. It aims to present an alternative normative legal edifice for international governance. It also aims to eradicate the current conditions of underdevelopment in the Third world. It seeks to do so by deconstructing international law as it has been used to perpetuate a racialised hierarchy of international norms and institutions that render non-Europeans subordinate to Europeans.<sup>61</sup>

TWAIL describes itself as being anti-hierarchal<sup>62</sup> and counter-hegemonic.<sup>63</sup> This is against the present construction of modernity which only allows for a hierarchal classification. It does so by dictating that those societies that do not adopt its characteristics are subordinate and not modern and will, therefore, not be offered an equal opportunity for participation. By adopting an anti-hierarchal approach similar to that of TWAIL, there could be an inclusive reconstruction of modernity through equal collaboration and representation that celebrates the full richness of our diverse world.<sup>64</sup>

A rejection of the Western-centric hegemony of modernity positively contributes to the crusade for large-scale justice and equity. It will decentralise Western thought and allow for the consideration of more relevant and substantive perspectives on justice. These perspectives would come from those in pursuit of justice in the non-Western world or Global South. TWAIL is an entirely independent doctrine that faces scrutiny and critique. However, this paper posits that a reconstruction of modernity according to a thought process similar to that of TWAIL would be a starting point to challenge modernity. It would legitimise the construction and allow a larger number of nations worldwide to take claim and ownership of the construction of modernity as their own.<sup>65</sup>

59 Anghie & Mutua (n 58) 34.

60 Anghie & Mutua (n 58) 31.

61 Anghie & Mutua (n 58) 32.

62 Anghie & Mutua (n 58) 37.

63 Anghie & Mutua (n 58) 38.

64 Anghie & Mutua (n 58) 37.

65 P Chatterjee 'Our modernity' 1997 <https://ccs.ukzn.ac.za/files/partha1.pdf> (accessed on 24 November 2021).

## 5 Conclusion

By briefly tracking the historical events that led to the establishment of modernity as we currently know, I have shown that modernity is built on Western ideals. I have also demonstrated that modernity spread and was universalised by cruel and illegitimate means. Due to the significant influence modernity has on global action in terms of social, political, and economic justice, liberation has flawed origins. These flawed origins cannot be ignored. TWAIL's interaction with international law has then been offered as inspiration for reconstructing modernity.

Modernity is a nuanced and ever-changing construction. It is not bound temporally or spatially.<sup>66</sup> As articulated at the beginning of this paper, for modernity to continue to be relevant, there must be a refusal to treat it as a sacred norm immune to critique or amendment.<sup>67</sup> As a critical means of understanding the present society, when modernity is found to create or maintain any oppressions, it must be revisited and appropriately challenged by considering knowledge systems outside of the Western archives.<sup>68</sup>

66 Anghie & Mutua (n 58) 39.

67 As above.

68 As above.



# A RIGHTS-BASED APPROACH TO DEVELOPMENT: THE LINK BETWEEN HUMAN RIGHTS AND DEVELOPMENT

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## Abstract

*This article explores the relationship between human rights and development and the emergence of a Rights-Based Approach to Development (RBAD). It will give a RBAD more consideration in order to contribute to the conceptual direction of academic discourse, and perhaps even the political direction by proposing solutions to Africa's socio-economic problems, especially in South Africa, which is facing many developmental challenges. Human rights and development have long been understood as separate terms that were incompatible. Historically, development was only perceived for its role in promotion of economic growth and prosperity of particular countries without any consideration for human development and well-being. However, human rights and development cannot be understood separately. Development and human rights share the same goal, which is to promote the dignity and worth of a human person by creating an environment where people can achieve their full potential. Following the adoption of the UN Charter in 1945, development became a key issue for the United Nations*

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(UN) and, for the first time, for the international community. Human development is now central to the realisation of human rights. After many years of debating development and human rights, it was agreed that human rights standards and principles do indeed recognise the link between human rights and development. In the 1990s, a RBAD emerged, transforming the global development order and affirming this relationship.

## 1 Introduction

Human rights and development have long been understood and treated separately.<sup>1</sup> Historically, development has been viewed only for its role in furthering the economic aspirations of individual countries with no connection to human development. However, human rights and development cannot be understood in isolation, as development and human rights share the same goals, namely, to promote the dignity and worth of a person by creating an environment in which people can achieve their full potential.<sup>2</sup>

In 1945, after the UN Charter was passed, development became a key issue for the UN and, for the first time, for the international community.<sup>3</sup> Human development has become central to the realisation of human rights. After many years of development and human rights debate, it was agreed that human rights standards and principles do indeed make this connection. The adoption of the UN Declaration on the Right to Development (Declaration) confirmed and strengthened the relationship between human rights and development.<sup>4</sup> This connection was reconfirmed in the 1990s when a RBAD<sup>5</sup> emerged and changed the global development order.<sup>6</sup>

Even though the literature on human rights and development makes visible this relationship between these two concepts, there seems to be a lack of comprehension that results in the absence of a RBAD in African states, including South Africa. Although a RBAD is acknowledged globally, its implementation in the public and private sectors is questioned at the level of the community due to a lack of understanding. Lack of awareness of a RBAD is demonstrated, among other things, by the absence of community involvement in development projects and a lack of accountability for failed projects

1 HO Sano 'Development and human rights: The necessary, but partial integration of human rights and development' (2000) 22 *Human Rights Quarterly* at 739.

2 SP Marks *The human rights framework for development: Seven approaches. reflections on the right to development* (2003) at 1-2.

3 P Jackson 'A prehistory of the millennium development goals: Four decades of struggle for development in the United Nations' (2007) 4 *United Nations Chronicle* at 7.

4 P Uvin 'From the right to development to the rights-based approach: How "human rights" entered development' (2007) 17 *Development in Practice* at 597.

5 Marks (n 2) 5.

6 Sano (n 1) 751.

brought on by corruption. I contend that how a RBAD is currently conceptualised at the local level is insufficient to capture what a RBAD is in Africa and South Africa. Mohan argues that a RBAD needs to re-emphasise its agenda to connect with and build upon the participatory approach and good governance that has grown over the years.<sup>7</sup> Considering the numerous appeals from academics and development organisations for a human rights-based development framework to combat the scourge of poverty, unemployment, and inequality in South Africa, this article aims to contribute to growing efforts to ascertain the potential value a RBAD could offer for development programming.

Therefore, this article's primary emphasis is on the relationship between human rights and development as well as the definition and underlying principles of a RBAD. It analyses the inherent advantages of such an approach and carefully evaluates its significance. The article further examines the limitations and criticisms that have been levelled against this approach. It articulates these viewpoints by focusing on a RBAD to offer a contribution to the conceptual direction of the academic discourses, and likely also the political direction by suggesting developmental solutions to Africa's socio-economic differences. In particular, I look at South Africa, which faces numerous development challenges.

## 2 The nexus between human rights and development

According to prominent development scholars such as Arndt,<sup>8</sup> Todaro et al,<sup>9</sup> and Sant'An,<sup>10</sup> the notion of development was used in relation to resources to maximise wealth and status. This was done under the impression that achieving economic progress could lead to reaching society as a whole 'either by market-driven "trickle down" effects or by state-driven social policy'.<sup>11</sup> By no means had it related the notion of development to the effect of economic growth on reducing poverty, unemployment, inequality, or increasing human well-being. Human rights language was fully incorporated into development discourse with the publication of the first Human Development Report (HDR), which includes UNDP's Human Development Index (HDI).

7 G Mohan & J Holland 'Human rights & development in Africa: Moral intrusion or empowering opportunity?' (2001) 88 *Review of African political economy* at 190.

8 HW Arendt 'Economic development: A semantic history' (1981) 3 *Economic development and cultural change* at 457.

9 P Todaro & SC Smith *Economic development in the third world* (2003).

10 M Sant'Ana 'The evolution of the concept of development: From economic growth to human' (2008) *Inter-University Attraction Pole Working Paper* at 5 file:///C:/Users/K%20moseli%20(SW%20GXD)/Downloads/The\_evolution\_of\_the\_concept\_of\_developm.pdf (accessed 25 October 2022).

11 As above.

Integrating human rights into development activities is known as a RBAD. At the end of the 1990s, many non-governmental organisations (NGOs), national and international development organisations and human rights bodies advocated for a RBAD. A RBAD emerged from recognising the link between human rights and development. Human rights became a central factor in forming a socially oriented order.<sup>12</sup> Development was perceived as a process of change, and human rights were able to give meaning to the process of change by incorporating human rights, norms, obligations, and principles to influence the outcome of developmental programming.<sup>13</sup> Incorporating human rights, norms, standards, and principles were recognised in the 1990s as an essential aspect of promoting developmental policy and planning. This rests on the basis that human rights can influence policy content and provide a conceptual framework to guide development and implementation.

Since then, a RBAD has gained worldwide recognition and has established itself over the years as an essential developmental tool to promote human development and well-being.<sup>14</sup> Darrow and Tomas<sup>15</sup> claim that integrating human rights norms and standards into development is fundamental and that such integration increases the potential for enjoying human rights in the development process.

The link between human rights and development was first formally recognised in Article 22 of the African Charter, adopted in 1981.<sup>16</sup> In addition, the Declaration recognised development as an inalienable human right. According to the Declaration, development is defined as:<sup>17</sup>

[a]n inalienable human right under which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realised.

12 Sano (n 1) 740-741.

13 D Banik 'Support for human rights-based development: Reflections on the Malawian experience' (2010) 14 *The International Journal of Human Rights* at 37-38.

14 A De Man 'The sustainable development goals and the rights-based approach to development: Compatible or missing the point?' (2019) 19 *African Human Rights Law Journal* at 469.

15 M Darrow & A Tomas 'Power, capture, and conflict: A call for human rights accountability in development cooperation' (2005) 27 *Human Rights Quarterly* at 501.

16 African Charter on Human and People's Rights (African Charter) adopted 27 June 1981 and entered into force on 21 October 1986.

17 United Nations Declaration on the Rights to Development adopted 4 December 1986.

The right to development integrates international human rights systems' norms, standards, and principles into development policies and processes. Thus, the right to development has given meaning to the notion of human-centred development and human empowerment.<sup>18</sup> According to Article 1 of the Declaration, everyone is entitled to a rights-sensitive approach to development programmes that affect them.<sup>19</sup>

In addition, the right to development emphasises the primary role of government in creating favourable conditions for realising the right to development at the national and international level. In other words, the essential aim of this right is to achieve the highest standard of living at the local level by supporting national and international development actors.<sup>20</sup> This includes fulfilling the right to just benefits from development processes that enhance human freedom and well-being and realising their value.<sup>21</sup> Article 2 of the Declaration recognises that '[t]he human person is the central subject of development and should be an active participant and beneficiary to the right to development'.<sup>22</sup>

Development took a new direction after the right to development was recognised as a composite and multifaceted human right that is consistent with other human rights.<sup>23</sup> The right to development and a human rights-based approach reinforces each other and can have a positive impact if adequately developed.<sup>24</sup> Realising the right to development requires the implementation of a rights-based approach. Both concepts place the individual at the centre of the action to realise his or her rights. It emphasises that individuals and people should be viewed as subjects, not objects, in the development process.<sup>25</sup> For example, people have the right not only to participate effectively in consultation processes on implementing applicable development policies but also to contribute to shaping their policies by actively participating in decision-making. This participation enables the government to reformulate and apply human rights norms

18 Marks (n 2) 15.

19 RF Oppong 'Trade and human rights: A perspective for agents of trade policy using a rights-based approach to development' (2006) 6 *African Human Rights Law Journal* at 126.

20 CC Ngang & PA Ageh 'Intellectual property protection of African traditional medicine within the legal framework of the right to development' (2019) 27 *African Journal of International and Comparative Law* at 437.

21 A Sengupta 'Right to development as a human right' (2001) 36 *Economic and Political Weekly* at 2529; SR Osmani 'Human rights to food, health, and education' (2000) 1 *Journal of Human Development* at 120.

22 J Seabrook *The no-nonsense guide to world poverty* (2009) at 27.

23 LH Piron *The right to development: A review of the current state of the debate for the department for international development* (2002) at 31.

24 A Hayrapetyan 'The right to development and rights-based approach to development: Two mutually reinforcing concepts?' (201) *European Union Foreign Affairs Journal* at 32.

25 Hayrapetyan (n 24) 41.

and standards in implementing any development agenda on its territory, in line with national development policies.<sup>26</sup>

Critics of the right to development argue that it has limited powers to bring about effective change. They are arguing that the right to development, as formulated in the Declaration, is non-binding and does not imply legal obligations at the international level.<sup>27</sup> The right to development does not have a clear textual presence in many constitutions, including that of South Africa.<sup>28</sup> South Africa's 1996 Constitution does not mention the right to development as a human right. However, the Bill of Rights guarantees socio-economic rights, including protecting the right to development.<sup>29</sup> This is evidenced by case law such as *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>30</sup> which was the first major Constitutional Court case to consider the enforceability of socio-economic rights. In the well-known *Government of the Republic of South v Grootboom*,<sup>31</sup> which dealt with the right to housing, the Constitutional Court found the government's housing programme inadequate because it did not provide access to housing for those in need. The Court's ruling affirms the significance of the normative and contextual framework of the right to development in altering society so that people can live with dignity and free from hunger, disease, and poverty. Former South African Chief Justice Pius Langa stressed that there could be no development at the national level unless socio-economic rights are realised.<sup>32</sup> This demonstrates once more that while the right to development is not explicitly addressed in the Constitution,<sup>33</sup> its realisation is aided by the protection of socio-economic rights that are consistent with it.

In the 1990s, human rights defenders argued that creating opportunities for people and groups to participate in development was a human right. Human rights and development work closely together in various aspects that affect the same target groups to advance human development. Both human rights and development aim to empower excluded and disadvantaged groups. Thus, the link between human rights and development is understood to create

26 Hayrapetyan (n 24) 33.

27 Uvin (n 4) 598; Sano (n 1) 738.

28 I Shai 'The right to development, transformative constitutionalism and radical transformation in South Africa: Post-colonial and de-colonial reflections' (2019) 19 *African Human Rights Law Journal* at 507.

29 SD Kanga *The right to development in the African human rights system* (2018) at 210.

30 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

31 *Government of Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

32 Justice PN Langa 'Human rights, the rule of law, and the right to development' Speech presented at the Birchwood Conference Center in Johannesburg, 24 November 2006.

33 South African Human Rights Commission 'Reflections on democracy and human rights' 2006 at 109-118.

conditions under which human rights can be realised.<sup>34</sup> For example, human rights are not only recognised to protect individuals and groups from those in power, but they also oblige the government to create decent living conditions for citizens.<sup>35</sup> In 1995, the relationship between human rights and development was upheld following the publication of *The rights way to development*<sup>36</sup> by the Human Rights Council of Australia. It viewed development activities as an integral part of human rights work. In support of these views, Article 10 of the 1993 Vienna Declaration of Human Rights<sup>37</sup> recognises that development is part of the human rights framework.

### 3 The rights-based approach to development: Definition and principles

#### 3.1 Definition of a rights-based approach to development

A RBAD was formally recognised at the 1993 Vienna World Conference on human rights where it was stated that ‘development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing’.<sup>38</sup> The conference also affirmed that all human rights are equal, valid, and interconnected. The recognition of human rights principles such as participation, equality, and non-discrimination, as well as accountability in the area of development, laid the foundation for the emergence of a RBAD (also known as human rights-based development).<sup>39</sup>

A RBAD has been defined in many ways. Gauri and Gloppen<sup>40</sup> define a RBAD as principles that justify demands on privileged actors, made by the poor or those acting on their behalf, using national or international instruments to protect the disadvantaged. For Darrow and Tomas, a RBAD is ‘a framework for understanding and managing the negative impacts of discrimination and disempowerment, not a one-dimensional and static formula’.<sup>41</sup> The UN Research Institute for Social Development defines a RBAD as ‘[a] conceptual framework that is capable in all development fields, and that is normatively based on

34 S McInerney-Lankford ‘Human rights and development: a comment on challenges and opportunities from a legal perspective’ (2009) 1 *Journal of Human Rights Practice* at 53.

35 Sano (n 1) 741.

36 Human Rights Council of Australia (eds) *The rights way to development: A human rights approach to development assistance: Policy and practice* (1995).

37 United Nations Vienna Human Rights Declaration and Program of Action (Vienna Declaration) adopted 25 June 1993.

38 Vienna Declaration (n 37) at para 8; A Payne & N Phillips *Development* (2010) at 122.

39 Darrow & Tomas (n 15) 497.

40 V Gauri & S Gloppen ‘Human rights-based approaches to development: Concepts, evidence and policy’ (2012) 44 *Polity* at 488.

