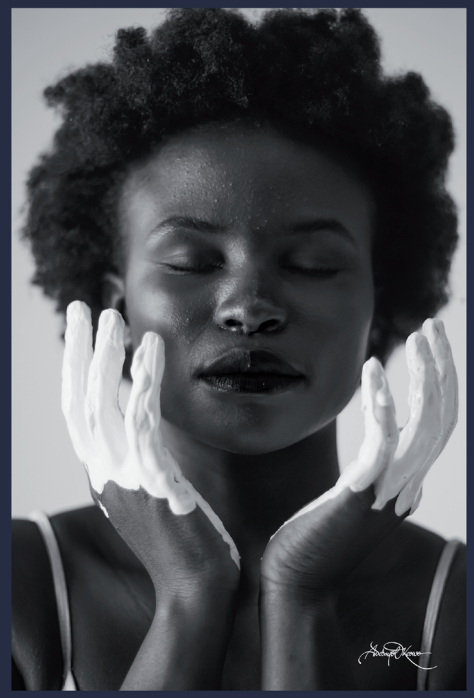

Photographs by Adebayo Okeowo

Pretoria University Law Press
PULP
www.pulp.up.ac.za

ISSN: 1998-0280

PRETORIA STUDENT LAW REVIEW

2023 • 17

PRETORIA STUDENT LAW REVIEW 2023 • 17 PULP

PRETORIA STUDENT LAW REVIEW
(2023) 17

Pretoria Tydskrif vir Regstudente
Kgatišobaka ya Baithuti ba Molao ya Pretoria

Pretoria University Law Press
PULP

2023

(2023) 17 Pretoria Student Law Review

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

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Printed and bound by:
Pinetown Printers, Durban

Cover:
Design by Adebayo Okeowo

To submit articles, contact:
https://www.up.ac.za/pretoria-student-law-review-pslr
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ISSN: 1998-0280

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https://doi.org/10.29053/pslr.v17i1

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EDITORS' NOTE

https://doi.org/10.29053/pslr.v17i1.5090

by Eric Geldenhuys

I am proud to present to you, the reader, the 17th annual edition of the *Pretoria Student Law Review* (*PSLR*) with its Special Section Gender and the Law. The Annual Edition deals with a multitude of topics which is a testament to the academic rigour and potential of the next generation of legal scholars. The *PSLR* continues to grow year-on-year and does so in tribute to the late Professor Christof Heyns, who was instrumental to the founding of our journal.

The *PSLR* fills a unique role in academia by granting young scholars the opportunity to publish their research and present their solutions to current legal and social issues. The *PSLR* is a stepping stone for young legal scholars to enter the world of scholarly research and to engage critically with content taught at universities. The journal continues to expand its reach across the borders of South Africa with this year's publication including articles written by authors from the United Kingdom and Kenya, alongside numerous South African authors. The various articles deal with deep-fakes and the right to participation in Kenya, digital currency, digital rights and film publication, the validity of customary marriages under South African law, patient autonomy in the United Kingdom, the role of ubuntu in South African corporate law, and transgender parenthood under the laws of England and Wales.

Thank you to our two senior editors, Marno Swart and MP Fourie, for their support, guidance, expertise and commitment. Both Mr Swart and Mr Fourie are to be commended for their dedication to the journal and the numerous hours, work and effort they put into training and assisting the editorial board. Together with Mr Swart and Mr Fourie, the *PSLR* management team was able to realise all the

goals we had set at the start of the term. Thank you to Mr Fourie for answering the call to re-join the journal while pursuing his LLM and working as a candidate attorney. A special thank you to Mr Swart for his love and passion for the *PSLR*. Mr Swart has been instrumental to the continued growth and success of the *PSLR* over the past three years. Mr Swart is knowledgeable, patient, a great teacher and mentor, and an even better friend to all those around him. We wish him all the best for his PhD candidacy at the University of Cambridge. To my predecessors, Adelaide R Chagopa and Marno Swart, thank you for standing by me and advising me throughout the term.

As each editor-in-chief before me, I did my best to build and grow the *PSLR*. The 2023 year brought both success and challenges. I am proud of the 2023 Editorial Board for its resilience and positivity, despite the challenges we faced. The *PSLR*'s management team's focus was to codify the solutions to the issues we faced and those preceding us. The *PSLR* Constitution, as amended in 2023, revised term limits and the internal governing structure. The amendments were written with authors, peer reviewers, editors, and incumbent editors in mind. I am certain that these amendments will ensure the independence and growth of the *journal*, increase its efficiency, improve its relations with authors and peer reviewers, and, at the end of the day, result in a journal that is recognised and revered for its quality and diverse contributions that tackle critical and current legal and socio-economic issues. Lastly, the *PSLR* Advisory Board was established in my tenure. The Advisory Board is composed of previous editors-in-chief and senior editors who will be available to advise, support and train the incoming and current Editorial Boards. The Advisory Board aims to bridge the gap between seasoned and new members by providing a mechanism whereby knowledge and skills transfer can occur without each new board having to face similar issues each year. In this way, the new Editorial Board strives to better focus and streamline on the journal's growth and daily running.

To our Guardians, Phemelo Magau and Yvonne Jooste, your unwavering support and eagerness to assist the Editorial Board is truly appreciated. Thank you for coming on board and getting 'your hands dirty' from the get-go. To our previous Guardian, Ilana le Roux, thank you. Ms le Roux's contribution and commitment to the *PSLR* over the years must not go unnoticed. Thank you to Charles Fombad, Lizette Hermann and Liesl Hager at the Pretoria University Law Press. Your assistance, guidance, positive encouragement, and dedication is most appreciated. Many thanks are extended to the Law Faculty of the University of Pretoria, our Dean, Elsabe Schoeman, and Deputy Dean, Charles Maimela.

To my parents, brothers, and friends, Aeglesia Caunhye and Lloyd Magee, thank you for your sacrifices, inspiration, love, and support. I

would not be who I am or where I am today would it not have been for your role in my life.

To the authors and future authors, you are the future attorneys, advocates, judges, and legal experts. I commend each and every one of you for your dedication to legal academia and the legal profession. Do not underestimate your voices, your opinions, and your solutions to what we face today. I encourage you, as aspiring legal professionals and academics, to keep on writing and researching what you are passionate about. Please visit our website for more information on the PSLR and on how to make a submission.

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

Eric Geldenhuys
Editor-in-Chief
Pretoria Student Law Review
2023

ANALYSING THE KENYA FILM AND CLASSIFICATION BOARD'S DISCRETION TO BAN AND ITS IMPACT ON THE REALISATION OF DIGITAL RIGHTS AND DIGITAL INCLUSION IN KENYA

https://doi.org/10.29053/pslr.v17i1.5091

by Alex Tamei

Abstract

This article critically examines the scope of discretion vested in the Kenya Film Classification Board (KFCB) under the Film and Stage Plays Act in regulating films and stage productions in Kenya. Specifically, the paper questions the absence of a clear standard or test for the determination of what constitutes 'decency' or 'public interest' in the KFCB's approval or disapproval of films and posters for public exhibition. Furthermore, the paper evaluates the compatibility of this discretionary power with the constitutional guarantee of artistic freedom of expression under Article 33 of the Kenyan Constitution. Finally, the paper explores the potential impact of KFCB's discretion on digital rights and digital inclusion in Kenya. By interrogating these issues, this paper seeks to contribute to the ongoing debates on the appropriate balance between regulation and protection of artistic expression, on the one hand, and the realisation of digital rights and digital inclusion, on the other.

1 Introduction

The Kenya Films and Classifications Board (KFCB) is a Kenyan state corporation founded in 1963 with the commencement of the laws outlined in the Films and Stage Plays Act of 1962 (the Act).[1] Its core mandate is to regulate the creation, broadcasting, possession, distribution and exhibition of films.[2] When KFCB came into being, it exercised its mandate by examining films and their creation, broadcasting, possession, distribution and exhibition of films by examining them for content, imposing age restrictions and giving consumer advice about various films.[3] The Act gave the board the power to approve or refuse to approve films and posters.[4] The Act also stated that approval is not to be granted to films that in the board's opinion, offended decency or are undesirable in the public interest.[5] In 2013, the Kenya Information and Communications Amendment Act of 2013[6] was enacted, granting the board the further mandate to monitor television stations and screen their content. The Communications Authority of Kenya published a programming code in 2015 that prescribed a watershed period (5:00am to 10:00pm) during which no content meant for adults was to be aired.[7] In 2018, the chief executive officer of the KFCB, Ezekiel Mutua, announced that he would take stern action against media organisations advertising a certain brand of condoms during the watershed period.[8] Earlier in 2016, The KFCB stretched the limits of their mandate further when they attempted to go after the organisers of the Project X party,[9] on the (unsubstantiated) grounds that they were part of an international syndicate that intended to utilise the event to shoot pornographic films.[10] Later in April of the same year, KFCB forced the Coca-Cola

1 N Adagala & D Muyonga 'A critical evaluation of the proposed Kenya's Film stage plays and publication Bill 2016' (2016) 3(12) *International Journal of Innovative Research and Advanced Studies*.
2 Film and Stage plays Act 34 of 1962 section 3.
3 Adagala & Muyonga (n 1).
4 Film and Stage plays Act 34 of 1962 section 3.
5 Film and Stage plays Act 6 of 2009 section 16.
6 The Kenya Information and Communications Amendment Act of 2013.
7 Kenya Communications Authority 'Programming Code for Free to Air radio and TV Stations in Kenya' 2015.
8 Kenya Film Classification Board 'KFCB warns on adult content during watershed hours,' 10 April 2018 https://kfcb.go.ke/kfcb-warns-adult-content-during-watershed-hours#:~:text=This%20is%20in%20response%20to,violate%20them%20because%20of%20money (accessed 17 August 2023).
9 Posters and announcement of the Project X party were doing rounds on the internet in 2016, posters and other media promised would be partygoers an atmosphere of pure debauchery; S Reporter 'Police ban planned project X party, organiser sought' *The Star* (Nairobi) 6 March 2016 at 12 https://www.the-star.co.ke/news/2016-03-06-police-ban-planned-project-x-party-organisers-sought/ (accessed 9 August 2023).
10 K24 TV 'KFCB announces that it has taken measures to ensure 'Project X' event is aborted' 7 March 2016 https://youtu.be/0Tj9hsBD-xE (accessed 9 August 2022).

company to scrap a kissing scene in one of their advertisements because it 'violated family values'.[11]

The seeming acquiescence of the state and the public as well as the lack of resistance to the acts of the KFCB has seen it transcend its position as a film regulatory board and instead incarnated in the form of the last line of defence against the 'great monster of immorality in the country'.[12] The effect of the KFCB's onslaught on immorality in the media has seen them perform actions that seem to be diametrically opposed to the freedom of artistic expression as provided by the 2010 Constitution of Kenya (the Constitution).[13] KFCB has been active in censoring far more than films; its crusade against the immoral has led the board to attempt to exercise its mandate on every possible form of artistic expression.[14] In 2016, KFCB ordered Google to pull down a song called *Same Love* because it advocated for gay rights in Kenya.[15] The KFCB in 2018 banned Marie Stopes advertisements on both television and radio on the grounds of allegedly incentivising abortion.[16] KFCB's CEO Ezekiel Mutua stated that the hospital, which is well known for advocacy for abortion care, was targeting teenage girls by providing them alternatives in situations of unwanted or unplanned pregnancies.[17]

KFCB has, over the years endeavoured to maintain a hard stance against any material that can be deemed obscene or indecent.[18] Unfortunately, KFCB has not made public the standard it uses. Without an inkling of an idea on the standards used by the KFCB, Kenyans have an ingrained image of KFCB as being tone deaf and

11 'Coca-Cola advert banned in Kenya over kissing scene' *BBC News* (Africa) 13 April 2016 https://www.bbc.com/news/world-africa-36035210 (accessed 9 August 2023).

12 JS Lupo, Introduction to Symposium on Pastoral Power, Clerical State, *Contending Modernities*, 21 September 2023 — https://contendingmodernities.nd.edu/blog/ (accessed 26 August 2023).

13 The Constitution of Kenya 2010 article 33(1)(b).

14 Article 19 'Kenya: Film Classification Board must stop stifling artistic expression' 29 September 2021 https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/ (accessed 26 August 2023).

15 S Njau 'Films board gives Google a week to take down gay song video' *Business Daily Africa* (Nairobi) 23 February 2016 https://www.businessdailyafrica.com/bd/corporate/companies/films-board-gives-google-a-week-to-take-down-gay-song-video-2109166 (accessed 9 August 2023).

16 B Otieno 'Fresh fry, Marie Stopes ads banned over sexual, abortion content' Business Daily 11 September 2018 https://www.businessdailyafrica.com/news/Pwani-Oil--Marie-Stopes-ads-over-sexual--abortion-content/539546-4754968-2k51tiz/index.html (accessed 19 August 2023).

17 H Kimuyu 'TV advert with "sex scenes and 'pro-abortion content" feels Mutua's wrath' *Nairobi News* (Nairobi) 12 September 2018 https://nairobinews.nation.africa/tv-advert-with-sex-scenes-pro-abortion-content-feel-mutuas-wrath/ (accessed 9 August 2023).

18 KFCB 'KFCB concerned over rampant sharing of inappropriate audio-visual content' 26 April 2023 https://kfcb.go.ke/kfcb-concerned-over-rampant-sharing-inappropriate-audio-visual-content (accessed 26 August 2023).

unchanging.[19] This begs several questions. What is the source of this code of 'African values' that the KFCB so fiercely protects? What is the effect of the KFCB's stance on complex issues such as reproductive rights and sexual minority rights on the perception of the public? How does the KFCB and its powers and mandates affect the realisation of digital rights and digital inclusion in Kenya? This article aims to answer these questions.

Digital rights are essentially a transference of rights people have in their material reality and the realisation of these rights in the context of new digital technologies.[20] With the rapid progress in technology, it has become integral that people enjoy the same rights in digital spaces as they do in their material reality.[21] Digital inclusion refers to the efforts made to ensure that all individuals and communities, regardless of their socio-economic status, have access to and can effectively use digital technologies.[22] This includes both access to technology and the development of digital skills. The goal of digital inclusion is to bridge the digital divide and promote equitable access to digital resources and opportunities for all.[23] The KFCB is uniquely placed to either help progress or completely derail the realisation of digital rights and digital inclusion. Banning of films advertisement or media because of controversial content can be seen as state legitimisation of perceptions manifesting as discrimination of women and other groups in online spaces such as sexual minority groups.[24]

In light of the above, this article seeks first to historicise film censorship in Kenya. Second, it seeks to reconcile the mandate of the KFCB with the provisions of the Constitution 2010. Finally, it seeks to highlight the digital landscape in Kenya and show the effect of KFCB's actions on the realisation of the ideal of digital rights and digital inclusion.

Accordingly, the article will trace the history of film and media censorship in Kenya from the pre-independence period to the current era in order to trace the source of modern policies and laws on film and media censorship. Thereafter it outlines the current digital landscape in Kenya and seeks to situate the powers and mandate of

19 Article 19, 'Kenya: Film classification board must stop stifling artistic expression' 29 September, 2021 — https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/ (accessed 26 August 2023).
20 Iberdrola 'Digital rights, essential in the digital age' https://www.iberdrola.com/innovation/what-are-digital-rights (accessed 26 August 2023).
21 As above.
22 UN roundtable on Digital Inclusion '*Definition of Digital Inclusion*'.
23 Christopher Tournis Gamble, Bridging the Digital Divide: The Imperative of Digital Inclusion, LinkedIn, 26 May 2023 — https://www.linkedin.com/pulse/bridging-digital-divide-imperative-inclusion-tournis-gamble/ (accessed 26 August 2023).
24 Article 19, 'Kenya: Film classification board must stop stifling artistic expression' 29 September, 2021 — https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/ (accessed 26 August 2023).

the KFCB within this landscape. Finally, it puts forward recommendations on streamlining the mandate of KFCB in order to accelerate the realisation of digital rights and inclusion.

2 Conceptual framework

The framework underpinning this article focuses on the intricate interplay between the state's authority in media regulation, the fundamental rights and freedoms of citizens, and their collective impact on digital rights and digital inclusion in Kenya. Within this framework, the article delves into the powers vested in the KFCB as granted by section 16 of the Films and Stage Plays Act, with a primary focus on their implications within the realm of media content regulation amid the emergence of digital technologies.

At the core of examination are two key variables. First, there's the concept of the state's police powers, referring to the governmental jurisdiction exercised through entities such as the KFCB, aimed at overseeing and managing media content for reasons spanning public decency, societal interests, and governance.[25] Second, citizens' rights and freedoms constitute a pivotal element. This encompasses the spectrum of individual rights assured by the Constitution, including the freedom of artistic expression outlined in Article 33 of Kenya's Constitution. The framework extends its scope to encompass digital rights, which involve the guarantee of equitable digital engagement, encompassing aspects like freedom of expression, data privacy, and unhindered access to digital platforms.

Moreover, the framework encompasses the notion of digital inclusion, characterised by endeavours to ensure universal access to and proficient use of digital technologies, thereby working towards narrowing the digital divide across socioeconomic strata. Embedded within the analytical approach is a multi-faceted perspective that amalgamates legal, historical, and digital rights considerations. This multifaceted lens is employed to scrutinise the matter from different angles, recognising the historical backdrop of media regulation while scrutinising how past colonial-era practices persist in molding the contemporary regulatory landscape.

Furthermore, the study delves into whether the KFCB's discretionary powers, which guide their assessment of 'decency' and 'public interest', align with the constitution's provisions safeguarding artistic freedom. The lens then broadens to assess the potential influence of these powers on digital rights and digital inclusion.

25 Jus Mundi, Police powers doctrine, 10 May 2023 https://jusmundi. com/en/document/publication/en-police-powers-doctrine#:~:text=The%20police%20powers%20doctrine%20provides,in%20accordance%20with%20due%20process (accessed 26 August 2023).

Central to the narrative is the exploration of the potential disconnect between conventional regulatory practices and the requisites of the digital era. This exploration leads to questions about the possible repercussions of the KFCB's actions. Could their practices impede digital rights by constricting information availability and curbing online expression? Similarly, the study probes whether these regulatory undertakings might inadvertently hamper digital inclusion, particularly for marginalised sectors of society.

3 Historical appraisal of film censorship laws and practices in Kenya

3.1 Colonial period

The curtain on film censorship in Kenya (British East Africa at the time) was raised in 1912 with the enactment of the Stage Plays and Cinematography Exhibitions Ordinance.[26] This law empowered licensing officers to inspect all films to ensure they did not contain any 'unpleasant' scenes and 'undesirable' ideas before issuing a license.[27] The law however did not definitively state what constituted these scenes and instead left it to the discretion of the licencing officers to decide what was acceptable and what was not.[28]

It is important to note that the government enacted the new law without appointing corresponding staff.[29] Qualification for license officer positions was open to police constables, as well as volunteer European women looking for something to do in their spare time.[30] Further, censorship officials received little to no training in film review or basic cinematograph techniques.[31] This situation led to an indiscriminate butchering of films in the colony, especially as female European and Indian censorship officials comprised the vast majority of board members.[32] They ruthlessly cut any and all scenes they believed to be unpleasant or put 'undesirable' ideas into the minds of Africans.[33] What bothered these licensing officials the most was depictions of nudity, especially that of white women. They maintained the belief that white women's bodies exemplified purity and virtue and that cinematographs depicting their nudity had a dangerous effect on 'coloured youth and men'.[34] So stringent were

26 S Kaunga Ndanyi 'Film censorship and identity in Kenya' (2021) 42(2) *Ufahamu: A journal of African Studies* 24.
27 East Africa Protectorate: Ordinances and Regulations, Vol XIV KNA, NRB.
28 Ndanyi (n 26) at 25.
29 As above.
30 Ndanyi (n 26) at 26.
31 Ndanyi (n 26) at 25.
32 Ndanyi (n 26) at 26.
33 As above.
34 Ndanyi (n 26) at 27.

they in any depiction of romance that even scenes of hand holding during courtship were struck out.[35] In addition to nude scenes, films with scenes that glamourised crime were also cut or banned.[36]

The unease of the settlers saw the colonial administration rounding up African children in urban centres, where surveilling black bodies was an easy undertaking.[37] Children were arrested for petty crimes — such as pickpocketing or loitering — that official believed induced the greatest cause for concern. A horrified colonial official noted that, 'a potential criminal gets "good ideas" from crime films, which he then tries to put into practice.'[38]

The Mau Mau rebellion, which began in the early 1950s and intensified in the 1960s, had a significant impact on censorship policies.[39] The British colonial government viewed the rebellion as a threat to their authority and a potential source of inspiration for anti-colonial activists. As a result, films that depicted the rebellion or criticised British colonial rule were often censored or banned outright.[40] The film *The Great Alaskan Mystery* (1944), attracted the scrutiny of colonial officials when they discovered — after issuing a license for public viewing — that the film had a scene depicting a staircase being blown up while a man was descending it.[41] Although it reached audiences in Kenya a decade after its release, the War Council recommended that films showing such scenes should not be exhibited at the *present time* (during the Mau Mau war).[42] The Kenyan struggle for independence, also influenced censorship policies. The British colonial government became increasingly sensitive to the portrayal of African culture in films as the struggle for independence gained momentum.[43] It was more likely to censor or ban films that celebrated African culture or depicted the struggle for independence.[44]

In 1963, Kenya gained independence, and the new government continued to regulate film content.[45] The 1963 Film Censorship Act replaced the previous regulations and established the KFCB as the government agency responsible for reviewing and approving films.[46]

35 Ndanyi (n 26) at 27.
36 As above.
37 As above.
38 As above.
39 Ndanyi (n 26) at 28.
40 As above.
41 As above.
42 CH Hartwell to Colonel Brown, Chairman, Film Censorship Board, Law and Order Stage and Cinematography, 1 April 1954 DC/KSM/19/155 KNA, Nairobi in SK Ndanyi 'Film censorship and Identity in Kenya' (2021) 42(2) *Ufahamu: A journal of African Studies* at 26.
43 Ndanyi (n 26) at 30.
44 As above.
45 Ndanyi (n 26) at 34.
46 Film and Stages plays Act 34 of 1962.

3.2 Post-independence and the new constitutional era

Following Kenya's independence in 1963, the government took over the responsibility of regulating film censorship. The Films and Stage Plays Act of 1962 replaced the previous British colonial regulations and established a government agency responsible for reviewing and approving films, the KFCB.[47] In 1968, the government amended the Film Censorship Act to give the KFCB broader powers to regulate film content.[48] The KFCB could now require filmmakers to obtain licenses, and it had the authority to ban films or order the deletion of certain scenes or dialogue deemed to be offensive or immoral.[49] During the 1980s (the Moi era), the KFCB's censorship policies became more restrictive. During Daniel Arap Moi's era in Kenya, state control and censorship extended beyond just the print and broadcast media. Film censorship, like other forms of media, was tightly regulated by the government.[50] The Moi administration exercised strict control over the film industry, leading to the censorship and restriction of films that were considered politically sensitive or critical of the government.[51]

Given the rampant governmental interference, a need for political reformation was warranted. This impetus was provided by, among other things, the decriminalisation of defamation, which marked the turning point of a new age of censorship as the government could not jail anyone saying something it did not like ,thus came moral censorship.[52] With the powers granted to the KFCB by the 1968 revision of the Act, grounds of censorship gyrated from political grounds to social ones.[53]

After the promulgation of the 2010 Constitution of Kenya, the KFCB continued to operate under the provisions of the new Constitution.[54] The KFCB's mandate to regulate film and stage play content is enshrined in the Constitution's Bill of Rights, which guarantees freedom of expression and information, and also allows for limitations in the interest of public morality, security, or order.[55]

47 Film and Stages plays Act 34 of 1962.
48 UNESCO *The African film industry: Trends, challenges and opportunities for growth* (2021) at 265.
49 Film and Stages Plays Act 38 of 1968.
50 George Ogola 'Moi and the media: How Kenyan Journalism suffered under his iron heel' *The Conversation,*18 February (2020) — https://theconversation.com/moi-and-the-media-how-kenyan-journalism-suffered-under-his-iron-heel-131681 (accessed 26 August 2023).
51 Ogola (n 50).
52 *Jacqueline Okuta & Another v Attorney General & Others* eKLR (2017).
53 SV Otieno 'Freedom of expression in Kenya: A study of section 16 of the Film and Stage Plays Act and its role in curtailing freedom of expression' unpublished LLB thesis, Strathmore University Law School, 2019 at 19.
54 Ndanyi (n 26) at 32.
55 The Constitution of Kenya, 2010 article 33.

Under the new Constitution, KFCB has continued to review and classify films and stage plays based on their content.[56] KFCB is required to adhere to the principles of good governance, including transparency, accountability, and public participation.[57]

In 2016, the KFCB proposed a bill known as Films, Stage Plays and Publications Act of 2016 ('the FSSP Act').[58] If passed, the FSSP Act would allow the board's compliance officers to raid, search, and seize equipment or materials from organisations perceived to be producing or exhibiting materials that they deem to have questionable content the bill however was not enacted in the end due to backlash and criticism from media stakeholders.[59] Later in 2018, the KFCB once again faced criticism for its decision to ban the film *Rafiki*, because it contained 'homosexual scenes' and was in contravention of the values of the Kenyan people.[60] The ban was challenged in court, and in a landmark ruling in the case *Wanuri Kahiu & another v CEO — Kenya Film Classification Board Ezekiel Mutua & 2 others*[61] the Kenyan High Court lifted the ban and ruled that KFCB had acted unconstitutionally and violated the filmmakers' right to freedom of expression.[62]

Another notable event was the KFCB's ban on the music video for the song *Takataka* by a Kenyan artist Alvindo in 2019.[63] The KFCB banned the video for its allegedly explicit and obscene content, including scenes of violence against women.[64] The ban sparked debate about the KFCB's role in regulating artistic expression and prompted criticism from some who argued that the board was overreaching.[65]

56 Ndanyi (n 26) at 32 &33.
57 The Constitution of Kenya, 2010 article 10.
58 Ndanyi (n 26) 30.
59 Editorial 'Bill on film, theatre and publications a threat to legal freedoms' *All Africa* (Kenya) 10 November 2016 https://allafrica.com/stories/201611110350.html (accessed 9 August 2023).
60 AFP 'Lesbian film ban "ridiculous" says Kenya Film Commission' *Nation Africa* (Nairobi) 23 May 2018 updated 28 June 2020 https://nation.africa/kenya/news/lesbian-film-ban-ridiculous-says-kenya-film-commission-47586 (accessed 9 August 2023).
61 *Wanuri Kahiu & another v CEO — Kenya Film Classification Board Ezekiel Mutua & 2 others* (2018) 313 eKLR.
62 AFP (n 60).
63 L Llado 'Kenyan government bans Taka Taka song' *Music in Africa* 17 April 2019 https://www.musicinafrica.net/magazine/kenyan-govt-bans-taka-taka-song (accessed 26 August 2023).
64 Llado (n 63).
65 W Osoro 'KFCB bans Alvindo's "Takataka" song, threatens to sue him' *The Standard* (Nairobi) 16 April 2019 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjJ2_CIrcn9AhXOiVwKHWiXC_wQFnoECBEQAw&url=https%3A%2F%2Fwww.standardmedia.co.ke%2Fentertainment%2Fnews%2Farticle%2F2001321254%2Fkfcb-bans-alvindos-takataka-song-threatens-to-sue-him&usg=AOvVaw3b0qu_-k4fjJtZYSC_-vPu (accessed 9 August 2023).

4 The current digital landscape in Kenya and the problematisation of the powers and mandate of the KFCB within this landscape

4.1 The digital landscape in Kenya

Digital technology has rapidly transformed the way people in Kenya live, work, and communicate.[66] The government of Kenya has recognised the importance of digital technology and has undertaken various initiatives to promote digital rights and digital inclusion in the country.[67] The digital rights and digital inclusion landscape in Kenya includes the legal framework, relevant statutes, policies by the government, and events bearing on digital rights and digital inclusion in the past decade.[68]

The Constitution of Kenya 2010 recognises the right to freedom of expression, which includes freedom of artistic creativity, academic freedom, and freedom of scientific research.[69] This constitutional provision has been used to safeguard digital rights, including the right to access information, freedom of the press, and freedom of assembly online.[70]

The legal framework for digital rights in Kenya includes the Access to Information Act ('the AIA'), which guarantees the right of access to information held by public and private bodies.[71] The AIA also provides for the creation of a public access to information database to promote transparency and accountability in government.[72] The Data Protection Act, which was passed in 2019, provides for the protection of personal data collected, processed, or stored in Kenya.[73] It also establishes the office of the Data Protection Commissioner, which is responsible for enforcing data protection laws in Kenya.[74]

66 F Ngila 'How technology changed lives of Kenyans in the past 10 years' *Business Daily* 07 January 2020 https://www.businessdailyafrica.com/bd/data-hub/how-technology-changed-lives-of-kenyans-in-the-past-10-years-2275412 (accessed 26 August 2023).
67 Ngila (n 66).
68 Londa 'Kenya digital rights and inclusion 2020 report: A paradigm initiative publication' 2021 — https://paradigmhq.org/wp-content/uploads/2022/06/Londa-Kenya-Report-2021-lr.pdf (accessed 26 August 2023).
69 The Constitution of Kenya, 2010 article 33.
70 Article 19 'Kenya: Harmonise legal framework on freedom of expression with ICCPR recommendations' 28 May 2021 https://www.article19.org/resources/kenya-harmonise-free-expression-with-iccpr-recommendations/ (accessed 26 August 2023).
71 Access to Information Act 31 of 2016.
72 As above.
73 Data Protection Act 24 of 2019.
74 Data Protection Act 24 of 2019 sections 5 & 8.

For the individual Kenyan citizen, these laws and protections mean that their digital rights are recognised and safeguarded by the government.[75] They have the right to access information held by public and private bodies, which promotes transparency and accountability in government.[76] The Data Protection Act protects their personal data from unauthorised access, ensuring their privacy and security online.[77] The establishment of the office of the Data Protection Commissioner provides a mechanism for citizens to report any violations of their data protection rights and seek redress.[78] Additionally, the Independent Electoral and Boundaries Commission ensures the integrity of the electoral process, including digital aspects, giving citizens confidence in the democratic process.[79] Overall, these laws and protections promote digital inclusion and empower individuals to exercise their digital rights in Kenya.

The government of Kenya has undertaken various initiatives to promote digital inclusion. One of the most significant initiatives is the Digital Literacy Program, which aims to provide every primary school child with a laptop and access to digital learning materials.[80] The program seeks to bridge the digital divide by ensuring that all children have access to digital technology and the skills necessary to use it.[81] The National Broadband Strategy aims to increase access to affordable broadband internet services throughout the country, with the goal of achieving 100% coverage by 2030.[82] In 2018, the Kenyan government proposed a social media tax, which would have required citizens to pay a fee to use social media platforms such as Facebook, Twitter, and WhatsApp.[83] The proposal was met with widespread criticism, and the government eventually dropped the plan.[84]

75 Data Protection Act 24 of 2019 section 5.
76 Constitution of Kenya 2010, article 35.
77 Data Protection Act 24 of 2019 section 3.
78 Data Protection Act 24 of 2019 section 5.
79 The Constitution of Kenya 2010, article 86.
80 'Digital Literacy Program (DLP)' Ministry of ICT https://ict.go.ke/digital-literacy-programmedlp/#:~:text=The%20government%20initiated%20the%20program,technology%20in%20the%20learning%20environment (accessed 9 August 2023).
81 Digital Literacy Program (n 80).
82 'National Broadband strategy 2018- 2023' Ministry of ICT https://www.ict.go.ke/wp-content/uploads/2019/05/National-Broadband-Strategy-2023-FINAL.pdf (accessed 9 August 2023).
83 Article 19 'Eastern Africa: New tax and licensing rules for social media threaten freedom of expression' 26 June 2018 https://www.article19.org/resources/eastern-africa-new-tax-and-licensing-rules-for-social-media-threaten-freedom-of-expression/ (accessed 26 August 2023).
84 The Finance Bill 2018.

In 2019, the Kenyan government launched a digital identification system, which uses biometric data to register citizens.[85] However, the system has been criticised for its potential impact on privacy and civil liberties.[86] In 2019, the government of Kenya launched the National ICT Policy, which provides a framework for the development of the information and communications tehcnology sector in the country.[87] The policy recognises the importance of digital rights and inclusion and seeks to promote the use of digital technology to improve service delivery, increase efficiency, and enhance the quality of life for all Kenyans.[88]

After the new regime came into power in the 2022 general election, emphasis on digitisation of government processes and services was enhanced significantly.[89] On June 13, 2022, the Government of Kenya set forth an ambitious ten-year Information and Communication Technology (ICT) Digital Masterplan, stretching from 2022 to 2032.[90] This visionary strategy was designed to align Kenya with global technological progress and empower its digital economy.[91] It revolved around four pivotal pillars: digital infrastructure, efficient digital services and data management, fostering digital skills, and nurturing an environment for digital innovation and entrepreneurship.[92]

Fast-forwarding to February 23, 2023, the government unveiled a bold initiative to revolutionise its public services through digitalisation, fostering a heightened sense of digital competitiveness.[93] The Ministry of Information Communication and The Digital Economy commenced the implementation of the Kenya National Digital Master Plan 2022-2032.[94] This comprehensive

85 A Macdonald 'Kenya mulls digital ID scheme and new uses for controversial huduma number' Biometric Update 16 January 2023 https://www.biometricupdate.com/202301/kenya-mulls-digital-id-scheme-changes-and-new-uses-for-controversial-huduma-namba#:~:text=The%20Huduma%20Namba%20biometric%20ID,been%20stuck%20in%20Kenya's%20parliament (accessed 26 August 2023).

86 Macdonald (n 85).

87 Ministry of ICT, 'National Information, Communications and Technology (ICT) Policy' November 2019.

88 Ministry of ICT (n 87).

89 Ministry of ICT, 'The Kenya national masterplan 2022 — 2032' April 2022.

90 International Trade Administration, 'Kenya launches new ten-year digital masterplan' 13 June 2022 https://www.trade.gov/market-intelligence/kenya-launches-new-ten-year-digital-masterplan (accessed 9 August 2023).

91 International Trade Administration (n 90).

92 Ministry of ICT, Innovation and Youth Affairs, 'The Kenya national digital master plan 2022-2032' https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf (accessed 9 August 2023).

93 C Suche & S Musa 'State to digitize all government services by June' *Kenya News Agency* (Mombasa) 23 February 2023 https://www.kenyanews.go.ke/state-to-digitize-all-government-services-by-june/ (accessed 9 August 2023).

94 H Abdullahi 'Ten-year national digital master plan unveiled' *Kenya News Agency* 12 April 2022 https://www.kenyanews.go.ke/ten-year-national-digital-master-plan-unveiled/ (accessed 26 August 2023).

roadmap embraced five core pillars, propelling the nation's digital transformation agenda: establishing robust digital infrastructure, optimising digital services and data management, equipping citizens with essential digital skills, promoting digital entrepreneurship, and ensuring policy and regulatory alignment.[95]

Continuing into May 24, 2023, President Ruto provided an encouraging update on the progress of this digital revolution.[96] Out of the entire spectrum of 7,000 government services, nearly 5,000 had already been seamlessly digitised, marking a significant leap toward efficiency and accessibility.[97] On June 5, 2023, Kenya took a strategic stride by launching the 'Huduma Kenya Digitalization Plan'.[98] Over the next three years, spanning from 2023 to 2026, this innovative roadmap aimed to enrich citizens' access to digital government services.[99] The plan encompassed the establishment of a centralised biometrics system, the integration of AI-powered service delivery methods, and the implementation of the Unified Personal Identification (UPI) platform, setting the stage for a more streamlined and efficient digital future.[100] On June 30, 2023, a monumental achievement was celebrated as President William Ruto unveiled an era of online accessibility to over 5,000 government services.[101]

However, despite the significant advancements in digitisation, the digital rights and digital inclusion landscape in Kenya has not existed without challenges. The government has also been criticised for its use of surveillance technology, including the installation of CCTV cameras in public spaces and the use of biometric data in the registration of citizens.[102]

This is the digital rights landscape in which this article situates the KFCB and its mandate. As seen above, the sphere of digital rights and inclusion has been and continues to progress towards a reality where every individual Kenyan citizen can exercise their rights as freely in

95 International Trade Administration (n 90).
96 K Ayodi 'President Ruto anks on digital revolution to create one million jobs' *Nacosti* 18 December 2022 https://www.nacosti.go.ke/2022/12/15/president-ruto-banks-on-digital-revolution-to-create-one-million-jobs/ (accessed 18 December 2022).
97 Office of the President 'President Ruto unveils online government services' https://www.president.go.ke/president-ruto-unveils-online-government-services/ (accessed 26 August 2023).
98 B Thomas-Aguilar 'Huduma Kenya: Digital transformation for social good' *VMware* (Kenya) 8 January 2019 https://news.vmware.com/esg/huduma-kenya-digital-transformation-social-good (accessed 9 August 2023).
99 Thomas-Aguilar (n 98).
100 Macdonald (n 85).
101 B Makong 'President William Ruto has disclosed that 5,000 of the country's 7,000 government services have been digitised so far, as the country races toward digitising all essential services' *Capital News* (Nairobi) 24 May 2023 https://www.capitalfm.co.ke/news/2023/05/5000-govt-services-digitized-so-far-president-ruto-says/ (accessed 9 August2023).
102 V Kapiyo & G Githaiga 'Is surveillance a panacea to Kenya's security threats' *Global Information Society Watch* 2014.

the digital realm as they would in the physical one. It is in this advancement towards a future characterised by digital equality that we situate the powers granted unto the KFCB by section 16 of the Film and Stage Plays Act and the manner (manifestly reminiscent of colonial precedent) that it has been wielding this power.