41 Banik (n 13) 38.

international human rights standards and operationally directed to promoting and protecting human rights'.<sup>42</sup> The primary function of a RBAD is to integrate the norms, standards and principles of the international human rights system into development plans, policies and procedures.

A RBAD treats international human rights law as a critical conceptual framework accepted by the international community that can provide a coherent system of principles and norms in the development field.<sup>43</sup> Following this approach, principles such as equality and non-discrimination are incorporated into development policies and strategies. Development plans, policies and projects anchored in a human rights system, therefore, correspond to obligations under international law. Uvin claims that a RBAD motivates a redefinition of the nature of the problem. The goals of the development initiative, translated into demands, obligations, and mechanisms, can promote respect and identify rights violations.<sup>44</sup> Protecting human rights promotes sustainability and the empowerment of the marginalised, participation in policy development, and actor accountability.<sup>45</sup> The 2003 UN *Statement of Common Understanding* also confirmed that all UN development programmes promote the realisation of human rights as enshrined in the Universal Declaration of Human Rights (Universal Declaration) and other international human rights instruments.<sup>46</sup>

## 4 Principles of the rights-based approaches to development

### 4.1 Participation

A thorough implementation of the human rights framework for development requires that those affected fully participate in development planning and decision-making. Participation as a human right means that government must encourage and ensure the free, meaningful and active participation of all individuals and groups when

42 UN Research Institute for Social Development 'The human rights-based approach to social protection "Issue Brief 2" Geneva 31 August 2016 [https://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/1E57FC1E56010C2CC125801B004B0D10?OpenDocument](https://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/1E57FC1E56010C2CC125801B004B0D10?OpenDocument) (accessed 31 August 2022).

43 V Abramovich 'The rights-based approach in development: Policies and strategies' (2006) *CEPAL Review* at 34; Mcinerney-Lankford (n 34) 73.

44 Uvin (n 4) 602.

45 Abramovich (n 43) 36-37.

46 The Human rights-based approach to development cooperation: Towards a common understanding among UN Agencies. Interagency Workshop on a Human Right-Based Approach. 3-5 May 2003 [https://unsdg.un.org/sites/default/files/The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN.pdf](https://unsdg.un.org/sites/default/files/The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf) (accessed 31 August 2022).



implementing and evaluating the development process.<sup>47</sup> For example, in the *Matatiele Municipality and Others v President of the Republic of South Africa and Others case*,<sup>48</sup> the Constitutional Court ordered the Eastern Cape and KwaZulu Natal legislature to jointly appear in court to present evidence regarding public participation in passing the Twelfth Amendment and Repeal Act.

This shows that participation can be used to measure and identify needs and priorities at the local level. Involvement in politics is another example, which calls for institutionalised participation in social engagement and periodical elections. Furthermore, it gives individuals the chance to exercise certain fundamental rights such as the right of association and assembly, freedom to unionise and freedom of expression and information.<sup>49</sup>

For effective participation, essential requirements should be met, and human rights should be fulfilled. Citizens should be equally empowered to assert their rights and be allowed to participate effectively in decision-making processes affecting their lives.<sup>50</sup> Interacting with community members gives development actors, who look from the outside, a better understanding of the local context. It ensures that development processes are relevant to people's lives and their daily challenges. They should be actively involved in planning, designing, and implementing programmes to meet people's needs. For example, the White Paper on Housing,<sup>51</sup> which guides government housing policies, and the National Housing Code,<sup>52</sup> provide housing policy guidelines. It requires that government housing policies and strategies promote effective public participation of affected people in the planning and implementation of housing development programmes.<sup>53</sup> This shows that people and their rights must be respected as a matter of principle. By adopting a RBAD, governments,

47 F Piovesan & MG Fachin 'Gender Equality, the right to development, and the 2030 Agenda for sustainable development in E-learning module on *Operationalizing the right to development in implementing the sustainable development goals*' (2018) at 4 [https://www.ohchr.org/sites/default/files/Documents/Issues/Development/SR/AddisAbaba/Rtd\\_GenderEquality\\_2030Agenda.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Development/SR/AddisAbaba/Rtd_GenderEquality_2030Agenda.pdf) (accessed 31 August 2022); E Filmer-Wilson 'The human rights-based approach to development: The right to water' (2005) 23 *Netherlands Quarterly of Human Rights* at 216-217.

48 *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (2) SA 47 (CC).

49 *Abramovich* (n 43) 43-44.

50 *Osmani* (n 21) 122.

51 National Department of Housing White Paper: A New Housing Policy and Strategy for South Africa (1994).

52 Department of Human Settlements 2009. Upgrading of Informal Settlement Programme, Part 3 of the National Housing Code [http://www.dhs.gov.za/sites/default/files/legislation/Policies\\_Housing\\_White\\_Paper.pdf](http://www.dhs.gov.za/sites/default/files/legislation/Policies_Housing_White_Paper.pdf) (accessed 26 October 2022).

53 L Chenwi 'Meaningful engagement in the realisation of socio-economic rights: The South African experience' (2011) 26 *Southern African Public Law* at 136.

organisations, and other duty bearers move from executors to facilitators of the development process.<sup>54</sup>

The power of the poor, vulnerable and marginalised lies in the power to participate in their development process because the ability to influence the development process puts them in a better position to assert their socio-economic rights. Section 152(1) of the Constitution of South Africa states that citizens must be encouraged to participate and engage in matters related to community development and that people's needs must be met in ways that satisfy them.<sup>55</sup> As a result, integrating rights and participation promotes empowerment by enabling people to voice their needs and wishes and act as their change agents.

Finally, participation should help development programmes succeed, in addition, it 'involves conflict, and demands a capacity to analyse, negotiate, and alter unequal relations at all levels'.<sup>56</sup> It should therefore be understood as a process that promotes fundamental awareness and decision-making as the basis of active citizenship.

## 4.2 Empowerment

A RBAD aims to empower through the recognition of rights. Once this concept is implemented in a political context, the focus of policymaking will not be limited to a specific section of society with unmet needs. Instead, it will include everyone who has enforceable rights.<sup>57</sup> Empowerment is a process of increasing interpersonal or political power so that individuals, families and communities can take action to improve their situation. It guarantees everyone's freedom to expand their choices.<sup>58</sup>

A RBAD strives to restore dignity and respect for the inherent worth of individuals, groups and communities affected by poverty.<sup>59</sup> The empowerment of disadvantaged and marginalised sectors in the community derives from recognising their rights with corresponding legally binding obligations of the government.<sup>60</sup> A RBAD empowers people to claim their entitlements because 'what was once understood as "charity" becomes "justice" from the corresponding duty-holder'.<sup>61</sup>

54 Filmer-Wilson (n 47) 218-219.

55 Constitution of the Republic of South Africa, 1996 (Constitution) sec 152.

56 Darrow & Tomas (n 15) 506; S Kindornay, J Ron & C Carpenter 'Rights-based approaches to development: Implications for NGOs' (2012) 34 *Human Rights Quarterly* at 480.

57 Abramovich (n 43) 36-37.

58 Uvin (n 4) 601.

59 Filmer-Wilson (n 47) 217-218.

60 Abramovich (n 43) 34.

61 Filmer-Wilson (n 47) 217.

Therefore, people are no longer human beings 'with needs who receive welfare benefits or other forms of discretionary provision, but possessors of rights who have the legal and social power to demand certain forms of behaviour from the State'.<sup>62</sup> Darrow and Tomas maintain that empowerment suggests the following variety of programme priorities.<sup>63</sup>

(1) Education and access to information, (2) strategies for inclusion and participation in decision-making and local and national level priority setting, (3) accountability of government officials, public employees, and private actors, and (4) the building of local organisational capacity.

Recognising rights is to take legal action that enable rights holders to seek redress when their rights have been violated, and so, hold duty bearers accountable.<sup>64</sup> In other words, rights holders are empowered in a way that can restore balance in social situations that exhibit fundamental inequalities.<sup>65</sup>

### 4.3 Equality and non-discrimination

Inequality and discrimination are major global crises. The human rights framework introduces the principles of equality and non-discrimination to the development process to ensure fair and balanced development programming. The government must not only commit to non-discrimination but also, to some degree, adopt affirmative measures to guarantee the inclusion of population groups or sectors that have traditionally been discriminated against.<sup>66</sup>

Guidelines to advance equality and non-discrimination can be found in several international human rights instruments. According to Article 2 of the Universal Declaration, everyone can assert their rights without repudiation based on race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.<sup>67</sup> Similar statements are observable in the

62 Abramovich (n 43) 38, states that 'people with needs who receive welfare benefits or other forms of discretionary provision, but possessors of rights who have the legal and social power to demand specific forms of behaviour from the State'.

63 Darrow & Tomas (n 15) 494.

64 P Gready 'Reasons to be cautious about evidence and evaluation: Rights-based approaches to development and the emerging culture of evaluation' (2009) 1 *Journal of Human Rights Practice* at 736.

65 Abramovich (n 43) 38-39.

66 Abramovich (n 43) 43.

67 Universal Declaration of Human Rights (Universal Declaration) adopted 10 December 1948, Art 2 states that '[e]veryone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; United Nations High Commissioner for Human Rights (UNOHCHR) Economic, social and cultural rights: annual report 2004 implementation of activities and use of funds at 143.

International Covenant on Civil and Political Rights (ICCPR)<sup>68</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>69</sup> Article 20(2) of the CCPR and Article 10(3) of the CESCRCR emphasise the obligation to reject all forms of discrimination by recognising, promoting, and protecting all human rights.<sup>70</sup>

The principle of equality and non-discrimination focuses on vulnerable people and groups such as women, children and refugees.<sup>71</sup> The government must incorporate regulations that protect its citizens from discrimination and take extraordinary measures that include an active protection policy.<sup>72</sup> Programmes aimed at empowering local populations should be straightforward and protect against potential discrimination between women and men, landowners and farmers, and workers and employers.<sup>73</sup> The equality principle also mandates special consideration for the most marginalised and at risk in society, including women, children, indigenous people, and refugees.

According to Abramovich, incorporating equality and non-discrimination principles into development processes can influence budget allocation criteria and social spending.<sup>74</sup> According to this viewpoint, the principle is sufficient to influence public order verification. Incorporating the principle of equality into development policies and strategies will ensure that vulnerable and marginalised groups enjoy their human rights.<sup>75</sup> By following this approach,

68 International Covenant on Civil and Political Rights adopted 16 December 1966 and entered into force on 23 March 1976 <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (accessed 31 August 2022).

69 International Covenant on Civil and Political Rights (n 68), Art 2(1) states that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966 entered into force on 3 January 1976), Art 2(2) states that '[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'; G Oberleitner 'International human rights Lexicon' (2006) 69 *The Modern Law Review* at 1035-1037.

70 RK Smith & C Van den Anker *The essentials of human rights* (2005) at 269-272; Art 20(2) states that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. (CCPR); Art 10(3) states that '[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions' (CESCR).

71 Abramovich (n 43) 42.

72 Osmani (n 21) 123-124.

73 Darrow & Tomas (n 15) 505.

74 Abramovich (n 43) 43; S Fukuda-Parr 'Human rights and politics in development' in ME Goodhart (ed) *Human rights: Politics and practice* (2016) at 179.

75 P Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the millennium development goals' (2005) 27 *Human Rights Quarterly* at 801-805.

development processes will benefit all parties equally. Making sure that development programmes are equitable requires considering both direct and indirect forms of discrimination.<sup>76</sup>

#### 4.4 Accountability

Lack of accountability in most development projects and programmes leads to project failure. Assigning direct accountability has been a challenge in all areas of development, including development projects by governments, international agencies and financial institutions, local businesses, and associations.<sup>77</sup> However, adopting a RBAD brings legal obligations that ensure all duty bearers are accountable for their development programming actions. Article 30 of the Universal Declaration of Human Rights (UDHR) provides for non-state actors as duty bearers and government structures.<sup>78</sup> This includes NGOs and community-level organisations that recognise that they must be accountable to the individuals they choose to serve by establishing effective oversight mechanisms. The need for accountability is central to applying a RBAD, and this emphasis, in turn, requires commitment.<sup>79</sup>

A RBAD views development issues as rights and responsibilities rather than charity. Bringing together duty bearers and stakeholders strengthens accountability in the development process.<sup>80</sup> The accountability principle also strengthens current accountability measures and aids in bridging some of the perceived gaps in accountability in horizontal (state-to-state) and vertical (citizen) interactions.<sup>81</sup> Accountability is aided by the gathering of accurate, timely, and reliable data from every stage of the development process. Collecting high-quality, timely, and reliable data from all sectors of the development process, as required in a RBAD, contributes to accountability.

The relationship between government and citizens is central to the principle of accountability.<sup>82</sup> The latter should be able to participate so that those directly affected by the policy can hold their

76 Darrow & Tomas (n 15) 506.

77 Darrow & Tomas (n 15) 488; Banik (n 13) 46-47.

78 UNG Assembly 1948. Universal Declaration of human rights. UN General Assembly, 302(2) adopted on 10 December 1948 [https://www.verklaringwarenatuur.org/Downloads\\_files/Universal%20Declaration%20of%20Human%20Rights.pdf](https://www.verklaringwarenatuur.org/Downloads_files/Universal%20Declaration%20of%20Human%20Rights.pdf) (accessed 31 August 2022).

79 Osmani (n 21) 123; Sano (n 1) 745-747.

80 A Cornwall & C Nyamu-Musembi 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* at 1426-1428; Darrow & Tomas (n 15) 511; Alston (n 75) 805.

81 McInerney-Lankford (n 34) 75.

82 D Nabarro 'Transforming our world: How sustainable development will help us achieve zero hunger' (2016) 22 *International Food Policy Research Institute* at 23-27; Filmer-Wilson (n 47) 217.

government or entities acting on their behalf accountable. Effective accountability measures may be judicial, administrative, or community-based, to name a few examples. Similarly, international and regional treaties adopted by states hold governments to international accountability for the realisation of human rights.<sup>83</sup> Those affected by development processes should be able to demand accountability 'to a due process, and it should refer as far as possible to specific rules, results, or behaviours that are objectively set and agreed upon with the participation of those involved or affected by a particular situation'.<sup>84</sup> Through effective accountability measures, a RBAD empowers individuals to use local mechanisms, be they political, administrative, judicial or quasi-judicial, to hold the government accountable for their human rights and development obligations.<sup>85</sup> Applicable accountability measures include enforcement by courts, international reporting requirements, parliamentary oversight, and pressure from independent media and NGOs.<sup>86</sup>

## 5 Advantages of the rights-based approach to development

A RBAD has numerous benefits that improve development programming. It provides a clear conceptual and normative framework that provides direction for more effective development programming.<sup>87</sup> By providing a clear conceptual and normative framework, a RBAD describes the duties of the duty-bearers.<sup>88</sup> Darrow and Tomas argue that a RBAD introduces a normative and instrumental approach to development. This normative approach ensures that human rights become binding through legal and moral obligation.<sup>89</sup> Normative standards indicate that human rights are at an end and must be considered in development processes.<sup>90</sup> In terms of specific developmental implications, Darrow and Tomas identify five distinctive features of a RBAD:<sup>91</sup>

(1) A solid normative basis for values and policy choices that otherwise are more readily negotiable; (2) a predictable framework for action, with the advantage of objectivity, determinacy, and the definition of

83 Osmani (n 21) 123.

84 Darrow & Tomas (n 15) 519, states that '[a]ccountability should be demanded and accorded by reference to a due process. It should refer as far as possible to specific rules, results, or behaviours that are objectively set and agreed upon with the participation of those involved or affected by a particular situation'.

85 Abramovich (n 43) 45; Uvin (n 4) 603.

86 McInerney-Lankford (n 34) 163-164.

87 Gready (n 64) 387; Abramovich (n 43) 34.

88 Abramovich (n 43) 34.

89 Darrow & Tomas (n 15) 492.

90 Darrow & Tomas (n 15) 492; Banik (n 13) 837; Sano (n 1) 748-750.

91 Darrow & Tomas (n 15) 485.

appropriate legal limits; (3) a quintessentially empowering strategy for the achievement of human-centred development goals; (4) a ready legal means to secure redress for violations; and (5) a secure basis for accountability, not only for the state party concerned but also for a significantly wider range of actors in international development cooperation.

The instrumental approach is based on the belief that a RBAD will generate more effective human rights ideas in development programming to reach the marginalised and improve their living conditions.<sup>92</sup>

The 1990s saw excessive inequalities on both the economic and political fronts. Many people remained marginalised in the development processes. A RBAD is appropriate to ensure that the most vulnerable and the marginalised citizens have access to essential services such as decent housing, health care, water, sanitation, and education. The experience of Pakistani citizens from Karachi demonstrates the significance of creating projects based on RBAD principles. All interested parties convened to begin discussions about the water problem in response to the difficulty in supplying water to Karachi. Residents, civil society groups, the commercial sector, and funding agencies, including the World Bank and the Asian Development Bank, were all involved in the project deliberations. All parties involved in the negotiations concluded that the sessions had been fruitful and yielded valuable lessons. The government learnt to be more inclusive and transparent in its decision-making by embracing the idea of including all stakeholders in the project development process.<sup>93</sup>

These human rights principles specifically address inequalities in resource allocation and wealth distribution, which play a significant role in poverty eradication.<sup>94</sup> For example, the *Khosa and others v Minister of Social Development* matter,<sup>95</sup> which dealt with the right to social security, confirmed that the debarment of permanent residents from the South African welfare system was inappropriate and inconsistent with the Constitution. Their exclusion was discriminatory and unfair and violated the right to equality. This decision obliged the government to help permanent and temporary residents implement the right to social security. In a RBAD, gaps can

92 Darrow & Tomas (n 15) 493.

93 Banik (n 13) 35.

94 G Schmidt-Traub 'The millennium development goals and human rights-based approaches: Moving towards a shared approach' (2009) 13 *The International Journal of Human Rights* at 79; E Dorsey et al 'Falling short of our goals: Transforming the millennium development goals into millennium development rights' (2010) 28 *Netherlands Quarterly of Human Rights* at 516; S Hickey & D Mitlin *Rights-based approaches to development: Exploring the potential and pitfalls* (2009) at 12.

95 *Khosa and others v Minister of Social Development and Others* 2004 (6) BCLR 569 CC.

be identified and addressed where poor, vulnerable, and marginalised groups have been overlooked.<sup>96</sup> By applying such an approach, these gaps are prioritised, and their needs are addressed.<sup>97</sup>

In a RBAD, goals must be achieved relatively, equitably, and sustainably.<sup>98</sup> To achieve this, governments and other development agencies must monitor and report on the duration of their achievements and empower people to hold duty-bearers accountable when progress is not sustained. A RBAD makes it possible to monitor development processes through a human rights lens.<sup>99</sup> This will ensure that disadvantaged sector grievances caused by political actors advancing their political agendas are minimised.<sup>100</sup>

The human rights agenda is not a narrow non-linear framework. It offers a holistic, integrated approach to address the multidimensional layers of development challenges. It is aware of local affairs. It considers the local environment and society, as well as the social, political, economic, and cultural practices that can influence development.<sup>101</sup> For this reason, using such an approach requires local involvement, which entails completely underestimating all the social dynamics needed to achieve development goals.

The human rights framework values and adapts to different local realities, subjective perceptions, resource constraints, and cultural and social factors.<sup>102</sup> A RBAD is primarily concerned with the appropriateness, affordability, accessibility, and acceptability of development outcomes in the local community. This approach aims to advance national efforts to ensure the fulfilment of human rights for all, to change the financial, social, and political frameworks underlying these efforts and strengthen international responsibility to support national programmes to a satisfactory extent.

96 S Kuruvilla et al 'The millennium development goals and human rights: Realizing shared commitments' (2012) 34 *Human Rights Quarterly* at 164; A Flynn-Schneider 'Inter-governmental organizations. Human rights brief 21(1)' (2014) <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1906&context=hrbrief> (accessed 31 August 2022). See also S Cecchini & F Notti 'Millennium development goals and human rights: Faraway, so close?' (2011) 12 *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People-Centred Development* at 123.

97 Kuruvilla et al (n 96) 153; UN Office of the High Commissioner for Human Rights 'Frequently asked questions on a human rights-based approach to development cooperation' (2006) (a) <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (accessed 31 August 2022); Cecchini & Notti (n 96) 123; Dorsey et al (n 94) 518.

98 Kuruvilla et al (n 96) 171; Dorsey et al (n 94) 518; Gready (n 64) 397.

99 RF Oppong 'Trade and human rights: A perspective for agents of trade policy using a rights-based approach to development' (2006) 6 *African Human Rights Law Journal* at 131.

100 Fukuda-Parr (n 74) 171; Darrow & Tomas (n 15) 487; Hickey & Mitlin (n 94) 220-222.

101 UDHR (n 78) 17; A Yamin 'Will we take suffering seriously? Reflections on what applying a human rights framework to health means and why we should care' (2008) 10 *Health and Human Rights* at 47.

102 Darrow & Tomas (n 15) 521.



The consideration of recommendations from international human rights mechanisms can be used to determine national areas of concern. This ensures that existing human rights violations are not perpetuated accidentally. Reports from treaty monitoring bodies can also be used to highlight development challenges, oppressive or discriminatory practices, and ongoing human rights violations. By recognising and responding to local needs and challenges, the opportunities for community members to take responsibility for development processes are improved. This, in turn, guarantees the sustainability of the programmes, as well as the progress made.<sup>103</sup>

In human rights law, governments are the primary duty bearers for fully realising human rights. For example, in the well-known *Minister of Health and Others v Treatment Action Campaign and Others* case,<sup>104</sup> the South African Constitutional Court ordered the government to comply with its obligations under the right to health. Therefore, achieving development goals through a RBAD requires governments to respect, protect, promote, and fulfil human rights throughout the development programming cycle. A RBAD creates global responsibility for everyone's development - at the national and international level, and global and regional level.<sup>105</sup>

## 6 Limitations and critiques of a rights-based approach to development

A RBAD has received mixed reactions over the years. Critics argue that the status of human rights is unclear and vague.<sup>106</sup> They believe that human rights are rhetorical and lack practical implementation. Others argue that a RBAD might be too rigid for public policy and therefore limits the discretionary powers of those setting development policies and strategies.

The lack of resources has also made it difficult for developing countries to adopt a RBAD. The shortcomings and challenges of a RBAD, particularly those experienced by essential institutions such as donor agencies and NGOs, have been noted by many organisations. One of the challenges identified by organisations is that a RBAD lacks a specific operational methodology for development practice. The interpretation of legal standards presented by international law in national development policies is a burdensome process which is hampered by a lack of knowledge and capacity.<sup>107</sup>

103 Filmer-Wilson (n 47) 219; Cecchini & Notti (n 96) 123; Darrow & Tomas (n 15) 506.

104 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (1) (CCT9/02) SA (CC) at 16.

105 Gready (n 64) 735-741.

106 Sano (n 1) 744.

107 Filmer-Wilson (n 47) 221.

The political and institutional aspects such as structural inequalities, limits on jurisdiction, lack of political will and respect for international human rights instruments play a significant role in the non-implementation of a RBAD. Additionally, social and cultural aspects such as a general awareness of human rights in society, previous experiences of communities with participatory decision-making, and the strength of local civil society organisations significantly impact the ease with which development strategies are implemented.<sup>108</sup>

Understanding human rights has also proven to be a stumbling block to the gradual implementation of a RBAD. For example, a lack of knowledge about human rights among government officials and the general population and a lack of independent local NGOs that can provide human rights education are obstacles from a RBAD perspective.

Applying human rights principles, such as participation, in development remains a significant challenge. A community might lack the skills to express its views and needs and contribute to decision-making. For example, in Botswana, UNICEF found active participation in the development process impossible due to a lack of community capacity. The poor and most marginalised groups lack decision-making experience owed to a lack of confidence to express their opinions.<sup>109</sup> However, Arnstein posits that in order to gain meaningful public engagement in development programmes, it is necessary to create initiatives to educate the public rather than simply appointing them to advisory boards to win their support.<sup>110</sup> Among other things, public education must enlighten people about their possibilities, rights, and responsibilities and give them the chance to share their opinions and suggestions.<sup>111</sup>

Similarly, the hypocrisy of bilateral donors and some NGOs in holding others accountable while evading accountability themselves is a significant challenge in implementing a RBAD.<sup>112</sup> The lack of support from managing authorities and development professionals for changes in their existing practice to incorporate a RBAD into their policies also makes implementation difficult. In Uganda, for example, the *Cooperative for assistance and relief everywhere* discovered that some key donors did not support the transition to a legal approach. Donors recognised that adopting the human rights approach would

108 Gauri & Gloppen (n 40) 494-500; Filmer-Wilson (n 47) 225.

109 Filmer-Wilson (n 47) 225-226.

110 SR Arnstein 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of planners* at 20.

111 Arnstein (n 110) 21.

112 Gready (n 64) 741.

promote the principles of non-discrimination, equality, broad participation and empowerment.<sup>113</sup> Because this had the potential to challenge existing power imbalances directly, development agencies feared that local opposition to changing the status quo could endanger rights advocates.<sup>114</sup> Filmer-Wilson agrees that ‘in these precarious conditions, finding ways to implement programmes while not compromising human rights principles, or compounding existing power imbalances is challenging’.<sup>115</sup>

A lack of conceptual clarity has proven to be a critical issue in adopting a RBAD. According to Darrow and Tomas, conceptual clarity is needed to highlight the unique opportunities and challenges that a rights-based approach poses.<sup>116</sup> Colloquial language, superficial marketing, and undue complication would only serve to cover what is new and notable about a rights-based approach. Conceptual clarity could also promote practical consistency and coordination between different development agencies and actors, thereby increasing the prospects for joint action. The need for clarity is more vital than ever before, as critics believe that a RBAD is based on conceptual rhetoric with unproven practical implications and mixed motives for its implementation.<sup>117</sup>

Although a RBAD has shortcomings, recent experience shows that the practical value of human rights concepts and standards in development strategies is better understood.<sup>118</sup> For example, UN agencies, policymakers, and program managers such as NGOs and bilateral development agencies have addressed and operationalised various rights-based programming methods in recent years. This benefits a better understanding of the conceptual framework of human rights by putting rights-based approaches into practice, promoting human development, and empowering the poor and marginalised.

## 7 Conclusion

This article has traced and examined the relationship between human rights and development and the emergence of a RBAD that has gained momentum among international development practitioners. Accepting a RBAD has enabled incorporating human rights, norms and standards into the development. The underlying RBAD principles of participation, empowerment, inequality, non-discrimination and accountability have proven essential to the advancement of

113 Filmer-Wilson (n 47) 226-227.

114 As above.

115 Filmer-Wilson (n 47) 227.

116 Darrow & Tomas (n 15) 482-483.

117 Darrow & Tomas (n 15) 483.

118 Darrow & Tomas (n 15) 489.

development programming. This can influence how government, international, national and local NGOs formulate, implement and monitor development policies and strategies to advance human development. Applying this approach in various development projects in South Africa will provide a framework in which the theoretical gaps between different types of rights can be overcome by emphasising their interconnectedness in practice. This paper has highlighted the need to understand development through the lens of human rights to improve the living conditions of the poor, the vulnerable and the marginalised.

# MOVING BEYOND THE ABYSSAL LINE: THE POSSIBILITY OF EPISTEMIC JUSTICE IN THE 'POST'-APARTHEID CONSTITUTIONALISM

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## Abstract

*In this article, I reflect on the idea of a 'post'-apartheid South African constitutionalism and the related and implicated notion of Transformative Constitutionalism by emphasising its continued bondage to a colonial and apartheid past. In an effort to critically explore the 'post'-apartheid transformative constitutional framework, I examine the endurance of colonialism as colonality in the manner it has unfolded in the South African context. This exploration involves highlighting three constitutive elements of this endurance: linear historicism as observed in Hobbes' social contract; the geography of reason as theorised by Schmitt; and the lines within South African society and knowledge systems as a result of what De Sousa Santos calls 'abyssal thinking'. Although the endurance of historical colonialism as colonality can be described in a number of ways, I deal with these specific constitutive elements in order to argue that the doctrine of*

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*transformation, which includes Transformative Constitutionalism, has largely been ineffective in its attempt to eradicate coloniality as it has failed to achieve epistemic justice for the majority of (South) Africans. I conclude by suggesting that the doctrine of transformation and, as such, Transformative Constitutionalism has served to further exclude and marginalise the knowledge of indigenous (South) African people in the 'post'-apartheid constitutional dispensation. The project of transformation has sustained the abyssal line as it has been internalised through coloniality. As such, the 'post'-apartheid South African dispensation remains divided by this line – essentially discarding indigenous (South) African people and their knowledge systems to the abyss. I further argue that the persistence of coloniality, sustained by the abyssal line, requires a project of conceptual decolonisation if coloniality and epistemic injustice is to be undone. In this sense, a true (South) African dispensation may be disclosed.*

*For us, the problem is not to make a utopian and sterile attempt to repeat the past, but to go beyond.<sup>1</sup>*

## 1 Introduction

South Africa has an extensive history of European colonialism. Colonialism as a historical occurrence may be understood as the political and economic relation established by the power of one nation over another in a manner that ensures the sovereignty of the former.<sup>2</sup> Throughout South Africa's history of colonialism, its indigenous people have been subjected to injustice and violence through countless instances of economic and political exclusion, wars of dispossession, racial discrimination and segregation, forced displacement and epistemic injustice.

Through a long and violent liberation struggle, South Africa eventually reached political liberation with the formal end of apartheid in 1994. South Africa entered a new era of democracy founded on a supreme constitution, promising the protection of South Africans' fundamental human rights. However, in 'post'-apartheid South Africa, the remnants of colonialism, which I refer to as coloniality, remain visible in its economic, social, legal, political, and moral spheres. It remains commonplace that European multinational companies own the majority of South African mines, and business is conducted on the basis of Western individualism; societal values are based on Eurocentric ideas of civilisation; the Constitution of the Republic of South Africa, 1996 ('the Constitution') contains a Bill of Rights which is based on Eurocentric principles of freedom, and the

1 A Césaire *Discourse on colonialism* (1950) at 52.

2 N Maldonado-Torres 'On the coloniality of being: Contributions to the development of a concept' (2007) 21 *Cultural Studies* at 243.

South African legal system remains largely dominated by English and Roman-Dutch law; national politics continue to be characterised by violence and corruption; and the colonisers entrenched Christianity in South Africa, where it has remained at the cost of (South) African belief systems. In the sections below, I will elaborate on the above illustration of the South African context.

It should be noted that I refer to the current dispensation as '*post'-apartheid*' because of its inextricable bondage to the history of colonialism, which implies that South Africa has not truly moved beyond its colonial-apartheid past.

Through the exploration below of '*post'-apartheid*' South African constitutionalism, it can be argued that colonialism still largely subsists in the form of coloniality. Colonial and Eurocentric knowledge systems continue to dominate South African knowledge systems. In order to counter the effects of colonialism, a project of Transformation – and in the South African legal context, Transformative Constitutionalism – was embarked upon with the advent of democratic rule.

Below, it is argued that the doctrine of Transformation, and Transformative Constitutionalism, has failed to include any attempt to eradicate coloniality and to achieve epistemic justice. This doctrine has rather served to further exclude and marginalise (South) African knowledge in '*post'-apartheid*' South Africa. This is specifically evident in the arbitrary exclusion of ubuntu from the final Constitution, and the large-scale denial of (South) African indigenous knowledge, specifically in the legal sphere. The article ultimately contends that because of the inherent nature of coloniality, a project of decolonisation must be embarked on if coloniality and the epistemic injustice it upholds is to be undone.

As mentioned, I will critically evaluate the doctrine of Transformation by exploring the endurance of colonialism as coloniality through three constitutive elements of this endurance: linear historicism, the geography of reason, and the lines within South African society and knowledge systems as a result of what De Sousa Santos terms '*abyssal thinking*'.<sup>3</sup>

Thereafter, I will discuss South African constitutionalism in the '*post'-apartheid*' era by considering its general characteristics as well as the doctrine of Transformative Constitutionalism. Moreover, I will problematise '*post'-apartheid*' constitutionalism for its continued bondage to the apartheid era, its exploitation of ubuntu, and the ongoing exclusion of (South) African indigenous knowledge from its ambit.

3 B De Sousa Santos *Epistemologies of the south: Justice against epistemicide* (2014) at 118.

I conclude by theorising a possible shift from the doctrine of Transformation to the project of decolonisation. It is this shift – the move beyond the abyssal line – that I believe is key to eradicating coloniality, achieving epistemic justice, and creating a true (South) African jurisprudence and political order.