4.2 Problematisation of the KFCB'S Actions within this landscape

4.2.1 Lack of a clear standard

The first, and most apparent problem posed by the KFCB's mandate is the lack of a clear standard for what constitutes obscene material by the KFCB poses significant problems. Firstly, it leads to inconsistency in the classification of films and stage plays, resulting in confusion among filmmakers and the general public.[103] Secondly, it raises questions about the objectivity of the board in the exercise of its mandate, as the lack of clear guidelines provides room for personal biases and subjective judgments.[104] This is exhibited most explicitly by the slew of decisions made by [then] chairman of the KFCB, Ezekiel Mutua between 2015 and 2018 such as declaring gay lions a product of the erosion of current values.[105] Thirdly, it limits artistic freedom, as filmmakers may self-censor their work for fear of falling foul of the board's subjective standards.[106] Therefore, there is a need for the KFCB to provide clear guidelines for the classification of films and stage plays to enhance consistency and transparency in its decision-making processes.

There have been several instances where the lack of clarity in legislation has led to devastating consequences. One example is the prohibition of alcohol in the United States during the 1920s, commonly referred to as the 'Prohibition era'.[107] The 18th Amendment to the US Constitution attempted to ban the manufacture, sale, and transportation of alcohol, but it did not clearly define what constituted 'intoxicating liquors'.[108] This lack of clarity led to confusion and inconsistent enforcement, as well as the emergence of organised crime groups that smuggled and sold illegal

103 N Adagala & D Muyonga 'A Critical Evaluation of the Proposed Kenya's Film, Stage Plays and Publications Bill 2016' (2016) 3(12) International *Journal of Innovative Research and Advanced Studies*.
104 Adagala & Muyonga (n 103) 136.
105 'Kenyan officials want 'crazy gay' lions isolated' *CBC News* (Johannesburg) 09 November 2017 https://www.cbsnews.com/news/kenya-crazy-gay-lions-isolated-ezekial-mutua-film-classification-board/ (accessed 9 August 2023).
106 Adagala & Muyonga (n 103) 134.
107 History.Com editors 'Prohibition' 29 October 2009 https://www.history.com/topics/roaring-twenties/prohibition (accessed 9 August 2023).
108 History.Com editors (n 107).

alcohol.[109] The prohibition also led to an increase in public health problems, including the consumption of dangerous bootleg alcohol, which resulted in thousands of deaths.[110]

Another example is the war on drugs initiated in the United States during the 1970s.[111] The laws and policies enacted to combat drug use and trafficking did not provide clear guidelines on how to differentiate between drug users and drug traffickers, leading to the disproportionate incarceration of people of colour for drug-related offenses.[112]

KFCB's lack of clear standards limits artistic freedom and expression as filmmakers may self-censor their work for fear of falling foul of the board's subjective standards. This issue has been a major concern for Kenya's film industry, which seeks to promote artistic expression while complying with the KFCB's mandate to protect the public from harmful content.[113]

To address this problem, KFCB needs to provide clear guidelines for the classification of films and stage plays to enhance consistency and transparency in its decision-making processes. The guidelines should be based on the Kenyan Constitution, which guarantees freedom of expression, creativity, and cultural diversity while also protecting citizens from harmful content.[114]

4.2.2 Balancing national values against morals vis a vis the Constitution of Kenya

The Constitution of Kenya outlines the national values and principles of governance that should guide the actions of all public entities, including the KFCB.[115] However, the Constitution does not define specific moral standards that should be applied in determining what constitutes obscene material. The problem with the KFCB asserting an ethereal standard of morality is that it can and leads to arbitrary and inconsistent application of the law.

It is clear that the regulation of obscenity is fraught with complex and often contradictory motives and purposes. While some

109 History.Com editors (n 107).
110 As above.
111 History.Com editors 'War on drugs' 17 December 2019 https://www.history.com/topics/crime/the-war-on-drugs (accessed 26 August 2023).
112 Drug Policy Alliance 'The Drug War, Mass Incarceration and Race' June 2015 https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf (accessed 9 August 2023).
113 Article 19 'Kenya: Film Classification Board must stop stifling artistic expression' 29 September 2021 https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/ (accessed 26 August 2023).
114 The Constitution of Kenya, 2010 article 33.
115 The Constitution of Kenya, 2010 article 10.

proponents of regulation may argue that obscenity poses a threat to public safety, others may seek to prevent the production and consumption of such materials altogether.[116] Furthermore, the impact of obscenity on human behaviour remains the subject of intense debate among psychologists, and the constitutionality of obscenity laws cannot be determined solely on the basis of their supposed effects on behaviour.[117]

Yet amidst this confusion, it is worth noting that the regulation of obscenity is typically motivated by a belief in the immorality of such materials, and a desire to protect individuals from the supposed corrupting influence of such content.[118] While obscenity may not be considered a crime in the strict legal sense, it is often viewed as a sin that undermines the character and morals of individuals, and threatens the social fabric of the community as a whole.[119] Indeed, this belief in the corrupting influence of obscenity is a driving force behind the regulatory efforts of many communities around the world.[120]

This dynamic is particularly evident when the KFCB is studied..[121] Section 16 of the Film and Stage Plays Act provides KFCB with broad powers to classify and restrict access to films and plays that are deemed to be 'contrary to public interest' or 'likely to cause harm to children.'[122] However, the exact criteria for what constitutes 'contrary to public interest' or 'harmful' content remains subject to varied interpretation, and the KFCB has often been accused of overstepping its mandate in its efforts to regulate the content of films and stage plays.[123]

Ultimately, the regulation of obscenity raises important questions about the relationship between morality, law, and social norms.[124] While many may believe that obscenity is inherently immoral and harmful, it is important to recognise that these beliefs are not universal, and that the imposition of moral standards through legal regulation can be fraught with difficulty.[125] Instead of focusing solely on moral concerns, it is crucial that lawmakers and regulators consider the broader national values and social norms that underpin the regulation of obscenity and other forms of expression.[126]

116 L Hekin 'Morals and the Constitution: The Sin of Obscenity' (1963) 63(3) *Columbia Law Review* at 139.
117 Hekin (116) at 157.
118 Hekin (n 116) at 393.
119 Hekin (116) at 137.
120 Henkin (n 116) 393.
121 Film and Stage Plays Act 34 of 1962 section 15.
122 Film and Stage Plays Act 34 of 1962 section 16.
123 *Wanuri Kahiu & Another v CEO – Kenya Film Classification Board Ezekiel Mutua & Others* [2020] eKLR.
124 Henkin (n116) at 413.
125 As above.
126 Henkin (n116) at 414.

This lack of clarity can create confusion and result in the censorship of content that is not necessarily obscene, but which may offend the personal sensibilities of certain individuals within the KFCB or the wider society.[127] It can also lead to the censorship of content that has social, political, or artistic value, thereby impeding the free expression of ideas and opinions.[128]

It is important to reiterate that the Kenyan Constitution focuses on national values as enshrined in article 10, rather than morality.[129] As such, legislation should be based on these national values rather than individual moral beliefs. This approach would ensure that regulations are in line with the country's aspirations and values, rather than the subjective opinions of a few individuals or groups. By aligning regulations with national values, the government can effectively regulate obscenity without suppressing artistic expression or violating individual rights.

4.2.3 The KFCB mandate and the national identity of the people of Kenya

The Constitution of Kenya recognises and upholds the rights of diverse communities, including ethnic minorities, indigenous peoples, sexual minorities, and other minority groups.[130] These communities have a right to freedom of expression, which encompasses the ability to seek, receive, and impart information and ideas, regardless of the medium used.[131] The actions of the KFCB often threaten the rights of these communities. For example, the KFCB has attempted to ban content that portrays LGBTQ+ individuals.[132] Such actions not only discriminate against sexual minorities but also disregard their status as members of Kenya's diverse populace.

Indigenous peoples and ethnic minorities are also at risk of having their ways of life affected by the actions of the KFCB. For instance, KFCB may seek to regulate content that depicts cultural practices that it deems immoral or obscene. However, these practices may be an integral part of the identity and culture of these communities. By seeking to regulate such content, KFCB may be disregarding the cultural rights of these communities.

This approach is particularly problematic in the digital age, where the lines between traditional media and new forms of digital media are increasingly blurred. The KFCB's efforts to regulate online content have been criticised by digital rights and digital inclusion

127 Media Council of Kenya 'Media Sector Legislative Review' 2021 at 23.
128 *WK & Another v CEO – KFCB & Others* (2020) eKLR.
129 The Constitution of Kenya 2010 article 10.
130 The Constitution of Kenya, 2010 Preamble.
131 The Constitution of Kenya, 2010 article 33.
132 *Eric Gitari v NGO's coordination board* eKLR (2013).

advocates, who argue that such regulation is often used to limit fundamental rights and freedoms.[133] For instance, KFCB's adamant persecution of LGBTQ material is seen as discriminatory and ignores the fact that sexual minorities are part of Kenya's diverse populace. This was highlighted in the case of *Eric Gitari vs NGO coordination board,*[134] where the Supreme Court held that sexual orientation cannot be used as a ground for discrimination.

To promote a diverse and inclusive digital environment, it is important for the KFCB to exercise its mandate in a manner that respects the constitutional principles of diversity and identity. This can be achieved by engaging with stakeholders and consulting widely before making decisions that affect the creative industry. Failure to do so not only jeopardise the utilisation of the digital realm by different groups of people but also impedes their digital rights.

5 Conclusion and the way forward

Over the past decade, the issue of film censorship has been a topic of much debate and scrutiny.[135] This article aimed to contribute to this ongoing conversation by examining the impact of film censorship on digital rights and digital inclusion in Kenya. The article is premised on the conceptual framework that film censorship can have a negative impact on freedom of expression and access to information. This framework emphasises the importance of protecting these fundamental rights, particularly in the digital age where access to information and the ability to freely express oneself are essential to democratic participation and the advancement of knowledge and innovation.

To explore this issue, the article focused on the role of KFCB and its discretionary powers in regulating the production, distribution, and exhibition of films, as well as monitoring online content, including social media platforms. The paper highlighted that KFCB's mandate as per Section 16 of the Film and Stage Plays Act grants it the power to seize and destroy content deemed offensive. However, this regulatory power must be balanced with the fundamental rights to free expression, access to information, and privacy. The board's power to restrict online content and its subjective interpretation of what constitutes 'offensive material' poses a threat to freedom of expression and the right to access information. Moreover, the lack of transparency and accountability in the decision-making process of the

133 Article 19 'Kenya: Film Classification Board must stop stifling artistic expression' 29 September 2021 https://www.article19.org/resources/kenya-kfcb-stop-stifling-artistic-expression/ (accessed 26 August 2023).
134 *NGOs Co-ordination Board v EG & Others; Katiba Institute* (2023) KESC 17 KLR.
135 Ndanyi (n 26) at 23.

board undermines the principles of digital inclusion, which require that all individuals have equal access to digital resources and opportunities.

To address these issues the author recommends the following:

(a) That the discretion of the KFCB to ban be based on the national values espoused in Article 10 of the Constitution.
(b) The creation of a platform for dialogue between film or content creators and the KFCB to ensure that both sides are on the same page regarding developments in the media industry.
(c) A review of the Kenya Film and Stage Plays Act to ensure that it is aligned with the international human rights standards.
(d) The KFCB should collaborate with stakeholders in the digital rights and digital inclusion community to develop guidelines for the regulation of online content that promote freedom of expression while protecting vulnerable groups from harm.
(e) That researchers continue investigating the impact of media regulation on the realisation of digital rights and digital inclusion, especially the role of content regulation bodies in shaping the digital landscape.

In conclusion, the article argues that the KFCB's regulatory practices must be reformed to align with the principles of digital rights and digital inclusion. This requires a shift away from the colonial-era model of media regulation and the adoption of a more democratic and inclusive approach to media governance. By implementing the recommended actions, Kenya can promote a diverse and inclusive digital environment that upholds fundamental human rights.

THE REGULATION OF INITIAL COIN OFFERINGS: A COMPARISON OF THE SOUTH AFRICAN INTERGOVERNMENTAL FINTECH WORKING GROUP POSITION PAPER AND THE EUROPEAN UNION EUROPEAN SECURITIES AND MARKETS AUTHORITY ADVICE ON INITIAL COIN OFFERINGS AND CRYPTO ASSETS

https://doi.org/10.29053/pslr.v17i1.5092

*by Thabiso Ramorara**

Abstract

The advent of crypto assets has led to creative alternative ways of raising capital for emerging businesses through token sales, aptly termed Initial Coin Offerings or ICOs. The crypto asset market has experienced a period of high market growth in the past decade due to ICOs — a relatively new phenomenon in the financial markets — which has seen investors invest their hard-earned capital despite the information asymmetry and associated risks. The lack of regulation in ICOs and crypto assets, in general, has prompted regulators to take steps towards regulation. This submission explores how South Africa proposes to regulate ICOs and provides a comparison with the European Union's approach towards regulating ICOs by paying specific attention to the governmental papers published in the respective jurisdictions.

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1 Introduction

Cryptocurrencies or crypto assets have disrupted the way in which the world formerly transacted within the context of commerce.[1] From its origins as decentralised digital currency such as Bitcoin,[2] to products that serve multiple purposes within the financial and securities market such as smart contracts.[3] Initial Coin Offerings (ICOs) is another phenomenal aspect that has emerged as a result of innovation within the crypto assets landscape.[4] As is the case with emerging technologies, policymakers have taken up the task of creating laws governing ICOs. This article explores how ICOs are to be regulated in South Africa, and how it compares with the regulation of ICOs in the European Union (EU).

This article will begin with a rudimentary discussion on the concept of blockchain technology and crypto assets. An explanation of the intricacies of blockchain technology and its role in the decentralised nature of crypto assets will be proffered. Next, the concept of ICOs will be explored. The definition, as well as the process of ICOs will be discussed as a capital raising mechanism. The features and challenges of ICOs will be highlighted. In the third section of this article, the South African regulatory approach to ICOs will be explored through an analysis of the Crypto Assets Regulatory Working Group (CAR WG) position paper. Thereafter, a discussion of and analysis of the EU jurisdiction will be presented focusing mainly on the directives and regulations proposed by the European Securities and Markets Authority (ESMA Advice). In the final section, this article draws a comparison between the regulatory approach adopted by the EU with the recommendations presented by the CAR WG position paper in South Africa.

2 Blockchain and cryptocurrencies or crypto assets

Initial Coin Offerings (ICOs) are a novel way for businesses to raise capital. They offer expediency and efficiency in the process of generating investor capital for companies, usually start-ups.[5] This, of

1 E Reddy & V Lawack 'An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies' 31(1) *Mercantile Law Journal* (2019) 5.
2 LP Nian & DLK Chuen *Handbook of digital currency* (2015) 11.
3 A Badari & A Chaudhurry 'An overview of Bitcoin and Ethereum white-papers, forks, and prices' 11 May 2021 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841827 (accessed 20 October 2023).
4 R Robinxo 'The new digital wild west: Regulating the explosion of initial coin offerings' 85(4) *Tennessee Law Review* (2018) 924.
5 WA Kaal 'Initial Coin Offerings: The top 25 jurisdictions and their comparative regulatory responses' (2018) 1 *Stanford Journal of Blockchain Law & Policy* 41.

course, entails that the ICO process provides leverage due to requiring minimal cost, providing large sums of capital rapidly, and issuing investors with tokens instead of equity.[6] To fully understand what ICOs entail, their purpose, function and utility, and a basic understanding of cryptocurrencies or crypto assets and blockchain technology, it is necessary to explain the technology.

Blockchain technology encompasses a network of computers that supports a platform known as digital ledgers, where cryptocurrency transactions are recorded.[7] Blockchain platforms provide end-to-end encryption which is only accessible to users on a peer-to-peer scale, who have been granted access to the crypto assets available on the blockchain.[8] Blockchain technology is central to the creation of crypto assets. Some of the most notable crypto assets created through blockchain technology are Bitcoin and Ethereum.[9] Crypto assets can be classified as virtual or digital currencies that are transacted and validated on an encrypted peer-to-peer scale, known as cryptography.[10] These digital currencies operate and are recorded on a blockchain — a distributed ledger technology ('DTL').[11]

Blockchain technology is decentralised and this, in essence, means that the crypto assets issued are unregulated.[12] Unlike fiat currency, crypto assets are not minted or issued by an intermediary such as the central bank and consequently, do not enjoy the status of legal tender in varying jurisdictions.[13] Crypto assets were introduced as an innovative development meant to create a new decentralised digital currency that would function as a mode of exchange.[14] However, its decentralised characteristic suggests that it is extra-legal and may, therefore, be prone to illicit use.[15] The emergence of cryptocurrencies has been met with apprehension, with some

6 Kaal (n 5) 41-42.
7 BV Adrichem 'Howey should be distributing new cryptocurrencies: Applying the Howey Test to mining, airdropping, forking, and Initial Coin Offerings' (2018) 20(2) *Columbia Science and Technology Law Review* 391.
8 AV Maese & others 'Cryptocurrency: A primer' (2016) *The Banking Law Journal* at 468-469.
9 Ibero-American Institute for Law and Finance 'Working Paper Series 4/2018 The Law and Finance of Initial Coin Offerings' (2018) 2.
10 NJ Sherman 'A behavioral economics approach to regulating Initial Coin Offerings' (2018) Georgetown *Law Journal Online* 18.
11 As above.
12 JD Moran 'The impact of regulatory measures imposed on Initial Coin Offerings in the United States market economy' (2018) 26(2) *Catholic University Journal of Law and Technology* 217.
13 NH Hamukuaya 'The development of cryptocurrencies as a payment method in South Africa' (2021) 24 *Pioneer in Peer-Reviewed, Open Access Online Law Publications* 2.
14 C Gamble 'The legality and regulatory challenges of decentralised crypto-currency: A western perspective' (2017) 20 *International Trade and Business Law Review* 347.
15 F Ukwueze 'Cryptocurrency: Towards regulating the unruly enigma of Fintech in Nigeria and South Africa' (2021) *Pioneer in Peer-Reviewed, Open Access Online Law Publications* 2.

countries issuing outright bans, while other countries have kept an open mind and published governmental position papers in an attempt to integrate and regulate the crypto assets already circulating within their jurisdictions.[16] ICOs play a critical role in the crypto assets market and its overall impact on financial markets.

3 Initial coin offerings

3.1 Defining Initial Coin Offerings

An ICO can be described as a capital raising process, initiated by a start-up seeking capital, where new digital coins are generated and offered for sale to the general public.[17] The offering of tokens is facilitated on a blockchain platform.[18] Tokens are usually offered to investors in exchange for money or other crypto assets.[19] The ICO process emulates that of an Initial Public Offering ('IPO'), where a company issues equity in the form of shares to the public for a fraction of ownership of a company.[20] In the case of ICOs, token-holders own a fraction of the start-up's blockchain project, which offers investors or token-holders some benefits such as access to certain features on the blockchain project.[21] The types of tokens generated in ICOs can either be security tokens or utility tokens.[22] The former is synonymous with equity shares which confer upon token-holders ownership rights, and the latter refers to tokens which grant token-holders access to blockchain features as alluded to above.[23]

By far, one of the most successful ICOs is Ethereum's 2014 ICO. Ethereum sold Ether tokens to the value of $18 million,[24] and, as of 3 April 2023, possesses a market capitalisation of $221,62 billion.[25] Lockaby proffers an explanation of the ICO process using an analogy describing Ethereum as a virtual amusement park.[26] To enter the

16 The Law Library of Congress 'Regulation of cryptocurrency in selected jurisdictions: Argentina, Australia, Belarus, Brazil, Canada, China, France, Gibraltar, Iran, Israel, Japan, Jersey, Mexico, Switzerland' 2018.
17 Moran (n 12) 215.
18 As above.
19 F Steverding & A Zureck 'Initial Coin Offerings in Europe – the current legal framework and its consequences for investors and issuers' 7 April 2020 https://dx.doi.org/10.2139/ssrn.3536691 (accessed 26 February 2023).
20 J Draho *The IPO decision: Why and how companies go public* (2004) 1.
21 CD Lockaby 'The SEC rides into town: Defining an ICO Securities safe harbor in the cryptocurrency wild west' (2018) 53(1) *Georgia Law Review* 342.
22 Moran (n 12).
23 As above.
24 CoinDesk 'Sale of the century: The inside story of Ethereum's 2014 premine' https://www.coindesk.com/markets/2020/07/11/sale-of-the-century-the-inside-story-of-ethereums-2014-premine/ (accessed 3 April 2023).
25 YCHARTs 'Ethereum Market Cap (I:EMC)' https://ycharts.com/indicators/ethereum_market_cap#:~:text=Ethereum%20Market%20Cap%20is%20at,47.67%25%20from%20one%20year%20ago (accessed 3 April 2023).
26 Lockaby (n 21) 342.

Ethereum amusement park, you would have to purchase Ether tokens as an entry ticket.[27] However, to enjoy some of the rides — accessing applications provided on the platform — you have to acquire tokens specifically required for those particular rides, by exchanging the Ether tokens in your possession.[28]

IPOs require companies to conduct the capital raising process through an investment bank that serves as an intermediary, where a prospectus that is compliant under the securities or stock exchange listing requirements and company laws, is prepared for investors.[29] A prospectus provides disclosure of essential information that is related to the company 'going public'.[30] In contrast, ICOs do not require a prospectus to be issued. A white paper which details the uses and function of the tokens is instead provided. White papers serve a similar purpose as a prospectus in that they aim to persuade investors to invest in the company or the blockchain project.[31] However, it is not mandatory for companies to furnish a white paper to prospective token-holders.[32]

ICOs operate in an unsupervised and unregulated market, where issuers have carte blanche to raise large, unprecedented sums of capital while employing cost-efficient and uncomplicated methods.[33] The non-regulation of ICO is what makes its position precarious when it comes to protecting investors and the integrity of financial markets. It is common parlance that the absence of legal certainty means the absence of legal enforceability.[34] ICOs and crypto assets generally present a host of issues. These issues may range from market volatility, misrepresentation on white papers, fraud, hacking, and the impossibility to conduct proper due diligence.[35] Ways in which various governmental bodies across the globe attempt to regulate ICOs are further explored in this article.

3.2 The Initial Coin Offering Process

As stated above, ICOs entail an offering of crypto assets or digital tokens to the general public as an attempt to raise capital for an entity, which includes the issue of a white paper. As discussed, as

27 Lockaby (n 21) 345.
28 As above.
29 Ibero-American Institute for Law and Finance (n 9) 15-16.
30 CM Dailya et al 'Investment Bankers and IPO pricing: Does prospectus information matter?' (2005) 20 *Journal of Business Venturing* 94.
31 F Steverding & A Zureck (n 19).
32 As above.
33 As above.
34 J Hall 'Nulla poena sine lege' 47(2) *The Yale Law Journal* (1937) 165.
35 B Custers & L Overwater 'Regulating Initial Coin Offerings and cryptocurrencies: A comparison of different approaches in nine jurisdictions worldwide' (2019) 10(3) *European Journal of Law and Technology* 5.

opposed to a prospectus, which is subject to regulatory provisions, a white paper is not regulated by any legal prescriptions.

This contributes to the perilous state of misleading content often presented by token issuers in white papers.[36] Ideally, white papers are supposed to articulate well-formulated solutions to bridge information gaps regarding the operation of ICO projects to prospective investors.[37] Kasatkin provides the legal provisions that must be present in white papers as relating to compliance with particular legal prescriptions such as anti-money laundering legislation, arbitration, legal rights conferred on tokens (depending on their classification e.g. security tokens), contractual liability of issuers, terms of sale, and restrictions on participants.[38]

An essential feature of ICOs is the blockchain platform that is used to host the project. The initial step to launching an ICO project is selecting the blockchain platform the project will be facilitated on.[39] Entities will develop a blockchain platform on which they will launch their tokens, or they may elect to utilise an already established blockchain, such as the popular Ethereum, on which numerous ICOs have been launched.[40]

Using an already existing platform provides an advantage in that issuers will not be required to exert substantial effort in developing the blockchain as the infrastructure is readily available. The code in the blockchain is usually posted to the general public on a static hosting service website called Github, where coders are free to provide their input about the code.[41] This creates an opportunity to have the blockchain fixed and improved before it is launched. In essence, this may positively impact the capital raising of the ICO.[42] ICOs may conduct a pre-ICO capital raise, otherwise known as a pre-sale, where they sell tokens to a limited pool of investors at a lower cost before the official launch of the ICO.[43]

However, this opens the floodgates to investors pumping and dumping the token, in other words, investors acquire tokens cheaper at a pre-sale but as soon as the ICO launches and the tokens are tradable in secondary markets for a higher price, investors

36 M Ofir and I Sadeh 'ICO v IPO: Empirical findings' (2020) 53 (2) *Vanderbilt Journal of Transnational Law* at 547..
37 S Kasatkin 'The legal content of a white paper for an ICO (Initial Coins Offering)' (2022) *Information & Communications Technology Law* 82.
38 Kasatkin (n 37) 84.
39 MH Joo & others 'ICOs, the next generation of IPOs' www.emeraldinsight.com/0307-4358.htm (accessed 22 March 2023).
40 Ofir &Sadeh (n 36) 568.
41 VV Collao & V Winship 'The new ICO intermediaries' (2019) 5(2) *Italian Law Journal* 737-738.
42 J Campino, A Brochado & Á Rosa 'Initial Coin Offerings (ICOs): Why do they succeed?' 2022 https://doi.org/10.1186/s40854-021-00317-2 (accessed 20 October 2023).
43 Moran (n 12) 224.

immediately dump the tokens and make higher returns while the value of the tokens plummet.[44] In the final stage, an ICO will launch online or on a crypto asset exchange platform where investors can purchase tokens until the target threshold is met, after which the ICO issuer will distribute the tokens to their respective buyers through a blockchain-facilitated wallet, where ownership will be conferred upon such investors.[45]

4 How South Africa aims to regulate ICOs: Risks associated and recommendations

As things stand in South Africa, no formal legislation has been adopted to regulate crypto assets, and more specifically ICOs. However, the South African Reserve Bank in collaboration with National Treasury has taken initiative by publishing position papers on crypto assets through its governmental organisations, the Intergovernmental Fintech Working Group (IFWG) and Crypto Assets Regulatory Working Group (CAR WG). The latest of these position papers was published on 11 June 2021.[46]

What the position paper aims to achieve is to highlight the use case of crypto assets, the risks involved therein, and propose ways in which crypto assets can be regulated through crypto asset service providers (or CASPs).[47] The position paper also touches on ICO use cases, where issuers will be regulated as CASPs. CASPs are the same as Virtual Asset Service Providers (VASPs) which are defined by the Financial Action Task Force as entities that provide services concerning virtual assets for exchanging virtual assets with fiat currency and vice versa; the exchange between a variety of virtual assets; virtual wallet services, and others.[48] The CAR WG position paper has adopted a similar definition for CASPs. In essence, CASPs may also launch ICOs to attract investors and raise capital.[49]

44 ICO Watchlist 'What is an ICO pre-sale?' https://icowatchlist.com/presale/ (accessed 20 February 2023).
45 S Holoweiko 'What's an ICO? Defining a security on the Blockchain' (2019)87(6) *George Washington Law Review* 1481.
46 South African Reserve Bank 'Publication Details' https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2021/IFWG-CAR-Working-Group-position-paper-on-crypto-assets (accessed 5 August 2023).
47 The Intergovernmental Fintech Working Group Position Paper on Crypto Assets (2021) at 3 (IFWG Position Paper).
48 Financial Action Task Force Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Provider (2021) at 22.
49 IFWG Position Paper (n 47) 25.

4.1 Risks factors necessitating the need for ICO Regulation

The use case of ICOs as set out in the position paper, is similar to the description proffered above, which is: ICOs are essentially aimed at raising capital.[50] The first concern with ICOs is the risks related to money laundering and financing of terrorists. Entities, particularly crypto assets providers, ought to be regulated and compliant with anti-money laundering and counter-financing of terrorists (AML/CFT) provisions, due to their participation in financial services.[51]

An example of such a provision that can be used to ensure AML/CFT compliance is section 29 of the Financial Intelligence Centre Act 38 of 2001 (FIC Act), which compels an 'accountable institution' to verify the identity of clients, monitor transactions, and report suspicious transactions. A definition of 'accountable institution' is provided in Schedule 1 of the Act. The decentralised nature and anonymity attributed to crypto assets make them highly susceptible to money laundering activities.[52] Hence this predicament necessitates the enforcement of AML/CFT regulations.

The second concern is related to the speculative and limited exit opportunities risks associated with ICOs.[53] ICOs as investment vehicles are extremely speculative, and the volatile cryptocurrency market means that investors face the risk of losing their capital investment.[54] Projections stipulated in white papers are not guarantees that the target returns stated therein will be realised.[55] As stated earlier, issuers tend to provide misleading or fraudulent information in white papers. Introducing regulation will ebb speculative and duplicitous ICOs.[56] Exit opportunities regarding ICO investments are limited in that there may be instances where investors cannot liquidate their tokens by trading them in exchange for fiat currencies or exchange them for any other crypto assets.[57]

Third, a 'high risk of failure and the concomitant risk to investors' is inherent in ICOs as they tend to be initiated by newly established businesses that are in their infancy stage.[58] The tokens issued in an ICO usually possess no utility outside of the product or service that will potentially be offered by the issuer, with the hope that the

50 As above.
51 As above.
52 D Erasmus & S Bowden 'A critical analysis of South African anti-money laundering legislation with regard to cryptocurrency' (2020) *Obiter* 313.
53 IFWG Position Paper (n 47) 25.
54 As above.
55 As above.
56 C Bellavitis *et al* 'A comprehensive review of the global development of initial coin offerings (ICOs) and their regulation' (2021) 15 *Journal of Business Venturing Insights* 9.
57 IFWG Position Paper (n 47) 25.
58 IFWG Position Paper (n 47) 26.

product or service is successful.[59] Sherman provides the following statistics regarding ICO failure:

> … A recent study of ICOs sheds more light on how pure speculation is driving the ICO market: 59% of ICOs in 2017 are either confirmed failures or failures-in-the-making. Out of the roughly 900 ICOs in 2017, 142 failed at the funding stage, 276 failed after issuers stole the money or the project failed, and an additional 113 coins are considered 'semi-failed' either because the company's team has stopped communicating about the project or the community is so small signifying that the project is unlikely to succeed.[60]

The speculative nature of ICOs is a breeding ground for fraud, where issuers can defraud investors of their capital and crypto assets investment.[61]

Fourth, the 'risk of unclear legal frameworks and ICOs being prone to fraudulent activity' means that the absence of a regulatory framework that accommodates the different classes of ICO activities creates an opportunity for illicit conduct to thrive.[62] Criminals may exploit the non-existent or weakened position of regulation in various jurisdictions where no firm policy stance has been taken.[63] ICOs falling outside of the scope of regulation are susceptible to fraud and money laundering, as identified by the position paper.[64]

Fifth, the 'lack of a fiscal framework' provides that the Ministry of Finance along with tax authorities have a policy in place regarding the taxability of profits generated by ICOs.[65] Sixth, ICOs are laced with inherent 'cybersecurity risks' and the lack of regulatory oversight to ensure that the platforms ICOs are launched are vetted by professional developers and cybersecurity analysts, making them vulnerable to cyber-attacks from hackers.[66] Lastly, the 'risks related to incomplete and/or inaccurate disclosure' in white papers are what has led to numerous ICO failures as stated above. Issuers tend to only highlight the advantages and never the disadvantages.[67] In some cases, information in white papers is presented in technical terms that are difficult to understand.[68]

59 As above.
60 Sherman (n 10) 23.
61 Sherman (n 10) 34.
62 IFWG Position Paper (n 47).
63 As above.
64 As above.
65 As above.
66 As above.
67 As above.
68 S Samieifar & DG Baur 'Read me if you can! An analysis of ICO white papers' January 2021 https://doi.org/10.1016/j.frl.2020.101427 (accessed 19 October 2023).

4.2 Recommendations made in terms of the CAR WG Position Paper

The position paper provides a few recommendations which are pertinent in regulating CASPs, which also include token issuers in ICOs. However, there are only two recommendations that specifically relate to ICO within the position paper, recommendations 20 and 21. The former provides that National Treasury and the Financial Sector Conduct Authority (FSCA) should attempt to bring the regulation of ICO issuers within the scope of regulation of securities and over-the-counter (OTC) financial instruments issuers.[69] The position paper advises that tokens should be treated as securities subject to the Financial Markets Act 19 of 2012, conditional on consultation with the Companies and Intellectual Property Commission and in cooperation with the Companies Act 71 of 2008 'to the fullest extent possible and appropriate'.[70] The key authority in implementing this recommendation is the Financial Sector Conduct Authority and the legislation to facilitate it is the Financial Markets Act.[71]

Recommendation 21 provides that the issuing of payment or exchange and utility tokens should be governed subject to the licensing activities provisions of the Conduct of Financial Institutions Bill, 2020 (CoFi Bill) and as financial services, as stipulated in the Financial Sector Regulation Act 9 of 2017.[72] The position paper further provides that the provisions of the CoFi Bill on licensing requirements and specific conduct standards ought to be developed.[73] These standards will oblige ICOs issuers of payment and utility tokens to produce a well-crafted and detailed prospectus for the

> … specific requirements and details on disclosures about the company, a governance plan, any agreement(s) between the customers and ICO issuers, comprehensive independent audits, and specific reports (to be confirmed) to regulators.[74]

To provide context to recommendations 20 and 21, it is important to highlight the content of recommendations 9 and 10. Recommendation 9.1 states that crypto assets should be declared 'financial products' by the FSCA in the intermediary in terms of the Financial Advisory and Intermediary Services Act (FAIS Act).[75] This will, in the interim, bring crypto assets into the purview of the FSCA and crypto assets will be

69 IFWG Position Paper (n 47) 46.
70 As above.
71 Financial Markets Act 19 of 2012.
72 FWG Position Paper (n 47) 38.
73 As above.
74 As above.
75 IFWG Position Paper (n 47) 35-36.

regulated as financial products under the FAIS Act,[76] which is subject to repeal upon the enactment of the CoFi Bill.[77]

Recommendation 9.2 briefly provides that there should be the inclusion of specified services for crypto assets under licensing activities in the CoFi Bill.[78] Recommendation 9.3 succinctly provides that specified crypto asset services should be defined as 'financial services' in terms of the Financial Regulation Act.[79] These provisions essentially regulate ICO issuers within the broader context of crypto assets, more specifically crypto asset service providers. Recommendation 10 states that the FSCA should become the body responsible for providing licensing for the 'specified services' for crypto assets.[80] However, the position paper provides that recommendation 10 is dependent upon the proper implementation of recommendations 9.2 and 9.3.[81]

5 The EU's Regulatory Position

European authorities have been cautious to not implement excessive regulation of ICOs that will consequently stifle innovation, and have striven to maintain balance by having a policy — or directives — that encourage a free market that enjoys healthy legal protection.[82] To regulate ICOs, the European Union (EU) has opted to expand already existing regulations to accommodate crypto assets instead of enacting crypto asset or ICO-specific regulations.[83]

Before delving further into EU regulation it is important to consider the difference between directives and regulations in the EU context. Allaert explains that the former is a legislative act that sets out the purpose and objectives that Member States are obliged achieve, and the latter provides guidelines that should be followed for the purpose of implementation by Member States.[84] There are several regulations and directives issued by the EU, however, attention will only be given to the Advice on Initial Coin Offerings and Crypto Assets (herein referred to as the Advice) issued by the European Securities and Markets Authority (ESMA).

76 Financial Advisory and Intermediary Services Act 37 of 2002.
77 IFWG Position Paper (n 47) 36.
78 As above.
79 As above.
80 As above.
81 As above.
82 K Allaert 'ICO regulation in the US, EU and China: A comparative analysis' (Masters thesis, Universiteit Gent, 2022) 19.
83 As above.
84 Allaert (n 82) 20.