## 2 The endurance of colonialism as coloniality in the South African context

Mudimbe points out that the word colonialism is derived from the Latin word *colĕre*, which can be translated as ‘to cultivate’ or ‘to design’.<sup>4</sup> Colonialism can be understood as the forcing of political and economic power relations of one state onto another, wherein the imposing state determines the sovereignty of the other state.<sup>5</sup>

South Africa first became a victim of European colonialism when the Dutch settled in and colonised the Cape in 1652.<sup>6</sup> After more than a century of Dutch rule, Britain occupied the Cape in 1795.<sup>7</sup> The Dutch briefly regained control over the Cape in 1803, but ultimately, British sovereignty was confirmed in 1806.<sup>8</sup> The Dutch, who renamed themselves the Afrikaners, in a claim to belonging and in resistance to British colonial power, moved inland where they continued colonising the South African landscape and its people.<sup>9</sup> It was only in 1910, when the Union of South Africa was established, that the British and Afrikaner forces were joined as one.<sup>10</sup> In 1948, Afrikaner nationalists took control of South Africa and imposed a policy of apartheid, a continuation of colonialism.<sup>11</sup> In 1961, South Africa gained independence from Britain, and the Republic of South Africa was established.<sup>12</sup> Once independent from Britain, the Afrikaners maintained control of South Africa until apartheid ended in 1994.<sup>13</sup>

Even though colonialism formally ended in South Africa when it became a constitutional democracy in 1994, it continues to define the culture, system of authority, relations of power, knowledge systems, economy, and the ontological framework of South Africa.<sup>14</sup> These continuities are examples of coloniality – it is what remains in the

4 V Mudimbe *The invention of Africa* (1988) at 1.

5 Maldonado-Torres (n 2) 243.

6 TRH Davenport *South Africa: A modern history* (1987) at 22.

7 L Thompson *A history of South Africa* (2014) at 52.

8 As above.

9 H Giliomee *Die Afrikaners: 'n Biografie* (2004) at 40; MB Ramose ‘The philosophy of the Anglo-Boer War’ in I Snyman (eds) *A century is a short time: New perspectives on the Anglo-Boer War* (2005) at 16.

10 Thompson (n 7) 157; Davenport (n 6) 255.

11 Thompson (n 7) 186.

12 Thompson (n 7) 188.

13 Thompson (n 7) 264.

14 As above.



aftermath of colonialism. Coloniality encompasses Euro-Western elements such as an international economy constituted by capitalism, vertical intersubjective relations determined by racism and Eurocentrism, as well as the dominance of Christianity, at the cost of other religions.<sup>15</sup>

I will consider three constitutive elements that have facilitated the endurance of colonialism as coloniality globally, and in South Africa: firstly, linear historicism; secondly, the geography of reason; and lastly, abyssal thinking. As mentioned above, although this endurance can be explained in a number of ways, I deal with the specified elements in order to specifically problematise the doctrine of Transformation and Transformative Constitutionalism in the South African context.

## 2.1 Linear historicism

Hannaford provides insight into linear historicism as theorised by Hobbes in the *Leviathan*.<sup>16</sup> Hobbes makes the argument that unless humankind is organised by civil society through a Social Contract, individuals will live in a state of nature where every human being fends for themselves.<sup>17</sup> In terms of the theory of Social Contract, people agree to denounce their right to use violence against one another in exchange for certain political rights and freedoms.<sup>18</sup> This theory presupposes that the state of nature – a pre-political state – is a state from which humankind can progress by concluding a Social Contract. Such progression refers to ontological, social, and economic development.<sup>19</sup> Dussel calls this the *fallacy of developmentalism*.<sup>20</sup> He argues that this type of thinking suggests that Europe's path of development must be followed by all other cultures and peoples, universally.<sup>21</sup>

Along the same lines, Arendt has argued that Hobbes's theory of Social Contract suggests that human beings within the Social Contract are free to do as they please with or to those who are excluded from the agreement.<sup>22</sup> Arendt describes these excluded communities as human beings who live in *apolitical voids*.<sup>23</sup> It is indeed this logic employed by Hobbes that sets a new standard for colonialism. Arendt

15 SJ Ndlovu-Gatsheni 'Genealogies of coloniality and implications for Africa's development' (2015) XL *Africa Development* at 18-19.

16 I Hannaford *Race: The history of an idea in the west* (1996) at 192.

17 As above.

18 As above.

19 E Dussel 'Eurocentrism and modernity (Introduction to the Frankfurt Lectures)' (1993) 20 *boundary 2* at 68.

20 Dussel (n 19) 67.

21 Dussel (n 19) 68.

22 H Arendt *The origins of totalitarianism* (1951) at 142; Hannaford (n 16) 192.

23 Hannaford (n 16) 192.

argues that Hobbes's Social Contract therefore served to legitimate the right to colonise those who are *still* in the state of nature.<sup>24</sup> This justification for colonisation meant that Europe – the colonisers – understood that they had the right to *correct*, *rescue* and *conquer* those who were *still* in the state of nature – the colonised.

Hobbes's theory of Social Contract was realised through agreements such as the Peace of Westphalia treaty of 1648.<sup>25</sup> State signatories agreed to the principle of state sovereignty as well as equality of such states.<sup>26</sup> This agreement, however, was entirely reserved for Europe and, as such, everything outside of Europe remained viable for conquest and colonialism.<sup>27</sup> Those who lived outside of the treaty were perceived to live outside of the law. Similarly, the Berlin Conference was held between 1884-1885 where the continent of Africa was divided and discussed.<sup>28</sup> Africa was, however, entirely excluded from the agreements made between the European states.<sup>29</sup> Excluded from the Social Contract, Africa could not benefit from it, and was conquered and colonised instead.

Berlin describes historical inevitability as large patterns that can be discerned in the procession of historical events, by applying a kind of scientific method in order to build on historical knowledge so as to fill gaps in knowledge of the past, to explain the present, and predict the future.<sup>30</sup> Similar to Hobbes' linear historicism, Berlin argues that the notion of historical inevitability places the colonised at the beginning of development, and Western Eurocentric civilisation at the end thereof.<sup>31</sup> This narrative forms the foundation for colonialism because it suggests that the colonial subject will *inevitably* develop and reach Western Eurocentric civilisation. It is, therefore, justified to conquer the colonised subject as such development is inevitable.

Such inevitability clearly rests upon the idea that history is *more* than mere past events, rather, it is a theodicy.<sup>32</sup> This means that historical events, as well as what happens in the present, seem to be caused by abstract forces such as class, race, culture, and religion.<sup>33</sup> The logic of historical inevitability and determinism is still perpetuated. Capitalism and the inequality it creates, namely, injustice and poverty, continues to be justified in society through the mechanisms of: the religious framing of individual, racial and classist positionalities as the will of the Christian god; the globalisation of

24 Arendt (n 22) 146; Hannaford (n 16) 193.

25 Ndlovu-Gatsheni (n 15) 25.

26 As above.

27 As above.

28 Ndlovu-Gatsheni (n 15) 26.

29 As above.

30 Berlin 'Historical inevitability' in H Hardy (ed) *Liberty* (2003) at 96.

31 As above.

32 Berlin 'Historical inevitability' in Hardy (n 30) 101.

33 Berlin 'Historical inevitability' in Hardy (n 30) 103.

capitalism as the most viable economic policy; and Eurocentrism situating Europe at the centre of the world order.<sup>34</sup> The logic of historical inevitability is, however, flawed as individual responsibility and free will cannot be entirely eliminated.<sup>35</sup> Unfortunately, this logic has worked in the coloniser's favour, as the colonised is accordingly doomed to believe that changing their circumstances is beyond their control and entirely up to abstract forces.

In this respect, Murungi argues that Africa is a victim of European terrorism.<sup>36</sup> The West has indeed managed to institutionalise liberty and equality in its own societies, while simultaneously institutionalising oppression and inequality in African societies.<sup>37</sup> The integrity of this logic can, however, only be maintained by convincing the colonised that their problems – poverty, disease, high mortality rates, racism – are simply a condition of their being.<sup>38</sup> This also means that the legitimacy of the Christian god in the presence of such grave injustice, evil, epistemic and social violence, is justified.<sup>39</sup>

Gordon argues that to understand colonialism, one has to understand Western modernity.<sup>40</sup> He defines Western modernity as the colonisers enforcing their idea of reality onto the colonised.<sup>41</sup> Gordon points out that this process does, however, only provide colonised peoples with two possible futures: firstly, the colonised could disappear through genocide, erasure or assimilation; or the colonised could adapt by way of hybridisation or transformation.<sup>42</sup> As such, modernity has ultimately threatened the indigenous culture, knowledge, values, and beliefs in its entirety. Modernity, as it is defined here, clearly distinguishes between one legitimate reality and everything beyond it, which is regarded as illegitimate.

Before turning to the second constitutive element, it should be noted that Hobbes's Social Contract implicitly suggests one single linear path of development that is essentially European. It is the deterministic and historically inevitable nature of this theory that supported the right to conquer and colonise. Colonial forces indicated that such development would eventually occur and, as such, interference and facilitation of the process was justified. In this sense, Christianity is also deeply implicated in the process of colonialism as it is a belief system and way of seeing the world that was entirely imposed on colonised peoples. The process of colonialism

34 Berlin 'Historical inevitability' in Hardy (n 30) 115.

35 As above.

36 J Murungi *An introduction to African legal philosophy* (2013) at 36.

37 Murungi (n 36) 37.

38 LR Gordon 'Justice otherwise: Thoughts on ubuntu' in L Praeg & S Magadla (eds) *Ubuntu: Curating the archive* (2014) at 14.

39 As above.

40 Gordon (n 38) 11.

41 As above.

42 As above.

thus came at the cost of indigenous culture, knowledge, values, and beliefs.

## 2.2 The geography of reason

With regards to the second constitutive element, Schmitt contended that the various geographical divisions for the purpose of colonialism resulted in the *geography of reason*.<sup>43</sup> At the dawn of colonialism, the spatial ordering of the earth led to the birth of international law. The earth was soon divided by cartographical lines.<sup>44</sup> The dividers, of course, were European Christian colonisers – who, at the time, perceived themselves as synonymous with civilisation.<sup>45</sup> This spatial ordering was, therefore, not merely a superficial cartography, but rather political from the start.<sup>46</sup>

Shortly, this spatial ordering brought about the Raya lines, which were Spanish-Portuguese divisional lines.<sup>47</sup> These lines were entrenched when two princes recognised the same spiritual authority – the pope – as well as the same international law – European law. They then agreed on the acquisition of land that belonged to other princes and/or people of another faith.<sup>48</sup> As such, a distinction was made between the territory of Christian princes, and non-Christian princes and/or people. Although the pope granted the princes a missionary mandate, on the basis of the Raya lines, such a right was not held separate from the right to trade and occupy a given territory.<sup>49</sup> As a rule, however, the Raya lines were not seen as global separations between Christian and non-Christian territories, but rather as treaties between land-appropriating Christian princes.<sup>50</sup>

The Amity lines were French-English friendship lines.<sup>51</sup> One specific Amity line – the Western meridian – demarcated where Europe ended, and the rest of the world began.<sup>52</sup> As a result, it was decided that European law also ended at this line. Schmitt claims that this is precisely how Europe managed to achieve a ‘bracketing’ of war through international law.<sup>53</sup> Beyond this line was the rest of the world – where the *legal limits* to war no longer applied.<sup>54</sup> As opposed to the Raya lines, the Amity lines were not based on any mutual authority

43 C Schmitt *The nomos of the earth in the international law of the jus publicum europaeum* (1950) at 86.

44 As above.

45 As above.

46 Schmitt (n 43) 88.

47 Schmitt (n 43) 90.

48 Schmitt (n 43) 91.

49 As above.

50 Schmitt (n 43) 92.

51 Schmitt (n 43) 90.

52 Schmitt (n 43) 93.

53 As above.

54 Schmitt (n 43) 94.

such as the pope.<sup>55</sup> It remained true, however, that the mutuality of Christian Europe was the basis on which the rest of the world was colonised.<sup>56</sup> As such, everything beyond the line was excluded from legal, moral, and political values that were recognised on Europe's side of the line.<sup>57</sup> This exclusion, however, challenged all traditional, European intellectual and moral principles.<sup>58</sup>

The behaviour of European Christians beyond the line rather coincides with actions in war, as opposed to the ethical values established within the bounds of Europe.<sup>59</sup> Beyond the line, the non-ethics of war regulated their behaviour.<sup>60</sup> Coloniality as entrenched colonialism can, therefore, be understood as the exception to ethics, namely, the non-ethics of war becoming a global norm.<sup>61</sup>

Thus, what first started out as cartographical divisions between the territories of the colonisers and the colonised, evolved to become a geography of reason. The Raya, Amity, and other similar lines demarcated where 'reason' would start and where it would end. On the European coloniser's side of the line; reason, law and Christian values were exhibited. Beyond the line, however, the non-ethics of war regulated the coloniser's behaviour – it was generally accepted to be void of reason. Over time, lines such as the Raya and Amity lines have become internalised in our societies, leading to the endurance of colonialism in the form of coloniality. In the following section, I will consider the third constitutive cause or element contributing to the entrenchment of colonisation as coloniality, namely, the lines within.

### 2.3 The lines within

Maldonado-Torres posits that colonialism, as it continues to exist through coloniality, has been internalised to the point where the *geography of reason*, as theorised by Schmitt, is now observable within society as opposed to being determined by a superficial cartography dividing international territories.<sup>62</sup> To explain the internalisation of the lines, Maldonado-Torres starts at the birth of European enlightenment: the Cartesian *ego cogito*.

Descartes's *ego cogito* (I think, therefore I am) is widely considered as the catalyser of Western modernity, and the foundation of European epistemology and reason. Dussel, however, argues that the Cartesian *ego cogito* must be understood in the context of the *ego*

55 As above.

56 As above.

57 As above.

58 Schmitt (n 43) 95.

59 Maldonado-Torres (n 2) 259.

60 As above.

61 As above.

62 Maldonado-Torres (n 2) 240-270.

*conquiro* (I conquer).<sup>63</sup> Dussel claims that the foundation of the project of colonisation is what the certainty of Descartes' reason above, and Europe's reason, is based on.<sup>64</sup> If Dussel's argument is accepted, and we are to understand the *ego cogito* in the context of the *ego conquiro*, then the ideology of *I think, therefore I am* presupposes two hidden facets.<sup>65</sup> Firstly, the *I think* conceals the notion that others 'do not think'.<sup>66</sup> Secondly, the *I am*, conceals the notion that others 'are not' or others 'do not have being'.<sup>67</sup> Dussel's argument provides insight into both the coloniality of knowledge and the coloniality of being.<sup>68</sup> The denial of the colonised's knowledge is the precondition to the affirmation of the coloniser's knowledge. Similarly, the denial of the colonised's being, is the precondition to the affirmation of the coloniser's being.<sup>69</sup>

This epistemological and ontological exclusion of those beyond the line – the colonised, the global South and Africa – has ensured that Europe and the West, remain visible.<sup>70</sup> Those beyond the line are doomed to a state of Fanon's *non-being*, or *invisibility* as Ralph Ellison wrote in his book, *Invisible Man*, in order to ensure the continued visibility of those who created, maintain, and continue to benefit from the line.<sup>71</sup>

De Sousa Santos argues that this logic of visible and invisible distinctions of modern Western thinking is an *abyssal thinking*.<sup>72</sup> The invisible distinctions divide reality into two distinct realms, namely, that which is on 'this' side of the line, and that which is 'beyond' the line.<sup>73</sup> Everything beyond the line is doomed to radical exclusion, incomprehensibility and invisibility.<sup>74</sup> These invisible distinctions coincide with the visible distinctions between the metropolitan societies of the West, or Europe; and colonial territories, or the Global South.<sup>75</sup> In law, science, philosophy, theology and knowledge, the visibility of that which is on this side of the line, depends on the invisibility of that which is beyond the line.<sup>76</sup> There is thus a clear tension between legitimate and illegitimate ways of knowing.

63 E Dussel 'Modernity, Eurocentrism, and Trans-Modernity: In Dialogue with Charles Taylor' in E Mendieta (ed) *The Underside of Modernity: Apel, Ricoeur, Rorty, Taylor, and the Philosophy of Liberation* (1996) at 133; Maldonado-Torres (n 2) 245.