The Advice provides that crypto assets are not legally defined within the context of EU financial laws.[85] However, the legal position of crypto assets may be determined by considering whether they constitute 'financial instruments' in terms of existing regulations such as the Markets in Financial Instruments Directive (MiFID),[86] which provides a comprehensive regulatory framework for transactions involving financial instruments.[87]

The elements of the definition are that financial instruments constitute 'transferable securities', 'money market instruments', 'units in collective investment undertakings' and various derivative instruments.'[88] When crypto assets satisfy the definition of securities, they will, as a consequence, be subject to the provisions of the Prospectus Regulation.[89] The Prospectus Regulation stipulates in article 3 that a prospectus must be published before a public offering and sets out the guidelines on the information that should be included therein, for securities in markets of Member States.[90]

The Prospectus Regulation became effective on 19 June 2019.[91] The Prospectus Regulation does not state who is responsible for the drafting of the prospectus but provides that the author of the prospectus be made known.[92] The threshold size of the offering may determine whether a prospectus needs to be published, for instance, offers below one million Euros – or eight million Euros according to the national legislation of Member States – will be exempt from publishing a prospectus.[93] In the context of ICOs, the Prospectus Regulation will apply if the tokens offered meet the definition of 'securities', and are within the prescribed threshold size.[94] Issuers in ICOs will also have to provide information regarding ICO projects such as the terms and conditions, risks associated, and the rights of token-holders.[95]

The Transparency Directive will only enjoy application where tokens are considered financial instruments in terms of MiFID II.[96] This directive's objective is to ensure the accurate disclosure of information regarding securities that are being traded in regulated markets within the jurisdiction of Member States.[97] The information is required to be disclosed on a periodic and ongoing basis by issuers

85 European Securities and Markets Authority Advice Initial Coin Offerings and Crypto Assets (2019) 18 (ESMA Advice).
86 Markets in Financial Instruments Directive 2014 (2014/65/EU).
87 As above.
88 Markets in Financial Instruments Directive 2014 (2014/65/EU) art 4(1)(15).
89 Regulation (EU) 2017/1129.
90 Regulation (EU) 2017/1129 art 3(1).
91 Regulation (EU) 2017/1129.
92 Regulation (EU) 2017/1129 art 6(1).
93 Regulation (EU) 2017/1129 art 3(2)(b).
94 Regulation (EU) 2017/1129 art 2(a).
95 Regulation (EU) 2017/1129 art 6.
96 Directive 2014/65/EU art 5.
97 Directive 2014/65/EU art 1; See also ESMA Advice (2021) 24.

in the form of, inter alia, financial statements, bi-annual reports, annual reports, and changes in ownership of equity.[98]

MiFID II deals with governing investment firms that provide trading services with respect to financial instruments.[99] The MiFID II also consists of a regulation, the Markets in Financial Instruments Regulation (MiFIR).[100] The Advice stipulates that where crypto assets are deemed financial instruments, the crypto assets trading platforms or intermediaries are required to comply with the relevant requirements set out in MiFID II.[101]

These applicable requirements are concerning, namely: 'capital requirements' in terms of article 47(f) entail a firm satisfying the minimum capital requirements under the directives and regulations. However, traders trading on their account, or utilising a multilateral trading facility (MTF), or organised trading facility (OTF) must have a starting capital of 730 000 Euros. Additionally, the 'organisational requirements' stipulated in article 16 state that firms must ensure that they have policies in place concerning the governance of the firm to deal with, inter alia: conflicts of interest; risk management'; financial reports and; transparency regarding the rules, procedures and objectives of the firm. Under 'investor protection' firms must adhere to the provisions of the MiFID II which provide that they should avert conflicts of interest, conduct their business with integrity and professionalism, disclose accurate and non-misleading information, and initiate trades that are not detrimental to their clients.[102]

'Access to MTFs, OTFs and RMs' according to article 18(3) comprises policies that are not exclusionary and ensure transparency ought to be implemented to ensure the efficient utilisation of these facilities, while in terms of articles 3 to 11 'pre and post-trade transparency' require that the MiFIR makes provision for requirements multilateral systems utilised in firms which provide pre-trade transparency, waivers regarding pre-trade transparency and the limitations thereof, as well as post-trade transparency and 'deferred publication'. Under 'transaction reporting and obligations to maintain records' MiFIR compels firms to retain records of orders about financial instruments for five years.[103]

98 Directive 2014/65/EU art 16.
99 Directive 2014/65/EU art 1(1).
100 Regulation (EU) No 600/2014.
101 Directive 2014/65/EU art 1; See also ESMA Advice (2021) 24.
102 Directive 2014/65/EU 'Title II Authorisation and Operating Conditions for Investment Firms.
103 Directive 2014/65/EU art 25(1); Regulation (EU) No 600/2014 art 25(2); See also ESMA Advice (2021) 25-27.

The Market Abuse Regulation (MAR) deals with preventing the trading of insider information, unlawful disclosure of trade information, and market manipulation.[104] The instruments governed under this regulation are financial instruments exchanged on a regulated market; financial instruments traded via MTF or an OTF.[105] In essence, MAR finds application to crypto assets that are deemed financial instruments.[106] MAR places an obligation on trading platforms to implement policies that will help detect, report and combat market abuses.[107]

The conundrum confronting ESMA is that unprecedented forms of market manipulation and insider trading may arise and that the current regulatory framework may lack the necessary capacity to deal with these novel issues.[108] MAR may also have difficulties identifying the true identity of the market operator due to the anonymity that comes with the decentralised nature of crypto assets.[109] Crypto assets that do not constitute financial instruments fall outside the purview of MAR.[110] However, where crypto assets constitute financial instruments, they fall within the purview of the Short Selling Regulation in the instance that they would provide leverage by declining in value.[111]

The Directive on Investor-Compensation Schemes stipulates that compensation, that is limited to a certain amount, will be provided to investors in the case where an investment firm becomes insolvent.[112] This Directive applies to crypto assets that constitute financial instruments and investment firms that fall within the scope of the MiFID II.[113]

The European Banking Authority (EBA) initially made recommendations in 2014 that 'virtual currency-to-fiat exchanges' and virtual currency wallet services be brought into the remit of anti-money laundering and/or financing of terrorist regulations, by including provisions thereto in the fifth Anti-Money Laundering Directive.[114] However, crypto assets have morphed into new advancements where they are no longer only exchangeable for fiat currency but can be traded for other crypto assets.[115] This development urged the EBA to submit recommendations, along with

104 Regulation (EU) No 596/2014 art 14.
105 As above.
106 Regulation (EU) No 596/2014 art 16.
107 Regulation (EU) No 596/2014 arts 17-20.
108 ESMA Advice (2021) 29.
109 ESMA Advice (2021) 30.
110 As above.
111 Regulation (EU) No 236/2012 art 3.
112 Investor Compensation Schemes Directive (97/9/EC); See also ESMA Advice (2021) 36.
113 As above.
114 Regulation (EU) 648/2012; See also ESMA Advice (2021) 36.
115 As above.

those of the Financial Action Task Force, for the revision of the scope of Anti-Money Laundering Directive 5,[116] to include:

(i) providers of exchange services between crypto-assets and crypto assets; and
(ii) providers of financial services for ICOs

The Advice identifies 'potential gaps and issues' in the MiFID in the context where crypto assets constitute financial instruments. ESMA finds that the existing regulatory framework does not adequately accommodate the crypto assets and therefore, issues relating to the interpretation by Member States, regarding applicable provisions pose problems regarding uniformity which may result in regulatory arbitrage.[117] Some of the substantial gaps identified include inter alia, risks that are not adequately addressed or anticipated.[118] ESMA holds that issues can be addressed by providing clarity as to which crypto asset activities and services constitute services in terms of EU law and this can be effectively done by developing a DLT framework.[119] Conversely, ESMA has raised the concern that there may be variations of crypto assets that will not be classified as financial instruments due to their function and that will as a result not be governed by MiFID and other regulations applicable to financial instruments.[120] In essence, the regulatory framework is found wanting in this regard and leaves investors exposed to risk.[121]

6 Comparison of the South African approach and the European Union approach

It has now been established that in both the South African and European Union jurisdictions no comprehensive regulatory framework governing ICOs exists. A similarity that can be observed between the CAR WG position paper and the ESMA Advice, is that both aim to use existing legislation to accommodate crypto asset-related services and activities by bringing them within the scope of specific definitions in their respective financial legislative frameworks. For example, in the South African context, the CAR WG position paper recommends that tokens issued, in this instance during ICOs, should be treated as securities and that issuers of those tokens thereof should be governed by the Financial Markets Act 19 of 2012.

Similarly, in the EU the Advice provides that crypto assets which encompass tokens issued in ICOs, will be treated as financial

116 Directive (EU) 2015/849
117 ESMA Advice (2021) 37.
118 As above.
119 As above.
120 ESMA Advice (2021) 39-40.
121 As above.

instruments provided, they meet the specific requirements and be governed in terms of the MiFID II. The definition of financial instruments in MiFID II includes transferable securities. As securities, crypto assets in South Africa will be subject to provisions dealing with insider trading under the Financial Markets Act. Section 78 of the Financial Markets Act comprehensively covers the offence of insider trading. In the European markets, the Market Abuse Regulation is the legislation used to prevent insider trading with respect to financial instruments traded in regulated markets.[122]

When it comes to exchange and utility tokens the CAR WG position paper recommends that they should be regulated under the licensing activities provision of the CoFi Bill once it comes into effect, as well as be treated as financial services in terms of the Financial Sector Regulation Act.[123] The purpose of this would be to compel issuers to furnish prospectuses that satisfy the requirements on the governance, audit, disclosures, and pertinent details relating to the ICO project.[124]

In the EU financial instruments are broadly regulated by the Prospectus Regulation, which set out the requirements prospectuses must satisfy before a public offering can be initiated.[125] The implication is that crypto assets that constitute financial instruments will be governed by these Directives. However, what is unclear is whether tokens issued in an ICO constitute financial instruments. Perhaps this determination will be left to whether the tokens satisfy the criteria of financial instruments which are: 'transferable securities', 'money market instruments', 'units in collective investment undertakings' and various derivative instruments.[126]

In terms of AML and counter financing of terrorism with respect to crypto assets, the European Union's Anti-Money Laundering Directive finds application in 'virtual currency-to-fiat exchanges', but the European Banking Authority has made submissions that the provisions should be extended to crypto asset-to-crypto asset exchanges to stay on par with changing developments in the crypto market sphere. In South Africa, the Financial Intelligence Centre Amendment Act holds that 'accountable institutions' must be subject to provisions that ensure they employ preventative measures against money laundering and financing terrorists.[127] These institutions, which will include CASPs and other token issuers, are obliged to adhere to these

122 Regulation (EU) No 596/2014 art 14.
123 Act 9 of 2017.
124 Act 9 of 2017 Act 9 of 2017 sections 35, 127 & 248.
125 Regulation (EU) 2017/1129.
126 ESMA Advice (2021) 19.
127 Act 1 of 2017 sec 2(b) & (c).

measures — verifying the identities of users, monitoring transactions, and reporting suspicious transactions.[128]

7 Conclusion

This article sought to draw a comparison between the proposed regulatory regime of ICOs in South Africa as proposed by the IFWG position paper, and the regulatory position of the European Union as set out in the ESMA Advice. It is our observation that the IFWG position paper and the ESMA Advice are similar in material respects. Both policies demonstratively aim to ensure the protection of market participants by advising and recommending that ICOs be brought within the scope of regulation.

The IFWG and ESMA provide that tokens generated through ICOs be regulated through existing frameworks by expanding the definitions of financial instruments, securities, and services to include tokens and crypto assets. However, crypto assets, and consequently tokens, that emerge from ICO tend to become more nuanced as they advance and may fall outside of the scope of existing regulations.

In conclusion, it is evident that in the future, new legislation and legislative provisions that are specific to crypto assets and ICOs will have to be formulated to keep up with the developments in South Africa, the European Union, and other international jurisdictions.

128 Act 1 of 2017 sec 34.

AN EXAMINATION OF THE SOUTH AFRICAN CORPORATE LAW THROUGH THE LENS OF UBUNTU

https://doi.org/10.29053/pslr.v17i1.5093

*by Siphethile Phiri**

Abstract

This article submits that ubuntu is indubitably a constitutional value which informs the constitutional era. Constitutional supremacy mandates that all values and principles of the Constitution must be observed to avoid invalidation. As a result of this constitutional obligation, this article intends to examine the inclusion of ubuntu as a constitutional principle in South African corporate law. To achieve this objective, the article employs doctrinal legal research methodology, also known as the black letter law, which encompasses scrutiny of various relevant legal sources. This research methodology is selected due to its ability to address the question of what the law is. In this case, the article intends to determine the position of ubuntu as a constitutional principle in the context of the South African corporate law. The conclusion reached is that the South African corporate law contains significant traces of the ontological elements of ubuntu. This is reinforced by the clear correlation between the values of ubuntu and corporate law principles. Accordingly, several South African corporate law concepts seem to correlate with the principles of ubuntu. A number of examples are expounded upon. Nonetheless, there is still no express inclusion of ubuntu in corporate law.

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1 An overview of ubuntu

Since the judgment of *S v Makwanyane and Another*,[1] (*Makwanyane*) ubuntu has been widely accepted as a constitutional value because of its equal status with the constitutional right of human dignity.[2] In *Makwanyane*, Sachs J emphasised that it was important to give 'long overdue recognition to African law and legal thinking as a source of legal ideas, values, and practices'.[3] Ubuntu also reflects constitutional imperatives such as equality and the advancement of human rights and freedoms.[4] Although the object of this paper is not to define the philosophical meaning of ubuntu, it is imperative to give a brief overview of what ubuntu entails within the ambit of the Constitution.

Owing to its African origin, ubuntu is not easily definable in English. Mokgoro submits that 'defining an African notion in a foreign language and from an abstract, as opposed to a concrete approach, defies the very essence of the African worldview and may also be particularly illusive'.[5] Ubuntu originates from the popular Nguni idiom that '*umuntu ngumuntu ngabantu*' which directly translates to a 'person is a person through other persons'.[6] Thus, ubuntu involves an interdependent relationship of persons and a sense of communality.[7] Ubuntu is also translated to refer to humaneness, personhood, and morality.[8]

Mokgoro further adds:

> These African values which manifest themselves in *ubuntu/botho* are in consonance with the values of the Constitution generally and those of the Bill of Rights in particular. The values of *ubuntu*, I would like to believe, if consciously harnessed can become central to a process of harmonising all existing legal values and practices with the Constitution. *Ubuntu* can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.[9]

1 1995 3 SA 391 (CC).
2 JY Mokgoro 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 16–32, M Thaddeus 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law* at 532-559; C Himonga et al 'Reflections on judicial views of ubuntu' (2013) 16(5) *Potchefstroom Electronic Law Journal* at 371-429.
3 *Makwanyane* (n 1) para 365.
4 Constitution of the Republic of South Africa, 1996 sec 1(a).
5 Mokgoro (n 2) 1. See also DM Tutu *No future without forgiveness* (1999) Rider, London at 34-35, where he argues that 'ubuntu is very difficult to render into Western language'.
6 AD Breda 'Developing the notion of ubuntu as African theory for social work practice' (2019) 55(4) *Social Work* at 439.
7 Mokgoro (n 2) 19.
8 As above.
9 Mokgoro (n 2) 10-11.

> In the African perception, human beings are considered in a communal sense, as opposed to the individualistic, Eurocentric perspective.[10] In accordance with ubuntu, a person is a human being by becoming a part of a an already existing and continuing community that considers the living, the living dead and the yet to be born.[11]

The communal understanding of the concept of ubuntu plays an imperative role in the South African corporate law. This is revealed through corporate law concepts such Corporate Social Responsibility (CSR), Corporate Legal Responsibility (CLR) and Environmental, Social and Corporate Governance (ESG) which l shall examine in paragraph 4 below.

2 Ubuntu as a principle of transformative constitutionalism

Ubuntu is one of the principles which has influenced transformative constitutionalism in South Africa, among the need to promote equality, freedom, dignity and other fundamental principles.[12] In the interim Constitution,[13] as opposed to the final Constitution, ubuntu was expressly stated as a founding value.[14] Although the Constitution does not expressly stipulate that ubuntu must be applied, ubuntu has nonetheless been accepted as an over-arching and a key principle of transformative constitutionalism.[15] Consequently, it has been widely accepted that ubuntu is an implied constitutional value because of its equal status to human dignity.[16]

Kroeze[17] highlighted the constitutional importance of ubuntu, namely that it gives content to rights, as a constitutional value[18] and the limitation of rights, as part of the values of an open and democratic society. This submission is absolutely accurate since

10 K Grootboom 'Abstract v substantive equality — A critical race theory analysis of "hate speech" as considered in the SAHRC-report on utterances made by Julius Malema' (2019) 13 *Pretoria Students Law Review* at 113.

11 Grootboom (n 10) 113; JK Khomba et al 'Shaping business ethics and corporate governance: An inclusive African ubuntu philosophy' (2013) 13(5) *Global Journal of Management and Business Research* at 31-42.

12 Constitution (n 4) sec 1(a)-(d).

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

14 Interim Constitution (n 13) at 114.

15 Himonga et al (n 2) at 380.

16 *Makwanyane* (n 1) para 311; See also article 27.7 of the African Charter on Human and People's Rights which imposes a duty on an individual to strengthen cultural values in a spirit of tolerance.

17 IJ Kroeze 'Doing things with values II: The case of ubuntu' (2002) 13 *Stellenbosch Law Review* at 252-253.

18 For example, the Constitutional rights to: equality (sec 9), human dignity (sec 10), freedom and security of a person (sec 12), privacy (sec 14), assembly, demonstration, picket and petition (sec 17), freedom of association (sec 18), freedom of movement and residence (sec 21), freedom of trade, occupation and profession (sec 22), labour relations (sec 23), environmental rights (sec 24) & access to information (sec 32).

ubuntu recognises communal existence, which required respecting the rights of others for a harmonious co-existence.[19] As a result, certain rights can be limited to avoid a conflict of people's rights. Thus, individuals' rights are exercised within the context of the entire or in relation to the needs of the entire community.[20] Therefore, ubuntu is based on the primary values of humanness, caring, respect and ensuring quality community life in the spirit of family.[21]

The connection between the limitation of rights by ubuntu and the limitation by the Constitution illustrates that both systems acknowledge that no right is absolute. The limitations clause[22] contained in Section 36 of the Constitution may be considered as a rights-balancing mechanism, which is partially influenced by ubuntu.[23] This is attributed to the fact that the constitutional limitation of rights, as in African communities, aims to promote peaceful co-existence among individual claimants of Constitutional rights.[24] For instance, section 16(2) of the Constitution limits the fundamental right to freedom of expression to exclude:

> (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Again, for the limitation of a fundamental right or freedom to be permissible, it has to pass the test of reasonability and justifiability in an open democratic society based on human dignity, equality and freedom.[25] The limitation of fundamental rights and freedoms is meant to promote peaceful coexistence within a community. If rights are left unlimited such will result in the infringement of the rights of others. Which might result in chaos and scramble for survival within the community. For instance, the right to freedom of expression if not properly managed may result in enticement of violence or hatred. The constitutional qualification that a democratic society must be based on human dignity, equality and freedom reverts back to ubuntu, which is of equal status with human dignity.[26] The provision of section 36 of the Constitution may be summed up to indicate that, rights may be limited in order to promoted peaceful coexistence. Which in the African philosophy can be interpreted to mean the promotion of ubuntu.

19 Grootboom (n 10).
20 As above.
21 CI Tshoose 'The emerging role of the constitutional value of ubuntu for informal social security in South Africa' (2009) 3 *African Journal of Legal Studies* at 13; SB Radebe & MR Phooko 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu' (2017) 36(2) *South African Journal of Philosophy* at 240.
22 Sec 36 of the Constitution.
23 See Mokgoro (n 2) 25.
24 As above.
25 Constitution (n 3) sec 36(1).
26 *Makwanyane* (n 1) para 311.

Ubuntu is considered an integral part of the Constitution. Sachs J in *Dikoko v Mokhakla*[27] (*Dikoko*) held that ubuntu is 'intrinsic to and constitutive of our constitutional culture'[28] and it supports the whole constitutional order.[29] It combines individual rights with a communitarian philosophy.[30]

In *Dikoko*, Sachs J portrays ubuntu as a fundamental constitutional value.[31] Despite its importance and influence, ubuntu has been facing exclusion in the South African law, which previously mainly consisted of Roman-Dutch and English law.[32] The formal recognition of indigenous law in the South African legal system is a recent phenomenon.[33] Although ubuntu is not a Western concept, its respect for human rights and human dignity aligns it to the Constitution and, more specifically, the Bill of Rights.[34]

However, ubuntu still poses the serious challenge of being either under- or over-explained.[35] This is due the difficulties in finding a precise definition of the concept.[36] This challenge is the main reason for the irregular and inconsistent application of ubuntu even by courts.[37]

Thus, although the Constitution does not have an express provision on ubuntu, ubuntu is recognised as the founding provision of the Constitution and has been applied in many instance as such.[38] The exclusion of this influential African philosophy from being an express founding principle might be due to Bhengu's observation that the three founding principles of the Constitution (equality, freedom and dignity) are of Western origin.[39] Hence, the Eurocentric nature of the Constitution led to the silencing of ubuntu.[40] Bhengu's submission exposes that the express founding values of the Constitution originate from the Western philosophical view that 'one is born a human and

27 2006 6 SA 235 (CC).
28 *Dikoko* (n 27) at 235.
29 *Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.
30 As above.
31 *Dikoko* (n 27) at 235.
32 WJ Hosten et al *Introduction to South African law and legal theory* (1995) at 1268.
33 J Church 'The convergence of the western legal system and the indigenous African legal system in South Africa with reference to legal development in the last five years' (1999) *Fundamina* at 8; J Church 'The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience' (2005) *Australia & New Zealand Law & History E-Journal* at 94-106.
34 Himonga et al (n 2) 382-383.
35 R English 'Ubuntu: the quest for an indigenous jurisprudence' (1996) *South African Journal on Human Rights* at 645.
36 As above.
37 As above.
38 Himonga et al (n 2) 369; *Makwanyane* (n 1) para 224; *Hoffmann v South African Airways* 2001 1 SA 1 (CC). fn 31.
39 MF Bhengu *Ubuntu: The essence of democracy* (1996) at 4; Grootboom (n 10) 112.
40 As above.

therefore deserving equal treatment, freedom and dignity'.[41] The Eurocentric notion of human beings is individualistic in nature.[42] The Eurocentric viewpoint of what a human being is, is different from the African philosophical notion of a human being. In the African philosophy one is a human being through communal interactions (*umuntu ngumuntu ngabantu)*.[43]

In the African philosophy of *ubuntu*, the definition of a human being is communal and not individualist. The community-based viewpoint of a human being has given birth to the famous African idioms such as *umuntu ngumuntu ngabantu* (a person is a person because of others),[44] and *inkosi yinkosi nga bantu bayo* (a king is a king because of his people).[45] The way in which the Ndebele tribe from Zimbabwe greet each other, portrays communalism spirit. One will greet by saying '*linjani*' ('How are you?' in plural) and the responder will say '*sikhona*' ('we are fine' as opposed to 'I am fine').[46] The 'li' prefix is in plural which illustrates the value placed on communality. Nonetheless, the express exclusion of the African philosophy of ubuntu due to Eurocentric constitutional influence does not in any way render ubuntu less important or irrelevant in the South African legal system.

3 The introduction of ubuntu into South African corporate law

Courts have attempted to define and interpret *ubuntu* as a 'culture' and philosophy of the African people which expresses compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community, which combines individuality with communitarianism.[47]

In *S v Mhlungu*,[48] Sachs J, in advocating for the incorporation of the history of South Africa in decision-making by the courts, held:

41 Bhengu (n 39) 4; Grootboom (n 10) 112.
42 As above.
43 MB Ramose 'An African perspective on justice and race' (2001) 3 *Polylog: Forum for Intercultural Philosophy* at 12; Tutu (n 5) 34-35.
44 N Ifejika 'What does ubuntu really mean?' (2006) *The Guardian* What does ubuntu really mean? | | The Guardian (accessed 09 August 2023).
45 SJ Ndlovu-Gatshen 'Inkosi yinkosi ngabantu: an interrogation of governance in precolonial Africa — the case of the Ndebele of Zimbabwe' (2008) 20 *Southern African Humanities* at 1.
46 S Phiri 'An examination of the inclusion of certain principles of transformative constitutionalism in South African corporate law' unpublished, LLD Dissertation, University of South Africa, 2021 at 155.
47 For instance, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37; *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2006 6 BCLR 728 paras 62–63.
48 1995 7 BCLR 793 (CC).

> We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.[49]

Courts have encouraged the application of ubuntu in decision-making.[50] *Mhlungu* did not only pave the way for the application of indigenous values which stem from ubuntu, but also urged courts to reflect on *ubuntu* in decision-making.[51]

In the Constitutional Court in *Hoffmann v South African Airways*[52] (*Hoffmann*) Ngcobo J promoted the constitutional rights to equality and human dignity by expressly applying ubuntu, and held that ubuntu must be showed towards HIV patients.[53] The ruling of the Court is based on the observation that, in ubuntu, all human beings are equal and deserve respect regardless of their status or any other qualification.[54] Bhengu asserts that if a nation follows the principles of ubuntu, there will be no discrimination.[55] This aligns with ubuntu as defined in *Hoffmann* to mean, 'the recognition of human worth and respect for the dignity of every person'.[56]

This indicates that the courts view ubuntu through the same lenses as African communities which consider ubuntu as including human dignity.[57] In the African community one deserves respect by mere fact of being a human being within a community.[58] A person is treated with dignity and respect regardless of their status or any qualification. This was also demonstrated in the leading case of *Makwanyane* where the Constitutional Court related the protection of human dignity to the concept of ubuntu.[59] In that case, the influence of ubuntu was central in the development and promotion of the entrenched constitutional rights by the Constitutional Court.[60]

49 *S v Mhlungu* 1995 7 BCLR 793 (CC) para 127.
50 As above.
51 S Netshitomboni 'Ubuntu: Fundamental constitutional value and interpretive aid' unpublished Master of Laws dissertation, University of South Africa, 1998 at 20.
52 2001 1 SA 1 (CC).
53 *Hoffmann* (n 52) para 38.
54 As above; Church (n 33) 102.
55 Bhengu (n 39) 38.
56 *Hoffmann* (n 52).
57 As above.
58 Bhengu (n 39) 58.
59 *Makwanyane* (n 1) para 481.
60 *Makwanyane* (n 1) para 302.

Similarly, corporations, when conducting their business, may not include contract terms which are against ubuntu.[61] To exhibit the influence of u*buntu* in corporate contracts, in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*[62] (*Mohamed*) the counsel for the respondent contended that:

> … public policy is informed by the concept of good faith, ubuntu, fairness and simple justice between individuals … we are obliged, in construing the impugned clause, to promote the spirit, purport and objects of the Bill of Rights as contemplated in s 39(2) of the Constitution. In other words, we must interpret it through the prism of the Bill of Rights. In essence, the case advanced for the respondent is that the principle of *pacta sunt servanda* is not a sacred cow that should trump all other considerations.[63]

It was held further in that case that, 'the spirit of good faith, *ubuntu* and fairness require that parties should take a step back, reconsider their position and not snatch at a bargain at the slightest contravention'.[64] And that, 'the values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution'.[65] Reference was also made to *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[66] (*Everfresh*) where it was held as follows:

> Good faith is a matter of considerable importance … and the extent to which our courts enforce the good faith requirement … is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. The issue of good faith … touches the lives of many ordinary people in our country.[67]

In the above judgments, the term 'good faith' was used extensively. Therefore, it is imperative to find the definition meaning of the term. Good faith has been defined to mean 'honesty' or 'sincerity of intention'.[68] The need to act in honest and sincerity bears the elements of ubuntu which can been seen in a number of corporate law aspects.[69]

61 *Hoffmann* (n 52) para 38; fn 31.
62 [2017] ZASCA 176.
63 *Mohamed* (n 62) para 12.
64 *Mohamed* (n 62) para 16.
65 *Mohamed* (n 62) para 17.
66 [2011] ZACC 30, 2012 1 SA 256 (CC).
67 Above para 22.
68 Cambridge dictionary available at GOOD-FAITH | English meaning - Cambridge Dictionary (accessed on 16 August 2023).
69 See for instance sec 76(3)(a) of the Act.

Courts should accept overall responsibility of giving content to all the constitutional values, including ubuntu as implied constitutional value which the Constitution seeks to promote.[70] Emphasis placed on human dignity and social justice in the Constitution accepts that these values must be given an indigenous perspective.[71] In *Everfresh*, the Constitutional Court emphasised that, when developing common law, the courts must infuse the law with the constitutional values,[72] these includes values of ubuntu which inspire much of the constitutional compact.

4 Ubuntu and the South African Corporate Law

Similar to the Constitution, the Companies Act[73] (hereafter the Act) which is South Africa's main corporate law statute, does not have an express provision on ubuntu. However, the traces of ubuntu are seen in many of its provisions, as will be shown below. Thus, although not expressly stated, ubuntu has in many ways been included in South African corporate law.

Section 22(1)(a) of the Act prohibits a company from engaging in reckless trading with gross negligence, with the intent to defraud any person or for any fraudulent purpose. Personal liability is imposed on directors of a company who engaged in prohibited conduct.[74] To curb the abuse of a juristic personal, section 20(9) of the Act gives the courts the discretion to lift the corporate veil where there is 'unconscionable abuse' of juristic personality.[75] In *Ex Parte: Gore NO and Others*[76] (*Ex Parte: Gore*) the Court found irregularities and dishonesty in the management of a group of companies owned by the three brothers.[77] The group of companies were managed as a single entity through the holding company.[78] The Court held that the Group was a mere sham aimed at deceiving the shareholders.[79] This resulted in the Court disregarding the separate legal personality of the subsidiary companies and treating them as one entity with the holding company.[80]

In the modern era of transformative constitutionalism, which requires that ubuntu must be promoted, it will be accurate to submit

70 Constitution (n 4) sec 39.
71 Kroeze (n 17) 252-253; Netshitomboni (n 51) 20.
72 *Everfresh* (n 66) para 34.
73 71 of 2008.
74 See also secs 20(9), 163(4) of the Act.
75 See S Phiri 'Piercing the corporate veil: A critical analysis of section 20(9) of the South African Companies Act 71 of 2008' (2020) 1(1) *Strategy Corporate & Business Review* at 17-26.
76 (18127/2012) [2013] ZAWCHC 21; [2013] 2 All SA 437 (WCC) (13 February 2013).
77 *Ex Parte: Gore* (n 76) para 8.
78 As above.
79 *Ex Parte: Gore* (n 76) para 15.
80 *Ex Parte: Gore* (n 76) para 37.

that the conduct of directors which infringes on the values of ubuntu, qualify as 'unconscionable abuse' of corporate personality. These include conduct such as dishonesty and irregularities as stipulated in *Gore*. This illustrates that the term 'unconscionable abuse' extends to those grounds prohibited in the ubuntu context.

Ubuntu describes human beings in their relationship with the community as a collective entity.[81] Thus, the impact of one's conduct on others and the surrounding environment is of considerable importance. Similarities can be seen with corporate law concepts such as CSR, CLR and the ESG, which require and oblige companies to consider the impact of companies' activities on its employees and the surrounding environment at large. Ubuntu is associated with concepts such as humanness, interconnectedness and concern for others, which is consistent with CSR, CLR and ESG values.[82] These corporate law concepts have been incorporated into the Act. For instance, section 72(4) of the Act requires certain categories of companies to have a Social and Ethics Committee (SEC). The determination to have a SEC is based on public interest consideration.[83] Companies have both a statutory and a constitutional obligation to act considerate towards the environment in which they operate.[84] Therefore, companies must ensure that they treat their environment with care and harmony at all the times, which is similar to the concept of ubuntu.

Woerman and Engelbrecht, in their paper in which they explore the manner and the extent in which ubuntu can serve as an alternative theory for determining the responsibility of companies towards third parties, subscribe to the relationholder theory, as opposed to the stakeholder theory.[85] Relationholder theory is premised on ubuntu, which renders it more accommodative to the interests of various stakeholders on moral bases to promote a harmonious relationship with the parties which the company communes with, as opposed to their stakes.[86] Woerman and Engelbrecht propose that CSR must now be viewed through the lens of a harmonious relationship between the company and the surrounding community and not stakeholder interests.[87] This is attributable to the fact that, ubuntu and relationholder theory grounds the responsibility of companies towards different parties involved with the company solely on the existing relationship with the company.[88] A company in

81 L Mbigi & J Maree *Ubuntu: The spirit of African transformation management* (1995) at 75.
82 As above.
83 Sec 72(4) of the Act.
84 Eg. Sec 72(4) of the Act; Ch 7 of NEMA and sec 24 of the Constitution.
85 M Woerman & S Engelbrecht 'The ubuntu challenge to business: From shareholders to relationholders' (2019) 157 *Journal of Business Ethics* at 28.
86 Above at 29-30.
87 Woerman & Engelbrecht (n 85) 30.
88 Woerman & Engelbrecht (n 85) 31.

the ubuntu perspective is not a nexus of contracts, as it is described by the stakeholder theory, but instead as a nexus of relationships or communality.[89] However, based on Du Plessis et al's definition of stakeholder that it refers to an individual or group of individuals who are affected by the activities of a company,[90] such as customers, suppliers, employees, creditors, and the environment. There is a close relationship between stakeholder and relationholder theory in that they both foster communal consideration. Therefore, Woerman and Engelbrecht seem not to be introducing any new concept. Philips et al describes stakeholder theory as a theory which involves ethics,[91] which is similar to Woerman and Engelbrecht's submission.

Makwara et al also advocate for the inclusion of the African ethical ethos, such as ubuntu, in the regulation African business practices because the Western theories fail to align with the moral values of many African communities.[92] Ubuntu, it should be borne in mind, is a 'code of ethics and behavior and it honors the dignity of others and development and continuous mutual affirming and enhancing relationships'.[93] This is because ubuntu does not only give an understanding of what being is, but also of what 'being with others' entails.[94] Ethical business practice entails appreciating the importance of human dignity.[95] Khomba et al state that:

> 'Ethical behavior is characterised by unselfish attributes which balances what is good for an organisation with what is good for the other stakeholders as well. Thus, business ethics embrace all theoretical perspectives of competing economic and societal systems.'[96]

Ubuntu is demonstrated through care and compassion. Thus, companies, through the lens of ubuntu, have a moral responsibility to affirm and enhance humanity.[97] In corporate law, this relates to a number of aspects such as the stakeholder-inclusive value approach and enlightened shareholder value approach. The stakeholder inclusive value approach requires that the company directors, in conducting the fiduciary duties in the best interest of a company,

89 Woerman & Engelbrecht (n 85) 31.
90 Du Plessis, J McConvill & M *Bagaric Principles of contemporary corporate governance* (2005) at 16.
91 R Phillips, E Freeman & A C Wicks 'What stakeholder theory is not' (2003) 13(4) Business Ethics Quarterly at 480.
92 T Makwara, DY Dzansi & C Chipunza 'Contested notions of ubuntu as a Corporate Social Responsibility (CSR) theory in Africa: An exploratory literature review' (2023) 15 *Sustainability.*
93 B Nussbaum 'Ubuntu: Reflections of a South African on our common humanity Reflections' (2003) 17(1) *World Business Academy* at 2.
94 Grootboom (n 10).
95 S M Byars & K Stanberry *Business ethics* (2018) at 9.
96 Khomba et al (n 11) 32.
97 Woerman & Engelbrecht (n 85) at 31.

must consider the interests of all stakeholders, in and out the company.[98] This approach is confirmed by the modern consideration of a company as both a social and economic tool.[99]

Section 7(d) of the Act provides that the Act as its object aims to reaffirm the concept of the company as a means of achieving economic and social benefits. This reinforces the triple bottom approach, which requires a consideration of the impact of corporate activities on three parts i.e., the society, environment, and economy in which a company operates in.[100] The enlightened shareholder value approach, on the other hand, supports a traditional consideration of a company.[101] It regards a company as an economic tool, incorporated to generate profits for the shareholders.[102] However, in terms of the enlightened shareholder value approach, interests of other stakeholders may be considered if such is to the benefits of the shareholders.[103] The enlightened shareholder value approach opens room for consideration of communal interests even though such considerations are subject to the benefit of shareholders,[104] this illustrates that this approach does not completely neglect the fact that a company cannot achieve success in isolation.

South African corporate law, similar to the Constitution,[105] has limited the constitutional freedom of expression.[106] For instance, freedom of expression in corporate law is limited when comes to the choice of a company name.[107] The selection of an appropriate company name is an essential aspect in corporate law.[108] Although companies for the most part enjoy the freedom to choose whatever name they consider fit, companies may not use names which fall within the ambit of section 16(2) of the Constitution. Section 16(2) of the Constitution imposes a justifiable limitation on the right to freedom of expression. The limitation set out in section 16(2) of the Constitution in substance has a reflection of ubuntu. This is because

98 IM Esser 'The protection of stakeholders: The South African social and ethics committee and the United Kingdom's enlightened shareholder value approach: Part 1' (2017) 50(1) *De Jure* at 98-99.
99 Sec 7(d) of the Act.
100 P Księżaka & B Fischbach 'Triple bottom line: The pillars of CSR' 2017 4(3) *Journal of Corporate Responsibility and Leadership* at 99-106.
101 S Kiarie 'At crossroads: Shareholder value, stakeholder value and enlightened shareholder value: Which road should the United Kingdom take?' (2006) *International Company and Commercial Law Review* 17(11) at 332.
102 As above.
103 T Wiese 'Corporate governance in South Africa with international comparisons' (2017) Juta: Cape Town 8; BM Mupangavanhu 'Directors' standards of care, skill, diligence, and the Business Judgment Rule in view of South Africa's Companies Act 71 of 2008: Future implications for corporate governance' (2016) unpublished PhD thesis, University of Cape Town at 51.
104 Mupangavanhu (n 103).
105 Constitution (n 4) sec 16(2).
106 See for instance sec 11(2)(a)-2(c) of the Act.
107 As above.
108 MF Cassim et al *Contemporary company law* (2012: Juta) at 113.

ubuntu like other constitutional values does not promote (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Rather it promotes peaceful community existence.