64 As above.

65 Maldonado-Torres (n 2) 252.

66 As above.

67 As above.

68 As above.

69 Maldonado-Torres (n 2) 253.

70 Maldonado-Torres (n 2) 257.

71 As above.

72 De Sousa Santos (n 3) 118.

73 As above.

74 As above.

75 As above.

76 De Sousa Santos (n 3) 119.

Beyond the line, there is no legitimate knowledge – only beliefs, opinions, intuitions, traditions, magic, and subjective understanding.<sup>77</sup> In the field of law, the visible, universal distinction between legal and illegal relies on the invisible distinction between that which is law and that which is lawless.<sup>78</sup> To consider the law as an example, the *non-ethics of war* is normalised beyond the line – in the colonial zone. But such behaviour remains lawless or *nonlegal*, as it is seemingly impossible to comprehend within the visible distinction between legal and illegal. As such, no legitimate form of law exists beyond the line, and that which does exist there is deemed invisible. Consequently, the indigenous and customary law of colonised people is simply erased or denied – an (im)perfect example of epistemic violence and injustice.

Western modernity and its logic does not signify the abandonment of the state of nature, as Hobbes theorised it – but rather its coexistence with civil society.<sup>79</sup> Europe – the West – exists within civil society, on its side of the line. The Global South, the colonised, Africa exists beyond the line and beyond legitimate reality, thereby, doomed to non-existence. The exclusion, negation and delegitimisation of the colonised is indeed the precondition to the affirmation of what is on Europe's side of the line – Eurocentrism, Western civilisation, modernity.<sup>80</sup> Its coexistence, however, has become increasingly complex.<sup>81</sup>

Colonial zones have become internalised to every society and in every space on a global scale.<sup>82</sup> It is now designated to prisons, townships, ghettos, sweatshops, human trafficking, prostitution rings and the list goes on.<sup>83</sup> What is *beyond the line* now exists *within*.<sup>84</sup> De Sousa Santos, therefore, agrees with Maldonado-Torres in that the logic of the superficial cartography of global lines – the Raya lines and the Amity lines – has indeed been internalised.<sup>85</sup> This leads me to consider the lines that have been internalised in South African society.

## 2.4 The endurance of colonialism as coloniality in the South African context

When considering the South African context, it is clear that we have endured a long history of colonialism that has been entrenched as

77 De Sousa Santos (n 3) 120.

78 As above.

79 De Sousa Santos (n 3) 123.

80 De Sousa Santos (n 3) 123-124.

81 De Sousa Santos (n 3) 124.

82 As above.

83 As above.

84 As above.

85 As above.

coloniality. From the perspective of the discussions above, it can be argued that at the dawn of its democracy, South Africa concluded a Social Contract, similar to the one theorised by Hobbes, namely, the 1996 Constitution. Just as with Hobbes's Social Contract, the Constitution has served both an including and excluding role in South Africa. Abyssal thinking and its visible and invisible distinctions between territory, knowledge, as well as being, remain evident to some extent. In South Africa, coloniality persists in domination by the Euro-West: the Constitution, the economy, the social and religious spheres, politics as well as power relations. What remains invisible is the (South) African indigenous and customary knowledge, beliefs, religions, and values.

From the perspectives theorised above, it can be argued that within South African society, African people are still excluded and doomed to exist *beyond the line*. I argue that coloniality, as it is internalised within the South African context, has made way for ontological as well as epistemic violence to thrive as the norm, even in the 'post'-apartheid constitutional dispensation.

### 3 Defining 'post'-apartheid South African constitutionalism

This section discusses 'post'-apartheid South African constitutionalism by considering its inherited nature as well as the doctrine of Transformative Constitutionalism theorised by Klare and Langa.

As I have previously remarked, I refer to the current South African dispensation as '*post*'-apartheid because of its inextricable bondage to the history of colonialism, which implies that South Africa has not truly moved beyond its colonial past.

#### 3.1 The legal system we inherited

The South African legal system has historically been shaped by Dutch and British colonialism and apartheid. Iya argues that a legal system is generally a cultural product of its community and thus a product of the community's history as influenced by politics, geography, and religion.<sup>86</sup> As such, Du Bois states that the South African legal system has developed according to: local demographic, political and economic factors, especially the replacement of Dutch by British rule, the expansion of the European settlement, the subjugation of the indigenous population, and the development of a commercial and

86 PF Iya 'The legal system and legal education in southern Africa: Past influences and current challenges' (2001) 51 *Journal of Legal Education* at 355-356.



industrial economy in the wake of the discovery of gold and diamonds in the late 19th century.<sup>87</sup>

When the Dutch East India Company (the VOC) arrived on South Africa's shores, essentially setting in motion the colonisation of the area, there were several people and communities already living there. It has been widely claimed that the Cape was colonised in 1652 when Jan van Riebeeck and his company officially settled there. Mellett argues that this is itself contested and should be known as the 'lie of 1652' as there had already been 180 years of engagement between the original peoples of South Africa, specifically the Khoi and San communities, and the Europeans.<sup>88</sup> The laws observed by the original peoples of South Africa is what is referred to as customary law, or indigenous law.

Authors have claimed that South Africa boasts a mixed, hybrid or pluralist legal system as it is determined and influenced by several different legal frameworks. The most significant of these legal frameworks is the Constitution that plays a foundational role in the South African legal system and is the supreme law.<sup>89</sup> Further, the major legal framework is the common law – which consists of English and Roman-Dutch law – as inherited from the British and Dutch colonisers. With the introduction of the Constitution, some authority was allegedly restored to customary law or indigenous law that existed in pre-colonial (South) Africa, and remained living throughout its history of colonisation. Other legal sources include legislation passed by parliament as well as judicial precedent set in our courts. It is said that all of these frameworks contribute to the current mixed, hybrid and/or pluralist 'post'-apartheid South African legal framework.

This is exactly where the problem of coloniality can be located in the 'post'-apartheid constitutional dispensation. What is common law if not merely European customary law? Yet the inherited systems of English and Roman-Dutch law have historically been adopted and developed as opposed to indigenous (South) African law. As an unfortunate result, indigenous (South) African law does not have an elevated status in 'post'-apartheid constitutionalism.

### 3.2 Transformation in the 'post'-apartheid legal sphere

The history of South African constitutions did not start with the Constitution that came into effect in 1996, nor did it start with the interim Constitution of 1993. South Africa's first constitution was

87 F Du Bois 'Introduction: History, system and sources' in CG Van der Merwe & JE Du Plessis (eds) *Introduction to the law of South Africa* (2004) at 1.

88 PT Mellett *The lie of 1652: A decolonised history of Land* (2020) at 95.

89 Constitution of the Republic of South Africa, 1996 sec 2.

introduced when it became a Union in 1910. It declared many of the same freedoms and rights entrenched in the current Constitution, but it was agreed to by white citizens, and deliberately excluded all non-white South Africans from its ambit. Today, however, the Constitution *prima facie* includes everyone within its ambit, regardless of social status, race, skin colour, sexual orientation, gender, and more. It can, therefore, very well still be argued that the Constitution, even in its new, democratic and inclusive form, remains Euro-Western in text, in structure and in virtue, due to the persistence of coloniality.

The 'post'-apartheid South African constitutional dispensation has been described as 'transformative'.<sup>90</sup> The core idea of transformation can be described as a call to change.<sup>91</sup> Albertyn and Goldblatt argue that this change must be brought by a complete reconstruction of the South African state and its society, with the aim of equality with regards to power and equal distribution of resources.<sup>92</sup>

Klare defines Transformative Constitutionalism as a long-term project that focusses on leading South Africa's political and social institutions, as well as power relations, towards a more equal and participatory democracy, by means of the interpretation and the enforcement of the Constitution.<sup>93</sup> Klare further contends that the Constitution is self-conscious as it is committed to social transformation and reconstitution. It further operates within the specific history of South Africa.<sup>94</sup> In agreement with Klare, former Chief Justice Langa describes Transformative Constitutionalism as a social and economic revolution that is mainly focused on the fulfilment of socio-economic rights.<sup>95</sup> The main goal of Transformative Constitutionalism can, therefore, be identified as the establishment of a truly equal society.<sup>96</sup>

Klare argues that a legal culture of justification is how the road to a transformed South African society will be paved.<sup>97</sup> This shift from a legal culture of authority to a legal culture of justification means that the law can no longer be separated from politics.<sup>98</sup> This shift must entail moving from a culture of authority to a culture of justification,

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

91 Langa (n 90) 352.

92 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* at 249; Langa (n 90) 352.

93 KE Klare 'Legal culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* at 150.

94 Klare (n 93) 155.

95 Langa (n 90) 352.

96 As above.

97 Klare (n 93) 147.

98 Langa (n 90) 353.

where every judicial decision can be substantively justified in terms of the values and rights entrenched in the Constitution.<sup>99</sup> Klare argues that adjudication on the basis of justification will be a significant means to achieving justice.<sup>100</sup> As such, judges must be conscientious in that they promote and fulfil the values and rights entrenched in the Constitution in such a manner that social justice is achieved.<sup>101</sup> Klare adds that Transformative Constitutionalism requires that value judgments are made and extra-legal considerations are taken into account.<sup>102</sup>

Many scholars have criticised 'post'-apartheid constitutionalism for its Western tenets and values, and its failure to create a fundamental rupture with the previous regimes of colonialism and apartheid. I will elaborate on these criticisms in the following section.

#### **4 Problematising the transformative nature of 'post'-apartheid South African constitutionalism**

The above discussions of 'post'-apartheid South African constitutionalism leads me to a few questions: If 'post'-apartheid South African constitutionalism is built on a skewed power relation between European common law and this constitutionalism, and indigenous (South) African law; is Transformative Constitutionalism not merely a vehicle for furthering coloniality? Is Transformative Constitutionalism then not merely the instrument that allows coloniality to continue its existence in 'post'-apartheid South Africa? If value judgments are to be made in courts by aligning indigenous (South) African law with the Euro-Western Constitution, are we not furthering the process of epistemic erasure that was first implemented by European colonialism? In other words, has epistemic justice been achieved in the 'post'-apartheid constitutional dispensation?

##### **4.1 'Neo-apartheid constitutionalism'**

Several authors have raised critiques against 'post'-apartheid South African constitutionalism and the doctrine of transformation for failing to fundamentally change the South African landscape in its economic, social and political spheres. These authors argue that when the 'post'-apartheid South African dispensation is considered as a

99 Langa (n 90) 353.

100 Klare (n 93) 147.

101 Klare (n 93) 148-149.

102 Klare (n 93) 158.

whole, not much has changed at all. One of these criticisms is raised by Ndlovu-Gatsheni who argues that even though African people continue to exist after colonialism, they are bound to do so within the limits of coloniality.<sup>103</sup> Assimilation into the existing European, colonial society was a prerequisite for existence. This is evident when considering that ‘post’-apartheid South African constitutionalism is governed by Eurocentric, Western limitations.

Another critical examination of the ‘post’-apartheid South African dispensation is put forth by Dladla, who claims that white supremacy can still be clearly observed in ‘post’-apartheid South Africa.<sup>104</sup> In ‘post’-apartheid South Africa the law of the colonised, the indigenous South African people, is referred to as *customary law*. Curiously, customary law has been far less developed and utilised than the colonisers’ law – Roman-Dutch and English law.<sup>105</sup> Moreover, international law outranks customary law in the hierarchical legal structure of ‘post’-apartheid South Africa.<sup>106</sup> Dladla argues that this continued marginalisation of African thought and perspectives in South Africa is a symptom of the absence of liberation in the context of the social, political and economic spheres.<sup>107</sup>

In line with the critiques of Ndlovu-Gatsheni and Dladla outlined here, Madlingozi refers to ‘post’-apartheid South African constitutionalism as neo-apartheid – a term coined by Leonard Gentle – and argues that Transformative Constitutionalism has failed to fundamentally change the bifurcated social structure inherited from the apartheid era.<sup>108</sup> In this regard, Mutua argues that the new constitutional framework adopted in ‘post’-apartheid South Africa has caused this bifurcated social and economic structure to be frozen in time.<sup>109</sup> The Constitution has, therefore, taken on the colour of oppression as it has been utilised as an instrument of the preservation of white privilege and wealth in the ‘post’-apartheid era.<sup>110</sup>

Even in the ‘post’-apartheid era, one finds mostly white people on this side of the abyssal line as well as the black elite living in a liberal democracy.<sup>111</sup> Beyond the abyssal line, however, one finds

103 Ndlovu-Gatsheni (n 15) 20.

104 N Dladla ‘Racism and the marginality of african philosophy in South Africa’ (2017) 18 *Phronimon* at 204.

105 Dladla (n 104) 205; N Dladla ‘Towards an African critical philosophy of race: Ubuntu as a philo-praxis of liberation’ (2017) 6 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 1 at 40.

106 Dladla (n 104) 206; Dladla (n 105) 40.

107 Dladla (n 104) 227.

108 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 125.

109 M Mutua ‘Hope and despair for a new South Africa: The limits of rights discourse’ (1997) 10 *Harvard Human Rights Journal* at 68.

110 Mutua (n 109) 112-113.

111 Madlingozi (n 108) 124.

dehumanisation and widespread social invisibility.<sup>112</sup> Madlingozi argues that land dispossession, epistemicide, and institutionalised anti-black racism constitute and are constituted by the abyssal line.<sup>113</sup>

At the dawn of the South African democracy, many Africans held on to the promise that assimilating into whiteness would lead to the recognition of their humanity.<sup>114</sup> Madlingozi specifically places the political party that has governed South Africa since the formal end of apartheid, the African National Congress (ANC), and its black elite in this category.<sup>115</sup> These Africans assimilated mostly out of fear of being banished to the abyss – beyond the line.

Dladla and Madlingozi have made it clear that 'post'-apartheid South African constitutionalism is rather a state of neo-apartheid; the bifurcated society inherited from our unjust past has been reaffirmed by the Constitution. Through the internalisation of the abyssal line, the Constitution has entrenched coloniality, resulting in a remaining divide between those who exist on this side of the line – the colonisers, white South Africans and some assimilated black South Africans, and those who are banished to the abyss – the colonised, indigenous, (South) African people.

Fundamentally linked with the indigenous (South) African peoples, are their indigenous (South) African epistemologies that have been banished to non-existence beyond the line. One specific example of such epistemic injustice is ubuntu. Although it was originally included in the interim Constitution, it was later excluded. In this next section, I will investigate the epistemic injustices committed by means of the abyssal line by considering (South) African indigenous knowledge.

#### **4.2 Epistemic injustice: (South) African indigenous knowledge & the abyssal line**

Praeg suggests that a clear distinction must be made between the African concept of ubuntu as praxis and the commercialised, decontextualised Ubuntu as an abstract philosophy.<sup>116</sup>

The concept of ubuntu as praxis, as being in Africa, must be understood through the notion of origin in the dimensions of land, the living dead and belief systems.<sup>117</sup> In these terms, land includes the symbiotic relationship between people and their land as well as

112 As above.

113 Madlingozi (n 108) 134.

114 Madlingozi (n 108) 131.

115 As above.

116 L Praeg 'A political economy of obligation' in *A Report on ubuntu* (2014) at 36.

117 Praeg (n 116) 37-38.

people and the living-dead that rest within the land.<sup>118</sup> As such, the inclusion of living people and the living-dead signify that the concept of land refers to a geographical space but also to a metaphysical location – the interface between the living and the living-dead.<sup>119</sup> It is, of course, this interface that forms the basis for the African belief system or rather, religion.<sup>120</sup> Ramose’s theory of ubuntu confirms this and he states that it consists of a metaphysical triadic structure between the living, the living-dead and the yet-to-be-born.<sup>121</sup>

As opposed to ubuntu as praxis, being a cultural, value-laden way of being and belonging, Ubuntu as abstract contemporary philosophy has lost most of the metaphysical wealth that it actually represents.<sup>122</sup> Praeg argues that due to ubuntu being a harmonising praxis, the decontextualised concept of Ubuntu often becomes inflated or assimilated into ‘ubuntufied Christianity’, where the lines between Western Humanism or Christianity and ubuntu become blurred.<sup>123</sup> Values such as compassion, mercy, forgiveness, and dignity become blended in this overlap.<sup>124</sup> Ramose, as opposed to Praeg, resists the recognition of Ubuntu as such a contemporary philosophy. Ramose argues that we must be aware of the dubious and arbitrary abuse of ubuntu by the colonisers of South Africa.<sup>125</sup>

At the dawn of the South African democracy, the colonisers appealed to ubuntu in order to justify establishing the Truth and Reconciliation Commission through the interim Constitution of 1993.<sup>126</sup> Thereafter, ubuntu was also invoked in the Constitutional Court to declare capital punishment unconstitutional in *S v Makwanyane*.<sup>127</sup> However, ubuntu was then discarded and omitted from the final Constitution that still reigns supreme today.<sup>128</sup>

I argue that the abstract, decontextualised Ubuntu, as Praeg describes it, feeds into Eurocentric hegemony and it sustains coloniality and the existence of the line and the abyss beyond it. This is merely an example of how the abyssal line constitutes what is legitimate knowledge and what is not. Christianity – a spiritual belief system of Europeans – may exist on this side of the line, but the metaphysical, spiritual, belief system of ubuntu has been banished to invisibility beyond the line and doomed to the abyss. I argue that we

118 Praeg (n 116) 38.

119 As above.

120 As above.

121 MB Ramose ‘An African perspective on justice and race’ 2001 *Polylog: Forum for Intercultural Philosophy* <http://them.polylog.org/3/frm-en.htm> (accessed 9 August 2021).