The criteria for choosing a suitable company name is regulated by section 11 of the Act. When choosing a suitable name, the incorporators of a company must consider the provisions of this section together with section 16(2) of the Constitution. As a result, a company is prohibited to use a name which is misleading,[109] constitute — (i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.[110]

In *Islamic Unity Convention v Independent Broadcasting Authority*,[111] (*Islamic Unity Convention*) the Constitutional Court, in limiting the freedom of expression, held that:

> Certain expressions do not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.[112]

Since ubuntu is equated to human dignity, limiting the constitutional right to freedom of expression on the basis that it violates dignity and other values of the Constitution signals that ubuntu is carried through Constitution.

Furthermore section 12(1) of the Constitution provides that everyone has a right to freedom and security of the person. This constitutional right entails that every person must be protected from any potential harm.[113] This constitutionally protected freedom has also found its way into the corporate law of South Africa. The fiduciary duty of company directors to act in the best interests of a company,[114] has been broadly accepted to imply that the directors must consider not only the interests of the company, but also those of other stakeholders involved with the company directly or indirectly.[115]

Section 76(3)*(*b*)* of the Act, read with the Constitution, imposes an obligation on company directors to ensure the protection of the

109 Sec 11(2)(b) of the Act.
110 Sec 11(2)(c) of the Act.
111 2002 (4) SA 294 (CC).
112 *Islamic Unity Convention* (n <XREF>) para 10.
113 AO Nwafor 'The protection of environmental interests through corporate governance: A South African Company Law perspective' (2015) 11(2) *Corporate Board: Role, Duties & Composition* at 6.
114 Section 76(3)(b) of the Act.
115 Nwafor (n 113) 8–9.

fundamental right to freedom and security of corporate employees, community members and the environment in which a company operates in.[116] This statutory provision portrays communal recognition, the core element of ubuntu.[117] As already said, the communal influence of ubuntu advocates for the need to promote and protect the interests of every individual living in the community and generations to come.[118] Thus, the directors' duty to consider the interest of all stakeholders and their environment is a revelation of the inclusion of spirit of ubuntu in corporate law.[119] This element of ubuntu is incorporated in the enlightened shareholder value approach and the stakeholder inclusive value approach as already highlighted.

Principle 16 of the King IV Report[120] also advocates for a stakeholder inclusive approach.[121] It provides that in executing the responsibilities and roles of governance in the best interests of a company, the governing corporate body should adopt an approach that balances the needs, interests, and expectations of different stakeholders.[122] In constitutional terms it implies that, in its operations, a company must ensure that it does not violate anyone's rights and freedoms, but rather promote harmonious operation and co-existence.[123] Section 7 of the Act confirms the obligation of companies in this regard. The section provides that the Act aims *inter alia* to 'promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law'[124] and also to reaffirm the concept of the company as a means of achieving economic and social benefits.[125] Company employees, the community and the environment in which the company operates must be protected (e.g. from harm which might result from hazardous operations undertaken by the company).[126] Companies must ensure that the environment in which they operate is safe for humans and for the natural environment.[127] This fundamental right to freedom and security of a person goes hand in hand with the constitutional right to a healthy and safe environment which is also bears ubuntu elements.[128]

116 As above.
117 Grootboom (n 10).
118 As above.
119 Grootboom (n 10).
120 Institute of Directors Southern Africa King IV Report on Corporate Governance For South Africa 20016 (King IV).
121 King IV (n 120) at 71-73.
122 Principle 16 of King IV (n 120) at 71.
123 See sec 8(2) of the Constitution.
124 Sec 7(a) of the Act.
125 Sec 7(d) of the Act.
126 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) (*Fuel Retailers Association*) para 60; principle 3 para 14(c)-(d) of King IV (n 120) at 45.
127 As above.
128 Sec 7(a) of the Act.

Gwanyanya posits that the constitutional right to freedom and security of the person in the context of corporate law can be indirectly interpreted to mean that companies must take initiatives to guarantee that the environment in which their employees work does not violate their constitutional right to freedom and security.[129] In other words, the right to freedom and security indirectly imposes a duty on companies to protect employees from exposure to a hazardous environment which might be caused by companies. The right also directly includes the right to a secure working environment.[130]

In *Mankayi v AngloGold Ashanti*[131] (*Mankayi*) the Court allowed the applicant to bring a delictual claim against the respondent company for damages suffered as a result of illness arising in the course of employment in a hazardous environment.[132] Gwanyanya, however, contends that the claim should rather have been based on the violation of the constitutional right to a healthy or hazard-free environment in terms of section 24 of the Constitution.[133] According to Gwanyanya, framing the claim in terms of section 24 of the Constitution would have been useful for determining the extent to which courts are willing to recognise the obligation of companies in the protection of human rights prior to the coming into effect of the Act.[134] Failure by the courts to depart from the 'classical libertarian roots and a concomitant hostility' and to promote constitutional values, shows that there is need for a more favorable approach where human rights protection takes center stage in the business sector.[135] However, this was not an absolute failure on the part of the courts, since it managed to enforce another constitutional right to freedom and security of the person as guaranteed by section 12 of the Constitution, which is connected to the environmental factors.[136]

Section 1(d) of the Constitution provides that South Africa is a sovereign, democratic state founded on the values of accountability, responsiveness, and openness. The Act captures this founding provision by providing that by the South African economy should be expanded by 'encouraging transparency and high standards of corporate governance'.[137] Transparency and high standards of

129 M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18(1) *Potchefstroom Electronic Law Journal* at 3116.
130 *Fuel Retailers Association* (n 126) para 63.
131 2011 (3) SA 237 (C).
132 *Mankayi* (n 131) para 17; read also para 13 & 15.
133 Gwanyanya (n 129) 3116.
134 As above.
135 Gwanyanya (n 129) 3116.
136 As above.
137 Section 7(a)-(b)(iii) of the Act. See also MM Botha 'First do no harm! On oaths, social contracts and other promises: How corporations navigate the corporate social responsibility labyrinth' in MM Botha and J Barnard *De Serie Legenda Developments in commercial law Vol III Entrepreneurial law* (2019) at 17.

corporate governance support ubuntu spirit[138] in the sense that it promotes 'efficient and responsible management of companies' as embodied in concepts like good corporate governance (GCG)[139] and ESG.[140]

One of the principles of GCG is that directors of a company must act in the best interest of the company. Section 76(3) of the Act states that directors, in pursuing the best interest of a company, must act in good faith and for a proper purpose. Acting in good faith entails that directors must be honest, not receive secret profits and only promote the purpose of the company.[141] The section 76 standard of the duty of directors was confirmed in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*[142] (*Visser Sitrus*). The Court found that the directors of the first respondent company acted in the best interest of the company in declining to approve the transfer of shares.[143] This is because permitting the transfer of shares would have negatively affected the interests of other shareholders as a collective body.[144] This indicates the 'communal/ collective' consideration of interests, an element of ubuntu. This shows that, the best interests of a company as per the decision of the court is not considered based of the interests of an individual shareholder but all shareholders as a collective body.

The GCG approach can be seen from three different perspectives: the shareholder system; the enlightened shareholder value; and the pluralist approach (stakeholder inclusive approach).[145] In respect of the shareholder system, shareholders of the company are the focus of corporate activity.[146] In regard to the enlightened shareholder value perspective on the other hand, directors should, in appropriate circumstances, ensure productive and long-term relationships with stakeholders while consideration of shareholders' interests remains an important aspect.[147] The pluralist approach, on the other hand, entails the balancing of the shareholders' interests with those of other stakeholders of the company.[148] South African corporate law is a combination of the enlightened shareholder approach and the stakeholder inclusive approach, since a company serves a dual

138 Principle 1 para f of King IV (n 120) at 44.
139 See sec 7(b)(iii) of the Act; Botha (n 137) 17.
140 Sec 72(4) of the Act.
141 MM Botha 'The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective' (2009) *Obiter* at 708; Sec 76(3)(a)-(c) of the Act; MM Botha & B Shiells 'Towards a hybrid approach to corporate social responsibility in South Africa: Lessons from India?' (2020) 83 *Journal of Contemporary Roman Dutch Law* at 586.
142 2014 (5) SA 179 (WCC).
143 *Sitrus* (n 142) para 95.
144 As above.
145 Botha 2009 (n 141) 704-705.
146 Botha 2009 (n 141) 705.
147 As above.
148 Botha 2009 (n 141) 705.

purpose that is profit generation for the shareholders, while also balancing of the interests of other stakeholders.[149] GCG in the South African context requires a balance to be struck between the interests of various stakeholders of the company, thereby displaying element of peaceful co-existence and interdependency as advocated by ubuntu.[150] This is demonstrated in section 7(d) of the Act, which provides that the Act aims to reaffirm the concept of the company as a means of achieving economic and social benefits. Which changes the traditional position where a company served only as an economic tool for the shareholders, with no consideration of the other stakeholders. This object of the Act portrays collective interest consideration, the core element of ubuntu.

The King IV Report requires the governing body of a company, in implementing its governance roles and responsibilities, to espouse the stakeholder inclusive approach which balances the needs, interests, and expectations of other stakeholders while advancing the best interest of the company.[151] This code advocates for the consideration of the community interests the core element of the principle of ubuntu.[152] Even though King IV is a voluntary code on good corporate governance, the JSE regards the King IV principles on good corporate governance as mandatory for all listed companies.[153] Failure to comply with the listing requirements can lead to the suspension of a company's listing.[154] However, although suspension is a sound enforcement measure, it applies only to large public companies listed on the JSE.[155]

GCG is essential in the business of a corporation.[156] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[157] (*Water Affairs*) Hussain J highlighted the importance of GCG by stating that:

> Practicing sound corporate governance is essential for the well-being of a company and is in the best interest of the growth of a country's economy, especially in attracting new investments. To this end, the corporate community within South Africa has widely, and almost uniformly, accepted the findings and recommendations of the King Committee on Corporate Governance …[158]

149 Botha 2020 (n 141) 582.
150 Mokgoro (n 2) 25.
151 Principle 16 of King IV report (n 120) at 36.
152 Grootboom (n 10).
153 JSE Listing requirements available at https://www.jse.co.za/sites/default/files/media/documents/201904/JSE%20Listings%20Requirements.pdf (accessed on 23 August 2023) para 3.84.
154 As above.
155 Botha & Shiells (n 141) 586.
156 Botha (n 137) 20.
157 2006 (5) SA 333 (W).
158 *Water Affairs* (n 157) 351.

Hussain J also pointed out that the King Committee was correct in stating that 'one of the characteristics of GCG is social responsibility'.[159] This implies that, like ubuntu, the governing board in acting in the best interests of a company, have the responsibility to consider the interest of the entire community involved with the company (CSR). CSR is an element of GCG. CSR encourages companies to demonstrate good corporate citizenship in their governance.[160] This means that companies, in their GCG strategies, should consider the impact of the activities of a company on the community, environment and the economy in which the company operates in.[161]

GCG has been applauded for playing an imperative role in the success of companies.[162] Thus, the King IV Report puts in place expected standards of GCG, by considering a company as both an economic and societal entity which should strike a balance between making profits and the interests of the community interest. Hence, the current author submits that this concept of corporate law is drawn from the ubuntu concept. Thus, incorporating these principles may lead to the transformation and Africanisation of the South African corporate law.

The above discussed corporate law concepts attunes to the main fundamentals of ubuntu through advocating for the new dual dimension of corporates which aim to advance both the social and the economic needs of all the stakeholders involved. This is attributed to the ontological elements of ubuntu which succumbs to peaceful communal existence, where individuals are expected to operate in a communal acceptable manner taking into account the needs and interests of existing and future members of the community. In the ubuntu perspective, the well-being of an individual is inquired through the wellness of the community.[163] From this philosophy, a company which exploits its employees, and the surrounding community cannot be considered as thriving.[164] In simply terms, a company which does not act as good corporate citizen may, when considered through the lens of ubuntu, be considered to not be doing well since it fails to take into account the needs of the involved stakeholders. In the communalistic nature of ubuntu an individual's existence is premised on their environment as well the community they live in.[165]

159 *Water Affairs* (n 157) 352; Botha & Shiells (n 141) 587.
160 Principle 3 of King IV (n 120) at 45-46.
161 As above.
162 *Water Affairs* (n 157) 351.
163 A Harris 'Corporate governance and ubuntu: South African and Namibian perspective' (2021) LLM Thesis unpublished, University of Cape Town at 29.
164 See further, F Mangena 'African Ethics through Ubuntu: A Postmodern Exposition' (2016) 9(2) *Africology: The Journal of Pan African Studies* at 69.
165 Harris (n 163).

5 General challenges in the inclusion of *ubuntu* in the South African corporate law

The general challenge associated with the African philosophies is lack of codification.[166] They are therefore, transmitted from one generation to the other through word of mouth, which may result in distortion of information.[167] Unlike European philosophies, which are codified, African philosophies are not, which makes it a challenge to implement and practise comprehensively and accurately.[168] In the Constitution, the supreme law of the land,[169] ubuntu is nowhere expressly stated, despite its acceptance as a constitutional principle by the courts.[170] Even though it has been submitted that ubuntu has been introduced into South African corporate law, the Act also lacks express provisions to this regard. Ubuntu operates on inferred application. The lack of solid provisions to back the application of this principle poses challenges in its application and interpretation.[171]

Lack of codification leads to poor circulation and knowledge-sharing of ubuntu principles. This results in many people, especially in modern communities, knowing nothing or very little about ubuntu. Scholars have developed interests in the African philosophies such as ubuntu which has led to receiving some scholarly attention. Gwaravanda and Ndofirepi observe, however, that African philosophers are sometimes blinded by the Eurocentric tendencies in the practice of African philosophy.[172] This is because European mind-set is considered universal. It is believed that, since Europeans discovered the way the world operates, what is left for Africans is only to lay their own "burnt" bricks on top of the European foundation.[173]

Perceived inferiority and Eurocentric influence thus also pose a challenge in the application of the African philosophy of ubuntu.[174] Anything of African origin in most cases is generally considered substandard.[175] Thus, preference is always given to ideologies of European origin because of perceived superiority over Africanism.[176]

166 I Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34(2) *Journal for Juridical Science* at 23.
167 JR Mugumbate et al 'Understanding Ubuntu and its contribution to social work education in Africa and other regions of the world' (2023) *Social Work Education* at 12.
168 As above at 12-13.
169 Sec 2 of the Constitution (n 4).
170 Himonga et al (n 2) at 380.
171 Himonga et al (n 2) at 380; Mugumbate (n <XREF>).
172 E Gwaravanda & A Ndofirepi 'Eurocentric pitfalls in the practice of African Philosophy: Reflections on African universities' (2020) 21 *Phronimon* at 1.
173 Gwaravanda (n 172) at 2.
174 CA Alvares 'Critique of Eurocentric social science and the question of alternatives' (2011) 46(22) *Economic and Political Weekly* at 72.
175 As above.
176 As above.

African legal concepts' validation has been always weighed through the lens of other legal systems.[177] For instance, for many years, the rules of customary law have been weighed against common law values. In cases of inconsistence between the two, common law takes precedent.[178] This can be the perceived position with the Constitution which recognises ubuntu through customary law.[179] The Constitution permits the application of customary law by courts subject to the Constitution and any legislation that specifically deals with customary law.[180] However, ubuntu like any other law, must be weighed only against the Constitution, the supreme law of the land. Interestingly, attempts have been made to place indigenous law on parallel footing with the common law.[181] In *Alexkor Ltd v Richtersveld Community*[182] (*Alexkor*) it was held:

> While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.[183]

The consideration of indigenous legal systems as part of the South African pluralistic justice system has ubuntu recognition.[184] In *Dikoko,* Mokgoro J applied the African concept of ubuntu in support of the determination of the appropriate amount for compensation in a defamation case and held:

> In our constitutional democracy the basic constitutional value of human dignity relates closely to ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms … A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.[185]

177 N Ntlama & DD Ndima 'The significance of South Africa's traditional Courts Bill to the challenge of promoting African traditional justice' (2009) 4 *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* at 4.

178 N Ntlama & DD Ndima (n 177); C Rautenbach 'Legal reform of traditional courts in South Africa: Exploring the links between ubuntu, restorative justice and therapeutic jurisprudence' (2015) 2(2) *Journal of International and Comparative Law* at 276.

179 Sec 39(2); ch 12 of the Constitution.

180 Sec 211(3) of the Constitution.

181 Rautenbach (n 178) 276.

182 2003 12 BCLR 1301 (CC).

183 Alexkor as above para 51.

184 Para 16(1) of sch 6 of the Constitution.

Mokgoro J's reasoning denotes that ubuntu is based on 'deep respect for the humanity of another' and restorative justice, which illustrates the importance of ubuntu in dispute resolution by the courts.

Although, in recent decades ubuntu has found some recognition, there is a need to develop certain aspects of ubuntu for it to meet the changing standards of the current democratic era. The application ubuntu as developed by courts and other adjudicating forums has constitutional recognition.[186] The Constitution requires that the development of customary law aspects must promote the spirit, purport and objects of the Bill of Rights.[187] Even though customary law and ubuntu are not the same, ubuntu forms an indispensable part of the African customs.[188]

6 Conclusion

In conclusion, from the literature examined above, ubuntu forms part of South African transformative constitutionalism and has been considered a constitutional value. There is also a clear correlation between the values of ubuntu and a number of the corporate law provisions. It is submitted that these similarities illustrate a successful introduction of the essence of ubuntu into South African corporate law. However, despite this notable success, there are still developments which need to be made, beginning with the express inclusion of ubuntu in the Constitution and the corporate law frameworks. This will promote a better understanding of ubuntu, a concept which is still clouded in the mist of subjective interpretations.

185 Dikoko (n 26) para 48; see also A Mukheibir 'Ubuntu and the Amende Honorable — a marriage between African values and medieval canon law' (2007) 28 *Obiter* at 583.
186 Constitution (n 4) sec 39(2).
187 As above.
188 *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 24.

RESPECTING PATIENT AUTONOMY: UNFORTUNATE VERDICT BUT SOUND PRECEDENT

***Evans v United Kingdom* app no 6339/05, (European Court of Human Rights, 10 April 2007)**

https://doi.org/10.29053/pslr.v17i1.5094

*by Megan Rosie O'Mahony**

Abstract

Evans v United Kingdom *saw the foundational medico-legal doctrine of informed consent come into conflict with women's reproductive rights in the context of in-vitro fertilisation. In this matter, the appellant, Evans, appealed the Court of Appeal's decision to sustain her erstwhile partner's (Johnston) right to withdraw his consent to implant embryos they had fertilised together. These embryos were Evans's last opportunity to have genetically related children. Evans submitted that the municipal courts had not adequately considered her position as a woman, and the judgment violated her article 8 and 14 rights under the European Convention of Human Rights.*

This case note analyses the majority and minority judgments of the European Court of Human Rights (ECHR). It finds that Evans's and Johnston's competing interests had to be weighed against each other, since the matter fell within the margin of appreciation awarded to the Grand Chamber of the ECHR. Evans's rights under articles 8 and 14 were both due consideration, and it was appropriate to attribute significance to her interests as a woman. However, her rights had to be weighed against Johnston's under article 8 and the importance of reinforcing the doctrine of informed consent. It is concluded that Evans's interests could not legally outweigh the dangerous precedent that would have

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been set by finding in her favour. Therefore, although the verdict was unfortunate for Evans, it was correct for the Grand Chamber to rule in favour of the UK to set a sound precedent that protects patient autonomy in Europe.

1 Introduction

In-vitro fertilisation ('IVF') forever transformed the notion of natural conception, providing previously childless couples with the opportunity to have genetically related children.[1] As with any scientific advancement of magnitude, the law required development to regulate this practice. This development included a re-evaluation of the boundaries of reproductive autonomy and the state's role in regulating it. The case of *Evans v United Kingdom*[2] (*Evans*) underscored the need for such development; it saw women's reproductive rights come into direct conflict with the foundational medico-legal doctrine of informed consent.[3] This case note argues that although the outcome was devastating to Evans, the judgment nevertheless strikes an appropriate balance between a woman's reproductive autonomy and the doctrine of informed consent. In doing so, the Strasbourg court again confirmed the importance of patient autonomy as a touchstone for ethical medical practice.[4]

While this case was decided over 16 years ago, it remains one of the very few cases that specifically deals with the subsequent withdrawal of consent during the IVF process. The case, therefore, continues to act as an important lodestar for both jurisdictions in and out of Europe, when addressing cases concerning informed consent and reproductive autonomy.[5]

In order to demonstrate the foregoing, this case note first contextualises the matter by providing a brief overview of the factual background and litigation history. Specifically, the arguments submitted before the Grand Chamber pertaining to the article 8 and 14 rights under the European Convention of Human Rights ('Convention')[6] will be discussed. Thereafter the majority and minority judgments are evaluated with reference to the importance of the doctrine of informed consent as a guiding principle for sound ethical medical practice.

1 A Kushnir et al 'The future of IVF: The new normal in human reproduction' (2022) 29 *Reproductive Sciences* at 849-856.
2 *Evans v United Kingdom* ECHR (10 April 2007) 6339/05 (*Evans*).
3 As above.
4 *Evans* (n 2) paras 89-90.
5 *Lopes de Sousa Fernandes v Portugal* ECHR (19 December 2017) 56080/13, *Del Campo v Spain* ECHR (6 November 2018) 25527/13, *Paradiso v Italy* ECHR (24 January 2017) 25358/12, *Lambert v France* ECHR (5 June 2015) 46043/14.
6 European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe (4 November 1950) ETS 5.

2 The facts of the case

To lucidly argue that the decision in *Evans* was correct, the facts of the matter, as well as the most pertinent rights under the Convention, are contextualised in this paragraph.

2.1 Evans, Johnston and infertility

In July 2000, after struggling to conceive naturally, Natalie Evans (Evans) embarked on fertility treatment with her long-term-partner Howard Johnston (Johnston).[7] During preliminary testing, Evans was diagnosed with pre-cancerous ovarian tumours, necessitating the removal of her ovaries.[8] In order to preserve her prospects of biological parenthood, Evans was offered the opportunity to fertilise her eggs with Johnston's sperm and freeze them for implantation two years after her treatment had concluded.[9] The consultation explaining Evans's diagnosis and the potential treatment options lasted approximately one hour.[10] During the consenting process, Evans was informed that under the Human Fertilisation and Embryology Act, 1990 of the United Kingdom ('1990 Act'), both parties could withdraw their consent up until implantation.[11] This is a fundamental component of the 1990 Act, Schedule 3 of the Act made such consent rules unequivocal.[12] This definitive legal standpoint is known as a 'bright-line rule' in the 1990 Act.[13] Evans enquired about freezing her eggs unfertilised, but was advised that, owing to poor success rates, such a procedure was not offered by the clinic.[14] After additional assurances by Johnston that such steps were unnecessary, both the individuals consented to treatment 'of myself and a named partner' and the clinic proceeded to create and freeze six fertilised embryos.[15]

In May 2002, the relationship between Evans and Johnston deteriorated, and the couple separated before the embryos could be implanted.[16] Johnston wrote to the clinic to inform them of these developments and revoked his consent to the implantation of the

7 *Evans* (n 2) para 13.
8 *Evans* (n 2) para 14.
9 *Evans* (n 2) paras 14-15.
10 *Evans* (n 2) para 15.
11 The Human Fertilisation and Embryology Act 1990 is an Act of the Parliament of the United Kingdom. It created the Human Fertilisation and Embryology Authority which is in charge of human embryo research, along with monitoring and licensing fertility clinics in the United Kingdom.
12 1990 Act (n 11) schedule 3.
13 *Evans* (n 2) para 70.
14 *Evans* (n 2) para 15.
15 *Evans* (n 2) para 16.
16 *Evans* (n 2) para 15.

embryos, after which the clinic informed Evans that in terms of the 1990 Act, the embryos had to be destroyed.[17]

2.2 Litigation history

In September 2003, Evans initiated proceedings in the High Court of the United Kingdom, seeking a declaration that Johnston could not withdraw his initial consent, as well as an order of incompatibility between the 1990 Act and the determinations of articles 8, 12 and 14 of the Convention.[18] Evans further asserted that in terms of articles 2 and 8 of the Convention, the embryos could not be unilaterally destroyed.[19]

Article 2 of the Convention establishes a right to life,[20] which Evans argued applied to the foetus.[21] Article 8, the right to private and family life, home, and correspondence, prescribes that there should be no interference from the state in private family matters, unless the action is unlawful or goes against public interest.[22] Article 12 denotes the right for men and women to marry and found a family and article 14 protects individuals from discrimination when enjoying their Convention rights.[23]

To the High Court, Evans also submitted that Johnston should be estopped from revoking his consent to the implantation of the embryos following his assurances when she had enquired about freezing her eggs unfertilised.[24] He had in fact told her to 'stop being so negative' because he wanted to father her children.[25] In the trial court, Wall J rejected this, determining that Johnston had not given his unequivocal consent to the use of the embryos regardless of circumstance and that, even if he had wanted to, he would never have been able to as a matter of statute and public policy.[26] Johnston had explicitly consented to the treatment of himself 'with a named partner' in the belief that their relationship would continue. Therefore, on their separation, Johnston could not be estopped from withdrawing his consent.[27]

With regards to article 8 of the Convention, while Evans's right to private and family life was interfered with, this could be said of both parties.[28] Wall J also ruled that the interference with Evans's

17 *Evans* (n 2) para 19.
18 *Evans* (n 2) para 19.
19 *Evans* (n 2) para I – II.
20 Convention (n 6) art 2.
21 *Evans* (n 2) para I.
22 Convention (n 6) art 8
23 Convention (n 6) arts 12 & 14.
24 *Evans* (n 2) para 19.
25 *Evans* (n 2) paras 15 & 19.
26 *Evans* (n 2) para 21.
27 As above.

Convention rights was not greater because of her sex or disability; thus, there was no infringement of article 14.[29] Since embryos are not generally considered to be people, there could be no claim to convention rights.[30] Evans's claim was consequently dismissed.[31]

Hereafter, Evans appealed the matter to the Court of Appeal, which dismissed the appeal in June 2004, for many of the same reasons as Wall J.[32] The House of Lords refused Evans permission to appeal to the Privy Council (as was then still in use), and having exhausted all domestic remedies, Evans subsequently challenged the finding before the European Court of Human Rights (ECHR), in Strasbourg.[33]

2.3 Evans's submissions before the European Court of Human Rights

In this paragraph, Evans's submissions and arguments before the European Court will be summarised and explained.

2.3.1 Article 8 — The right to respect for private and family life

The right to private and family life asserts that unless the action is unlawful or goes against public interest, there should be no interference from the state regarding a person's private family life, his home and his correspondence.[34] The judgement states that this article imposes both a negative obligation of non-interference on the state, as well as a positive obligation to protect an individual's rights from infringement.[35]

Evans argued that while regulations in reproductive medicine are necessary, the impugned legislation is excessive.[36] She submitted that the legislation was unduly inflexible and had the effect that no woman, whether embarking on the process with a partner or anonymous sperm donor, could secure their ability to have a genetically related child, as in either scenario, consent could be withdrawn at any time by the other donor.[37] Throughout the IVF process, Evans, as a woman, had borne a greater physical burden and been subjected to more invasive procedures than Johnston.[38]

28 *Evans* (n 2) para 23.
29 As Above.
30 *Evans* (n 2) para 22.
31 *Evans* (n 2) paras 20-23.
32 *Evans* (n 2) paras 24-28.
33 *Evans* (n 2) paras 20, 28, 53, 57, 93.
34 Convention (n 6) art 8.
35 *Evans* (n 2) para 75.
36 *Evans* (n 2) para 61.
37 *Evans* (n 2) para 63.
38 *Evans* (n 2) para 62.

Additionally, as the harvested eggs represented her final opportunity to have a genetically related child, it was submitted that her emotional investment also superseded that of Johnston.[39] It was submitted that Evans's greater physical and emotional investment justified her rights being promoted over Johnston's.[40]

2.3.2 Article 14 — Prohibition of Discrimination

A breach of article 14 can only be pleaded in conjunction with another Convention right.[41] Evans held that the High Court judgment breached article 14 on the basis of discrimination based on sex and disability, as, on these grounds, her ability to exercise her article 8 rights were unfairly limited.[42] The applicant submitted that her socio-physical position as a woman was not adequately considered, and in failing to protect her reproductive autonomy, the decision amounted to discrimination.[43] In terms of discrimination on the basis of disability, Evans submitted that as a woman requiring IVF, she was subject to control from her partner regarding the future of embryos in a manner that a woman able to conceive naturally would not be.[44] For a couple not using IVF, once the male has 'donated' his sperm (ejaculated), he is unable to withdraw his consent to the creation or gestation of the embryo and the decision to either continue or terminate the process lies entirely with the woman.[45] As the 1990 Act permitted withdrawal of consent pre-implantation, Evans submitted that this put women requiring IVF at the mercy of male partners and unfairly curtailed their ability to exercise their article 8 rights when contrasted to women that do not require fertility treatment.[46]

3 The judgment

The judgment was handed down by the Grand Chamber in Strasbourg by a panel consisting of 17 judges.[47] The decision to reject the submission of a violation of article 2 was unanimous.[48] However, regarding articles 8 and 14, the Court was split 13-4, the majority finding that there was no violation of the rights in question.[49]

39 As above.
40 As above.
41 Convention (n 6) art 14.
42 *Evans* (n 2) paras 93–94.
43 *Evans* (n 2) para O-I15.
44 *Evans* (n 2) para 93.
45 *Evans* (n 2) para O-I8
46 *Evans* (n 2) para 93.
47 *Evans* (n 2) para H4.
48 As above.
49 *Evans* (n 2) para 96.

3.1 The majority

3.1.1 Article 8 — The right to respect for private and family life

It was agreed that article 8 applied to both Evans and Johnston.[50] While the domestic courts decided the matter with emphasis on the negative obligation, i.e., not curtailing Evans's article 8 right, the ECHR emphasised the state's positive obligation to balance all competing interests.[51]

The Grand Chamber acknowledged that a verdict in either direction would wholly frustrate the opposing party's interests in exercising their article 8 rights.[52] In addition to these interests, they noted that the questions raised in *Evans* also concerned a number of public interests including upholding the principle of respect for informed consent and promoting clarity and certainty within the law.[53]

Whether acting upon a positive or negative obligation, the state must strike a fair balance between the competing interests of the individual parties and the wider community.[54] When there is no consensus among member states on how these interests should be balanced – as in *Evans* – a wide margin of appreciation can be afforded to the adjudicating court.[55] However, the margin of appreciation permitted may be limited by the nature of the rights involve[56]d. Where the contention concerns an area of life that is intimate and involves an important facet of an individual's existence (as can be said of conceiving a child and parenthood) the margin of appreciation must be curtailed.[57] On balance, owing to the fast-moving nature of fertility medicine and the complexity of the ethical questions raised, the margin that was afforded to the UK by the ECHR was wide.[58]

The Grand Chamber acknowledged that the 1990 Act was a product of extensive consideration of social, legal, and ethical implications of the developments in reproductive technology.[59] In light of this, the 'bright-line rule' regarding consent to use embryos should not be dismissed lightly.[60] It was deemed appropriate that UK law took account of the delay in implantation during IVF; thus, it was

50 *Evans* (n 2) para 71.
51 *Evans* (n 2) para 76.
52 *Evans* (n 2) para 73.
53 *Evans* (n 2) para 74.
54 W Schabas *The European Convention on Human Rights: A commentary* (2016) at 368.
55 As above.
56 As above.
57 As above.
58 *Evans* (n 2) para 81.
59 *Evans* (n 2) para H16.
60 *Evans* (n 2) para 60.

decided that the 'bright-line rule' was permissible and fell comfortably within the margin of appreciation afforded.[61]

The Grand Chamber deemed the inflexibility of Schedule 3 of the 1990 Act, criticised by Eva, to be compatible with article 8, owing to the benefits such regulation provided, namely legal clarity and certainty.[62] The Court further deemed that upholding legal clarity and certainty, is of the utmost importance for society at large.[63] It was crucial that the right to consent, and therefore the right to autonomy, was upheld in law for the future of all patients receiving medical treatment.[64] It was therefore decided that the interests of Evans, Johnston and society were weighed appropriately, and the limitation of Evans's article 8 — right had been lawful. [65]

3.1.2 Article 14 — Prohibition of discrimination

In the High Court, Wall J compared Evans to a man facing infertility and ruled that his decision would be the same in such a case.[66] He thus reasoned that his decision regarding the limitation of her article 8 rights did not constitute discrimination on the basis of sex.[67] The Grand Chamber did not address this. Instead, they held that because Evans failed to prove a violation of article 8, there could be no violation of article 14.[68] They were, therefore, also unwilling to consider the claim of discrimination on the grounds of disability, when Evans's situation was compared to women who did not require the use of IVF to reproduce.[69]

3.2 The minority

Instead of viewing the matter as an exercise in balancing positive obligations, the minority found that the case concerned an interference with Evans's right to become a biological parent.[70] They accepted that while such interference had legitimate aims, when taking into account the specifics of the case, it was neither necessary nor proportional.[71]

61 *Evans* (n 2) para 82.
62 *Evans* (n 2) para 74.
63 *Evans* (n 2) para 60.
64 *Evans* (n 2) paras 89, 90, 92.
65 As above.
66 *Evans* (n 2) para 23
67 As above.
68 *Evans* (n 2) para 94.
69 *Evans* (n 2) para 95.
70 *Evans* (n 2) para O-I5.
71 *Evans* (n 2) para O-I7.

3.2.1 Article 8 — The right to respect for private and family life

In their dissent, the minority of the Court ardently argued that the impact of the decision on Evans as a woman had not been adequately considered by the Court of Appeal and, therefore, the decision amounted to a violation of article 8.[72]

They found it to be intolerable if the 1990 Act's provision meant that a woman had no way to secure her ability to have a genetically related child, as it could always be vetoed at the whim of the man, be that partner or sperm donor.[73] This was of particular concern to the minority, who argued that women have experienced historic difficulty exercising their reproductive autonomy and are also subject to more associated societal and economic pressures.[74] Instead, the minority held that once the embryos had been created, Johnston had lost control of his gametes.[75] He could no longer destroy his sperm without also destroying Evans's eggs and, thus, the majority of the Grand Chamber was incorrect to find that the 1990 Act provided for an appropriate balance.[76]

It was argued that while bright-line rules can be useful in complex matters, they are, by their nature, limited by their inflexibility.[77] The minority criticised the contractual approach that had been used by the majority, arguing that the specifics of Evans's position made such a method inappropriate.[78] Adherence meant that the nuances of this case, i.e. Evans's medical condition, her position as a woman, and Johnston's assurances, were not adequately considered.[79]

The lack of consideration for Johnston's assurances was also criticised.[80] Evans proceeded in fertilisation with Johnston, believing in 'good faith' that he would honour his commitment; it is not reasonable to expect Evans, having received a devastating diagnosis, not one hour prior, to have anticipated Johnston's withdrawal.[81] Without such assurances, Evans could have sought alternative fertility treatment to better ensure her chances of having genetically related children.[82] Despite this, the minority did not hold that Johnston was estopped from withdrawing his consent, only that such reassurances

72 *Evans* (n 2) para O-I14.
73 *Evans* (n 2) para OI2.
74 N Priaulx 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) 16 *Medical Law Review* at 180-188.
75 *Evans* (n 2) para O-I8.
76 As above.
77 *Evans* (n 2) para O-I6.
78 As above.
79 As above.
80 *Evans* (n 2) para O-I8.
81 As above.
82 As above.

were not adequately weighed against him by the Grand Chamber when balancing competing interests.[83]

3.2.2 Article 14 — Prohibition of discrimination

The minority claimed that the example of a man facing infertility provided by Wall J did not capture the complexities of the competing rights that were at stake.[84] It was submitted that, in line with the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), women's rights require special consideration.[85] In areas where they are distinctly different from men, including reproductive matters, their rights should be approached from a women-centred perspective.[86] CEDAW specifies that failure to make corresponding provision for women's rights amounts to discrimination. Accordingly, Wall J had used an inappropriate method to test for a violation of article 14.[87]

The minority argues that an approach similar to that taken in *Thlimmenos v Greece*,[88] should be taken instead. In *Thlimmenos* it was held that where two situations are different, they require different treatment.[89] The minority, consequently submitted that the circumstances of Evans's case and the excessive physical and emotional burden placed upon her required special consideration and treatment. By not doing so, Evans's article 14 rights, in conjunction with her article 8 rights, were violated.[90]

4 Assessment

Using the arguments submitted by each party as well as European and UK jurisprudence, this section evaluates the arguments outlined above to argue how they should be weighed for a coherent and legally sound judgment. This section first considers the submissions pertaining to estoppel, and then to articles 8 and 14.