122 Praeg (n 116) 45.

123 Praeg (n 116) 39-40.

124 As above.

125 Ramose (n 121).

126 As above.

127 1995 (3) SA 391 (CC) para 313.

128 Ramose (n 121).

must (re)discover what has been banished to non-existence in the abyss. We must move beyond, even if it means that a truly (South) African dispensation will prove 'post'-apartheid constitutionalism in itself to be an injustice.

Epistemic injustice committed in terms of the abyssal line can also be observed in the South African intellectual property law regime. The South African government has set out to reform intellectual property law to ensure that indigenous forms of creativity, innovations, indigenous art and music are recognised as protectable intellectual property.<sup>129</sup> These reforms, contained in the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019, has, however, not been implemented as of yet<sup>130</sup>.

South Africa contains a wealth of indigenous knowledge dating back hundreds and thousands of years before the first colonisers even reached its shores. Unfortunately, intellectual property laws in South Africa provide insufficient protections to indigenous (South) African communities and their knowledge.

An example being the Hoodia plant that the San communities of Southern Africa traditionally use as an appetite suppressant when they are busy with work.<sup>131</sup> In 1998, the South African Council for Scientific and Industrial Research (the CSIR) filed an international patent application relating to compounds extracted from the Hoodia plant.<sup>132</sup> This application was filed without prior consent or any benefit-sharing agreement with the indigenous San community.<sup>133</sup> The CSIR later licenced this intellectual property to Phyto Pharma, a UK-based company, to develop and commercialise this new patented product.<sup>134</sup> Thus, the traditional knowledge developed over time by the San communities was appropriated by wealthy Western entrepreneurs at the cost of excluding the San communities from the right to protection and to benefit from their own traditional knowledge.<sup>135</sup>

Gebrehiwot argues that this is a prime example showcasing that traditional communities lack the means and access to knowledge to protect their traditional bio-innovations by way of patents, leading to their manipulation and exploitation.<sup>136</sup> This often leads to communities losing livelihoods and the erosion of traditional knowledge.<sup>137</sup> The Hoodia case study makes it clear that the 'post'-

129 TD Gebrehiwot 'Patents and the traditional bio-innovation predicament: Critical perspectives' (2019) *South African Intellectual Property Law Journal* 7 at 57.

130 As above.

131 Gebrehiwot (n 129) 66.

132 Gebrehiwot (n 129) 65.

133 As above.

134 As above.

135 Gebrehiwot (n 129) 67.

136 Gebrehiwot (n 129) 66.

137 As above.

apartheid South African political framework has failed to include indigenous (South) African people, and offers little to no protection to their knowledge systems. Even though their knowledge of the Hoodia plant has been extracted and appropriated to be used on this side of the line, the San community is discarded into the abyss, where they are invisible and disregarded as the original bearers of such knowledge.

I argue that the line as well as the abyss beyond it, is sustained in and by 'post'-apartheid South African constitutionalism. It is clear that coloniality is deeply embedded in the current South African legal dispensation, where indigenous (South) African knowledge exists almost entirely in the abyss, beyond the line, only recognised when it is appropriated by the coloniser. Euro-Western knowledge, especially in the legal system is allowed to exist on this side of the line. Unfortunately, it seems that 'post'-apartheid South African constitutionalism and the underlying approach of Transformative Constitutionalism has been ineffective in protecting indigenous (South) African knowledge and peoples. Just as the inherited, bifurcated social structure remains, the bifurcated structure stretches into the realms of knowledge, the production thereof, and the law.

The section below turns to the possibility of a deconstructed, rediscovered, rethought approach. As an alternative to current 'post'-apartheid South African constitutionalism, dominated by the doctrine of Transformation, I will now investigate decolonisation as the possibility for the creation of a true (South) African jurisprudence and political order.

## **5 Moving into the abyss: Possibilities of epistemic justice in South Africa**

From the discussion above, it should be clear that the 'post'-apartheid South African constitutional framework and the doctrine of Transformation (transformation through constitutional means and ends) has thus far been ineffective in eradicating the abyssal line. South Africa's society remains bifurcated in its cultural, political, societal, legal and economic spheres. The abyssal line still exists within 'post'-apartheid South Africa, and serves to exclude (South) African indigenous people and their knowledge systems – doomed to invisibility in the abyss.

Decolonisation is a way in which the invisible is made visible.<sup>138</sup> Coloniality, understood as internalised abyssal thinking, has created a

138 Maldonado-Torres (n 2).



tension between legitimate, visible knowledge – Eurocentric, Western knowledge systems – and illegitimate, invisible knowledge – (South) African knowledge systems. Decolonisation could potentially mean moving into the abyss, beyond the line, in a quest to expose and (re)discover the knowledge that has been regarded as illegitimate and invisible since the conception of colonisation.

### 5.1 A case for decolonisation

Wiredu argues that decolonisation must take place in order for a contemporary African philosophy to emerge.<sup>139</sup> Wiredu posits that such decolonisation must, however, take place on a conceptual level, where all structures upholding society must be decolonised.<sup>140</sup>

Serequeberhan argues that decolonisation addresses the neo-colonialism that Africans experience in the post-independence era.<sup>141</sup> As such, the (re)discovering and practicing of African philosophy through decolonisation is practicing resistance against Eurocentrism.<sup>142</sup> Serequeberhan contends that the idea of Eurocentric universalism must be dismantled in favour of African knowledge systems through the project of decolonisation.<sup>143</sup>

In order to dismantle Eurocentric universalism, it must be understood that the specific particularity of European modernity has been globalised and normalised and has become universal.<sup>144</sup> European modernity has spread through educational, cultural and political institutions as modern humanity.<sup>145</sup> As opposed to such progress, other cultures appear to be inherently pre-modern.<sup>146</sup> In South Africa, what has been universalised in our legal system is Euro-Western law – common law, English law and Roman-Dutch law. This universalisation has come at the exclusion of (South) African legal knowledge from beyond the line.

As such, Serequeberhan calls for a (re)orientation of thought towards indigenous sources. Post-abyssal African thought must be both de-constructive and constructive.<sup>147</sup> Serequeberhan argues that a (re)discovering of the source of indigenous forms of knowledge is essential.<sup>148</sup> In this respect, Maldonado-Torres argues that

139 K Wiredu 'Conceptual decolonisation as an imperative in contemporary African philosophy: some personal reflections' (2002) 2 *Rue Descartes* at 56.

140 As above.

141 T Serequeberhan 'African philosophy as the practice of resistance' (2009) 4 *Journal of Philosophy: A Cross-Disciplinary Inquiry* at 45.

142 As above.

143 As above.

144 Serequeberhan (n 141) 45.

145 As above.

146 As above.

147 Serequeberhan (n 141) 46.

148 Serequeberhan (n 141) 47.

decolonisation involves the making visible of that which is invisible and analysing the mechanisms that continue to produce such invisibility with a specific focus on the invisible people themselves.<sup>149</sup> As such, it is essential that we move into the abyss in order to (re)discover what, *and who*, has been made invisible. Post-abysal thinking involves a radical break with Euro-Western ways of thinking and acting.<sup>150</sup>

Considering these perspectives on decolonisation, it can be concluded that post-abysal thinking requires that we move into the abyss, to make visible those people and knowledge systems that have been banished to invisibility and nonexistence beyond the line. It is, however, essential that the abyssal line and its continuous existence must first be recognised. Thereafter, we may (re)discover what has been hidden beyond it.

## 6 Conclusion

In this article, I have explored the endurance of colonialism as coloniality as it unfolded in the South African context. This exploration outlined three identified constitutive elements of this endurance: linear historicism, the geography of reason, and the lines within South Africa's society and knowledge systems as a result of abyssal thinking.

I have also discussed current South African constitutionalism in the 'post'-apartheid era by considering its general nature as well as the doctrine of Transformative Constitutionalism. I have put forth critical theories of the 'post'-apartheid constitutional dispensation, specifically critiquing its continued bondage to colonial-apartheid, its exploitation of ubuntu, and the ongoing exclusion of (South) African indigenous knowledge from its ambit.

In this article, I have further argued that the doctrine of transformation and Transformative Constitutionalism has largely failed to include any attempt to eradicate coloniality and the epistemic justice that it upholds. The project of transformation, and Transformative Constitutionalism in the legal sphere, has rather maintained the abyssal line and internalised it as coloniality. As such, the 'post'-apartheid South African legal and political framework remains divided by the line – essentially leaving indigenous (South) African people and their knowledge systems invisible in the abyss.

The abyssal line and its exclusionary nature is specifically evident in the arbitrary exclusion of ubuntu from the Constitution and the

149 Maldonado-Torres (n 2) 262.

150 As above.

large-scale denial of (South) African indigenous knowledge specifically in the legal sphere.

As an alternative to the doctrine of transformation and the related notion of Transformative Constitutionalism, I have argued that, due to the inherent nature of coloniality sustained by the abyssal line, a project of decolonisation must be embarked on. It remains the only viable way in which coloniality and the epistemic injustice it upholds, can be undone. The process of decolonisation, specifically in the South African context, could be the only way in which the abyssal line may be crossed and hopefully eradicated. In this sense, a true (South) African jurisprudence and political order may be discovered.

# AN EXPLORATION OF JUSTICE: IDEAL AND NON-IDEAL THEORY PERSPECTIVES ON THE CONSTITUTION

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by Tabazi Ntsaluba\*



## Abstract

*This article explores and analyses the concept of justice in post-apartheid South Africa and whether the 1996 Constitution of the Republic of South Africa is just. This is done through critical analysis and juxtaposition of the varieties of justice presented by constitutional optimists and constitutional abolitionists. The paper will show how the principles of Ideal Theory and Non-Ideal Theory feature in the political narratives of the constitutional optimists and abolitionists, respectively. Further, this paper allows for introspection surrounding the conception of justice and how justice is realised in society. Finally, it will be argued that the conception of justice that manifests in society is subjective to the interests of the agents that hold the economic means to influence political power.*

## 1 Introduction

Following 350 years of colonial rule and approximately 50 years of apartheid rule, South Africans of all races participated in the Truth and Reconciliation Commission (TRC). The purpose of the TRC was,

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ostensibly, to facilitate reconciliation between the oppressors and the oppressed through the process of truth telling in the hopes that this would heal the nation.<sup>1</sup> However, victims grew tired of repeatedly telling their truths with no payoff, as promises of truth recovery and reparations were never realised.<sup>2</sup> The over-saturation of notions of forgiveness for the wrongs committed against victims during the apartheid regime, the TRC was labelled a ‘perpetrator-friendly’ process that protected the interests of individuals who benefited from the apartheid system.<sup>3</sup> The objective of the TRC was not only to investigate human rights violations perpetrated between 1960 and 1994 but to bring about closure.<sup>4</sup> However, the opposite was achieved, whereby the beneficiaries of the apartheid system continued to show no remorse or intention to correct their past transgressions, while the victims were left with a growing desire for proper justice.<sup>5</sup>

The Constitution of the Republic of South Africa, 1996 (the Constitution) was presented as the panacea to past injustices.<sup>6</sup> It was the bridge from a divided and dehumanising past to a unified and just South Africa built on equality, freedom and human dignity.<sup>7</sup> Although the Constitution presents itself and the rights contained therein as the key to emancipation and justice, it has been criticised by various scholars and theorists of jurisprudence, such as Madlingozi, Ramose and Modiri.<sup>8</sup> As the discourse evolves regarding competing views of what the injustice of the past was and what justice entails, it becomes clear that various conceptions of justice are at play in this discussion.

The two conceptions of justice that will be discussed in this paper are the Ideal Theory and the Non-Ideal Theory of justice. Ideal theorising employs ideal conceptions and assumptions as its basic apparatus.<sup>9</sup> These will all be discussed throughout this paper, and include:

- (a) The ideal social ontology: This is stereotypically characterised by an equal society as envisioned by the classical liberal tradition and is encapsulated in the Constitution’s political vision.<sup>10</sup>

1 C Villa-Vicencio ‘Living in the wake of the Truth and Reconciliation Commission: A retroactive reflection’ (1999) 3(2) *Law, Democracy & Development* at 199.

2 T Madlingozi ‘On transitional justice entrepreneurs and the production of victims’ (2010) 2(2) *Journal of Human Rights Practice* at 125.

3 As above.

4 As above.

5 Madlingozi (n 2) 125.

6 T Madlingozi ‘Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution’ (2017) 28(1) *Stellenbosch Law Review* at 128.

7 Madlingozi (n 6) 128.

8 JM Modiri ‘Introduction to special issue: conquest, constitutionalism and democratic contestations’ (2018) 34(3) *South African Journal on Human Rights*. These thinkers are mentioned on different pages namely 276, 296, 298.

9 C Mills ‘“Ideal theory” as ideology’ (2005) 20(3) *Hypatia* at 165.

- (b) Idealised human capabilities: Human agents are awarded unrealistic capabilities, capacities and reasoning abilities. This is showcased in the transformative constitutionalism and adjudication enterprise.<sup>11</sup>
- (c) Silence on the oppressive powers' operation in society and how these affect social institutions and the realisation of the ideal. This will be addressed in the discussion on the politics of rights discourse.<sup>12</sup>
- (d) Ideal social institutions are conceptualised not to have counteractive or disadvantageous elements. The discussion on poverty, land dispossession and the colonial project will engage with this characteristic of ideal theory.<sup>13</sup>

On the other hand, Non-Ideal Theory is premised on identifying injustices, and conceptualising how justice ought to be applied to remedy these injustices. The assumptions heavily inform constitutional optimism. The abolitionists argue that the abstraction of actual material realities born from injustice in South Africa prevents the achievement of the envisioned ideal.<sup>14</sup> The main contentions presented by abolitionists against the optimists' ideal theorising challenge the foundational assumptions of the constitutional order. First, is the assumption that the injustice of the past that must be corrected is apartheid.<sup>15</sup> Second, the Constitution assumes that affording black people white rights has erased the effects of colonisation.<sup>16</sup> Lastly, the Constitution, coupled with projects such as the TRC, impose the narrative that the Constitution and its supporting enterprises provide the only possible means of emancipation that is just.<sup>17</sup> The rest of the article will examine these claims.

I will explore the conceptions of justice presented by optimists and abolitionists in an attempt to organise the debate and conclude how justice manifests in society. Furthermore, I will argue that constitutional optimists endorse an idealised sense of justice premised on presupposed moral values that inform the political values of the democratic transition. The Constitution sustains these political values. The constitutional abolitionists favour a Non-Ideal Theory of justice that is categorised by correcting injustices identified in society as they appear. Lastly, I will argue that the controversial political philosophy proposed by constitutional optimism is purposed

10 Mills (n 9) 168

11 As above.

12 As above.

13 Mills (n 9) 169

14 Mills (n 9) 170.

15 JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34(3) *South African Journal on Human Rights* at 302.

16 Madlingozi (n 6) 129.

17 JM Modiri 'Law's poverty' (2015) 18(2) *Potchefstroom Electronic Law Journal* at 248.

to sustain South Africa as an unjust polity and preserve the interests of the oppressor.