4.1 Estoppel

In the United Kingdom, the doctrine of estoppel has its origins in common law.[91] It stipulates that if a party leads another to reasonably

83 *Evans* (n 2) para O-I9.
84 As above.
85 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (December 1979) UNTS 1249.
86 As above.
87 As above.
88 *Thlimmenos v Greece* (2001) 31 EHRR 15 (*Thlimmenos*).
89 *Evans* (n 2) para O-I15.
90 As above.
91 *Central London Property Trust Ltd v High Trees House Ltd* (1947) KB 130.

believe that they will not enforce their legal rights, then they will be precluded from doing so at a future time.[92] In the *Evans* case, it cannot be reasonably claimed that Johnston had unequivocally promised to never revoke his legal consent.[93] He may well have been *bona fide*, but his consent was conditional on the nature of the relationship at the time and could not estop him from revoking it later when circumstances had changed dramatically.[94]

As mentioned above, even if Johnston had wanted to provide his unequivocal consent during the appointment, he was unable to.[95] The 1990 Act intentionally and specifically ensures that both parties' rights to withdraw consent pre-implantation are protected, with no possibility of waiver.[96] This ensures that any individual embarking on fertility treatment can be sure that their genetic material cannot go on to be used without their consent. It is therefore argued that the objectives of the 1990 Act regarding protecting informed consent, together with the larger importance of the doctrine across medical treatment generally, are an interest that outweighs the interests served by the common law. In any case, this legal argument did not play a significant role in the case before the ECHR, as it was not mentioned past the domestic courts.[97]

4.2 Article 8 – The right to respect for private and family life

Reproductive autonomy is considered integral to a fulfilling life,[98] and women's reproductive rights are owed additional special consideration under CEDAW.[99] Evans submitted that, therefore, her rights should outweigh Johnston's.[100]

A case with similar facts, *Nachmani v Nachmani*[101] was used to support Evans's claims. In this case, the Israeli Supreme Court ruled in favour of Ms Nachmani using cryo-preserved embryos with a surrogate after her husband withdrew his consent.[102] Goldberg J found, similarly to the minority in *Evans*, that the harm that would be caused to Ms Nachmani by denying her biological parenthood far exceeded that which would be inflicted on Mr Nachmani by forcing fatherhood onto him.[103] As in *Evans*, the man would be experiencing

92 As above.
93 *Evans* (n 2) para 21.
94 As above.
95 As above.
96 The 1990 Act (n 11) schedule 3.
97 *Evans* (n 2) para 21.
98 EM Jackson *Regulating reproduction law, technology and autonomy* (2001) at 323.
99 CEDAW (n 85).
100 *Evans* (n 2) para 62.
101 *Nachmani v Nachmani* Supreme Court (12 September 1996) 5587/93 (*Nachmani*).
102 As above.
103 D Dorner 'Human reproduction: reflections on the *Nachmani* case' (2000) 1 *Texan International Law Review* at 6.

a specific restriction of a general right, as he was not expressing a desire never to have children but a desire not to parent a child with this specific partner.[104] In contrast herewith, Ms Nachmani, like Evans, could not have genetically related children any other way, and denying her this opportunity would entirely negate her right – a considerably larger infringement.[105]

Nachmani is, however, of limited application, as the interests of the state in respecting informed consent were not considered.[106] Under UK law, respect for autonomy is paramount.[107] This is strongly reflected in case law, where, in weighing up the ability to exercise reproductive autonomy and the ability to override informed consent, rulings have consistently been made in favour of respecting informed consent.[108] Setting a precedent that informed consent, can be overridden in favour of personal interests, even when it is explicitly required by statute, would be an untenable position, especially for patients using artificial reproductive technologies.[109]

Throughout *Evans*'s litigation history, it was recognised that Johnston had a valid claim under article 8 to choose not to become a biological parent,[110] which could be protected from infringement by the positive obligations incurred by the state under the Convention. He had clearly consented to treatment 'together' with Evans,[111] knowing that either of them could withdraw their consent up until the embryos were implanted.[112] On this matter, the law was unequivocal.[113]

Informed consent is one of the foundations of the 1990 Act; the doctrine is fundamental to ethical medical practice, is the manifestation of an individual's right to self-determination, or autonomy, and is necessary for lawful medical treatment.[114] In recent years, the UK courts have clearly asserted, through landmark cases such as *Montgomery v Lanarkshire)*,[115] the importance of promoting patient autonomy and respecting a patient's choice in important decisions.[116] This has made it a dominant aspect of ethical medical

104 As above.
105 As above; K Wright 'Competing interests in reproduction: The case of Natalie Evans' (2008) 19(1) *King's Law Journal* at 146.
106 Nowhere in the *Nachmani* (n 101) case's 53-page judgement is there mention of the state's interests in respecting informed consent.
107 Schabas (n 54) 371.
108 *R v Human Fertilisation and Embryology Authority ex parte Blood* (1997) 2 All AR 687; *Mrs U v Centre for Reproductive Medicine* (2002) EWCA Civ 565.
109 S Sheldon 'Gender equality and reproductive decision-making' (2004) 12(3) *Feminist Legal Studies* at 311.
110 *Evans* (n 2) para 71; the Convention (n 6) art 8.
111 Sheldon (n 109) 439,440; Wright (n 105) 137.
112 *Evans* (n 2) para 16.
113 *Evans* (n 2) para 37.
114 The 1990 Act (n 11) Schedule 3, S Pattinson *Medical law and ethics* (2017) at 101.
115 *Montgomery v Lanarkshire* [2015] UKSC 11, see also as *Re MB* (1997) EWCA Civ 1361 (*Montgomery*).

practice.[117] True autonomy requires the right to refuse or withdraw consent, lest the entire principle is undermined.[118] The 'bright-line rule' which necessitates both parties to consent to implant embryos, was specifically designed to assure consent and avoid the arbitrariness that could arise from balancing individual circumstances.[119] Forcing Johnston into biological parenthood would wrongly assert that women's interests in procreation inherently outweigh men's and would infringe upon men's right to self-determination under article 8.[120] It could be submitted that this comes into tension with CEDAW's standpoint that women's reproductive autonomy be owed 'additional special consideration'.[121] However, in the author's estimation, overriding the informed consent of another individual goes beyond affording special consideration to the reproductive rights of women, and would have been an inappropriate interpretation of the legislation.

Infringing upon Johnston's right to self-determination could have had impacts extending far beyond the couple. Ruling in favour of Evans would have set a precedent that lawful, informed consent could be waived in favour of the personal interests of another individual, compromising patients' autonomous decision-making.[122] Under article 8, it is accepted that there is scope for state interests when the aim is to protect the rights and freedoms of others or the interests of the public.[123] Providing legal clarity and protecting the legal enforcement of respect for patient autonomy falls comfortably within this ambit.[124]

While it may be arguable that on an individual level, Evans's interest in having a genetically related child outweighed Johnston's interest in avoiding genetic parenthood, this would be too reductive. There must also be consideration of the impact of infringing on Johnston's right to autonomy. With these factors taken into consideration, while unfortunate for Evans, the judgment is sound in holding that Johnston's interests, coupled with society's, outweigh hers. Thus, the Grand Chamber's judgment pertaining to article 8 was legally correct.

116 Pattinson (n 114) at 117, J Keown *The law and ethics of medicine* (2012) at 19.
117 As above.
118 Universal Declaration on Bioethics and Human Rights (2005) art 6.
119 The 1990 Act (n 11) schedule 3 sec 5.
120 Sheldon (n 109) 303.
121 CEDAW (n 85) art 4.
122 S Sheldon '*Evans v Amicus Healthcare*; *Hadley v Midland Fertility Services* — revealing cracks in the twin pillars' (2012) 16(4) *Child and Family Law Quarterly* at 444.
123 Convention (n 4) art 8.
124 Wright (n 105) 145.

4.3 Article 14 — Prohibition of discrimination

While there was consensus among the courts that article 14 was relevant, the ECHR ultimately ruled that as there had been no infringement of article 8 and the question of an infringement upon article 14 did thus not require discussion.[125] This section however, examines the submissions pertaining to article 14 and how they should have been weighed, had the Court decided to do so.

The two grounds upon which Evans submitted to have been discriminated against, i.e sex an disability, require separate consideration. The minority reasoned that, as a woman, Evans's situation was significantly different to a man in an analogous medical predicament.[126] Biologically, as mammals, sexual reproduction is not gender neutral; women bear a far heavier burden than men.[127] Additionally, women's worth within society is often directly influenced by their ability to bear children, so while a childless woman is viewed pejoratively, a childless man is less so.[128] CEDAW permits temporary different treatment between the sexes in order to correct *de facto* differences, and the minority argued that, by not addressing the fundamental differences, both biological and social, associated with childbearing, the majority decision amounted to discrimination.[129]

However, Evans was not in a position where the decision by the court would necessarily leave her childless. Indeed, she could still experience motherhood through adoption or use a donated ovum to gestate and deliver a child, albeit not one that was genetically related to her. Thus, the judgment may not have the social implications suggested by the minority.[130]

As with article 8, there is once again a balance to be struck. A ruling in favour of Evans would have forced Johnston into biological parenthood, which, in addition to infringing on his article 8 rights, could also have amounted to discrimination. In the UK a woman can hardly ever be forced into biological parenthood as she can unilaterally decide to terminate the pregnancy at any time up until 24 weeks.[131] On balance, considering Evans's position as a woman in the UK, with access to alternative forms of motherhood, and the impacts on Johnston and society, it was not proven beyond reasonable doubt

125 *Evans* (n 2) para 95.
126 *Evans* (n 2) para O-I15.
127 G Laurie et al *Mason and McCall Smith's law and medical ethics* (2018) at 274.
128 Priaulx (n 74) sec 3.
129 CEDAW (n 85) art 4.
130 *Evans* (n 2) para 72.
131 The Abortion Act, 1967 sec 1(1)(a).

— the burden of proof required by the Convention — that the decision amounted to discrimination against Evans on the basis of her sex.[132]

The other grounds on the basis of which Evans submitted she had been discriminated against, was that of disability. Evans argued that she had less control over her reproductive freedom than a woman who did not require IVF.[133] With IVF, the male partner has the opportunity to revoke consent for the use of their semen after fertilisation has occurred, effectively having a veto to implantation.[134] This subjects the woman to more control from the male party than occurs in natural conception.[135] Evans argued that this amounted to discrimination.[136] This interpretation, however, misses vital differences between the two means of conception.

Firstly, there are many additional hurdles in assisted reproduction, including the financial implications and considerations of the welfare of the prospective child before treatment is provided.[137] These differences are accepted owing to the innate differences between the methods of conception, as well as state interests in the provision of the necessary technology.[138]

Secondly, there is also a difference in the rights invoked. In unassisted reproduction, once the male gametes have been 'donated', there is no way to prevent implantation that would not infringe on the woman's autonomy, i.e., as a competent person, she cannot be forced to undergo medical intervention against her will.[139] This right is not invoked in IVF; therefore, it is argued that the situations are sufficiently dissimilar that differential treatment does not constitute discrimination.

Overall, though Evans's article 14 rights were certainly due consideration, there were fair grounds to rule that there was no discrimination on the basis of sex or disability. This is not to say Evans's article 14 rights were not infringed at all, but on balance, her claim would still have failed.

5 Conclusion

The *Evans* case challenged the notion of informed consent and the way in which it is dealt with under UK law, in terms of IVF specifically,

132 Schabas (n 54) 570.
133 *Evans* (n 2) para 93.
134 *Evans* (n 2) para O-I2.
135 Wright (n 105) 149.
136 *Evans* (n 2) para 93.
137 Wright (n 105) 149.
138 As above.
139 This stems from the common law right to bodily autonomy, see Schabas (n 54) 371, and has been partially codified in the Convention (n 6) article 3 and article 8.

and women's rights generally. With up to one in six people affected by infertility globally,[140] the precedent set by *Evans* is crucial for nations whose courts have not yet encountered such issues. Though the judgment was unfortunate for Evans, and arguably for many women in similar situations, it was legally sound for the Grand Chamber to rule in favour of the UK. In ruling in favour of the UK, the Grand Chamber ruled in favour of society as a whole's right to informed consent. This applies to both men and women, in and out of the reproductive medicine sphere.

The judgment cemented the importance of patient autonomy as a touchstone for medical practice; in order to truly respect their patients, clinicians must heed decisions both consenting to treatment and refusing it, lest the doctrine becomes inept. It is indeed true that there cannot truly be informed consent where the right to withdraw such consent is not also respected.

140 World Health 'Organisation 1 in 6 people globally affected by infertility: WHO' 4 April 2023 https://www.who.int/news/item/04-04-2023-1-in-6-people-globally-affected-by-infertility (accessed 12 July 2023).

THE CONCEPT OF GOOD FAITH IN THE LAW OF CONTRACT: REDEFINED AND REIMAGINED

https://doi.org/10.29053/pslr.v17i1.5095

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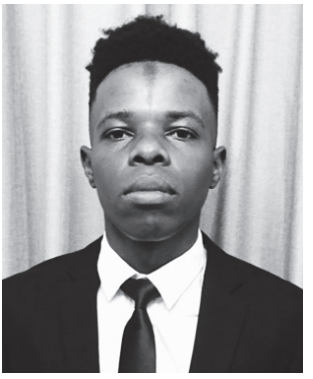

Abstract

In civil, and some common law, jurisdictions, good faith is recognised as a fundamental principle informing the law of contract and is often invoked by some law courts to set aside contracts found not to have been concluded in good faith. It is a counterpoise to the dominant idea of freedom of contract. Whilst it cannot be denied that the Constitution of the Republic of South Africa, 1996 has had a positive impact on the doctrine of good faith in South African jurisprudence, good faith still has a larger role to play to ensure justice and fairness whilst preventing commercial immorality. It is, therefore, against this backdrop that this paper will examine the role of good faith and fairness in South African contract law. it is found that the concept of good faith plays an important role in contract law as it can be a determining factor in the validity or invalidity of a contract. It is inextricably linked to the concept of fairness and has the effect of counteracting contracts that are unfair or unconscionable. The article further looks at the role of good faith in the contract law of foreign jurisdictions and sets out the lessons we can draw from these jurisdictions.

* LLB Candidate, University of the Western Cape. ORCiD Number: 0000-0001-8348-5688 Infinitely grateful to my mother, friends and the rest of my family for their unwavering and unfaltering support. A special thank you to my mentors and icons, Dr Kasker and Dr Osiki of the University of the Western Cape for their guidance and the tremendous impact they have had on my career. Without the support of Prof Glazewski, Adv Nqabayethu Buthelezi and Mxolisi Ngulube, I dare say, my childhood dream of becoming a lawyer would not be possible. Lastly, I would be remiss if I neglected to convey my infinite indebtedness to the Canon Collins Trust for the support, which extends beyond financial support.

1 Introduction

The South African common law of contract stems from a combination of Roman-Dutch law and English common law. An analysis of the great *Corpus Juris Civilis*, or the Code of Justinian, shows that good faith initially played almost no role under Roman law in *stricti iuris* contracts as long as the formalities of the contract were complied with.[1] In other words, the contract was binding irrespective of whether it was induced by fraud.[2] This frequently led to injustices, and therefore, there was a need for legal development in this area of contract law.[3] Good faith later developed as a procedural instrument under which an equitable discretion was bestowed upon judges to adjudicate a case before them fairly and reasonably.[4] This meant that courts had the power to vary the rights and obligations of the parties to a contract by invoking concepts such as justice, fairness and reasonableness.[5] The effect of this development in Roman-Dutch law was that contracts were based on consent and parties were required to act in good faith.[6] However, there is uncertainty regarding whether courts had an equitable discretion to decide a matter based on the failure of either party to act in good faith. Moreover, if the courts held such discretion, the scope of its exercise is unclear. There are conflicting writings regarding this question and the correct position remains unclear. English law was largely considered supplementary to Roman-Dutch law.[7] South African courts often turned to English law to decide commercial law disputes.[8]

2 The meaning of good faith and fairness

Good faith and fairness mean that a party to a contract must act in a way that he or she believes is acceptable, the party's belief must be based on honesty and rationality, grounded in morality, and there must be reasonable standards of fair dealings.[9] The content, role and scope of good faith and fairness in contract law are not clear.[10] It appears from case law that good faith entails that parties to a

1 A Rodger 'Developing the law today: National and international influences' *TSAR* (2002) 15.
2 D Hutchison et al (ed) *The law of contract in South Africa* (2017) 22.
3 E Fagan 'Roman-Dutch law in its South African historical context' in R Zimmermann & D Visser (eds) *Southern Cross: Civil and common law in South Africa* (1996) 218.
4 Hutchison (n 2) 22.
5 South African Law Commission 'Unreasonable stipulations in contracts and rectification of contracts' Working Paper 54 Project 47 1994 para 2.1.
6 Hutchison (n 2) 22.
7 Fagan (n 3) 57.
8 Fagan (n 3) 57.
9 Hutchison (n 2) 17.
10 Hutchison (n 2) 24.

contract must deal with each other honestly and fairly.[11] Perhaps the justified expectations of the parties to a contract is an accurate description of the term 'good faith'. For instance, the rendering of an imperfect performance will be a manifestation of *mala fide*. The minority judgment of the Appellate Court in *Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman*[12] took the view that the function of good faith is to give expression to the community's sense of what is fair, just and reasonable.[13] Today, this view manifests in the notion of public policy[14].

The meaning of good faith and fairness is multifaceted. There appears to be a close nexus between good faith and public policy. Public policy represents the legal convictions or general sense of fairness of the community.[15] The law of contract should be flexible to allow arbiters of the law to import open-ended standards such as good faith and reasonableness to ensure fairness in contracts. However, a court is not entitled to refuse to enforce a contract on the basis that a judge regards this as unreasonable or unfair.[16] This flows from the Supreme Court of Appeal (SCA) jurisprudence that reasonableness and fairness are not free-standing requirements for the exercise of a contractual right.[17] It can be deduced from this that good faith and fairness are not requirements for the validity of a contract, and therefore, may be accurately described as principles underlying contract law.

3 The determination of good faith and fairness

Ngcobo J ruled that public policy, in the context of the law of contract, must be determined with reference to the Constitution.[18] This means that public policy is now rooted in the Constitution. In other words, a contractual term that is contrary to public policy inadvertently violates the Constitution.[19] Moreover, the Constitutional Court developed a helpful two-legged reasonableness test in the matter of *Barkhuizen v Napier*.[20] First, it considers

11 For example, the Appellate Division in *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) 651C, observed that in terms of Roman law, courts generally had wide powers to interpret contractual terms in accordance with the concepts of justice, reasonableness and fairness and in turn these concepts constitute good faith.
12 1997 (4) SA 302 (A).
13 *Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (A) 87.
14 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) 122.
15 *Barkhuizen* (n 14) para 73.
16 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 5 BCLR 449 (CC) 25.
17 *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) 28.
18 *Barkhuizen* (n 14) para 29.
19 *Barkhuizen* (n 14) para 29.
20 2007 (5) SA 323 (CC).

whether the clause in question was reasonable.[21] Thereafter, if it was reasonable, it had to be established whether the clause should be enforced in particular circumstances which prevented compliance with the clause.[22] The first leg calls on the courts to weigh competing interests and rights.[23] For example, the principle of sanctity and freedom of contract with the right of a party to seek judicial redress. The second leg requires the claimant to justify his non-compliance with the contract.[24] In this regard, a court can take into consideration the circumstances of the claimant and the circumstances surrounding the conclusion of the contract.

The ruling in *Barkhuizen v Napier* has been welcomed and has developed contract law jurisprudence by strategically construing the rights in the Bill of Rights and values underlying the Constitution with the law of contract. It laid the foundation for the much-needed development of the law of contract.[25] This is apparent in the subsequent rulings of the Constitutional Court. In the case of *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd*,[26] the Constitutional Court reiterated the importance of good faith in contracts and went as far as to express a desire to infuse the concept of ubuntu and other constitutional values into the law of contract.[27] Two years after this ruling, the Constitutional Court took the same view and held that contractual relationships are subject to the values of good faith, fairness and other values that underlie the Constitution.[28]

In the recent case of *Beadica 231 CC v Trustees of the time being of the Oregon Trust*,[29] the Constitutional Court referred to these judgements with approval and concurred with the SCA regarding the role of good faith in the law of contract.[30] However, the Court took it a step further and opined that public policy is informed by concepts of reasonableness, good faith, and fairness.[31] The Constitutional Court also restated the need for the infusion of constitutional values into contract law.[32] This is, of course, a welcomed development as

21 *Barkhuizen* (n 14) para 56.
22 *Barkhuizen* (n 14) para 56.
23 *Barkhuizen* (n 14) para 57.
24 *Barkhuizen* (n 14) para 58.
25 Citing *Barkhuizen* with approval in *Everfresh*, Moseneke DCJ pronounced, obiter, at para 71 that:
"Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact."
26 2012 (1) SA 256 (CC).
27 *Everfresh* (n 26) para 71.
28 *Botha v Rich* NO 2014 (4) SA 124 (CC) 24.
29 2020 (9) BCLR 1098 (CC).
30 *Beadica* (n 29) para 176.
31 *Beadica* (n 29) para 35.
32 *Beadica* (n 29) para 76.

the introduction of constitutional values may curb commercial immorality which is prevalent in present-day commercial dealings. Any argument against such an approach must contend with the fact that South Africa is founded upon the supremacy of the Constitution, which informs all other laws, with commercial law being no exception.[33]

4 The role of good faith in contract law

The role of good faith in contract law can be seen as having a controlling function.[34] In this regard, good faith can be considered as one of the factors a court must consider in deciding whether to enforce a contract. The SCA has held that good faith is not an independent cause of action that can be used in a matter to challenge a contract but must be seen as an underlying value influenced by other more technical doctrines.[35] In subsequent cases, the Constitutional Court somewhat deviated from the conservative approach of the SCA.[36] Despite this deviation, the Constitutional Court regrettably did not make an unequivocal statement about the role of good faith in the law of contract. The lack of clarity regarding the role of good faith in the law contract is evident from the recent case *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments*.[37] In its judgment, the SCA did not refer to the two-legged reasonableness test developed by the Constitutional Court in *Barkhuizen v Napier*. It also did not consider the Constitutional Court's judgments endorsing the importance of good faith.[38] The SCA only cited *Beadica* and conceded that good faith underlies and informs the law of contract. However, the Court held that it is not a free-

33 Section 1 of the Constitution of the Republic of South Africa 1996 provides as follows:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'
Section 2 states that 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

34 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 22.

35 *Brisley* (n 34) para 22

36 *Everfresh* (n 26); *Barkhuizen* (n 14); *Beadica* (n 29).

37 [2021] 3 All SA 647 (SCA).

38 The matter of *Everfresh* (n 26) para 69, for example, wherein the Constitutional Court acknowledged the importance of good faith in contractual law.

standing principle that can be used to interfere with freedom of contract.[39]

In *Coral Lagoon*,[40] Capitec Bank entered into a subscription of shares agreement with Coral in terms of which it would issue Coral with shares with the proviso that under clause 8.3 permission was required for Coral to dispose of the shares to a non-B-BBEE[41] compliant third party.[42] Subsequently, Capitec Bank refused to give such permission and Coral sought judicial redress asserting that the withholding of consent was unreasonable and in breach of the good faith required by the agreement.[43] The High Court found that withholding consent was contrary to good faith and reasonableness and ordered Capitec Bank to consent to the sale.[44]

On appeal, in a unanimous SCA judgment the Court set aside the order of the High Court on the basis that good faith cannot be used to determine the terms of a contract and cannot justify the imposition of a duty to give consent where Capitec Bank had the right to refuse to consent.[45] The SCA went as far as ruling that even where a party changes its stance cynically on an issue, a court is not allowed to use good faith to deviate from the agreement.[46] Inconceivably, the SCA did not consider the reasonableness test enunciated in *Barkhuizen,* let alone apply it. It is the author's view that the matter called upon the Court to consider whether the clause requiring consent was reasonable and whether the clause was enforceable in the circumstances. Capitec Bank did not, in the view of the author, withhold its consent impermissibly as it was entitled to do so in terms clause 8.3 of the subscription of shares agreement. Both the High Court and SCA conflated the issues that were before them. It was common cause that Capitec Bank was entitled to consent to the disposal of its shares or even withhold consent for want of compliance with the B-BBEE.[47]

In instances where the entity or person to whom the shares are disposed to comply with B-BBEE Act with the result that Capitec Bank's empowerment credentials in terms thereof remained intact, Capitec has no choice but to give consent.[48] The clause itself was

39 *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments* 194 (Pty) Ltd and Others [2021] ZASCA 99 [2021] 3 All SA 647 (SCA) para 63.
40 [2021] 3 All SA 647 (SCA).
41 BEE equate to broad-based black economic empowerment, which in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 is the economic empowerment of black people including women, workers, youth, people with disabilities and people living in rural areas.
42 *Coral Lagoon* (n 39) para 27.
43 *Coral Lagoon* (n 39) para 23.
44 *Coral Lagoon* (n 39) para 65.
45 *Coral Lagoon* (n 39) para 68.
46 *Coral Lagoon* (n 39) para 56.
47 Act 53 of 2003.
48 *Coral Lagoon* (n 39) para 30.

reasonable in that it had the effect of allowing Capitec Bank to fulfil at all times its black-empowerment obligations in terms of the B-BBEE Act.[49] Both the *court a quo* and the SCA were supposed to confine their inquiry to whether the consent was unreasonably withheld by considering whether Capitec Bank will continue to be compliant with the B-BBEE Act by looking at its black shareholding subsequent to the disposal of the shares. The second leg of the test required the SCA to consider the justification for non-compliance and the circumstances that prevented Coral from complying with the clause that required consent from Capitec Bank.[50] It is therefore evident that there is a need for a binding and unequivocal ruling of the Constitutional Court on the role of good faith in contracts.

The matter of *AB v Pridwin Preparatory School*[51] in which the Constitutional Court once again overruled the decision of the SCA further highlights the clear division between the SCA and the Constitutional Court. In this case, the SCA adopted a restrictive approach to the interpretation of the contract and refused to infuse constitutional principles when it clearly should have[52]. It incorrectly held that section 29(1) of the Constituti[53]on does not apply to independent schools on the basis that they do not provide basic educati[54]on. Respectfully, it also misdirected itself by not applying the appropriate constitutional standard, namely the best interest of the ch[55]ild.

Conversely, the Constitutional Court decided that the decision to terminate the contract was unconstitutional because the school failed to afford parents an opportunity to be heard on the best interests of the children affected and the interference with the children's right to basic education.[56] This, despite the existence of a contract between the school and the parents which entitled the school to terminate the contract. In its judgment, the Constitutional Court did not refer to good faith, but, in the author's view, it could be argued that the failure to provide an opportunity to be heard is a manifestation of *mala fide*. The Constitutional Court did consider the good faith measures that were taken by the school such as taking alternative

49 *Coral Lagoon* (n 39) para 1.
50 As it was articulated in *Barkhuizen* (n 14) para 58.
51 *AB and another v Pridwin Preparatory School and others* 2020 (9) BCLR 1029 (CC).
52 *Pridwin* (n 51) para 10.
53 Section 29(1) of the Constitution of the Republic of South Africa, 1996 provides that "Everyone has the right —
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."
54 *Pridwin* (n 51) para 10.
55 Section 28(2) of the Constitution of the Republic of South Africa, 1996 provides that "A child's best interests are of paramount importance in every matter concerning the child."
56 *Pridwin* (n 51) para 61.

measures to termination and assisted the parents in finding another private school.[57]

5 The role of good faith and fairness within a constitutional framework

Good faith and fairness are inextricably linked with open-ended standards such as public policy, equity, and reasonableness.[58] This lays a foundation for courts to infuse the common law of contract concept of good faith with the founding values of the Constitution, such as human dignity and the achievement of equality.[59] The latter constitutional value is of particular importance in instances where there is unequal bargaining power between parties. In this regard, there has been statutory intervention in the form of the Consumer Protection Act 68 of 2008 to rescue vulnerable parties.[60] However, it is important to note that this statute does not apply to all contracts, it only applies to contracts involving the supply of goods or services concerning vulnerable consumers, including small businesses.[61] Therefore, the Consumer Protection Act covers only a distinct part of the law of contract. The law of contract is still largely regulated by the rules of the common law.[62]

Courts are obliged by the Constitution to develop the common law. Section 8(3) of the Constitution enjoins a court to develop the common law when applying a provision of the Bill of Rights insofar as legislation does not give effect to that right.[63] Section 39(2) goes further and places courts under an obligation to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law.[64] Lastly, Section 173 provides that all superior courts have, taking into account the interests of justice, the inherent power to protect and regulate their own procedure to develop the common law.[65] Regrettably, the courts

57 *Pridwin* (n 51) para 207.
58 Hutchison (n 2) 43.
59 In terms of section 1 of the Constitution of the Republic of South Africa, 1996, the Republic of South Africa is founded on, inter alia, human dignity and the achievement of equality.
60 The preamble to the Consumer Protection Act 68 of 2008 provides that this Act aims to fulfil the rights of historically disadvantaged persons and protect consumers from exploitation or abuse.
61 Section 5 of the Consumer Protection Act 68 of 2008.
62 In terms of section 5(2)(b) of the Consumer Protection Act 68 of 2008, the Act does not apply to any transaction in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction equals or exceeds the monetary threshold, which as at the time of writing was fixed at R2 million, which monetary threshold is calculated in accordance with GN 294 of 1 April 2011.
63 The Constitution of the Republic of South Africa, 1996.
64 The Constitution of the Republic of South Africa, 1996.
65 The Constitution of the Republic of South Africa, 1996.

have largely failed to use the concept of good faith and other open-ended concepts to infuse the law of contract with constitutional values and allow for flexibility in the adjudication of contractual disputes.

For many years, the courts failed to use the discretion bestowed upon them by the Constitution to develop the common law concept of good faith.[66] The Constitutional Court has questioned whether the limited role assigned to good faith is appropriate in the new constitutional dispensation but found it unnecessary to address that issue.[67] This has caused uncertainty in the commercial and academic world regarding the role of good faith in light of the prescripts of the Constitution. The Constitutional Court has favoured public policy, ruling that the correct approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy, with reference to the values that underlie the Constitution, and which find expression in the Bill of Rights.[68]

The Constitutional Court subsequently had another opportunity to clarify the role of good faith in contract law considering the Constitution in the *Everfresh*.[69] The Constitutional Court respectfully misdirected itself by not referring the matter back to the High Court to develop the common law, on the basis that there were no prospects of success in the case.[70] They further refused to hear the matter holding that without the benefit of the views of the High Court and SCA, it was not in the interests of justice for the Court to hear the claim and that no special circumstances existed for it to hear the matter as a court of first instance and therefore refused to grant leave to appeal.[71] Both the majority and minority were in agreement that Everfresh's claim to have the common law of contract developed presented a constitutional case of substance and yet, the majority declined to address the constitutional issue.[72]

The precepts of good faith require honesty and fairness between contractual parties. This, in turn, promotes the spirit, purport and objects of the Bill of Rights. According to *S v Makwanyane*, ubuntu is an integral part of constitutional values.[73] The concept of ubuntu carries in it the ideas of humaneness, social justice and fairness.[74] Ubuntu can be an appropriate principle to use to inform the new developments in the law of contract, to ensure that it is brought in

66 K Christie 'The Law of Contract and the Bill of Rights' in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (2006) 38.
67 *Barkhuizen* (n 14) para 82.
68 *Barkhuizen* (n 14) para 29.
69 *Everfresh* (n 26) para 19 and 48.
70 *Everfresh* (n 26) para 69.
71 *Everfresh* (n 26) para 77.
72 *Everfresh* ((n 26) para 88.
73 *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 225.
74 *Makwanyane* (n 73) 237.

line with the aims and objectives of the Constitution.[75] It brings forth flexibility and discretion for each particular case to be decided on its own merits. Of course, such discretion must be exercised judiciously. The flexibility of ubuntu is advantageous, and as a foundational principle, it has a certain unchanging and unyielding focus on the greater good, communal interest and dignity.[76] It is seemingly compatible with the concept of good faith and public policy.[77] Good faith also promotes fairness, humanness and social justice as it requires sincerity between contractual parties, therefore, circumventing fraud.

The concept of good faith in contract law promotes the spirit, purport and objects of the Bill of Rights. In *Everfresh*, the Court emphasised the central importance of good faith in contract law and the desirability of infusing the law of contract with constitutional values, including ubuntu.[78] Therefore, it is to be hoped that courts will, in the future, exercise their constitutional mandate and develop the common law of contract to include good faith as a standard or, ideally, requirement for the validity of a contract as this approach is consistent with the Constitution and its values. Parties should then have an election to contract out of this standard or requirement or limit its application, provided that the enforcement of such a contract will not be patently unfair or violate public policy as discerned from the values embodied in the Constitution. This approach gives effect to both the principle of freedom of contract in terms of the common law and the values embodied in the Constitution.

The minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*[79]argued that the function of good faith was to give effect to the community's sense of fairness, reasonableness, and appropriateness where a contractual matter arose.[80] Moreover, the Constitutional Court has held that what constitutes public policy must be discerned in light of the fundamental values embodied in the Constitution, particularly the Bill of Rights.[81] The role of good faith is still, unfortunately, a matter for debate and there is a need for the Constitutional Court or the legislature to intervene in respect of the position of good faith and fairness in contract law.

75 E Van der Sijde 'The role of good faith in the South African law of contract' unpublished LLM Dissertation, University of Pretoria, 2012 at 64.
76 Van der Sijde (n 75) 64.
77 Van der Sijde (n 75) 69.
78 *Everfresh* (n 26)para 44.
79 1997 (4) SA 302 (SCA).
80 *Eerste Nasionale Bank* (n 79) para 32.
81 *Barkhuizen* (n 14) para 82.

6 Lessons South Africa can learn from other jurisdictions

South Africa can learn numerous lessons from other jurisdictions in respect of the role of good faith in contract law. According to section 39(1)(c) of the Constitution, a court, forum, or tribunal when interpreting the Bill of Rights may consider foreign law.[82] In many civil law systems, good faith is recognised and enforced as an overriding principle that in conclusion and performance of contracts.[83] In such systems, contrary to what has been wrongfully claimed by some legal academics and judicial officers, this view does not defeat legal and commercial certainty.[84] Rather, it promotes certainty by limiting freedom of contract and, accordingly, parties know what is expected of them.