## 2 Ideal and non-ideal theorising concerning the Constitution

The conception of justice postulated by constitutional optimists resonates with Ideal Theory as they present justice as achieving an ideal society built on democracy and fundamental rights enjoyed by all. This line of theorising can be traced back to philosopher John Rawls' *A theory of justice*.<sup>18</sup> Here Rawls argued that the remedy to the world's injustices begins with an objective idea of what justice entails.<sup>19</sup> Society must set its conception of justice by first envisioning the characteristics of a just society.<sup>20</sup> Thus, this theory presents justice under ideal conditions and the principles thereof are selected behind 'The veil of Ignorance'.<sup>21</sup> What the veil of Ignorance essentially proposes is for members of a society, free from their subjective realities, to set the conditions that should exist for an ideal society.<sup>22</sup> Since these conditions are spoken in a state of ignorance regarding their own social and economic positions, the society envisioned by each member would be a society where freedom, equality, and essential goods and services are provided to all.<sup>23</sup> Consequently, free from subjective prejudices, such a society would be just and fair.<sup>24</sup> In this way, justice is produced through a social contract, and its limits and possibilities are set by a veil of ignorance.<sup>25</sup>

Constitutional optimists favour this Rawlsian approach to justice. Moreover, the Constitution functions as their 'veil of ignorance,' effectively establishing the social contract for the new democratic society. The 'new' South Africa is founded on the values of freedom, equality and human dignity, which are the springboard to the normative model articulated by the Constitution.<sup>26</sup> Normative models are employed to achieve a particular nation-state by setting the normative principles that guide the actions of individuals and other agents that operate within society to create a particular envisioned state.<sup>27</sup> Stemplowska postulates normative model building as having

18 J Rawls *A theory of justice: Revised edition* (1999) at 4.

19 As above.

20 As above.

21 Rawls (n 18) 11.

22 Rawls (n 18) 17.

23 As above.

24 As above.

25 Rawls (n 18) 3.

26 Constitution of the Republic of South Africa, 1996.

27 A Volacu 'Bridging ideal and Non-Ideal Theory' (2018) 66(4) *Political Studies* at 888.

three definitive steps:<sup>28</sup> The first is the selection of assumptions; the second is the construction of rules and values that ought to represent the model and the setting of normative principles that guide the model; and the third is the implementation of mechanisms to guide the action of the individual or collective.<sup>29</sup> These three steps are respectively exemplified in the Constitution's claim to neutrality and objective morality, the provisions contained in the constitutions, and the principles such as equality, dignity and lastly dissemination of transformative legal enterprises.

Ideal theorising of justice has been heavily scrutinised for its over-reliance on the idealisation of factors whilst minimising or excluding the actual manifestations of these factors.<sup>30</sup> This results in the actual conditions being understood either as simple deviations from the ideal, which are not worth theorising and critical analysis, or undesirables that are best remedied by striving towards the ideal.<sup>31</sup> For those who favour the Constitution, present-day South Africa – where all citizens, regardless of their racial, social and economic standing, are afforded equal rights and access to the law – is just. Thus, not only was the enactment of the Constitution a symbol of justice, but the rights contained therein, sharpened by the framework of transformative constitutionalism and adjudication, are the necessary tools for addressing societal injustices.

The abolitionists not only rebut the grand ideals presented by the optimists but also offer a competing stance, effectively poking holes in the optimists' arguments, exposing inconsistencies, challenging existing values and presenting new values. As the name suggests, abolitionists postulate a narrative to abolish the social contract that is the Constitution. Although there is mention of a post-colonial constitution, none has intricately mapped out what such a constitution might look like; hence we can understand the abolitionists' conception of justice as more of a reaction to injustice – namely, settler colonialism and white supremacy. In this way, constitutional abolitionists favour more non-ideal theorising by identifying injustices and conceptualising how justice proper is to be achieved.

For Rawls, the principles of justice are developed in response to the human condition, and justice regulates how resources ought to be distributed in society.<sup>32</sup> Rawls' theory of justice has been criticised for being too focused on idealising society whilst turning a blind eye to the crucial aspects of real-world politics.<sup>33</sup> Rawlsian Ideal

28 As above.

29 Volacu (n 27) 888.

30 Mills (n 9) 168.

31 Mills (n 9) 168.

32 L Valentini 'Ideal vs. Non-Ideal Theory: A conceptual map' (2012) 7(9) *Philosophy Compass* at 5.



Theorising is categorised by well-ordered and just institutions coupled with individuals willing to comply and submit to the regulations imposed by these institutions.<sup>34</sup> This means that the ideal may be disturbed by unjust institutions, or citizens who are unwilling to comply fully with the regulations of the ideal.<sup>35</sup> It is in these cases that non-ideal theorising is utilised.<sup>36</sup> The Non-Ideal Theory provides solutions when others fail to do their part in society, namely through punishment and restitution.

Furthermore, Non-Ideal Theory acknowledges the existence of unjust legal requirements and prescribes civil disobedience when justice demands that citizens not comply with unjust regulations.<sup>37</sup> Rawls' approach has also been criticised for not being realistic enough since its circumstances of justice do not consider the circumstances of politics, which include various perspectives on what is just.<sup>38</sup> From a realist's perspective, one can imagine the ideal society but not predict it. Therefore, holding society accountable to such demanding moral standards becomes a naïve and ineffective undertaking.<sup>39</sup> Moreover, like individuals, institutions can also be unwilling to play their part. Therefore, there must be mechanisms through which institutions and their agents can be punished and for restitution to be effected.<sup>40</sup>

Rawls argues that Non-Ideal Theory presupposes Ideal Theory because until an ideal is realised, the Non-Ideal Theory lacks an objective reference point for its queries.<sup>41</sup> Ideal theorising sets out an ideal long-term goal for institutional reform, whilst Non-Ideal Theory opts to set out the steps for how this goal is to be achieved.<sup>42</sup> The elements and consequences thereof will be discussed later in this article.

33 As above.

34 G Sreenivasan 'What Is Non-Ideal Theory?' (2012) 51 *NOMOS: American Society for Political and Legal Philosophy* at 234.

35 As above.

36 As above.

37 Sreenivasan (n 34) 234.

38 Valentini (n 32) 7.

39 As above.

40 Sreenivasan (n 34) 235.

41 Valentini (n 32) 9.

42 Valentini (n 32) 8.

### 3 The Constitution as the ideal tool for freedom and nation-building

#### 3.1 The idealised social ontology

At the heart of constitutional optimism is an unwavering faith in the Constitution as the cornerstone of transformation in South Africa. The rights therein, so the argument goes, provides the necessary means to attain freedom for all persons. The Bill of Rights is fundamental to nation-building.<sup>43</sup> The Bill of Rights is the collection of values that empower citizens governed by laws to acquire justification for laws and decisions.<sup>44</sup> Furthermore, the Bill of Rights empowers citizens to be active participants in the making of laws and policies as well as to choose their leaders in a democratic election process.<sup>45</sup> The rights prescribed therein are not absolute, however, section 36 of the Constitution<sup>46</sup> sets out the requirements that ought to be satisfied to justify the limitation of a right.<sup>47</sup> Rights such as the right to freedom of expression contained therein, are the constitutional embodiment of its conception and support for a culture of individual self-realisation.<sup>48</sup>

The Constitution lays the nation's political foundation and prescribes the means to realise the values upon which a democratic society is to be built.<sup>49</sup> The vision articulated in the Constitution is purposed to heal the divisions of the past<sup>50</sup> and rectify material inequalities that exist in society, along with the power relations from which these inequalities stem.<sup>51</sup> Thus, constitutional optimists argue that the Constitution is a well-crafted document with immense potential to realise its vision and to be the catalyst for widespread transformation in South Africa.

43 D Davis 'Is the South African Constitution an obstacle to a democratic post-colonial state?' (2018) 34(3) *South African Journal on Human Rights* at 363.

44 E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* at 32.

45 Constitution of the Republic of South Africa, 1996.

46 As above.

47 The Constitution of the Republic of South Africa, 1996 Bill of Rights contains rights such as the right to freedom of Religion, Belief and Opinion, freedom of expression, freedom of association. Sec 36 also allows for prescribed limitations on the rights contained in the Bill of Rights.

48 Davis (n 43) 368.

49 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14(2) *South African Journal on Human Rights* at 248.

50 Albertyn & Goldblatt (n 49) 249.

51 Albertyn & Goldblatt (n 49) 250.

### 3.1.1 *Idealised human capabilities*

South Africa's democratic transition is significant because it symbolises a shift from a culture of authoritarianism and parliamentary sovereignty to a culture of justification and constitutional supremacy.<sup>52</sup> It is important to note that this culture of justifiability not only refers to the correctness of an administrative decision but also scrutinises the soundness of the process through which a decision is made.<sup>53</sup> When looking at the South African constitutional system, there is heavy reliance on judges' ability to apply the law in line with the values enshrined in the Constitution, which form the basis of our democratic society. Therefore, judicial decisions are a source of law-making.<sup>54</sup> Since that is the case, South Africa's democratic vision rests on a legal system composed of conscientious judges who strategically navigate themselves within the prescribed legal constraints in the pursuit of freedom and social justice.<sup>55</sup> In this way, judge's adjudication unlocks law-making and transformative adjudication unlocks legal practices that can be used to accomplish justice.<sup>56</sup> Through the exercise of conscientious interpretation and adjudication, the Constitution can be used to create a legal framework that supports transformative hopes and creates a society centred on democratic values, social justice and fundamental human rights.<sup>57</sup> This is referred to as transformative constitutionalism. Transformative constitutionalism, according to Klare, is 'an amorally and politically engaged long-term process of constitutional enactment, interpretation and adjudication dedicated to evolving the country's social and political institutions and power relations into an exhibition of democracy, social inclusion and egalitarianism'.<sup>58</sup> This way, transformative constitutionalism is an enterprise dedicated to large-scale change rooted in law.<sup>59</sup>

A restricted legal culture affects interpretative and adjudicative practices and, ultimately, legal and social development.<sup>60</sup> Therefore, advocating for more policy arguments that push the boundaries of law and policies, opening the door for social realities outside the parameters of legal practices, displays how a transformed legal culture translates into jurisprudential progress.<sup>61</sup> Inviting social realities into the arena of the courtroom, together with the

52 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14(1) *South African Journal on Human Rights* at 147.

53 Mureinik (n 44) 41.

54 Klare (n 52) 147.

55 Klare (n 52) 148.

56 Klare (n 52) 147.

57 Klare (n 52) 149.

58 Klare (n 52) 150.

59 As above.

60 Klare (n 52) 168.

61 Klare (n 52) 169.

simultaneous process of self-evaluation and reflection, will evolve judicial adjudicators' ability to interpret and apply the law conscientiously to effect social change.

### 3.2 Silence on the oppressive powers operative in society and how these affect social institutions and the realisation of the ideal

Kapur argues that human rights enterprises demand that the subjects of human rights submit to and adhere to their regulations to qualify to receive aid from human rights projects.<sup>62</sup> The necessity for these projects is often the consequence of the colonial actions of first-world countries.<sup>63</sup> However, these states pose as the salvation and corrective force for third-world countries, masking their role in creating third-world issues.<sup>64</sup> Furthermore, to save victims of human rights worldwide, human rights campaigns grossly misrepresent third-world issues and their causes in the global media by subscribing to gender and cultural essentialism.<sup>65</sup> This results in the perpetuation of negative gender, racial and cultural stereotypes, leading to a preference for Western culture whilst the issues that third-world nations face and their root causes remain largely unaddressed.<sup>66</sup> Furthermore, this discourse not only distorts reality but also eclipses their self-expression and conditions a perception of self that mirrors this global narrative of victimhood.<sup>67</sup> If I apply this argument to the South African context, I would argue that the Constitution operates similarly.

The Constitution has committed the nation and its legal system to focus their resources and intellect in pursuit of a better South Africa. Through this narrow lens, the Constitution prescribes what the injustices of the past were and what a just future should look like.<sup>68</sup> Democracy and social justice are primarily predicated on the assumption that more rights will equate to more freedom, thus breaking free from past oppression.<sup>69</sup> Legal enterprises are presented as a liberating force when they operate as a governance project aimed at ordering the lives of non-white South Africans.<sup>70</sup> Previously

62 R Kapur 'Human rights in the 21st century: Take a walk on the dark side' (2006) 28 *Sydney Law Review* at 685.

63 By first-world and third-world nations I mean developed and developing nations respectively.

64 Kapur (n 62) 671.

65 Kapur (n 62) 678.

66 As above.

67 Madlingozi (n 2) 211.

68 Madlingozi (n 6) 128.

69 R Kapur 'In the aftermath of critique we are not in epistemic free fall: Human rights, the subaltern subject, and non-liberal search for freedom and happiness' (2014) 25(1) *Law and Critique* at 28.

70 As above.

disadvantage groups are positioned as the subjects and beneficiaries of constitutional rights however, the constitution has not been able to effect large scale change where it counts (that being, the material reality of majority of black South Africans lives). In this way, constitutional rights are the instruments of a government responsible for producing the victims they claim to protect.<sup>71</sup> The constitutional project, based on the belief that more rights will equate more freedom, is a political project with political power carrying a brand of justice.<sup>72</sup> Constitutional optimists present the Constitution as the only mechanism for liberation and achieving justice; therefore, this bridge to the 'new South Africa' functions to preclude other means of emancipation and versions of justice.<sup>73</sup> Moreover, although the Constitution may claim openness and plurality, it lends itself to a particular script of freedom and liberation, effectively engaging in a political project under an apolitical guise.<sup>74</sup>

The worshiping of the Constitution creates a culture of legal fetishism and colonial unknowing.<sup>75</sup> The constitutional enterprise idealises a particular political vision and conception of a new nation, which has left colonial political and social structures undisturbed.<sup>76</sup> The centralising of the Constitution as the superlative mechanism for tackling social issues and injustices has resulted in the denial of alternative political visions and conceptions of justice.<sup>77</sup> It also overlooks persisting material inequalities and injustices lived by disadvantaged groups.<sup>78</sup> As the constitutional project remains constrained by the colonial power structures, we ought to seek alternative understandings of justice not rooted in Western modernity and white supremacy.<sup>79</sup> Critiques of the Constitution allow for reconceptualising historical events and inspire a variety of new articulations of counter-hegemonic theories and politics.<sup>80</sup> This will help remedy the existing consciousness of subaltern groups as subjects of Western history that acquire humanity through a struggle for legitimacy.<sup>81</sup> This legitimacy is acquired by positioning them as beings that have been afforded rights and freedoms.<sup>82</sup> Therefore, it appears that the rights contained in the Constitution seem to be aimed at making material realities tolerable for minorities but not liberating them.

71 Kapur (n 69) 28.

72 As above.

73 Kapur (n 69) 29.

74 Kapur (n 69) 30.

75 Modiri (n 15) 306.

76 Modiri (n 15) 307.

77 As above.

78 As above.

79 Modiri (n 15) 309.

80 Kapur (n 62) 42.

81 As above.

82 As above.

Williams admits that the concept of rights is obscure and vague and cannot empower itself.<sup>83</sup> Paper promises such as the American Civil Rights Act of 1964 have passed off illusions as gains.<sup>84</sup> Whilst recognising that black people have always been sceptical of the liberal mandate of constitutional rights, Williams asserts that although it would be correct to state that black people never believed in rights, it is equally correct to state that it was black people who believed in them, so much that they gave them life; held onto them and nurtured them.<sup>85</sup> However, despite enacting a liberal constitutional order coupled with an anti-discrimination legal order and socio-economic rights, black people still make up the majority of communities living in poverty in South Africa.<sup>86</sup> Although some may escape the shackles of poverty by improving their economic conditions, aspects of oppression such as powerlessness, marginality and cultural imperialism continue to affect black people regardless of their class.<sup>87</sup>

When one conceives poverty as a form of oppression and domination rather than an unintended mishap of policy and legal arrangements, it demonstrates that poverty is a logical outcome of a system that distributes benefits and opportunities following social power.<sup>88</sup> This is an inherent feature of a liberal democratic society. Racialised poverty is a symptom of the paper promises of the liberal constitutional order; it is a consequence of the constitutional optimist's ideal theorising. The idealist's vision thus becomes the object that is impossible to obtain since the Constitution is the product of political fantasy.<sup>89</sup> The anti-black politics of hope keep black people in pursuit of the ideal whilst widening the gap between historical reality and fantastical ideals.<sup>90</sup> Under the politics of hope, solutions do not exist, just the illusion or hope of a different order in the future.<sup>91</sup>

83 DA Bell 'Who's afraid of critical race theory' (1995) 4 *University of Illinois Law Review* at 900.

84 As above.

85 As above.

86 Modiri (n 17) 239.

87 As above.

88 Modiri (n 17) 239.

89 C Warren 'Black Nihilism and the Politics of Hope' (2015) 15 *CR: The New Centennial Review* at 221.

90 As above.

91 Warren (n 89) 223.

### 3.3 The conception of ideal social institutions

#### 3.3.1 *The counteractive or disadvantageous elements*

Lawrence disagrees with the idealist notion that law is written from a neutral perspective.<sup>92</sup> He claims that such a neutral perspective cannot exist because we all speak from a specific context, which he calls a positioned perspective.<sup>93</sup> This makes enterprises such as transformative constitutionalism fundamentally flawed because whatever consciousness an adjudicator may possess must still be applied within the legal constraints and thus operates subject to a particular political vision. This limits their ability to support specific perspectives. The law systematically and simultaneously privileges the perspectives that strengthen the ideal and purposefully ignores, silences or distorts oppositional voices that threaten the ideal.<sup>94</sup> Due to this, critical race theorists posit that racial problems are to be viewed from the perspective of the oppressed.<sup>95</sup>

Niebuhr states that the political contribution of the realist is his awareness of self-interest.<sup>96</sup> The human and political situation is accounted for in the national self-interest.<sup>97</sup> A statesman that acts in his official capacity carries a responsibility to his community, including the preservation of the many individuals he serves.<sup>98</sup> The claims of the nation that govern individuals and communities are partly justified, partly pretentious, assume concrete universality and present itself as objectively moral.<sup>99</sup> The nation positions itself as God.<sup>100</sup> The supreme Constitution is portrayed as a set of unconditional values and the defender of everything worthwhile in human history. Although this self-interest is qualified by a more significant loyalty to an ideal South Africa, the question remains: Whose ideal? Furthermore, what happens when the national interests clash or even act against the material welfare and interests of its citizens? Under idealist theorising, such occurrences are remedied by continued faithfulness to the ideal or are regarded as slight deviations from the ideal that are not worth theorising.<sup>101</sup>

Although the Constitution has been in effect for more than 20 years, Madlingozi argues that most black people still live in poverty

92 Bell (n 83) 901.

93 As above.

94 Bell (n 83) 902.

95 As above.

96 R Good 'The national interest and political realism: Niebuhr's "Debate" with Morgenthau and Kennan' (1960) 22(4) *The Journal of Politics* at 598.