For example, in Germany, under the German Civil Code, contracting parties must observe good faith in both negotiation and performance of the contract.[85] This means parties are under an obligation to display honesty even before contracting and must act under the legitimate and reasonable expectations of the other party. They must also show a sincere intention to enter into a contract.[86] In the absence of good faith, an aggrieved party is entitled to rely upon the absence thereof as a ground to have the contract revoked.[87] In contrast, case law in New Zealand supporting the doctrine of good faith is currently meagre.[88] The main judicial proponent of the doctrine is the judgment in *Livingstone v Roskilly*,[89] where the Supreme Court asserted, *obiter*, that it would not exclude from the common law of New Zealand the concept that, generally the parties to a contract must act in good faith in concluding and performing contracts.[90] There is no authority in New Zealand expressly rejecting

82 Constitution of the Republic of South Africa, 1996.
83 J Steyn 'The role of good faith and fair dealing in contract law: A hair-shirt philosophy' (2012) 1 *Denning Law Journal* at 131.
84 *Potgieter & Another v Potgieter N.O. & Others* 2012 (1) SA 637 (SCA) para 32 wherein the SCA overturned the judgement of the North Gauteng High Court and held that while good faith, reasonableness and fairness are fundamental to the law of contract, they cannot be invoked by courts so as to intervene in contractual relations as such an approach will introduce legal and commercial uncertainty.
85 A Mehren 'The French civil code and contract: A comparative analysis of formation and form' (1955) 15 *Louisiana Law Review* at 698.
86 P Giliker 'Contract negotiations and the common law: A move to good faith in commercial contracting?' (2022) 43 *Liverpool Law Review* at 176.
87 Giliker (n 86) 176.
88 J Bayley 'A doctrine of good faith in New Zealand contractual relationships' unpublished LLM thesis, University of Canterbury, 2009 at 397.
89 [1992] 3 NZLR 230.
90 *Livingstone v Roskilly* [1992] 3 NZLR 230 237.

the doctrine of good faith. Similar to the South African position, the issue of good faith in contracts is a developing area of the law.[91]

In English jurisprudence, there is no general obligation of good faith.[92] Such an obligation may be included in express or implicit terms in the contract. For instance, in *Walford v Miles*,[93] the House of Lords, in ruling that each party to contract negotiations is entitled to pursue their own interest, so long as he avoids making misrepresentations, seemingly precluded such a duty.[94] The role of good faith in England's contract law is to some extent similar to that of South Africa, save for the Unfair Contract Terms Act,[95] which, when read with the Unfair Terms in Consumer Contracts Regulations, defines an unfair term to be a term which has not been individually negotiated and contrary to the requirement of good faith in that it causes a significant imbalance in the rights and obligations of the parties.[96] In England and South Africa the role of good faith is limited.[97] However, in South Africa the role of good faith has been aided by the Constitution.[98]

Unlike the majority of the common law countries, the United States (US) has accepted the doctrine of good faith in contract law. This is done in terms of three sources of law. The first is the Uniform Commercial Code which imposes an obligation of good faith in the performance or enforcement of every contract.[99] This is a set of laws that regulates all commercial transactions in the US.[100] Every state has adopted the Code, although some states have made modifications to certain of its provisions.[101] Second, the American Law Institute's Restatement of the principles of contract at common law provides that every contract imposes on each party a duty of good faith and fair

91 Bayley (n 88) 28.
92 *Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371.
93 [1992] 2 AC 128.
94 *Walford v Miles* [1992] 2 AC 128 at 138.
95 1977.
96 Section 62(4) of the Consumer Rights Act, 2015, which Act consolidates the provisions of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 insofar as they applied to consumers, provides as follows:
"A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."
97 Under English Jurisprudence, good faith is solely confined to contracts concluded between a seller or a supplier and a consumer.
98 See *Everfresh* (n 26) para 71wherein the Constitutional Court expressed the desire to develop the common law of contract by infusing it with constitutional values, including values of good faith and ubuntu.
99 Uniform Commercial Code 1952 articulates obligations of good faith in 60 sections and provides a general good faith definition and definitions specific to particular sections.
100 Uniform Commercial Code 1952.
101 For example, the Uniform Commercial Code of the District of Columbia § 28:1–101 (Public Law 88-243-Dec. 30, 1963) has adopted the Uniform Commercial Code with some modifications.

dealing in its performance and its enforcement.[102] Although this is a secondary source of law, it is heavily relied upon by courts and has been cited with approval numerous times. US courts often turn to it as an interpretative aid of the common law. Third, the United Nations Convention on Contracts for the International Sale of Goods, to which the United States is a party,[103] suggests the observance of good faith in international trade, in its article 7(1).[104]

The courts in the US have also on occasion imposed an obligation of good faith in contractual performance, in circumstances where the Uniform Commercial Code does not apply, by applying the common law.[105] This can be seen in the ruling of the US Court of Appeals for the Ninth Circuit,[106] in which it applied the duty to act in good faith by relying upon an earlier judgement of the California Supreme Court.[107] The District Court for the Eastern District of Pennsylvania has similarly held that 'every contract imposes upon the parties a duty of good faith and fair dealing in the performance and enforcement of the contract'.[108] In US jurisprudence, good faith is treated as an implied provision in the contract and the duty of good faith cannot be waived, although parties may, in the exercise of their freedom of contract, limit or define the scope of the duty.[109]

From the above examples, it can be seen that uncertainty in the role of good faith in contract law may be eliminated by either statutory or judicial intervention. In many civil law jurisdictions, good faith in contract law is an overriding principle. Therefore, a legislature may, in this regard, enact legislation that will regulate the law of contract and similarly incorporate good faith as an overriding principle. Legislation could also require parties to observe good faith in both negotiation and performance of the contract, as is done in Germany. The South African legislature may also take inspiration from US law and impose on contractual parties a duty of good faith and fair dealing. US courts further regard good faith as an implied provision in the contract.

These jurisdictions should serve as examples for South African courts so that they may exercise their constitutional mandate to develop the common law and consider good faith as an implied provision. In light of the role of good faith in other jurisdictions, the

102 EA Farnsworth *The restatement (second) of contracts* (1981) at 340.
103 The US ratified the Treaty on 11 December 1986.
104 Art 7(1) United Nations Convention on the Contracts for the International Sale of Goods, 1980 United Nations General Assembly Resolution 33/93 19 ILM 668.
105 EA Farnsworth 'Good faith performance and commercial reasonableness under the uniform commercial code' (1962) 30 *University of Chicago Law Review* 666.
106 *Seaman's Direct Buying Service v Standard Oil Co. of California*, 36 Cal.3d 752, 768, 686 P.2d 1158, 1166, 206 Cal.Rptr. 354, 362 (1984).
107 *Los Angeles Memorial Coliseum Commission v National Football League*, 791 F.2d 1356.
108 *City of Rome v Glanton*, 958 F. Supp. 1026, 1038–39.
109 Bayley (n 88) 397.

Constitutional Court or the legislature should clarify the position of good faith in contract law to promote legal and commercial certainty. The current uncertain position of good faith gives wide discretion to courts when adjudicating contractual matters and therefore opens the room for endless and uncertain litigation which is both time-consuming and expensive. This is not in accordance with the principle of legal certainty.

7 Good faith and fairness are not requirements

Good faith and fairness can, at best, be seen as the underlying principles of the law contract. This means good faith or fairness cannot be used as an independent and direct defence to have a contract set aside.[110] Consequently, the lack of good faith in a contract does not automatically make it invalid. Good faith could, however, be used indirectly to set a contract aside. This was established in the case of *Sasfin (Pty) Ltd v Beukes*,[111] where it was held that contractual terms that were unconscionable and exploitative may be set aside on the grounds of violating public policy.[112] These terms could also be considered as being *mala fide* and unfair.[113] Good faith and fairness form part of public policy in that public policy indirectly ensures that contracts are in good faith and are fair, as unjust contracts are unenforceable because they are against public policy.[114] Although good faith is fundamental to the law of contract, it is, however, not an independent rule that a court can make use of directly to find a contract invalid or interfere in a contractual relationship.[115]

The SCA has held that good faith is a sub-component of public policy, and it is applied in the interest of the public.[116] There are certain cases in specific instances where the lack of good faith could amount to a breach. This was confirmed in the case of *Silent Pond*

110 This is best captured by using the words of Brand JA in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27 wherein he profound as follows:
"although abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder."

111 1989 (1) SA 1 (A).

112 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) para 37.

113 Hutchison (n 2) 58.

114 As per Ngcobo J's ruling in *Barkhuizen* (n 14) paras 23-30.

115 *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA) para 31-32.

116 *Eerste Nasionale Bank* (n 79) para 318.

Investments CC v Woolworths (Pty) Ltd,[117] where parties agreed they would observe utmost good faith in their relationship, and in this case, it was also expressly stated in the contract.[118] So an obligation was created for the parties of the contract to act in good faith. This fortifies good faith and creates grounds for a party to be found in breach based on failure to act in accordance therewith.[119] This essentially means that if a party to a contract does not act in good faith, they have failed to fulfil their contractual obligation which could, depending on the terms of the contract and prayer of the aggrieved party, lead to the contract being set aside. Parties may well be advised to include an express clause in the contract requiring the observation of good faith and, for the sake of practicality, define the conduct or omission that will amount to bad faith and the consequences thereof. This is usually an act that undermines the contractual rights of the other party, such as an imperfect performance of contractual obligations or withholding material information.

8 Conclusion

The role of good faith and fairness in contract law is regrettably uncertain. In practice, this has caused commercial and legal uncertainty. Great strides have been made by the Constitutional Court in developing the concepts of good faith and fairness in contract law. Unfortunately, this is not enough as the role of these concepts continues to remain uncertain. There are lessons that South Africa can learn from other jurisdictions. For example, South Africa may, by statutory enactment, recognise good faith as an overriding principle like the majority of civil law countries. The South African legislature may also take inspiration from US jurisprudence and impose on contractual parties a duty of good faith and fair dealing. Nothing prevents courts from regarding good faith as an implied provision in every contract in the exercise of their constitutional mandate to develop the common law. It is, therefore, evident that there is a need for an intervention by the Constitutional Court or through statute that clearly and explicitly clarifies the role of good faith and fairness in contract law. It is unacceptable that, in an unequal society, good faith and fairness are not overriding principles underpinning our law of contract, let alone an obligation on contractual parties to act in accordance therewith. In this regard, this is an important constitutional issue, albeit in a commercial setting. The correction of this constitutional blemish is necessary for achieving equality as outlined in the founding provisions of the Constitution.

117 2011 (6) SA 343 (D).
118 *Silent Pond Investments* (n 117) para 66.
119 *Silent Pond Investments* (n 117) para 84.

EXAMINING THE LEGAL ATTRIBUTION OF TRANSGENDER PARENTHOOD IN ENGLAND AND WALES:

R (Mcconnell) v Registrar General for England and Wales [2020] EWCA CIV 559

https://doi.org/10.29053/pslr.v17i1.5096

*by Cameron Main**

Abstract

This note comments on the decision of the England and Wales Court of Appeal in R (on the application of McConnell) v Registrar General for England and Wales *[2020] EWCA Civ 559. Freddy McConnell was registered as female at birth but transitioned at age 22 to live as a male. Mr McConnell was issued a certificate on 11 April 2017, confirming his gender as male. On 21 April 2017, Mr McConnell commenced fertility treatment. Upon giving birth to a son, Mr McConnell sought to register the birth of his son with the Registry Office. In a decision in January 2019, he was informed that he would have to be registered as the child's 'mother'. In this judgement, the Court of Appeal rejected McConnell's contention that he should be registered as either the 'father' or 'gestational parent' as a matter of domestic law. Secondarily, it also held that this interpretation was not incompatible with articles 8 and 14 of the European Convention on Human Rights.*

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1 Introduction

The law's approach in England and Wales to non-traditional parenthood and family systems is much criticised, particularly concerning the assignment of legal parenthood.[1] However, there is also a distinct lack of acceptance for transgender parents, even in excess of those attitudes toward same-sex parents, which have gradually improved.[2] Despite this, many who have changed their gender express a desire to become a parent.[3] Therefore, it would not be surprising for issues to persist in the law which governs transgender parenthood. McCandless and Sheldon have previously noted:

> the questions posed by transgender parenthood serve to illuminate many of the tensions inherent in continuing to map our legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings.[4]

This is the context in which the current case sits. At first glance, this background tells us that this case could present an opportunity to modernise the law through the courts or by observing how the current law addresses these issues. The procedural approach taken by the Court of Appeal to both grounds of appeal highlights the issues with the law's attempt to mould non-traditional parenthood around the already established rules on traditional parenthood, rather than evolve alongside these developments.[5]

2 The facts

Freddy McConnell was registered as a female at birth and transitioned at the age of 22 to live as a male. In January 2017, McConnell was issued a gender recognition certificate which declared him as legally

1 Eg, A Diduck 'If only we can find the appropriate terms to use the issue will be solved: Law, identity and parenthood' (2007) 19 *Child and Family Law Quarterly* at 458; L Smith 'Tangling the web of legal parenthood: Legal responses to the use of known donors in lesbian parenting arrangements' (2013) 33 *Legal Studies* at 355.

2 H von Doussa et al 'Imagining parenthood: The possibilities and experiences of parenthood among transgender people' (2015) 17 *Culture, Health & Sexuality* at 1119; BD Spidsberg 'Vulnerable and strong - lesbian women encountering maternity care' (2007) 60 *Journal of Advanced Nursing* at 478.

3 M Bjorkman & K Malterud 'Lesbian women's experiences with health care: A qualitative study' (2009) 27 *Scandinavian Journal of Primary Health Care* at 238; S Hines 'Intimate transitions: Transgender practices of partnering and parenting' (2006) 40 *Sociology* at 353.

4 J McCandless & S Sheldon 'The Human Fertilisation and Embryology Act (2008) and the tenacity of the sexual family form' (2010) 73 *Modern Law Review* at 202.

5 A Brown 'Trans parenthood and the meaning of "mother", "father" and "parent" — *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559' (2021) 29 *Medical Law Review* at 167.

male.[6] In April 2017, McConnell successfully underwent fertility treatment, giving birth to a son the next year.[7] Later, McConnell was informed that he was registered on his son's certificate as the 'mother'. Labelling him as such provided the central basis of McConnell's contention. He brought a judicial review application against the decision to name him as the mother. Instead, he wished to be known as either the 'father' or the 'gestational parent'.[8]

At first instance, the President of the High Court's Family Division refused McConnell's application for judicial review, instead declaring that McConnell is the 'mother' of his son.[9] But what questions must be addressed to make such a declaration? On appeal, the first issue before the Court of Appeal was the correct construction of the Gender Recognition Act 2004 (GRA).[10] This statute governs the law on legally changing one's gender. In the first instance, Sir Andrew MacFarlane P identified the evident lack of parliamentary consideration of the novel issue presented in this case.[11] Consequently, the Family Division assumed the courts' rightful place as a secondary lawmaker through the process of legislative interpretation. The President's interpretation of the GRA was that McConnell is the 'mother'. In the alternative, McConnell appealed the compatibility of this finding with the European Convention on Human Rights, specifically those under articles 8 and 14.[12] The President had found the Registrar General's decision constituted a legitimately justified interference with McConnell's rights.[13] In doing so, the court deferred the role of modernising the law to Parliament.[14]

3 The Court of Appeal judgment

In comparison to the President's judgment, the Court of Appeal's decision was restricted in its focus. The President's judgement spanned over sixty pages, whereas the Court of Appeal only considered the two issues that had been appealed. This judgement is split into two major sections for each ground of appeal.

6 *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; Gender recognition certificates are obtained under the Gender Recognition Act 2004, s 4.
7 *McConnell* (n 6) para 8.
8 McConnell (n 6) para 10.
9 *R (on the application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam) [279].
10 *McConnell* (n 6)24.
11 *R (on the application of TT)* (n 9) 90.
12 *McConnell* (n 6) para 24.
13 *R (on the application of TT)* (n 9) para 281.
14 *McConnell* (n 6) 81.

3.1 Interpretation of the GRA

Whilst there was much discussion by the President as to the meaning of the word, 'mother', the Court of Appeal found the 'critical issue' to be statutory interpretation.[15] Section 9(1) of the GRA states that if a person has a gender recognition certificate, 'the person's gender becomes for all purposes the acquired gender'.[16] This would seemingly extend to whether Freddy McConnell should be called, 'mother' or 'father'. However, section 12 GRA provides that where someone becomes an acquired gender, the 'status of that person as the father or the mother of a child' is not affected.[17] It was uncontested that the latter section had a retrospective effect, but the question before the Court of Appeal was whether it also had a prospective effect. Crucially, if the section were only to have a retrospective effect, then it would not influence situations such as McConnell's, where the gender recognition certificate is received before someone becomes a parent. Conversely, if the court were to find a 'prospective effect' interpretation, McConnell-type situations would be caught within the scope of section 12. The Court of Appeal accepted the argument made by the Registrar General, that section 12 should be interpreted to cover both retrospective and prospective effects.[18]

The Court of Appeal found that this was the ordinary meaning of section 12.[19] The court supplemented this with three arguments. First, the alternative interpretation, that section 12 should only have retrospective effect, 'would render otiose the provisions of section 9(2).[20] Section 9(2) provides that section 9(1) 'does not affect things done, or events occurring, before the certificate is issued'. Second, section 12 is similar to 'the wording in other sections of the GRA which marks out exceptions to the general effect of a certificate under section 9(1).'[21] The court illustrated this point by reference to section 16.[22] Third, retrospective effect, where Parliament has intended it in the GRA, was made 'clear through express language', such as in section 15.[23]

Having laid out the reasons for favouring the Respondent's interpretation of Section 12, the court went on to reject the Appellant's use of explanatory notes. It was argued that section 12 should be given only a retrospective interpretation because the

15 *McConnell* (n 6) para 28.
16 GRA 2004, s 9(1).
17 GRA 2004, s 12.
18 *McConnell* (n 6) para 29.
19 *McConnell* (n 6) para 30.
20 GRA 2004, s 9(2); *McConnell* (n 6) para 31.
21 *McConnell* (n 6) para 32.
22 As above; GRA 2004, s 16.
23 *McConnell* (n 6) para 33; GRA 2004, s 15.

Explanatory Notes to section 12 read that where a person is regarded as being of the acquired gender, 'the person will retain their original status as either the mother or father of a child. The continuity of parental rights and responsibility is thus ensured.'[24] Yet, the Court did not go into detail about whether they found the content of the Notes to be persuasive because they found that they were not an admissible aid to the construction of the GRA, in this case.[25] In defence of this, The Court argued that the 'Notes could not alter the true interpretation of the statute. Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted'.[26]

> Lastly, the court addressed the appellant's submission that the statute should be interpreted 'in line with contemporary moral and social norms'.[27] It cited Lord Bingham's explanation of this principle:

If Parliament, however, long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not considered as dogs when the Act was passed but are so regarded now. [28] To this, the court responded that it finds it 'difficult to see how that principle of statutory construction assists in resolving the issue' of whether section 12 should have a prospective effect.[29] Nevertheless, the court noted that the President's judgement had used such a contemporary interpretation by construing 'mother' to be 'the person who gives birth to a child rather than a gender-specific word like "woman"'.[30] Yet, the Court of Appeal said that this did not extend to the word, 'mother', being construed as the word, 'father' because this 'would offend against the principle as enunciated by Lord Bingham that the word "dog" cannot be construed to mean "cat".' Additionally, the court found that to use a new term such as 'gestational parent', 'would not be an exercise in interpretation at all but would amount to judicial legislation'.[31]

3.2 The Court's assessment of the human rights claim

The court next considered the appellant's alternative claim, that this interpretation violated his Convention rights, specifically article 8 and article 14.[32] The court first considered article 8 because an infringement of article 14 can only occur in conjunction with a

24 Explanatory Notes to the Gender Recognition Act 2004 para 43.
25 *McConnell* (n 6) para 37.
26 As above.
27 *McConnell* (n 6) para 34.
28 *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 [9].
29 *McConnell* (n 6) para 35.
30 As above.
31 As above.
32 *McConnell* (n 6) para 44; European Convention on Human Rights, Arts 8, 14.

corresponding infringement of article 8.[33] The court briefly analysed the interference with article 8, explaining that it persisted for two reasons. First, the 'state requiring a trans person to declare in a formal document that their gender is not their current gender, but the gender assigned at birth' goes against 'a person's sense of their own identity'. Second, this interference results from the incongruence between the appellant's legal relationship with his son, one of mother and son, and the corresponding social relationship, one of father and son.

As both parties and the court agreed that there was an interference with article 8, the determinative issue before the court was whether this interference was justified under article 8(2).[34] The court found that the interference was justified because it was both in pursuance of a 'legitimate aim' and was proportionate to that aim.[35] The court briefly addressed the legitimate aim, claiming it to be the 'protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births.'[36] In contrast, the court accorded more space to the question of whether that aim was justifiable, applying the well-recognised Bank Mellatt questions to this issue.[37] The first two questions were not contended by either party, so the court decided to focus on the third and fourth questions. These ask (i) Are there less intrusive means available? And (ii) Is a fair balance achieved between individual and community rights?[38] Rather than addressing these questions directly, the court emphasised 'certain fundamental features of this case'.[39]

First, this case sits in a difficult and sensitive context.[40] Second, many pieces of legislation may be affected by adopting an alternative interpretation of the word, 'mother'.[41] Other pieces of legislation using this word include the Human Fertilisation and Embryology Act 2008 and the Children Act 1989, which uses the word, 'mother', no less than 45 times.[42] Third, the court felt it prudent to note that there is no decision from the Strasbourg Court on this issue which supports the Appellant's interpretation.[43] With no authoritative judgement to refer to, the court instead discussed a German case that has a very similar factual nexus to the present case.[44] The German Federal High

33 European Convention on Human Rights, art 8.
34 *McConnell* (n 6) para 56.
35 *McConnell* (n 6) paras 58, 61-82.
36 *McConnell* (n 6) para 58.
37 *McConnell* (n 6) para 59; *Bank Mellatt v HM Treasury (No 2)* [2012] UKSC 39.
38 As above.
39 *McConnell* (n 6) para 61.
40 *McConnell* (n 6) para 62.
41 *McConnell* (n 6) para 63.
42 *McConnell* (n 6) paras 64-65.
43 *McConnell* (n 6) para 72.
44 *McConnell* (n 6) para 73.

Court found the interference with article 8 to be within the wide margin of appreciation. The court noted that it 'cannot exclude the possibility that the Strasbourg Court may disagree with the courts in Germany, but it found 'that their reasoning is compelling.'[45] Fourth, there is no consensus across Europe on the issue of this case.[46] This is meaningful in that it allows the court to afford a 'margin of judgement' to Parliament on the matter of proportionality.[47] The court supports this margin on the bases that the courts have a lower 'relative institutional competence' than Parliament and that the latter enjoy a democratic legitimacy that the courts do not.[48]

For the above reasons, the Court of Appeal found that 'there is no incompatibility between sections 9 and 12 of the GRA, on their natural interpretation, and convention rights.'[49] Because of this, the Appellant's article 14 argument was also rejected. The court dismissed the appeal on both grounds.

4 Comment

This article will comment on each ground of appeal in turn. It will start with the court's approach to interpreting the provisions of the GRA. Then, it will analyse the court's justification of that interpretation, considering the human rights challenge proposed by the Appellant.

4.1 Interpretation of the GRA

The Court of Appeal rightly begins its analysis of statutory interpretation by examining the 'ordinary meaning' of section 12.[50] The court describes the interpretation of section 12 of the GRA as unambiguous and ordinary, yet this analysis will show that the matter is not so straightforward.[51] The tense chosen by Parliament demonstrates this. Section 12 reads: 'The fact that a person's gender has become the acquired gender under this act does not affect the status of the person as the father or mother of a child'.[52] One may reasonably view the italicised words as crucial because they show that whilst the person's gender is currently changing, at least legally, their 'status' as a 'father' or a 'mother', has already been gained. It is, therefore, not unreasonable to read only a retrospective effect into

45 *McConnell* (n 6) para 78.
46 *McConnell* (n 6) para 79.
47 *McConnell* (n 6) para 80.
48 *McConnell* (n 6) paras 81-82.
49 *McConnell* (n 6) para 88.
50 *McConnell* (n 6) para 30; L Norbury & D Bailey *Bennion on Statutory Interpretation* (2017) at 680.
51 *McConnell* (n 6) para s 30, 38.
52 GRA, s 12 (emphasis added).

this provision as here, the status of fatherhood or motherhood has already been gained before the gender recognition certificate. At the very least, Welstead is correct in saying that 'the wording of section 12 of the GRA 2004 is open to the interpretation that it is prospective as well as retrospective.'[53] So, the interpretation of prospective effect is by no means ordinary and straightforward, as the Court of Appeal suggested.

Despite this, there is support for the Court of Appeal's supplementary arguments that the Appellant's interpretation would be inconsistent with other provisions in the GRA. Brown suggests there would certainly be an incongruence between Sections 12 and 9(2), if the Appellant's interpretation was accepted by the Court of Appeal.[54] On this view, one of these provisions would have to concede a lack of meaning for the other to have any. However, section 9(2), simply put, precludes the operation of Section 9(1) where a transgender person becomes a parent before receiving a gender recognition certificate. In contrast to what was argued by the Court of Appeal and Brown, this appears to cover the same ground as the retrospective effect of Section 12. Yet, both the Appellant and the Respondent agreed that retrospective effect should be included in an interpretation of Section 12. It is this basic, retrospective effect of section 12 that appears 'to render otiose' Section 9(2), rather than the additional prospective effect that the Appellant opposed. The court found that the Appellant's attempts to restrict section 12 to solely retrospective effect, but this is a mischaracterisation. As Brown has pointed out, it is more logical to say that Section 12 becomes meaningless, rather than section 9, if it were to have no prospective effect.[55] This is primarily because it is the meaning of section 12, not section 9, that is in dispute. Although this may seem to be no more than semantics, this exposes the crucial difference between the two parties' proposed interpretations. From the discussion above, it can be seen that if the Appellant's proposed interpretation results in no meaning for section 12, then it must follow that the Respondent's submission only includes prospective effect. Yet, this is at odds with what both parties and the courts have agreed, which is that section 12 does have a retrospective effect. In short, the court's finding that the Appellant's submission conflicts with section 9(2) is questionable.

The analysis of the GRA so far has been based on the literal and golden rules of statutory interpretation. The theoretical assumption behind these rules is that Parliament is 'rational, reasonable and

53 M Welstead 'Biology matters: Is this person my mother or my father?' [2019] 49 *Family Law* at 1416.
54 Brown (n 5) 166.
55 Brown (n 5) 166.

informed' and pursues a 'clear purpose in a coherent and principled manner'.[56] For this reason, there is a fundamental principle of statutory construction which presumes that every word in a piece of legislation will impact its meaning.[57] Acting on this basis, the Court of Appeal may be reasonable in supporting the Respondent's interpretation of section 12 by referring to the wording used in other areas of the GRA. On one reading, this similarly presumes that Parliament intended only retrospective effect where it has explicitly chosen to do so, such as in section 15. However, on another reading, this may use reasoning which is abstracted from this fundamental principle. It assumes that Parliament intended to create a dual retrospective and prospective effect by omitting to explicitly opt for one or the other, or both. This type of omission-based inference provides a weaker basis for an argument than the simple claim that section 15 has only a retrospective effect. This is especially the case where Parliament has not considered the issue at all, such as the application of McConnell-type situations to sections 9 and 12. In his first instance judgement, the President explicitly notes that this issue was not contemplated by Parliament in their discussions about the GRA.[58] Although it may go against strict adherence to a principled conception of Parliament, it seems that, in reality, Parliament's omission was not a purposeful attempt to include prospective effect. As a result, it is, at a minimum, unclear whether section 12 should be given a prospective effect or not. Further, this analysis tends towards the suggestion that a prospective effect should not be applied.

Because the use of the literal and golden rules does not leave a clear picture of Section 12, the next step is to identify the mischief that Section 12 targets. This leads us to view the Explanatory Notes to the GRA differently than in the Court of Appeal, which found section 12's interpretation to be clear.[59] Explanatory notes 'may be used to understand the background to and context of the Act and the mischief at which it is aimed.'[60] Yet, the Court of Appeal only gave a brief consideration of the Notes, which said that the purpose of section 12 is 'the continuity of parental rights and responsibilities', by ensuring a person will 'retain their original status as either mother or father of a child.'[61] The court's judgement is somewhat surprising, in its claim that the Notes are not inconsistent with the Respondent's interpretation of section 12. Although the Notes do not explicitly suggest that there should be no prospective effect, they strongly imply that retrospective effect is all that was aimed at by Parliament

56 Norbury & Bailey (n 50) 408.
57 Norbury & Bailey (n 50) 662.
58 *R (on the application of TT)* (n 9) para 90.
59 Explanatory Notes (n 24).
60 *R (on the application of Kaitey) v Secretary of State for the Home Department* [2021] EWCA Civ 1875 [109].
61 Explanatory Notes (n 24) para 43 (emphasis added).

in enacting section 12. It seems likely that the court was reluctant to accord any weight to the Explanatory Notes because it had already been convinced by its analysis of the actual text of the legislation itself. This explains the court's comment that, even if the Notes were inconsistent with the court's interpretation of section 12, they 'could not alter the true interpretation of the statute.'[62] Whilst, arguably, the text was not sufficiently unambiguous to render the Explanatory Notes inadmissible, the court's approach is understandable in that the perceived ordinary meaning is, under the rules of construction, more authoritative than explanatory notes. However, the Appellant finds himself blocked by the procedure of the legal process from what is a more just outcome for him; the notes do strongly suggest Parliament only intended to create a retrospective effect.

This reluctance also persists in the court's rejection of the 'always speaking' doctrine.[63] Not only did the court refuse to use the doctrine, but it went as far as to say that it could not see how the doctrine would assist in construing the statute as only retrospective effect or also prospective effect.[64] In my view, the contemporary social norm that the Appellant's submission referred to is that it is more respectful for a transgender person to be described as, and addressed by, the gender they identify with, regardless of their legal or biological status.[65] Later in their judgement, the Court of Appeal itself describes this social norm in its consideration of the human rights appeal. It says that 'as a matter of social life, their relationship is that of father and son', referring to the Appellant and his child. If the interpretation of the GRA were to follow this social norm, then it may be accepted that McConnell and others in his situation will be legally recognised as fathers to their children, or at least not as mothers. This controversial reluctance is especially so considering that it is based on the strength of conviction behind the ordinary meaning of the words identified at the beginning of the court's interpretative analysis. This is because, as pointed out above, the ordinary meaning of section 12 is unclear.

Oddly, having found that the doctrine is not relevant to the interpretation of section 12 of the GRA, the court affirmed the first instance judgement's usage of the doctrine.[66] There is a conflict apparent in the two statements that the court makes in doing so. On one hand, the court found the doctrine to be outright irrelevant. Yet, on the other, the court endorses its use. Additionally, the intention behind outlining the limits to this rule that 'cats' may not be

62 *McConnell* (n 6) para 37.
63 *Owens v Owens* [2018] UKSC 41; *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13.
64 *McConnell* (n 6) para 35.
65 For example, EL Green et al 'Glossary of transgender terms' *The New York Times* (New York) 21 October 2018 at 53.
66 McConnell (n 6) para 35.

interpreted as 'dogs' is not simply to say that the two are different. Of course, they do represent different things. However, the purpose of the 'always speaking' doctrine is to recognise where, over time, one word can now be considered to mean something else. Consequently, the purpose of the limit to this doctrine is to illustrate that 'cats' will never be recognised as 'dogs' and vice versa. Yet, as a matter of social life, mothers can become fathers, and fathers can become mothers. Furthermore, the GRA itself recognises that changing one's gender is a legally recognised concept. Arguably, the court is too hasty to throw out this submission. The court's endorsement of the word, 'mother', being gender-neutral rather than one attached to being a female may directly not lend itself to McConnell being labelled as a 'father'. However, there may be more force behind the request to be called a 'gestational parent', on this basis.

Unfortunately, for the Appellant, adding the term 'gestational parent', was found to be a step too far away from the courts' proper constitutional role. In making this finding, the Court of Appeal accepted that the constitutional arrangement of the courts and Parliament prevents them from doing what is fair and just, or even assessing that matter properly. Whilst there are strong arguments for maintaining a rigorous division of constitutional power, the courts are nonetheless secondary lawmakers. Furthermore, in the Appellant's situation which was found to not be in Parliament's consideration during the debate of the GRA, there is a strong justification for engaging this secondary lawmaker function. This case's result highlights some of the issues underlying the rules of statutory construction. Even though some support the court's approach as a mechanistic application of these, the result here is that the court cannot supplement the GRA where Parliament failed to consider those such as McConnell.[67] In this light, the outcome, in this case, can be seen as an unaddressed injustice against McConnell.[68]

Whether one agrees with the interpretation of the GRA, persistent issues remain in this area of law. If the court's interpretation is incorrect, that presents a problem in itself. Alternatively, if the interpretation is viewed as the 'correct' one, this brings into play an important comment from Fenton-Glynn, that this case 'lays bare the gendered, heteronormative conception of the family currently in operation under English law'.[69] This is especially clear by the fact that the court felt it could not substantially alter the meaning of 'mother' or 'father' because of how deeply ingrained the use of these words is

67 Brown (n 5) 166-7.
68 The court in accepted that their interpretation interfered with the Appellant's article 8 rights: *McConnell* (n 6) [53].
69 C Fenton-Glynn 'Deconstructing parenthood: What makes a "mother"?' (2020) 79 *The Cambridge Law Journal* at 36.

in English law.[70] There are growing calls for the concept of family to be adapted to reflect the social reality more accurately, including that there are many transgender parents.[71] This would replace the current approach, through which new forms of parenthood are assessed by reference to how to fit within a traditional family relationship.[72] Unfortunately, the court does not aid the modernisation of the law in this regard, not only in how it interprets the GRA but also in the language it uses. The use of the words, 'cats' and 'dogs', seems to be, at best, an unwise choice, especially as the court describes the case as 'one in which difficult and sensitive social, ethical and political issues arise'.[73]

4.2 The human rights claim

The court's approach to human rights was similarly overridden by broad, top-level factors. For this issue, this meant that a discrete proportionality analysis never materialised in the court's judgement. The court's analysis of proportionality is a short one whereby it avoided engaging with the Bank Mellatt questions, directly and in a narrow sense.[74] The court pays little to no consideration to weighing up the interference with the Appellant's rights against the aim that the statutory scheme pursues.[75] In place of such a narrow analysis, the court accorded a much heavier weight to broad overarching principles, which it said were fundamentally informative to the question of proportionality.[76] Despite these broader principles not directly engaging with the question of proportionality, it is submitted that the court's view of them as 'fundamental' meant they formed the basis of a strong presumption in their favour. For example, the courts said that 'the courts should be slow to occupy what should be Parliament's role'.[77] This presumption is notable in two respects. Firstly, it meant that the court felt that only a short consideration of the human rights appeal was required. Secondly, and arguably most importantly, this has the consequence of giving a strong authority to these fundamental features and their use across human rights law in England and Wales. Although these features chronologically follow

70 *McConnell* (n 6) paras 64-72.
71 For example, Fenton-Glynn (n 69); McGuiness & Alghrani 'Gender and parenthood: The case for realignment' (2008) 16 *Medical Law Review* at 279; McCandless & Sheldon (n 4); T Callus 'A new parenthood paradigm for twenty-first century family law in England and Wales?' (2012) 32 *Legal Studies* at 368.
72 J McCandless 'Transgender parenting and the law', 6 January 2012 https://blogs.lse.ac.uk/politicsandpolicy/parenthood-laws-family/.
73 *McConnell* (n 6) para 62.
74 *Bank Mellatt* (n 37).
75 *McConnell* (n 6). The narrow analysis was considered from para 52-59, whereas the broad analysis took place from para 60-86.
76 *McConnell* (n 6) para 61.
77 *McConnell* (n 6) para 82.

the legitimate aim in the court's judgement, because the court considers them so fundamental, they will be considered first here.

An interesting 'fundamental feature' that the court refers to is the lack of any Strasbourg jurisprudence on this novel area.[78] What is noteworthy is the court's response of substituting a non-authoritative German Federal High Court's decision in place of a judgment from the European Court of Human Rights.[79] However, the Court of Appeal does rightly note that it 'cannot exclude the possibility that the Strasbourg court may disagree with the courts in Germany.'[80] Yet, visually, the court takes the German decision as entirely authoritative. It uses the decision to support its argument and takes no action to account for the possibility the European court will disagree with this decision. Apart from mentioning the possibility, the court gives very short shrift to this materialising. Instead, it simply adopts the reasoning of the German court, with little analysis of it. Whilst a Strasbourg disagreement may be unlikely, because of the commonality of a wide margin of appreciation in such situations, the German decision, properly regarded, does not carry any weight in England and Wales.[81] It is surprising to see this decision used in the court's favour as, for the rest of the judgement, the court has rigorously avoided what are admittedly challenging questions around gender and parenthood by applying the law in a mechanistic and procedural fashion.

Another notable 'fundamental feature' was the role of the constitutional arrangement between Parliament and the courts.[82] Although it is not cited, the margin of judgement given by the court follows the important Nicklinson judgement in placing a high level of importance on the deference given to Parliament.[83] In that case, a majority of Supreme Court judges were sympathetic to the argument that whether or not something is a proportionate interference with Convention rights, broader principles may preclude a declaration of incompatibility from being made.[84] In both Nicklinson and this Court of Appeal judgement, the courts appear to be set against a declaration of incompatibility from the start, for fear of stepping on the toes of Parliament. In essence, the Court of Appeal held that because of the relative institutional competence and the lack of democratic legitimacy held by the courts, it should be extremely

78 *McConnell* (n 6) para 72.
79 German Federal High Court, Decision XII ZB 660/14 (2017).
80 *McConnell* (n 6) para 78.
81 Y Shany 'All roads lead to Strasbourg?: Application of the margin of appreciation doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2017) 9 *Journal of International Dispute Settlement* at 181.
82 *McConnell* (n 6) para 81.
83 *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38 [63], [297].
84 *Nicklinson* (n 83).

cautious when considering declarations of incompatibility. This seems to go against the very function of section 4 of the Human Rights Act 1998.[85] Through this statute, Parliament deemed the courts to be the appropriate institution to provide a check on that which may not be compatible with Convention rights. In response, the courts have paradoxically decided that they know better than this Parliamentary decision and should instead pay ultimate deference to Parliament. Importantly, the result of a declaration of incompatibility is not that a piece of legislation will become invalid. Instead, this declaration simply refers the matter back to Parliament, which then retains its sovereignty by making the final decision on how to address the matter. Instead of improperly taking such an issue from Parliament, a declaration refers it to Parliament.[86] Dissenting in Nicklinson itself, Lord Kerr explained this:

> What the courts do in making a declaration of incompatibility is to remit the issue to Parliament for a political decision, informed by the court's view of the law. The remission of the issue to Parliament does not invoke the court's making a moral choice which is properly within the province of the democratically elected legislature'. It is this fact that renders so much of the judicial agonising about whether assisted dying is an issue for the courts or Parliament misguided and unnecessary[87]

However, because of the context created by the majority in Nicklinson, this agonising persists in McConnell as well. Whilst, in contrast to the German case, Nicklinson is an authoritative judgement, this still serves to provide substantial injustice to the Appellant, as there is an unjustifiable reluctance to find a declaration of incompatibility.

In addition to demonstrating the significance of a broad proportionality analysis, this judgment illustrated the relative lack of consideration required in a narrow proportionality analysis. An important part of this shortness was the discussion of the legitimate aim. The court identified the aim to be the protection of the rights of children of trans parents and the maintenance of a clear and coherent scheme of birth registration.[88] It was viewed as unproblematic that this was a legitimate aim and was not considered at length.[89] One issue with this, however, is that the court did not articulate precisely what the aim is. The court does not detail how enforcing the prospective effect of section 12 of the GRA will protect the rights of

85 Under s 4, a court has the power to declare legislation incompatible with a Convention right.

86 E Wicks 'The Supreme Court Judgment in Nicklinson: One step forward on assisted dying; two steps back on human rights: A commentary on the Supreme Court judgment in *R (Nicklinson) v Ministry of Justice*; *R (AM) v Director of Public Prosecutions* [2014] UKSC 38 (2014) 23' *Medical Law Review* at 153.

87 *Nicklinson* (n 83) para 344.

88 *McConnell* (n 6) para 58.

89 As above.

children. Perhaps, the Court of Appeal was referring to the first instance analysis, where it was suggested that the legitimate aim specifically protected the interest of a child in knowing the identity of their mother.[90] At first instance, the President found that if no mother was described on the birth certificate, then there would be 'no statutorily guaranteed method of discovering the identity of the person who gave birth to [them]'.[91] This may, ostensibly, seem to be a legitimate concern. However, trans men may have children through natural means (rather than assisted reproduction, as was the case here). In such a case, the child's right to know their mother will be irrelevant. It is not entirely clear, therefore, why this right provides a barrier between these transgender men and the legal attribution of fatherhood, as this is not a right that exists outside of assisted reproduction.

Similarly, the second legitimate aim seems equally dubious. It is not immediately obvious how the registration scheme would become unclear if transgender men were to be labelled as gestational parents. In addition, the register may yet become more coherent if it accurately reflects social reality. The Court of Appeal itself, when describing the interference with article 8, suggested that it is problematic for the state to describe a relationship as mother and son, when, 'as a matter of social life, their relationship is that of father and son.'[92] Although the court included this in its analysis of the interference, it did not recognise the same point's relevance to its consideration of a legitimate aim. This is a clear example of using an old set of terms to describe a modern situation. The supposed legitimate aim tries to retain the use of a singular word, 'mother', to mean a female parent and 'father', to mean a male parent. This system was devised without knowledge of the idea that in modern society, this correspondence may not always persist. McGuinness and Alghrani summed the point well:

> [By] forcing definitions to stretch, so that males are acting as 'mothers' and females as 'fathers' we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations.[93]

It is challengeable to claim that the coherence of the registration scheme is a legitimate reason to interfere with article 8 rights, let alone a proportionate interference.

90 *R (on the application of TT)* (n 9) para 237.
91 As above; *Godelli v Italy* (2012) EHRR 33783/09 at 12.
92 *McConnell* (n 6) para 55.
93 McGuiness & Alghrani (n 71) 279.

5 Conclusion

In both grounds of appeal, the appellant's attempts to demonstrate injustice were drowned out by wider concerns. On behalf of statutory interpretation, this wider concern was the procedural barrier presented by maintaining systematic application of the rules of statutory interpretation. Those who are sceptical of this judgement may believe that the Court of Appeal used this systematic application as a shield against the requirement to consider the impact of the legislation on the lived experience of transgender parents. In a technical sense, this presents no legal issue, as the well-established role of the courts is simply to interpret what Parliament has written, not to remake the law. In doing so, Parliament is assumed to have considered all potential issues and addressed them coherently.[94] Concerning the human rights appeal, the current context around this area of law and the relationship between Parliament and the courts renders it extremely challenging to succeed, even when, on a narrow reading, there is an unjustified interference with Convention rights. In this way, the second half of the judgement is also procedural, but in a looser, less technical manner.

This article has attempted to show two problems with proceeding in such a procedural manner. Firstly, as is shown by the present case, a rigorous application of the rules can expose flaws in that system. Despite the issue of construction being considered for 25 paragraphs, it was the pivotal point was the identification of the ordinary meaning of section 12 to include prospective effect. From that moment onwards, the court displayed a reluctance to accept the Appellant's submissions. For this reason, it strongly rejected the Appellant's use of the 'always speaking' doctrine and the explanatory notes in an incredibly quick fashion. The court admitted that it could not see how the former was relevant and held the latter to be inadmissible. Similarly, the broad analysis of the human rights claim led to questionable use of German jurisprudence and, in my view, a misreading of the Human Rights Act 1998, by overly concentrating on paying due deference to Parliament. Secondly, if the court's interpretation can be successfully defended, that interpretation serves to highlight issues in this legal system. This focus on broad-level analysis diverted the attention of the court away from an examination of whether the interference was just. There was no direct consideration of whether the legitimate aim was important enough to outweigh the interference with McConnell's Convention rights. In turn, the Court of Appeal missed the opportunity to ask Parliament to 're-imagine a model of parenthood fit for the 21st

94 Norbury & Bailey (n 50) 408; *Inland Revenue Commissioners v Hinchy* [1960] AC 748.

century', one which adopts a wholesale acceptance of non-traditional families.[95] Instead, the law determinedly attempts to conform those like McConnell into more traditional categories, retaining the issues highlighted by the construction of the GRA.

95 Fenton-Glynn (n 69) 37.

THE RIGHT TO DEMOCRATIC PARTICIPATION IN AFRICA IN THE ERA OF DEEPFAKE

https://doi.org/10.29053/pslr.v17i1.5097

*by Mujib Jimoh**

Abstract

In theory, the right to democratic participation in Africa is safeguarded by an array of international and regional human rights instruments, such as article 13 of the African Charter on Human and Peoples' Rights. In essence, the right entails the genuine freedom of people to participate in government and to vote freely, without coercion, intimidation, or deception. In recent times, there has been a growing concern about the impact of artificial intelligence (AI) on the enjoyment of human rights. Deepfake, a relatively new concept, is one of such AI-controversy. Recently, scholars have considered the impacts of deepfakes on different areas of law, such as intellectual property, torts and evidence. In human rights discourse, discussions on deepfake have focused particularly on the right to dignity and privacy. But in fact, the right to information is probably the human right most endangered by deepfake. This article seeks to underscore that there is a concerning impact on the right to democratic participation. First, the article shows the interdependence and interrelation between the right to democratic participation and the right information. Thereafter, it argues that the right to information makes sense only when seen as 'the right to truth'. Further, it argues that deepfake interferes with the 'freely' component of the right to democratic participation in that it disturbs and distorts information necessary for the electorates to freely participate in government. The article notes the little response from

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African states despite the call from the African Commission to establish a framework for human rights in the use of AI and emphasises the importance of partnership with technology companies in addressing the problem. Other recommendations made include the need to educate the electorates on deepfakes and the formulation of law and policy compatible with the African Charter in addressing the problem.

1 Overview of the legal framework of the right to democratic participation in Africa

Eighteen African countries will have elections between August 2023 and November 2024.[1] One potential problem that has emerged in the electoral process across the world, which African countries will have to pay particular attention to, is deepfake.[2] This is because deepfakes have the potential of being used 'to fool the voter into believing that they are themselves seeing a person say or do something they didn't say'.[3] They may be used to portray political opponents doing abhorrent things to sway the minds of the electorates against the opponents.[4] The proliferation of deepfakes and their potential impacts on democratic participation, thus, call for urgent action.[5]

Before the turn of the century — and beyond — one of the recurrent themes about African human rights system, is the 'egregious' violations of human rights by African governments.[6] The right to democratic participation has not been spared — despite the settled principle that the right is an international human right[7] — several scholars, especially in the late twentieth century, have proliferated on the violation of this right by African states, most

1 J Wan 'Africa elections 2023: All the upcoming votes' 1 August 2023 https://africanarguments.org/2023/08/africa-elections-all-upcoming-votes/ (accessed 24 August 2023).

2 Simonite 'What happened to deepfake threat to the election' 16 November 2020 https://www.wired.com/story/what-happened-deepfake-threat-election/ (accessed 24 August 2023).

3 A Swenson 'FEC moves toward potentially regulating AI deepfakes in campaign ads' https://apnews.com/article/fec-artificial-intelligence-deepfakes-election-2024-95399e640bd1e41182f6c631717cc826 (accessed 24 August 2023).

4 H Hall 'Deepfake videos: When seeing isn't believing' (2018) 27(1) *Catholic University Journal of Law and Technology* at 51.

5 The United States Federal Election Commission, for instance, recently moved to regulate deepfake in campaign ads. See Swenson (n 3).

6 M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* at 342; J Akokpari 'Policing and preventing human rights abuses in Africa: The OAU, the AU and the NEPAD peer review' (2004) 32(2) *International Journal of Legal Information* at 461; M Ssenyonjo 'Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples' Rights (1987–2018)' (2018) 7 *International Human Rights Review* at 1.

7 GH Fox 'The right to political participation in international law' (1992) 17(2) *Yale Journal of International Law* at 541.

notably, through the practice of a one-party system.[8] The violations of this right have occurred through unlawful arrests and detention of opposition party members; and detention of journalists to suppress valuable information to the electorates. Even academics and activists are not immune: they are threatened for their writings and activism.[9] It is noteworthy, that the problem with attaining and enjoying the right is neither the absence of a framework nor legislation. But the framework — particularly the role the African Union can play — has often been criticised as 'tepid', preferring stability rather than addressing the problem.[10]

As for the legislation, under the African human rights system, there are various instruments — both 'hard' and 'soft' — that safeguard the right to democratic participation. The African Charter on Human and Peoples' Rights (African Charter), the main African human rights instrument,[11] guarantees the right of every citizen 'to participate freely in the government' of their country.[12] Both the African Commission on Human and Peoples' Rights (African Commission)[13] and the African Court on Human and Peoples' Rights

8 See U Kumar 'Justice in a one-party African state: The Tanzanian experience' (1986) 19(3) *Law and Politics in Africa, Asia and Latin America* at 255-274; C Baylies & M Szeftel 'The fall and rise of multi-party politics in Zambia' (1992) 54 *Review of African Political Economy* at 75-91; J Quigley 'Perestroika African style: One-party government and human rights in Tanzania' (1992) 13 *Michigan Journal of International Law* at 611.

9 MK Mbondenyi 'Entrenching the right to participate in government in Kenya's constitutional order: Some viable lessons from the African Charter on Human and Peoples' Rights' (2011) 55(1) *Journal of African Law* 30–58; NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24(4) *Michigan Journal of International Law* at 1274.

10 See D Wippman 'Pro-democratic intervention in Africa' (2002) 96 *American Society of International Law Proceedings* at 143–145: stating that 'African states have been slow to condemn President Mugabe's use of intimidation, ballot box stuffing, and related tactics to ensure a favourable electoral outcome despite an apparent opposition victory. As of March 2002, the OAU Central Organ had not initiated the responses called for in its Lomé Declaration. The tepid response suggests that for most African states, the commitment to promotion of democracy is primarily about regional stability'. For a recent critique, see CA Odinkalu 'Neither African nor a union' 7 May 2023 https://www.premiumtimesng.com/opinion/597192-neither-african-nor-a-union-by-chidi-anselm-odinkalu.html (accessed 11 May 2023).

11 C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* at 155 at 156; S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3(1) *African Human Rights Law Journal* at 118-119.

12 Organization of African Unity (OAU) African Charter on Human and Peoples' Rights June 1981 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (African Charter) Art 13(1).

13 The African Commission was established by the African Charter Art 30. See M Jimoh 'A critique of the seizure criteria of the African Commission on Human and Peoples' Rights' (2022) 22 *African Human Rights Law Journal* at 365; E Bello 'The mandate of the African Commission on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* at 55; CA Odinkalu & C Christensen, 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20(2) *Human Rights Quarterly* at 235.

(African Court)[14] have had to consider communications and applications alleging violations of this right and have upheld the right.[15] In addition to the African Charter, the Universal Declaration of Human Rights (UDHR) — some provisions of which are now considered to be part of customary international law[16] — provides that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.[17] The International Covenant on Civil and Political Rights (ICCPR) also provides that every citizen shall have the right and opportunity to (a) take part in the conduct of public affairs, directly or indirectly through freely chosen representatives; and (b) vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.[18]

This right is also contained in other international human rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination;[19] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[20] the European Convention on Human Rights (ECHR);[21] and the American Convention on Human Rights (AmCHR).[22] The foregoing human rights instruments' provisions and the jurisprudence from the UN Human Rights Committee and other regional human rights bodies, by the 'decompartmentalization' articles of the African Charter — that is, articles 60 and 61[23] — serve as a source of guarantee for this

14 The African Court was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights.

15 For some of these, see Section 2 and Section 3 below.

16 J Humphrey 'The Universal Declaration of Human Rights: Its history, impact and judicial character' in BG Ramcharan (ed) *Human rights: Thirty years after the Universal Declaration* (1979) at 29; D Forsythe '1949 and 1999: Making the Geneva Conventions relevant after the cold war' (1999) 81 *International Review of the Red Cross* at 266.

17 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (UDHR) Art 21(1).

18 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966 (ICCPR) Art 25.

19 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 Art 5(c).

20 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 (CEDAW) Art 7.

21 European Convention on Human Rights, 15 December 2011 (ECHR) Art 3.

22 American Convention on Human Rights, 22 November 1969 (AmCH) Art 23.

23 'Decompartmentalization is a process allowing the use of various external sources to interpret the rights enshrined in the African, Inter-American, and European human rights instruments and allowing pursuit of the greatest possible protections for the human being.' Articles 60 and 61 of the African Charter allow decompartmentalization. See L Burgorgue-Larsen '"Decompartmentalization": The key technique for interpreting regional human rights treaties' (2018) 16(1) *International Journal of Constitutional Law* at 187; M Jimoh 'The evolutive interpretation of the African Charter on Human and Peoples' Rights' (2023) 10(1) *Indonesian Journal of International and Comparative Law* at 43.

right and are useful in understanding the scope of this right within the African human rights system.[24]

Apart from the above-stated human rights instruments, the African Charter on Democracy, Election and Governance[25] — which is considered a human rights instrument[26] — also contains provisions safeguarding the rights of Africans to democratic participation. There are also numerous soft laws — resolutions, Declarations, Principles and General Comments — on the right in Africa.[27] Thus, it may fairly be argued that the African human rights system has a robust framework protecting the right to democratic participation.

1.1 The problem

There are presently debates about the effects of the misuse of modern technology on human rights.[28] The concern about the impacts of modern technology on human rights has been raised by states and international organisations since, at least, 1968.[29] One of the recent

24 In the past, the African commission and the African court have been inspired by these instruments. See M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal of Human Rights* at 145.

25 For discussion, see S Elvy 'Towards a new democratic Africa: The African Charter on Democracy, Elections and Governance' (2013) 27 *Emory International Law Review* at 41.

26 For discussion on it being a human rights instrument, see G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' (2019) 63(1) *Journal of Africa Law* at 63.

27 These soft laws include (1) African Commission's Resolution on Electoral Process and Participatory Governance, see 'Resolution on Electoral Process and Participatory Governance ACHPR/Res.23(XIX)96' in *Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (1988-2017)* (2017) at 59; (2) African's Commission Resolution on Elections in Africa, see 'Resolution on Electoral Process and Participatory Governance ACHPR/Res.23(XIX)96' in *Recommendations and Resolutions Adopted by the African Commission on Human and Peoples' Rights (1988-2017)* (2017) at 307; (3) General Comment 25 of the UN Human Rights Committee on political participation, see UN Human Rights Committee, General Comment 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7; (4) The Addis Ababa Declaration, see 'Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World AHG/Decl.1 (XXVI) 1990' 11 July 1990; (5) The Algiers Declaration, see 'Algiers Declaration AHG/Dec.1(XXXV) 1999' 14 July 1999 https://archives.au.int/bitstream/handle/123456789/569/AHG%20Decl%201%20%28XXXV%29%20_E.pdf (accessed 12 May 2023); (6) The Lomé Declaration, see 'Lomé Declaration AHG/Decl.2 (XXXVI)' 12 July 2000 https://www.peaceau.org/uploads/ahg-decl-2-xxxvi-e.pdf (accessed 12 May 2023); (7) Declaration on the Principles Governing Democratic Elections in Africa, see 'OAU/AU Declaration on the Principles Governing Democratic Elections in Africa AHG/Decl. 1 (XXXVIII)' 8 July 2002 https://archives.au.int/bitstream/handle/123456789/572/AHG%20Decl%201%20%28XXXVIII%29%20_E.pdf (accessed 12 May 2023).

28 See P Nagaraj 'Human rights in the WSIS process: The notion of interdependence and indivisibility as a way forward' (2016) 9 *NALSAR Student Law Review* at 125.

29 JM Myers 'Human rights and development: Using advanced technology to promote human rights in sub-Saharan Africa' (1998) 30(2) *Case Western Reserve Journal of International Law* at 343.

concepts that has emerged is 'deepfake' and its attendant implications for human rights.[30] Deepfakes are synthetic[31] and hyper-realistic[32] videos, audios or images created through deep learning, where new contents, which never occurred, are created, either from a true occurrence or from a non-existent occurrence. Caldera puts it simpler: 'a deepfake is a forged video; it depicts something that has never happened by manipulating previously existing video footage or pictures'.[33] Deepfakes have been deployed to manipulate the information received by people. In the United States, for instance, deepfakes were said to have manipulated its recent election[34]s. Indeed, the potential manipulation of audios, images and videos is not new.[35] Described as a '400-year problem',[36] sub-Saharan Africa is said to have a 'long history of fake news'.[37] With deepfakes, three new issues compound the manipulations: first, the advancement in technology making it very difficult to detect the deepfake manipulation;[38] second, the surge of deepfakes 'produsers';[39] and third, the ease with which the deepfakes could be disseminated via social media.

As an instance, in January 2019, the Gabonese military attempted an unsuccessful *coup d'état*. The move was reportedly triggered by a deepfake video of Gabon's unseen president, Ali Bongo.[40] The President had been out of the country since October 2018, with little information about his whereabouts. As the speculations about his death grew, the President's advisors promised to release a New Year's

30 See MB Dobrobaba 'Deepfakes as a threat to human rights' (2022) 75(11) *Lex Russica* at 112.

31 T Hwang 'Deepfakes: A grounded threat Assessment' 2020 https://cset.georgetown.edu/wp-content/uploads/CSET-Deepfakes-Report.pdf (accessed 12 2023).

32 M Westerlund 'The emergence of deepfake technology' (2019) 9(11) *Technology Innovation Management Review* at 39.

33 E Caldera 'Reject the evidence of your eyes and ears: Deepfakes and the law of virtual replicants' (2019) 50 *Seton Hall Law Review* at 179.

34 M Appel & F Prietzel 'The detection of political deepfakes' (2022) 27(4) *Journal of Computer-Mediated Communication* at 1.

35 JP LaMonaga 'A break from reality: Modernizing authentication standards for digital video evidence in the era of deepfakes' (2020) 69(6) *American University Law Review* at 1952; J Langguth et al 'Don't trust your eyes: Image manipulation in the age of deepfakes' (2021) 6 *Frontiers in Communication* at 1.

36 L Floridi 'Fake news and a 400-year-old problem: We need to resolve the "post-truth" crisis' 29 November 2016 https://www.theguardian.com/technology/2016/nov/29/fake-news-echo-chamber-ethics-infosphere-internet-digital (accessed 12 May 2023).

37 See A Mare et al '"Fake news" and cyber-propaganda in sub-Saharan Africa: Recentering the research agenda' (2019) 40(4) *African Journalism Studies* at 2.

38 R Pfefferkorn 'Deepfakes in the courtrooms' (2019) 29 *Public Interest Law Journal* at 271.

39 The term denotes the fact that those who were formerly mere users of information technology now take part in the production of the contents. The term signifies 'the blurring of production and consumption'. See Mare et al (n 37) 1.

40 A Breland 'The bizarre and the terrifying case of the "deepfake" video that helped bring an African nation to the brink' 15 March 2019 https://www.motherjones.com/politics/2019/03/deepfake-gabon-ali-bongo/ (accessed 12 May 2023).

address video by the President. However, when the video was released, the Gabonese military believed that it was a deepfake, confirming that something had happened to the President and saw it as an opportunity to seize power. But there were also reports that the video was real.[41] Thus, even though any claim that the dissemination of fake content in Africa started with the emergence of emerging technologies will fall into an 'ahistorical complacency',[42] it is not in doubt that emerging technologies through deepfake has, and will, further augment the fakery.[43]

1.2 Scope of the article

Noting that currently, the African continent lacks a framework for addressing human rights issues in the use of AI, robotics, and emerging technologies,[44] the main question to be addressed by this article is: What is the relationship between the right to democratic participation and deepfake? While clearly, deepfake has implications for the right to freedom of information in the African Charter[45] and may impact the right to freedom of expression[46] — for instance, where an attempt to criminalise deepfake leads to censorship and suppression[47] — this article will argue that: (i) the jurisprudence of the African Commission and African Court shows that the right to democratic participation is interdependent and interrelated to those rights impacted by deepfake; and (ii) deepfake has effects on the right to democratic participation in Africa.

The article is divided into five sections. After this introduction, paragraph 2 discusses the jurisprudence on the right to democratic participation in Africa. It considers the provisions in the African Charter and its criticisms; and the meaning of the right as espoused by the African Commission and the African Court. Paragraph 3 discusses the relationship between the right to democratic participation and other rights in the African Charter. The other rights to be considered are the right to information, the right to freedom of

41 B Okunoye 'Elections in Africa: AI generated deepfakes could be the greatest digital threat in 2020' 6 January 2020 https://paradigmhq.org/deepfakes/ (accessed 12 May 2023).
42 Mare et al (n 37) 4.
43 J Langa 'Deepfakes, real consequences: Crafting legislation to combat threats posed by deepfakes' (2021) *Boston University Law Review* at 767.
44 See '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' https://achpr.au.int/en/adopted-resolutions/473-resolution-need-undertake-study-human-and-peoples-rights-and-art (accessed 12 May 2023) (Resolution 473).
45 African Charter (n 12) Art 9(1).
46 As above Art 9(2).
47 H Latham 'Fake news and its implications for human rights' 14 December 2020 https://www.humanrightspulse.com/mastercontentblog/fake-news-and-its-implications-for-human-rights (accessed 12 May 2023).

association, and the right to self-determination. Paragraph 4 wages into the deepfake in human rights discourse. This paragraph considers deepfake and human rights and the effects deepfake has on the right to democratic participation. Finally, paragraph 5 concludes the article.

2 The jurisprudence on the right to democratic participation in Africa[48]

2.1 The Provisions of the African Charter

Article 13 of the African Charter provides that:

(1) Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
(2) Every citizen shall have the right of equal access to the public service of his country.
(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

It should be noted that the lack of sufficient *travaux préparatoires* of the African Charter has not prevented scholars from engaging in an impassionate critique of this provision.[49] Given the poor democratic system in most African states, one of the main criticisms levelled at this provision as defying 'logic' is that the right is not 'full' or at least, not 'on par' with the provisions of other international human rights instruments.[50] Most commentators posit that in comparison with other instruments, the right as provided in the African Charter is

48 For jurisprudential analysis, see C Heyns et al 'The right to political participation in sub-Saharan Africa' (2019) 8(2) *Global Journal of Comparative Law* at 128.

49 For discussion on the scarcity of the *travaux préparatoires* of the African Charter, see MA Plagis & L Riemer 'From context to content of human rights: The drafting history of the African Charter on Human and Peoples' Rights and the enigma of Article 7' (2021) 25 *Journal of History of International Law* at 563. See also Fox (n 7) 558: stating that 'lack of background materials makes investigation of rights articulated in the African Charter difficult. Transcripts of a crucial drafting meeting have yet to be released to the public, and the decisions of the African Commission on Human Rights are kept confidential to protect the safety of the petitioners'.

50 MK Mbondenyi 'The right to participate in the government of one's country: An analysis of Article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis' (2009) 9 *African Human Rights Law Journal* at 186–187.

narrower.[51] Perhaps, the harshest critique of the provision is that given by Gregory Fox:

> Article 13 also lacks provisions on discrimination, universal suffrage, and a secret ballot. Finally, the reservation that all rights need only be 'in accordance with the provisions of the law' suggests that article 13 requires nothing more of states than what is already required by their national constitutions. If so, then article 13 is almost entirely useless as an international standard of conduct by which each state is to measure the legality of its actions.[52]

The criticism places emphasis on the 'claw back' clause contained in article 13(1) as limiting the enjoyment of the right to 'the provisions of the law'.[53] 'If caution is not taken', states Mbondenyi, 'such a law could at best be too restrictive or, at worst, discriminatory'.[54] However, it has been submitted that considering the robust jurisprudence of the African Commission on claw-back clauses — particularly the interpretation of 'law' as 'international law',[55] — the criticism on the claw-back clauses should be foreclosed.[56] Hence, the criticism on the provisions of article 13 as permitting a claw-back, is now superfluous. Moreover, as a general principle of international law, a state cannot use its national law to evade international obligations.[57]

In *Constitutional Rights Project and Another v Nigeria*,[58] the African Commission held that what constitutes free and fair elections has international standards and that it 'would be contrary to the logic of international law' if a national government were granted unlimited

51 Fox (n 7) 558: stating that 'the text of the Charter alone, however, suggests that it provides guarantees substantially narrower in scope than those found in the American and European Conventions or the Political Covenant'. See also C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Dickson Law Review* at 687: stating that '[…] the right of political participation [is] given scant protection in comparison with international standards'.

52 Fox (n 7) 558.

53 For discussion on claw-back clauses, see R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis (1982) 22(4) *Virginia Journal of International Law* at 691–709; S Sibanda 'Beneath it all lies the principle of subsidiarity: The principle of subsidiarity in the African and European regional human rights systems' (2007) 40 *Comparative & International Law Journal of Southern Africa* at 443.

54 Mbondenyi (n 50) 34.

55 See *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) (*Article 19)*.

56 See M Jimoh, 'Investigating the responses of the African Commission on Human and Peoples' Rights to the criticisms of the African Charter' (2024) 4 *Rutgers International Law and Human Rights Journal* (forthcoming): stating that 'as may be gleaned from some of the recent decisions of the Commission, it seems that African States have heeded this warning as they rarely rely on these clauses. Indeed, though some leading scholars believe that 'the Commission has clearly been designed to accomplish very little,' this radical approach by the Commission with respect to claw-back clauses is one of the significant contributions of the Commission in the protection of human rights on the continent. The Commission has, thus, responded adequately'.

57 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969 Art 27.

58 *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) (*Constitutional Rights Project)*.

latitude to determine this standard.[59] Thus, in *Legal Resources Foundation v Zambia*,[60] the African Commission 'argued forcefully' while discussing the right to democratic participation, that a state party cannot avoid responsibilities by 'recourse to the limitations and "claw-back" clauses in the Charter'.[61] The African Commission pointed out that 'the purpose of the expression "in accordance with the provisions of the law" is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right'.[62]

Further, another criticism levelled against the provisions of article 13 is that it is susceptible to discrimination.[63] The jurisprudence of the African Commission, however, suggests otherwise. In practice, the African Charter has been interpreted holistically,[64] with all clauses 'reinforc[ing] each other'.[65] In *Legal Resources*, the African Commission found allegations of violation of article 13 by examining 'closely the nature and content' of the right to non-discrimination in article 2 of the African Charter.[66] The African Commission concluded that the limitation on the right to democratic participation 'cannot be used to subvert rights already enjoyed'.[67] Also, in *Purohit & Moore v The Gambia*[68] — communication bordering on automatic institutionalisation of people with psychosocial disabilities under the Gambian Lunatics Detention Act, 1917 — the African Commission held that the right to political participation is extended to every person under the African Charter, without any distinction. In addition, part of the criticisms contained in Fox's work is also that:

> Article 13 of the African Charter guarantees participatory rights, but because the provision lacks enforceable standards its utility remains limited… However, unlike the Political Covenant or the European Convention, the African Charter fails to stipulate that an electoral choice must reflect the free expression of the electors' will or the opinion of the people. The absence of such a provision suggests the African Charter permits one-party elections.[69]

Like the other criticisms, little support can be found for this criticism from the jurisprudence of the African Commission and the African

59 As above para 48.
60 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) (*Legal Resources*).
61 As above para 70.
62 As above para 72.
63 Fox (n 7) 558.
64 A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* at 204.
65 *Legal Resources* (n 60) para 70.
66 As above para 71.
67 As above para 70.
68 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003).
69 Fox (n 7) 558.

Court. For instance, in *Constitutional Rights Project*, the African Commission found that to participate freely in government includes the right to vote for the representative of one's choice.[70] Clearly, a one-party election mandated on the electorates, without a choice of other candidates, would be a violation of this right. Thus, in *Lawyers for Human Rights v Swaziland*,[71] the Swazi King's Proclamation which repealed the 1968 Constitution and Bill of Rights, and outlawed the formation of political parties, was held by the African Commission to 'seriously undermine the ability of the Swaziland people to participate in the government of their country and thus violated article 13 of the African Charter'.[72]

2.2 The meaning of the right to democratic participation

The right to democratic participation simply means the enjoyment of the freedom to engage in electoral processes through voting — either by voting or being voted for.[73] Also included in the right is the freedom to join and form political parties, and to participate in the formulation of policies.[74] Within the African context, the rationale for including the right in the African Charter was a result of the despotic regimes which plagued Africa in the 1960s and 1970s and the 'desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest it in citizens'.[75] To fully enjoy the democratic system in Africa, it was understood that the right of people to freely participate in governance is a prerequisite.[76]

In many communications and applications which have been considered by the African Commission and the African Court, the scope and limitation of the right have been duly considered.[77] Part of the principles which have been espoused on the nature of the right is that requiring a candidate to belong to a political party before they are able to participate in governance violates article 13 of the African Charter.[78] Also, the prohibition of electoral alliances with a view to

70 *Constitutional Rights Project* (n 58) para 50.
71 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) (*Lawyers for Human Rights)*
72 As above para 63.
73 WA Oluchina 'The right to political participation for people with disabilities in Africa' (2015) 3 *African Disability Rights Yearbook* at 312.
74 As above 312.
75 Mbondenyi (n 50) 187. See also MK Mbondenyi 'Improving the substance and content of civil and political rights under the African human rights system' (2008) 17(2) *Lesotho Law Journal* at 39.
76 See Udombana (n 9) 1254.
77 In fact, the first merit judgment of the African Court mainly discussed the right to democratic participation. See *Mtikila v Tanzania* (14 June 2013) 1 AfCLR 34 (*Mtikila)*.
78 As above para 99.

running a candidacy for election would violate the tenets of this right.[79]

Importantly, the right is not absolute. But any such restriction must be necessary in a democratic society; and be reasonably proportionate to the legitimate aim pursued.[80] In addition, the State Party should be able to prove that the restriction serves one of the purposes set out in article 27(2) of the African Charter.[81] Thereafter, a proportionality test is applied to weigh the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal.[82] So far, the African Commission and the African Court have found some restrictions as failing the proportionality test, while some have passed the proportionality test.

For instance, in *Ajavon v Benin*,[83] the African Court held that it was not 'convinced that the requirement relating to the number of founding members to constitute a political party, corroborated by the social necessities invoked by the Respondent State, is contrary to the requirements of articles 27(2) … of the Charter'.[84] The African Commission too found that a requirement to provide an address and identification when casting a vote was not unreasonable.[85] But a requirement that a person can only exercise the right to be voted for if both their parents were born in Côte d'Ivoire, was held to be unreasonable.[86]

3 Interdependence and interrelation of human rights: The right to democratic participation and other rights

The purpose of this paragraph is to discuss, very briefly, the relationship — that is, the interdependence and the interrelation — between the right to democratic participation and the right to information, the right to association and the right to self-determination under the African human rights system. The debate on whether the notion of indivisibility and independence of rights means

79 *Ajavon v Benin* (Judgment) (2020) 4 AfCLR 133 (*Ajavon)* para 206.
80 *Mtikila* (n 77) para 106.1.
81 The purposes are the rights of others, collective security, morality and common interest. These are the only limitations permitted. See In communications 105/93, 128/94, 130/94, 152/96, *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).
82 *Mtikila* (n 77) para 106.1
83 *Ajavon* (n 79).
84 *Ajavon* (n 79) para 185.
85 *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996).
86 *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 75 (ACHPR 2008).

the same is outside the scope of this paragraph.[87] For the purposes of this article, the relationship between the right to democratic participation and the right to information, the right to association, and the right to self-determination under the African human rights system is treated as a *related independence*. In this sense, rights are considered to be 'mutually reinforcing or mutually dependent, but distinct'.[88] Thus, the rights are complementary, yet autonomous.[89]

3.1 The right to democratic participation and the right to freedom of information

There is an obvious relationship between the right to democratic participation and the right to information in the African Charter because information is necessary to participate in government fully and freely.[90] Article 9 of the African Charter provides:

> (1) every individual shall have the right to receive information.
> (2) every individual shall have the right to express and disseminate his opinion within the law.

It should be noted that article 9 contains two stand-out and stand-alone rights — the right to information and the right to freedom of expression — which are not necessarily coefficients.[91] The tenets of the right to democratic participation demand that people should have access to information 'so that they can make […] decisions intelligently'.[92] In part, the restriction on the right to information has contributed to dictatorship in Africa, which in turn, affects the right of the people to democratic participation.[93] In the fragile societies we have in Africa, effective access to information 'is critical for full and effective participation in governance'.[94]

87 For full consideration, see and compare JW Nickel 'Rethinking indivisibility: Towards a theory of supporting relations between human rights (2008) 30 *Human Rights Quarterly* at 984 and C Scott 'Interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights (1989) 27(3) *Osgoode Hall Law Journal* at 769. See also G Gadzhiev 'The interdependence of economic and social rights' (1998) 39(3) *Acta Juridica Hungarica* at 213.
88 Scott (n 87) 782.
89 As above 783.
90 See Heyns et al (n 51) 131: stating that 'the right to equal participation in political and public affairs can be realised only in conjunction with a range of other rights, including that to freedom of expression and information, peaceful assembly, association, equality, non-discrimination, and access to justice and socio-economic rights. In some instances, there may also be a right not to participate, or to disengage, for example on the basis of freedom of religion'.
91 M McDonagh 'The right to information in International human rights law' (2013) 13 *Human Rights Law Review* at 29.
92 Udombana (n 9) 1230.
93 FD Ifeanyi & VO Odoh 'Mass media and challenges of Africa's development: An analysis of press freedom and access to information in Africa' (2014) 32 *Journal of Law, Policy and Globalization* at 153.
94 JM Mbaku 'Corruption and democratic Institutions in Africa' (2018) 27(2) *Transnational Law and Contemporary Problems* at 333.

While the jurisprudence of the African Commission and the African Court has not fully revealed the relationship between the right to democratic participation and the right to information, scholars have conducted studies showing their relationship.[95] One of these is the work of Shyamal Chowdhury which considers the impact of information on democratic participation and corruption.[96] Mbaku states that:

> Shyamal Chowdhury has empirically investigated the impact of democracy and freedom of the press on corruption. He argues that freedom of the press serves as a mechanism through which cases of corruption can be brought to the attention of voters. In other words, an independent press can effectively investigate corruption and make the information available to voters. The voters can then utilize that information to make decisions about who to vote for. Politicians whose corrupt activities are exposed by the press can be punished at the polls by voters. Elected officials and candidates are then forced to avoid engaging in corrupt activities because of the risk of being punished by the voters.[97]

When journalists are illegally arrested and detained, the right of the people to receive information is affected. There are numerous decisions of the African Commission and the African Court where violations of the right to information have been found due to the arrest of journalists.[98] In *Article 19 v Eritrea,*[99] for instance, the African Commission observed that the imprisonment of journalists deprives not only the journalists of their rights to freely express and disseminate their opinions but also the public, of the right to information.[100] A public deprived of information cannot enjoy the right to democratic participation to its fullest extent. In addition, undue restriction on (social) media restricts the maximum enjoyment of the right to democratic participation.

95 Udombana (n 9) 1274; Heyns et al (n 51) 131; Mbondenyi (n 50) 35.
96 SK Chowdhury 'The effect of democracy and press freedom on corruption: An empirical test' (2004) 85 *Economic Letters* at 93.
97 Mbaku (n 94) 337.
98 See for instance, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) (*Jawara); Zimbabwe Lawyers for Human Rights and Another (on behalf of Meldrum) v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009).
99 *Article 19* (n 55).
100 As above para 106.