97 As above.

98 As above.

99 Good (n 96) 599.

100 As above.

101 Mills (n 9) 168.

and face generalised marginalisation and social injustices.<sup>102</sup> Despite new public holidays and a new flag, the independence acquired has failed to produce more dignified conditions and effect tangible change in their lives.<sup>103</sup> This exposes social justice projects as an assimilationist tactic to preserve hierarchical structures.<sup>104</sup> The compromises made during the negotiations leading up to the enactment of the Constitution is the consequence of negotiating from a position of weakness.<sup>105</sup> Negotiating from such a position forces one to accept unacceptable compromises that ultimately lead to no real change as the colonial structure remains intact, albeit under a different name and with new agents.<sup>106</sup>

Madlingozi argues that in this idealised democratic South Africa, those still bound by the shackles of poverty are the forgotten, left behind on the bridge to the 'New South Africa'.<sup>107</sup> The forgotten are left to internalise that their misfortune and circumstances are not a product of historical oppression and injustice. Since the past is dead and gone, they are the issue with society.<sup>108</sup> At this point, it becomes evident that the ideal is more concerned with preserving the old order than with acknowledging how its philosophy harms its citizens' welfare.

Poverty cannot be simply apprehended as a material or economic condition but also carries psychological, symbolic and ontological dimensions.<sup>109</sup> Poverty not only infringes on socio-economic rights and deprives people of basic needs. It also discounts the humanity of the impoverished by structuring their lives as unreal and stripped of human teleology or presence either through oppressive practices such as apartheid, or systematic state negligence such as poverty and inequality.<sup>110</sup> This is what Butler refers to as derealisation.<sup>111</sup> In light of this, many theorists advocate for a language and vocabulary that can correctly articulate the experiences of black people in society in ways that speaks to how black people experience rights and society differently from white people.<sup>112</sup>

Although theoretical self-preservation is understandable and even expected, it should not mean that national self-interest is accepted as normative.<sup>113</sup> Niebuhr states that political justice agents that act

102 Madlingozi (n 6) 129.

103 M More 'Fanon and the land question in (post) apartheid South Africa' in *Living Fanon* (Springer, 2011) 173 at 4.

104 More (n 103) 3.

105 More (n 103) 10.

106 As above.

107 Madlingozi (n 6) 125.

108 Madlingozi (n 6) 126.

109 Modiri (n 17) 242.

110 Modiri (n 17) 243.

111 As above.

112 Modiri (n 17) 236.

113 Good (n 96) 601.



beyond their self-interest must acknowledge the interested motives that partly prompt their actions.<sup>114</sup> It has been argued that since the apartheid regime was abolished, this promotes the enterprise of justice in the country. However, as pointed out in this paper, such an argument is not without flaws. Indeed, the discriminatory and dehumanising legal system has *de jure* been abolished, but has any material change followed? Were all the parties involved in pursuing the democratic Constitution convinced their actions were just or were ulterior motives at play?

The apartheid regime did not end due to a severe moral crisis within the oppressive class. Rather, local and international pressure from economic sanctions, sports sanctions and civil uprising prompted their decision to enter negotiations and broker a peaceful resolution with the ANC leaders.<sup>115</sup> Factors such as the government's increasing foreign debt, trade sanctions, the weakening currency and international boycotts forced the oppressors to the negotiating table and commit to a democratic political system.<sup>116</sup> The ANC's conception of justice centred on a multiracial democratic society, was the most palatable conception for the apartheid government, as opposed to the African Nationalist brand adopted by parties such as the Pan African Congress.<sup>117</sup>

Over 20 years into the democracy, we clearly see the effects of the apartheid and ANC governments' negotiated approach to transition as the white minority still controls the country's wealth and economic power.<sup>118</sup> Therefore, the Constitution that presents itself as a symbol of freedom becomes a symbol of a neo-apartheid state, effectively sustaining South Africa as a white supremacist polity bound to the will of the conqueror with a distinctively European political history.<sup>119</sup> Modiri writes that the idealisation of the Constitution amounts to a colonial unknowing in that a particular narrative of South Africa's past and future effectively erases settler colonialism from historical and theoretical awareness.<sup>120</sup> As I stated previously, the Constitution serves as the 'Veil of Ignorance' from which the optimists set out the ideal South Africa. The Constitution is portrayed as an apolitical tool that will achieve the ideal and rectify past injustices. However, viewed through an abolitionist lens, the Constitution is a veil ignorant of its inability to realise the society it envisions. Furthermore, the Constitution functions as a veil that keeps

114 As above.

115 More (n 103) 6.

116 As above.

117 Madlingozi (n 6) 129.

118 As above.

119 N Dladla 'The liberation of history and the end of South Africa: Some notes towards an Azanian historiography in Africa, South' (2018) 34(3) *South African Journal on Human Rights* at 418.

120 Modiri (n 15) 306.

citizens ignorant of the fact that settler colonialism (and the effects thereof) remains unaddressed by reframing the root causes of South Africa's issues.

Neo-apartheid constitutionalism is the name given to the current political and legal systems that have reinforced South Africa's colonial structures since 1910.<sup>121</sup> The Constitution's contemporary discourse advocating social justice is complicit in perpetuating anti-black colonial structures.<sup>122</sup> Social relations inherited from colonialism remain ever so present as the Constitution fails to address the material realities of those left behind on the bridge to the new society while their humanity remains unrecognised.<sup>123</sup> Social justice is sold as a remedy to the historically marginalised, giving them recognition and incorporation without dismantling the institutions agreed upon in the elite compromise.<sup>124</sup> The controversial constitutional ideology and philosophy that sustains South African polity is challenged by Azanian critical philosophy, which, *inter alia*, is committed to national and individual freedom.<sup>125</sup> Azania is the name given to an entirely African polity with an alternative idea of nationhood, culture and justice premised on Africanist ideology and liberatory philosophy.<sup>126</sup> It is this ideology and philosophy upon which abolitionist theorising is predicated.

### 3.3.2 *Two competing ideals of justice*

Kennan and Morgenthau identify two types of idealists: the pretentious idealist and the perfectionist idealist.<sup>127</sup> The pretentious idealist is oblivious to the hypocrisy in the nation's claim to transcendent values locally, resulting in fanaticism.<sup>128</sup> The perfectionist idealist only sees the hypocrisy in the nation's claim to a universal principle, resulting in withdrawal.<sup>129</sup> It can be argued that constitutional optimism and constitutional abolitionism resemble these two types of idealists, respectively. When confronted with their political vision's hypocrisy, constitutional optimists opt to preserve their ideal, believing that continued loyalty will remedy its inconsistencies and injustices. Although this article argues that constitutional abolitionists exemplify more non-ideal theorising, since their discourse largely rejects the vision for the 'New South Africa' and is set on dismantling white supremacy, they also mimic the

121 Madlingozi (n 6) 125.

122 As above.

123 Madlingozi (n 6) 127.

124 Madlingozi (n 6) 128.

125 Dladla (n 119) 420.

126 Dladla (n 119) 417.

127 Good (n 96) 602.

128 As above.

129 As above.

perfectionist idealist. In addition to the phenomena of racialised poverty discussed above, this is further illustrated in the debate surrounding land ownership.

Fanon argues that land was the fundamental target of colonial conflict; thus, any venture towards liberation must aspire to restore the land to the indigenous people.<sup>130</sup> The conquest of South Africa has been categorised as brutal and relentless land dispossession by settler colonialists.<sup>131</sup> Land gives life and by denying the land, we deny the right to life. Such a violation being especially egregious when the original owner with the right to the land is the party that is denied.<sup>132</sup>

The Constitution restored the native's right to own land. Yet, it never restored ownership of the land, while simultaneously solidifying the property rights of the oppressor that founded such a right to the land through violent acquisition.<sup>133</sup> The Mandela republic carries no fundamental transformation as the land was compromised during the negotiation process and was never resolved.<sup>134</sup> Therefore, although the Natives Land Act<sup>135</sup> was abolished, it is essentially *de facto* still operative.<sup>136</sup> Constitutional optimists remain oblivious to this fact.

Through the negotiated settlement, the colonisers strategically ensured that although apartheid was *de jure* abolished, the extensive white economic, cultural and social power structures of white supremacy remained intact.<sup>137</sup> The compromises left the economic power in the hands of the white elite and afforded the ANC mere political power.<sup>138</sup> As a consequence of trying to attain power peacefully, significant compromises were made that secured the existing property relations, thus stunting the achievement of a revolution as the land question remains unresolved.<sup>139</sup>

These idealistic competing principles informed by different strains of thought concerned with analysing the connection between racial capitalism and consciousness embody South African society's fundamental contradictions.<sup>140</sup> Liberal legalism reproduces rather than resolves the basic contradictions.<sup>141</sup> Through liberalism's exercise of ideological power, justice becomes nothing more than the interest of the strongest, as Thrasymachus stated. Or as Geus put it,

130 More (n 103) 7.

131 As above.

132 More (n 103) 8.

133 More (n 103) 9.

134 As above.

135 Act 27 of 1913.

136 More (n 103) 9.

137 More (n 103) 7.

138 More (n 103) 6.

139 More (n 103) 7.

140 A Hunt 'The theory of critical legal studies' (1986) 6(1) *Oxford Journal of Legal Studies* at 20.

141 As above.

ethics is usually dead politics – the victor of a past conflict extending their hand to the present and future.<sup>142</sup> Those who favour liberal ideologies share an unwavering faith in freedom through reconciliation with authority.<sup>143</sup> This liberal authority sets limitations, yet, these chains do not seem to matter nor are they accepted for what is believed to be the ‘greater good’.<sup>144</sup> This begs the question: is the purpose of the South African liberal constitutional order to maximise the freedom possible for oppressed groups under Western authority? In other words, has the constitutional order deemed all sacrifices made in its vision and pursuit of freedom as inconsequential and immaterial to freedom? As Davis argues, it is incorrect to frame the Constitution as the reason for South Africa’s lack of development.<sup>145</sup> Instead, it is the presence of corruption within the government that hinders society.<sup>146</sup> To Davis, factors such as the colonial project are not the cause of South Africa not realising its Ideal. Therefore, one might infer that he views sacrifices such as land ownership as immaterial to pursuing freedom.

South Africa finds itself in a state of pseudo-independence as a consequence of pursuing independence through a negotiated settlement rather than through struggle, which would have ensured authentic independence.<sup>147</sup> Fanon argued that the Hegelian master/slave paradigm doesn’t completely apply to the white master and African slave colonial situation because under the racist colonial ideology and culture, Africans were not deemed as human.<sup>148</sup> Black humanity should be fought for by the black person by his own will and not conferred upon him by the mercy of his master.<sup>149</sup> Where recognition of black humanity is given without conflict, it amounts to nothing more than a gesture since the enslaved person has not attained independent self-consciousness and thus remains dominated by the master’s paradigm.<sup>150</sup> When the master sets the enslaved person free, this independence emerges externally and not from within the enslaved person. Thus external liberation does not lead to genuine liberation since the enslaved person did not act but was acted upon.<sup>151</sup>

Therefore, freedom is more than the absence of external obstacles and boundaries, it is premised on a liberated consciousness and should that consciousness be lacking, external freedom means

142 E Rossi ‘Is there such a thing as liberalism?’ (2013) at 8 available at <https://ssrn.com/abstract=2378348> (accessed 21 May 2020).

143 More (n 103) 9.

144 As above.

145 Davis (n 43) 372.

146 As above.

147 More (n 103) 1.

148 As above.

149 As above.

150 More (n 103) 2.

151 As above.

nothing.<sup>152</sup> This means that decolonisation requires the oppressed to win on two fronts: freeing the land from the coloniser on the physical level, and freeing the consciousness from a slave mentality.<sup>153</sup> Black people must free themselves psychologically if we hope to liberate ourselves politically.<sup>154</sup> This is because freedom cannot be given, it must be taken.<sup>155</sup> Decolonisation must achieve the complete replacement of one species of human with another and give birth to a new humanity.<sup>156</sup>

## 4 Conclusion

This paper has provided a critical analysis and juxtaposition of the various conceptions of justice presented by constitutional optimists and constitutional abolitionists and linked those to Ideal and Non-Ideal theories. Ideal theorising shows its benefits to society by setting standards that society ought to strive towards. This provides a basis for individuals and agents of society to be held accountable. This is the purpose and function of the Constitution. The idealising of the Constitution is a large part of why its enactment was viewed as a victory for oppressed groups and perpetuated the idea of justice as an ideal.<sup>157</sup> Since South Africa's constitutional vision of justice is predicated on the quest for a democratic nation founded on freedom, equality and human dignity, it is clear that constitutional optimism has accepted justice as an ideal that the nation strives toward using the Constitution and the values contained therein as the mechanism for achieving justice. The Constitution operates as the social contract to which the nation is accountable. As such, the optimists' approach supports the Ideal theory.

On the other hand, Non-Ideal theorising views justice as a response to injustices rather than justice as a grand ideal to strive towards. In the case of South Africa, constitutional abolitionists vehemently oppose the optimists' approach which they (abolitionists) argue has left the grave colonial injustices of the past unaddressed.<sup>158</sup> Abolitionists have criticised the Constitution for being ineffective in addressing and abolishing settler colonialism and white supremacy. Furthermore, they argue that enacting the democratic Constitution birthing the 'new South Africa' has created the false impression that South Africa is free from the effects of its oppressive past. Therefore,

152 As above.

153 As above.

154 More (n 103) 2.

155 More (n 103) 3.

156 More (n 103) 4.

157 S Hassim 'Decolonising equality: the radical roots of the gender equality clause in the South African constitution' (2018) 34(3) *South African Journal on Human Rights* at 344.

158 More (n 103) 7.

the Constitution is argued to be the glass ceiling prohibiting true justice from being realised.<sup>159</sup> This is why constitutional abolitionists call for abolishing the social contract that is the Constitution and call to explore a social order that rectifies colonial injustices. Consequently, constitutional abolitionism resonates with Non-Ideal Theory as it focuses on identifying past and present injustices that remain unchecked and contemplates the demands of justice proper.<sup>160</sup>

As previously mentioned, to ensure its perpetual sovereignty, the constitutional vision must eliminate alternative political narratives, particularly those that challenge it. This is exhibited in its claim that universality, supremacy, and democracy created an element of absolutism in line with the Idealist stance. This objectivity is threatened when the constitutional vision is put under critical scrutiny. Despite presenting themselves as apolitical, liberal constitutional rights carry a particular form of politics representing and monopolising the political space.<sup>161</sup> Whilst operating to dismiss other radical forms of political emancipation, rights discourse conveys its political mandate regarding justice, freedom and equality.<sup>162</sup> The abolitionists not only bring an alternative view to justice but one that directly threatens that of the constitutional optimists. The abolitionist theorists argue that the current South African society and economic climate contradict the idealistic notion that justice is based on objective universal morality. It suggests the opposite, that justice or the social contract that sustains the South African polity is premised on the values of those with the institutional power to influence the political vision of the nation. In doing so, they can create a society that satisfies their ideals.

159 Modiri (n 15) 309.

160 Mills (n 9) 168.

161 Modiri (n 17) 248.

162 As above.