3.2 The right to democratic participation and the right to freedom of association

Also closely related to the right to democratic participation, is the right to freedom of association.[101] One of the key components of the right to democratic participation is the freedom to join any political party of one's choice. A person has a right choose to join a political party.[102] In *Jawara,*[103] the African Commission explained the relationship between the right to democratic participation and the right to freedom of association. The African Commission noted that the banning of political parties is a violation of the right to freedom of association, which affects the right to democratic participation.[104] The rationale is that when there is a ban, individuals are denied or compelled to join or form an association before seeking elective positions.[105] States Parties are thus under obligation to ensure that the activities of its ruling party do not prevent the forming of opposition parties.[106]

3.3 The right to democratic participation and the right to self-determination

Article 20 of the African Charter guarantees the right of a people to self-determination. The relevance of the right to democratic participation in determining the right of the people to self-determination has been canvassed in the jurisprudence of the African Commission. The relationship between the two exists because the right to self-determination cannot be exercised in the absence of proof of massive violations of human rights, that is, oppression and domination.[107] Thus, where it is found that people have a representation in government with the enjoyment of the right to democratic participation, the right to self-determination cannot be exercised.[108]

101 The right to freedom of association is contained in the African Charter Art 10. See Mbondenyi (n 50) 35: stating that 'indeed, even the jurisprudence of the African Commission confirms the foregoing observation. For instance, the Commission has emphasised the connectivity between this right and, among others, the rights to nationality, freedom of assembly and expression and self-determination'.

102 *Tanganyika Law Society & The Legal and Human Rights Centre v The United Republic of Tanzania* Application 011/2011 (*Tanganyika)* para 107.1.

103 *Jawara* (n 98)

104 As above para 59.

105 *Mtikila* (n 77) para 114.

106 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

107 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009).

108 See *Front for the Liberation of the State of Cabinda v Republic of Angola* (Communication 328/06, 54th Ordinary Session).

In *Katangese Peoples' Congress v Zaire*,[109] the African Commission concluded that in the absence of evidence that the people of Katanga were denied the right to participate in government as guaranteed by article 13(1) of the African Charter, they could not exercise their right to self-determination in a way incompatible with the sovereignty and territorial integrity of Zaire.[110]

4 Deepfake and the human right discourse

4.1 Deepfake and human rights

One of the main advancements in technology since the turn of the century is AI. There are numerous definitions and descriptions of what AI is.[111] A symmetrical theme that runs through these numerous descriptions is that it is a problem-solving tool. There are numerous reports on how AI is being used to meet many of the world's most urgent challenges, such as humanitarian crises and climate change.[112] Similarly, in Africa, AI is increasingly being utilised. There are reports that AI is steadily covering fields such as finance, education, and transportation, especially in Nigeria, Ghana, Kenya, and South Africa.[113] AI is equally being used to improve food security and healthcare in Africa.[114]

109 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) (*Katangese)*.

110 As above para 6.

111 Marvin Minsky, defines it as 'the science of making machines do things that would require intelligence if done by men'. John McCarthy defines it as 'the science and engineering of making intelligent machines. Stuart Russell and Peter Norving suggest that AI can be broken down into the following categories: 1) systems that think like humans; 2) systems that act like humans; 3) systems that think rationally; and 4) systems that act rationally'. Mathias Risse sees AI as the 'ability demonstrated by machines, in smart phones, tablets, laptops, drones, self-operating vehicles or robots that might take on tasks ranging from household support, companionship of sorts, even sexual companionship, to policing and warfare'. See M Risse 'Human rights and artificial intelligence — An urgently needed agenda' 2018 https://carrcenter.hks.harvard.edu/files/cchr/files/humanrightsai_designed.pdf (accessed 12 May 2023).

112 'United Nations activities on artificial intelligence (AI) 2019' 2019 https://www.itu.int/dms_pub/itu-s/opb/gen/S-GEN-UNACT-2019-1-PDF-E.pdf (accessed 12 May 2023).

113 C Besaw & J Filitz 'Artificial intelligence in Africa is a double-edge sword' 16 January 2019 https://ourworld.unu.edu/en/ai-in-africa-is-a-double-edged-sword (accessed 12 May 2023).

114 A Moyo 'Africa: Google using artificial intelligence to improve health care and food security' 26 April 2019 https://www.business-humanrights.org/en/latest-news/africa-google-using-artificial-intelligence-to-improve-healthcare-food-security/ (accessed 12 May 2023).

However, despite the expediency of AI to human lives, there is a growing concern that it constitutes a threat to human rights,[115] such as the right to privacy, human dignity, equality and non-discrimination, freedom of expression and information, freedom of movement, and freedom of assembly. In fact, AI is said to affect all internationally recognised human rights because human rights 'are interdependent and interrelated'.[116] Deepfake utilises AI technology.[117]

The origin of deepfake is usually traced to a Reddit — a social website — user with the handle 'u/deepfakers' who created a series of videos utilising new AI techniques that superimposed the faces of several prominent actresses into pornographic videos in 2017.[118] Since then, deepfake technology has continued to advance, making it more difficult to distinguish between real and fake content. The proliferation of deepfake software apps has compounded the problem.[119] Just like in the rest of the world, the concern of deepfake has been raised by commentators in Africa.[120] But the peculiarity of the problem with Africa is that a lot of Africans are ignorant of what deepfake content is,[121] and there is a lack of framework for its use and regulation.

The internet, specifically, social media, is the platform where most deepfake content is disseminated.[122] In recent times, Africa's internet and social media users have risen significantly. In 2010, there were about 100 million African internet users.[123] By December 2021,

115 'Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights' May 2019 https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64 (accessed 12 May 2023); S Baweja & S Singh 'Beginning of artificial intelligence, end of human rights' 16 July 2020 https://blogs.lse.ac.uk/humanrights/2020/07/16/beginning-of-artificial-intelligence-end-of-human-rights (accessed 12 May 2023).

116 'Human rights in the age of artificial intelligence' November 2018 https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf (accessed 12 May 2023).

117 C Kocsis 'Deepfakes, shallowfakes, and the need for a private right of action' (2022) 126 *Dickinson Law Review* at 623.

118 For discussion, see LaMonaga (n 35) 1948.

119 T Cline 'When seeing is no longer believing: An African take on the cost of deepfake' 16 January 2023 https://www.forbesafrica.com/technology/2023/01/16/when-seeing-is-no-longer-believing-an-african-take-on-the-cost-of-deepfakes/ (accessed 12 May 2023).

120 A Mascellino 'Deepfake problem studied in Europe; Africa no immune' 20 January 2023 https://www.biometricupdate.com/202301/deepfake-problem-studied-in-eu-africa-not-immune (accessed 12 May 2023).

121 L Ndebele 'Deepfakes worrying threat to democracy, says report' 23 February 2024 https://www.news24.com/news24/africa/news/deepfakes-worrying-threat-to-democracy-in-africa-says-report-20230223 (accessed 12 May 2023).

122 Mbaku (n 94) 364: arguing that the internet has become the main conduit for communicating and disseminating information.

123 A Essoungou 'A social media boom begins in Africa' December 2010 https://www.un.org/africarenewal/magazine/december-2010/social-media-boom-begins-africa (accessed 12 May 2023).

this number had increased to more than 590 million.[124] Thus, many African users may encounter deepfakes, without necessarily realising it. Recently, there were perturbations in Mali over the exponentiality of deepfakes.[125]

Arguably, part of the most obvious human rights implicated by the dissemination of deepfakes are the rights to human dignity and the right to privacy. The superimposition of the faces of female celebrities, such as Scarlet Johansson, into pornographic videos, demeans the character of Scarlet Johansson.[126] When the faces of people are superimposed on the body of another without their consent when creating deepfakes, the right to privacy is implicated.[127] Beyond dignity and privacy, however, deepfake affects the right to democratic participation guaranteed under the African Charter. Thus, the relationship between the right to democratic participation and deepfake is not at arm's length. These implications are discussed below.

4.2 The effects of deepfake on the right to democratic participation in Africa

The greatest effect of deepfake on human rights is the distortion of information, and, in the long run, the creation of a situation termed 'information apocalypse'.[128] It may be argued that the right to information makes sense only when seen as 'the right to truth'.[129] Otherwise, there would be no point enshrining this right in international human rights instruments,[130] because no one would

124 'Internet Penetration in Africa — 2020 — Q1 — March' 25 May 2022) https://www.internetworldstats.com/stats1.htm (accessed 12 May 2023).

125 The reason for the perturbations was because of the sensitivity and content of the deepfakes. For instance, one 'video claims that the French intellectual Bernard-Henri Lévy is a spy selling information about the Malian army's position and forces to jihadists in Mali, based on a photo of him taken when he was in Sudan in 2007 and taken out of context'. C Bennett 'Fake videos using robotic voices and deepfakes circulate in Mali' 10 January 2022 https://observers.france24.com/en/tv-shows/truth-or-fake/20220110-truth-or-fake-debunked-mali-robot-voices-deepfakes (accessed 12 May 2023).

126 See P Hayward & A Rahn 'Opening pandora's box: Pleasure, consent and consequence in the production and circulation of celebrity sex videos' (2015) 2(1) *Porn Studies* at 49.

127 S Maddocks 'A deepfake porn plot intended to silence me: Exploring continuities between pornographic and "political" deep fakes' (2020) 7(4) *Porn Studies* at 415.

128 Westerlund (n 32) 43: stating that '…the most damaging aspect of deepfakes may not be disinformation *per se*, but rather how constant contact with misinformation leads people to feel that much information, including video, simply cannot be trusted, thereby resulting in a phenomenon termed as "information apocalypse" or "reality apathy"'.

129 As above.

130 See UDHR Art 19; ICCPR Art 19. In Africa, the right to information is guaranteed under African Charter Art 9 and many other instruments.

clamour for a right to be lied to.[131] As argued above, the right to democratic participation is interrelated with the right to information. With this, it is not difficult to see how deepfake creates a web of impacts on the right to democratic participation. Mainly, deepfake interferes with the 'freely' component of the right to democratic participation. It disturbs and distorts information necessary for the electorates to freely participate in government through the decisions made during election.

In recent years, technology has played an important role in elections in Africa.[132] Africans have shown interest in politics through their activities on social media. For instance, according to Portland, 1.6 billion geolocated posts on X (formerly Twitter) originated from Africa in 2015 and almost 1 in 10 of the most popular hashtags in 2015 related to political issues and politicians.[133] This connotes a rise in political posts from Africa. Noteworthily, in the exercise of the right to participation, the 'will of the people must be expressed in elections, which must be "periodic" and must be "genuine"'.[134] The 'freely chosen' requirement of the right to democratic participation denotes that the people's right to vote is not undermined by coercion, intimidation, or deception.[135]

But deepfake does exactly the opposite. The underlying aim of deepfake is deception. As it relates to democratic participation, the objective of deepfake could be political manipulation. Political opponents could superimpose the faces of their main opponents, saying and doing things never said or done.[136] 'A well-timed deepfake', states Langa, 'distributed when there is enough window for the fake to circulate but not enough window for the victim to debunk it effectively', could influence the outcome of an election by creating a 'decisional chokepoint: [a] narrow window of time during which irrevocable decisions are made, and during which the circulation of false information, therefore, may have irremediable effects'.[137] While in developed societies, there is doubt on the exact impact of deepfakes on election and democratic process,[138] the peculiarity of the situation in Africa — illiteracy, the lack of a

131 See *Gomez Lund v. Brazil* 24/2010 IACtHR Series C 219 (2010); McDonagh (n 91).
132 A Erlich et al 'Using communications technology to promote democratic participation: Experimental evidence from South Africa' 2022 https://gps.ucsd.edu/_files/faculty/mcintosh/mcintosh_SA_ICT_EDCC_Resubmit_220920.pdf (accessed 12 May 2023).
133 'How Africa Tweets' https://portland-communications.com/publications/how-africa-tweets-2016/ (accessed 12 May 2023).
134 Udombana (n 9) 1250.
135 Fox (n 7) 570.
136 Hall (n 4) 51.
137 Langa (n 43) 773.
138 As above 772.

framework, and military rule and unconstitutional changes[139] — calls for particular attention.

In recent months, there have been reports of deepfakes threatening the democratic landscape in the Gambia,[140] Mali,[141] and South Africa.[142] Deepfake has also been used as a 'defence-to-truth strategy' in Nigeria, thereby undermining the right to democratic participation. For instance, in 2018, a video emerged online of a Nigerian Governor stuffing his Babaringa[143] with bundles of US Dollars.[144] Though many critics believed that the video was real, the Governor has consistently maintained that the video was 'cloned'.[145] The proliferation of deepfake software apps provided the opportunity to deny the authenticity of the video. The 'defence-to-truth strategy' adopted by the Governor might have neutralised the impacts the video could have had on the Governor's election bid in 2019. Thus, as the proliferation of deepfake software apps continues, it is imperative to design a framework to address their human rights concerns. Because most African States — with the increase in *coup d'états* in recent years — have weak democratic institutions. Human rights stakeholders on the continent need to pay particular attention to deepfake and its negative effects on the right of African people to participate freely in government.

5 Recommendations and conclusion

This article argues that the relationship between the right to democratic participation and deepfake is not at arm's length. Though the most obvious human rights implicated by deepfake are the right to information, the right to dignity, and the right to privacy, the interdependence and the interrelation between the right to democratic participation and the right to information means that the former is affected by the proliferation of deepfake software apps. In developed countries, the first effort shown in addressing the deepfake problem is by identifying its potential impact. Also, governments have partnered with private companies to find a solution to the problem.[146] Whereas in Africa, since the call by the African Commission to African states in 2021 to 'work towards a

139 Mbondenyi (n 50) 187.
140 Okunoye (n 41).
141 Bennett (n 125).
142 L Nweti 'Deepfakes go South African — Ramaphosa in video of plan to tear down Voortrekker monument and Loftus' 15 April 2023 https://mybroadband.co.za/news/internet/487811-deepfakes-go-south-african-ramaphosa-in-video-of-plan-to-tear-down-voortrekker-monument-and-loftus.html (accessed 12 May 2023).
143 *Babaringa* is a big traditional dress worn by the Hausa tribe in Nigeria.
144 'Ganduje in the eye of the storm' 10 October 2021 https://www.thisdaylive.com/index.php/2021/10/10/ganduje-in-the-eye-of-the-storm/ (accessed 12 May 2023).
145 As above.

comprehensive legal and ethical governance framework for AI technologies, robotics and other new and emerging technologies to ensure compliance with the African Charter and other regional treaties'.[147] There is little evidence that African states have responded to this clarion call. Of course, the starting point in addressing the problem is as stated by the African Commission: a policy design approach where extensive research precedes the formulation of a framework. A point not canvassed, however, by the African Commission, and which is important in addressing the problem, is the necessity of African states partnering with technology companies in addressing this problem.

It is also recommended that human rights stakeholders in Africa, including civil organisations and NGOs, should increase their efforts in educating Africans about the negative impact of deepfakes and their effects on human rights, particularly on the right to democratic participation. One way this may be achieved is through conferences, seminars, publications in media, and reports by organisations and law enforcement agencies. In Africa, the African Commission, under its promotional role needs to take the lead in this quest. Lastly, African states should formulate laws and policies to address the impact of deepfakes. Such laws should, however, comply with human rights standards and may not be so stringent that they violate the right of Africans to freely express themselves.

146 For instance, 'Voight-Kampff' tests are being used by the United States government in partnership with technology companies to determine if content is a deepfake. see Caldera (n 33) 181.

147 Resolution 473 (n 44) para 4.

‘CONSENT’ AND CONFUSION CASTING DOUBT ON THE VALIDITY OF A CUSTOMARY MARRIAGE

***Mgenge v Mokoena & another* [2023] JOL 58107 (GJ)**

https://doi.org/10.29053/pslr.v17i1.5098

*by Liesl Hager**

Abstract

In Mgenge v Mokoena & another *[2023] JOL 58107 (GJ), the Gauteng High Court, Johannesburg, per Rome AJ, considered the validity of a customary marriage concluded between the bride (the first respondent) and the deceased groom with reference to the requirements outlined in section 3 of the Recognition of Customary Marriages Act 120 of 1998. The mother of the groom (the applicant) challenged the validity of the marriage certificate. The main issue under inspection is whether the applicant’s lack of participation in, consent to, or knowledge of the customary marriage is sufficient to rebut the* prima facie *proof of validity offered by the marriage certificate. In this contribution, I recount the Court’s systemic approach to determine if the applicant’s misunderstanding of the purpose or intention of the events that transpired and her absence in participating in the negotiations and entering into or celebration of the customary marriage invalidates the* prima facie *proof offered by the marriage certificate. I explore the Court’s approach to the requirements for a valid customary marriage, specifically the negotiation and celebration requirements, as well as the integration and physical handing over of the bride. I also briefly inspect the role of expert evidence and living customary law. This judgment demonstrates the dynamic and evolving nature of living*

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customary law in South Africa and the approaches adopted by the judiciary when exploring customary law issues like the validity of a customary marriage.

1 Introduction

Customary marriages in South Africa, concluded in terms of the Recognition of Customary Marriages Act 120 of 1998 (RCMA), are one of three legally recognised marriages or unions that may be concluded in the Republic of South Africa.[1] The other two are civil unions entered into in terms of the Civil Union Act 17 of 2006 and civil marriages concluded in terms of the Marriage Act 25 of 1961. Cohabitation (in the form of domestic partnerships) and universal partnerships, also attract legal recognition, which is in some ways similar to a union or marriage concluded in terms of these Acts,[2] but fall beyond the scope of this discussion. This case note focuses specifically on customary marriages and the recent case of *Mgenge v Mokoena*.[3]

In this matter, the applicant (the deceased groom's mother) sought a court order invalidating the marriage certificate recording that the groom (her deceased son) and the bride (the first respondent) had entered into a customary marriage on 17 November 2018.[4]

The applicant argued that as the single mother of the groom, she was unaware of the existence of this marriage and had not consented thereto.[5] Essentially, the applicant argued that the absence of her knowledge, participation, or consent to the customary marriage meant that the marriage certificate was invalid, as it incorrectly reflected that the groom was married to the bride per customary

1 RSA Gov 'Getting married' Date unknown https://www.gov.za/services/services-residents/relationships/getting-married#:~:text=Three%20types%20of%20marriages%20are,customary%20marriages%20and%20civil%20unions (accessed 18 March 2023). At the time of writing, the Registration of Muslim Marriages Bill (B30-2022) was referred to Portfolio Committee, see RSA Parliament 'Registration of Muslim Marriages Bill (B30-2022)' Date unknown https://www.parliament.gov.za/bill/2306910 (accessed 18 March 2023). Once enacted, Muslim marriages may be a possible fourth type of legally recognised marriages or unions in South Africa.

2 *Volks v Robinson* 2005 (5) BCLR 446 (CC) paras 107 & 120, K Madzika 'Dawn of a new era for permanent life partners: from *Volks v Robinson to Bwanya v Master of the High Court*' (2020) 53(1) *De Jure* 393–406; L Hager 'The dissolution of universal partnerships in South African law: Lessons to be learnt from Botswana, Zimbabwe and Namibia' (2020) 53(1) *De Jure* 123–139, S Sibisi 'The Supreme Court of Appeal and the handing over of the bride in customary marriages' (2021) 54(1) *De Jure* 385 with reference to De Villiers AJ in *ND v MM* unreported case number 18404/2018 SGJ (12 May 2020), A Manthwa 'An appraisal of the hurdles with ascertaining the applicable customary law when determining conclusion of a customary marriage – *ND v MM* (18404/ 2018) (2020) ZAGPJHC 113 (12 May 2020)' (2022) 36 *Speculum Juris* 223–232.

3 [2023] JOL 58107 (GJ) (*Mgenge*).

4 *Mgenge* (n 3) paras 7, 11, 16-18.

5 *Mgenge* (n 3) para 5.

law.[6] The applicant argued that according to customary law, she was required to participate in any pre-marital negotiations between the families of the bride and the groom.[7]

In this discussion, I explore the judgment in more detail with reference to the arguments considered by Rome AJ. I also highlight the approach followed by the Court in concluding that the customary marriage was, in fact, valid, without considering the particular or specific customary traditions at play. In the following paragraph, I explore the relevant law concerning the facts of the matter.

2 The requirements for a valid customary marriage

For a customary marriage to be valid, it must comply with the requirements outlined in the RCMA.[8] Section 3 of the RCMA provides:

> (1) For a customary marriage entered into after the commencement of this Act to be valid —
> (a) the prospective spouses —
> (i) must both be above the age of 18 years; and
> (ii) must both consent to be married to each other under customary law; and
> (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

That is to say, failure to register a customary marriage entered into after the commencement of the RCMA (15 November 2000) does not invalidate the union.[9] The judgment did not mention this point; although it was briefly discussed by the court *a quo*.[10]

In this matter, the court ultimately held that all three requirements set out in the RCMA were satisfied, and the marriage certificate was valid.[11] Rome AJ's reasoning in coming to this conclusion is peculiar, especially considering the applicant's lack of consent and participation in the pre-marital negotiations.

From the outset, Rome AJ correctly notes:

6 *Mgenge* (n 3) paras 1-5.
7 *Mgenge* (n 3) para 5.
8 *Mgenge* (n 3) para 19.
9 The RCMA was assented to on 20 November 1998 and commenced on 15 November 2000. See also C Rautenbach *Introduction to legal pluralism in South Africa* (2021) at 101, Law, race and gender research unit, University of Cape Town 'The recognition of customary marriages in South Africa: law, policy and practice' December 2012 https://law.uct.ac.za/sites/default/files/content_migration/law_uct _ac_za/1149/files/CLS_RCMA_Factsheet_2012_Eng.pdf (accessed 18 May 2023) at 4.
10 *Mgenge v Mokoena* [2021] ZAGPJHC 58 (*Mgenge* 2021) para 4.
11 *Mgenge* (n 3) paras 19 & 52.

> The requirements appear capable of easy fulfilment. However, the prerequisite that the marriage must be negotiated and entered into or celebrated in accordance with customary law gives rise to some legal complexities.[12]

The Court did not expand on the complexities, but they are conceivably rooted in the living nature of customary law.[13] Living customary law refers to the original customs and usages of indigenous communities and their ever-changing and non-stagnant nature.[14] Living customary law is preferred to the so-called 'official' codified versions of customary law,[15] since the 'official' versions of customary law do not accurately reflect a particular community's original customs and usages.[16] These communities are continuously evolving, and the living law meets the demands of these developing communities.[17] Sometimes, expert evidence may be relied upon in court to ascertain the relevant living law.[18]

The bride and groom were both older than 18 years of age, as required in section 3(1)(*a*)(*i*), and both parties consented to be married to each other under customary law, as required in section 3(1)(a)(ii).[19] I now turn my attention to the main issue under consideration in this case, which is the requirements contained in subsection (b): 'the marriage must be negotiated and entered into or celebrated in accordance with customary law'.[20]

The Court followed a two-step approach to determine if the marriage was negotiated and entered into or celebrated in accordance with customary law: First, Rome AJ inspected the requirement of negotiation,[21] and second the 'celebrated' or 'entered into' requirement.[22] Below, I deal with each in more detail.

12 *Mgenge* (n 3) para 19.
13 *Mgenge* (n 3) para 46 with reference to *Tsambo v Sengadi* 2020 ZASCA 46 (*Sengadi*) para 15.
14 Rautenbach (n 9) 31.
15 *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) (*Bhe*) paras 86 & 87, Rautenbach (n 9) 31.
16 *Bhe* (n 15) para 87: 'The official rules of customary law are sometimes contrasted with what is referred to as "living customary law," which is an acknowledgement of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are ad hoc and not uniform.'
17 *Bhe* (n 15) para 85, Rautenbach (n 9) 32.
18 *Bhe* (n 15) para 150, Rautenbach (n 9) 31.
19 *Mgenge* (n 3) para 19.
20 As above.
21 *Mgenge* (n 3) paras 9–20.
22 *Mgenge* (n 3) paras 22–32.

2.1 The negotiation requirement

The bride produced a copy of the *lobola* agreement to prove the negotiation requirement was satisfied.[23] In the judgment, the contents of the *lobola* agreement is outlined:

> The lobola document was signed on 17 November 2018 and read thus as translated:
>
> 'Below are the marriage agreements between the family of Mokoena and the family of (Mahlangu) Mgenge.
>
> The Mahlangu's and the Mokoena's agreed on ten (10) cattle whereby one cattle will cost Three Thousand Five Hundreds Rands (R3,500.00) ...
>
> The Mahlangu's paid the amount of Ten Thousand Rands (R10,000.00) and the balance is Eighteen Thousand Rands (R18,000.00) And Two living cattle.'[24]

Thus, R10 000 of the *lobola* was paid to the bride's family on 17 November 2018 by an uncle of the groom on behalf of the groom.[25] Rome AJ held that this part-payment of the *lobola* and the wording of the *lobola* agreement itself meant that the parties 'successfully negotiated a customary marriage' on 17 November 2018.[26]

The *lobola* agreement amounts to more than a mere introduction or commencement of discussions about a possible marriage (as averred by the applicant),[27] and the applicant's assertion that the *lobola* agreement did not indicate successful negotiation was negated by the *lobola* agreement's wording and the part-payment of the *lobola*.[28]

From the above, it is thus clear that the wording of the *lobola* agreement and the part-payment of the *lobola* is sufficient to satisfy the negotiation requirement in this case.[29] The next step of the two-step approach followed by Rome AJ refers to the 'celebration' requirement.

2.2 The celebration requirement

The Court explored the celebration requirement under the heading of 'integration'.[30] This is likely so because section 3(1)(*b*) of the RCMA states that 'the marriage must be negotiated *and* entered into *or*

23 *Mgenge* (n 3) para 20.
24 *Mgenge* (n 3) para 17.
25 *Mgenge* (n 3) paras 15 & 18.
26 *Mgenge* (n 3) para 21.
27 *Mgenge* (n 3) para 20.
28 As above.
29 *Mgenge* (n 3) para 21.
30 *Mgenge* (n 3) para 22.

celebrated in accordance with customary law'.[31] In this case, 'entered into' *or* 'celebrated' falls under the auspice of 'integration'.[32]

In discussing the 'integration of the bride into the groom's family',[33] Rome AJ did not elaborate on what integration means in this context.[34] It is only later in the judgment that Rome AJ explained that he is dealing with the handing over of the bride.[35] For present discussion, I consolidate these two discussions in the judgment to illustrate how the Court concluded that the celebration requirement was met.

Semantics aside, the Court considered the celebration of the marriage against the expert evidence of Professor Thandabantu Nhlapo.[36] As mentioned above, expert evidence may be relied upon in certain cases to ascertain the relevant living law.[37] Professor Nhlapo testified on the following three questions:[38]

> (a) Whether the deceased [groom] when marrying ought to have followed the traditions of his biological father being the Ndebele customs. (b) Whether the deceased [groom], when marrying ought to have follow [*sic*] the traditions of his mother being the Zulu customs. (c) The requirements to be satisfied for a valid customary marriage in terms of the Sesotho, isiNdebele and isiZulu customs.

On the question of which custom applied (Sesotho, isiNdebele, or isiZulu), Rome AJ concluded that according to the compelling reasoning of Professor Nhlapo, the 'marriage had to be celebrated in accordance with Sesotho customs'.[39]

Professor Nhlapo added that 'it would be more appropriate that the search for the living law should be directed at where the bride's home community is situated and not anywhere else.'[40] This is an

31 Own emphasis added.
32 *Mgenge* (n 3) paras 21–22. The RCMA does not define 'entered into' or 'celebrated'.
33 *Mgenge* (n 3) paras 22–32.
34 For a more detailed discussion on the handing over of the bride, see Sibisi (n 2) 370–386 & 383: The handing over signifies the unification of families. See also P Bakker 'Integration of the bride and the courts: is integration as a living customary law requirement still required?' (2022) 25 *Potchefstroom Electronic Law Journal* 3.
35 *Mgenge* (n 3) paras 41–42.
36 *Mgenge* (n 3) para 23: Professor Nhlapo 'holds the following law degrees. A BA (Law) from the National University of Lesotho (1971), LLB (Honours) from the University of Glasgow (1980) and a PhD in Family Law, which he obtained from Oxford University in 1990. He was Deputy Vice-Chancellor at the University of Cape Town for ten years, where he had served as Professor and Head of the Department of Private Law.' See *Mgenge* (n 3) paras 22–32 for the expert evidence.
37 *Bhe* (n 15) para 150, Rautenbach (n 9) 31.
38 *Mgenge* (n 3) para 24.
39 *Mgenge* (n 3) para 30.
40 *Mgenge* (n 3) para 27.

important statement, as the applicant contended that the marriage was invalid because it was not celebrated in terms of either isiZulu or isiNdebele custom.[41] Hence, according to the testimony of Professor Nhlapo, the search for the living law should be directed at where the bride's home community is situated (in this case, Sesotho customary law)[42] and not isiZulu or isiNdebele customs, as argued by the applicant.[43]

Rome AJ also distinguished between the consummation of the customary marriage and the handing over of the bride.[44] On this point, Professor Nhlapo added that when the beast is slaughtered at the *lobola* negotiation it signifies the father's acceptance of the groom as his daughter's husband and the consummation of the customary marriage.[45] However, the bride is not yet actually handed over at this time.[46] Here, Professor Nhlapo clearly distinguishes the father accepting the groom as his daughter's husband and the handing over of the bride. The Court, however, did not explore this distinction further in its judgment.

Despite the credible and compelling evidence of Professor Nhlapo, Rome AJ decided that it was not necessary, on the facts before the Court, to determine the outcome of the dispute on the basis that Sesotho customs applied.[47] Interestingly, the judgment contains eight paragraphs of Professor Nhlapo's testimony, and still, the Court decided it need not be considered.[48] Furthermore, the judgment provides no reason for not deciding the outcome of the dispute based on Sesotho customs. I submit that the only reasons for not considering Sesotho customs are perhaps necessity and convenience. For example, Rome AJ did not deem it *necessary* to determine the outcome of the dispute on the basis that Sesotho customs applied. Rome AJ explained this: '[t]he question of whether the requirement of handing over was met can be determined on the basis of the following more general considerations'.[49] Hence, Rome AJ did not consider the outcome of the dispute (specifically if the handing over requirement was met) based on Sesotho customs, because of the more easily accessible (and perhaps convenient) 'general considerations'.

To answer the question of whether the handing over requirement was met, Rome AJ referred to more general considerations like (1) the

41 *Mgenge* (n 3) paras 10–13.
42 *Mgenge* (n 3) para 26, i.e., the '*lex loci domicilii* of the bride's father'.
43 *Mgenge* (n 3) paras 10, 11, 22 & 24.
44 *Mgenge* (n 3) para 29.
45 *Mgenge* (n 3) paras 28–30.
46 *Mgenge* (n 3) para 29. For a detailed discussion on the delivery of the bride, see DS Koyana 'Delivery of the bride as a requirement for the validity of a customary marriage — the final verdict' (2022) 36 *Speculum Juris* 1–16.
47 *Mgenge* (n 3) para 31.
48 *Mgenge* (n 3) paras 31–32.
49 *Mgenge* (n 3) para 32.

marriage certificate as *prima facie* proof of the marriage,[50] and (2) if the bride's actual *physical* handing over is a requirement for the conclusion of a customary marriage.[51] This more general approach was thus favoured and followed by Rome AJ, as opposed to considering any particular customary traditions like the Sesotho customs, as recounted by Professor Nhlapo under the integration discussion.[52]

In the following paragraphs, I deal with this two-prong 'general' approach followed in the judgment. First, I consider the marriage certificate as *prima facie* proof of the marriage; thereafter, I look at whether the bride's actual, physical handing over is a requirement for the conclusion of a customary marriage.

3 The marriage certificate as *prima facie* proof of the marriage

Rome AJ correctly held that the marriage certificate amounts to *prima facie* proof of the marriage,[53] in terms of section 4(8) of the RCMA. The Court had to determine whether the applicant, as the mother of the groom, had to 'consent' for the customary marriage to be valid. This wording might be somewhat misleading. A person aged 18 and above has the full capacity to act[54] and legal capacity[55] and may enter into various agreements, including a marriage contract.

As mentioned above, the bride and groom in this case were both older than 18 years of age, as required in section 3(1)(a)(i) and both parties consented to be married to each other under customary law, as required in section 3(1)(a)(ii).[56] The age and consent requirements were not in dispute.

In this case, the applicant averred that as the mother of the groom, she did 'not have *knowledge* of the marriage and had not *consented* thereto'.[57] I submit that this averment does not relate to the 'consent' requirement in section 3(1)(a)(i) of the RCMA. The 'consent' requirement, as averred by the applicant, is entwined with

50 *Mgenge* (n 3) paras 33–40.
51 *Mgenge* (n 3) paras 41–50.
52 *Mgenge* (n 3) paras 22–30.
53 *Mgenge* (n 3) para 33. See also Rautenbach (n 9) 101 with reference to *Baadjies v Matubela* 2002 (3) SA 427 (W).
54 T Boezaart *Law of persons* (2010) at 7: 'The capacity to act can be defined as the judicial capacity to enter into legal transactions.'
55 Boezaart (n 54) at 7: 'Legal capacity is the judicial capacity that vests the individual with legal subjectivity and enables him or her to hold offices as a legal subject.'
56 As above.
57 *Mgenge* (n 3) para 5. Own emphasis added.

the 'negotiated and entered into' facet of a customary marriage (as outlined in section 3(1)(b) of the RCMA).

I submit that this case essentially pivots on the applicant's misunderstanding of the events. The applicant believed that the events that transpired (like the family delegation that travelled to QwaQwa on 17 November 2018) were intended to be mere introductions.[58] Furthermore, the applicant persisted that 'the *lobola* document merely evidenced an intention to commence initial marriage negotiations.'[59] Initiating *lobola* negotiations is integral to a customary marriage.[60]

As noted above, Rome AJ held that these were more than initial introductions or negotiations.[61] The *lobola* agreement and the events of 17 November 2018 were indicative of negotiating and entering into/celebrating the customary marriage between the bride and the groom.[62]

Rome AJ worded it as 'consent' being absent, meaning that the applicant did not 'consent' to the marriage, which was therefore invalid.[63] Perhaps a better phrasing would be that the applicant claimed the marriage was invalid because of her lack of knowledge of and participation in the negotiation and entering into/celebration of the customary marriage. In this case, it was not about 'consent' as such but rather a misunderstanding of the visit to QwaQwa on 17 November 2018 and the purpose of that visit. The applicant understood the meaning of the visit as being an introduction.[64]

Essentially, the issue revolves around whether the applicant's knowledge and participation (rather than consent) are required for the validity of the customary marriage. Hence, the question here is if the applicant's participation and knowledge, as the single mother of the groom,[65] was required for the valid negotiating and entering into/ celebration of the customary marriage between the bride and the groom. Rome AJ did not explain if the absence of the applicant's participation in the events or her lack of knowledge, supported by sufficient evidence, could lead to a rebuttal of the *prima facie* proof offered by the marriage certificate.

58 *Mgenge* (n 3) paras 8 & 11.
59 *Mgenge* (n 3) para 8.
60 S Sibisi 'Is the requirement of integration of the bride optional in customary marriages?' (2020) 53(1) *De Jure* 91.
61 *Mgenge* (n 3) para 20.
62 *Mgenge* (n 3) para 21.
63 *Mgenge* (n 3) paras 5 & 36.
64 *Mgenge* (n 3) para 8.
65 The applicant described herself as a single parent, despite the fact that the biological father of the deceased groom was still alive at the time of the marriage negotiations and celebrations; see *Mgenge* (n 3) paras 25–26.

Instead, Rome AJ concluded that the applicant's misunderstanding of the purpose or intention of the events that transpired and her absence in the negotiations and entering into or celebrating the customary marriage between the bride and the groom does not invalidate the *prima facie* proof offered by the marriage certificate.[66] Here, Rome AJ considered if the *prima facie* proof provided by the marriage certificate could be rebutted by the evidence and concluded that it did not.[67]

In the introduction to this note, I mention that the 'consent' requirement under examination is better suited under the auspice of the 'negotiated and entered into' facet of a customary marriage.[68] However, Rome AJ, in this case, did not consider the applicant's absence of knowledge and participation as a separate requirement under the auspice of 'negotiated and entered into' as outlined in section 3(1)(b) of the RCMA. As mentioned, Rome AJ approached the applicant's absence of knowledge and participation against the backdrop of rebutting the *prima facie* proof offered by the marriage certificate.

To determine whether the marriage certificate is *prima facie* proof of the marriage, the Court referred to the evidentiary nature of a marriage certificate set out in *W v W*,[69] as established in *Gumede v S*.[70] Rome AJ considered the claims of the applicant, and the reasons why they were insufficient to rebut the *prima facie* proof offered by the marriage certificate.[71] The Court concluded that the applicant's version of events offered insufficient evidence to rebut the *prima facie* proof offered by the marriage certificate.[72] Seeing as the marriage certificate serves as *prima facie* proof of the marriage, the second factor inspected by Rome AJ was if the *physical* handing over of the bride was required.[73]

4 Integration and the *physical* handing over of the bride

In addition to the knowledge, consent, and participation argument, the applicant also argued that the 'events in QwaQwa did not comply with the requirement of the handing over of the bride', and because of this, the marriage had not been concluded under customary law.[74]

66 *Mgenge* (n 3) paras 21, 33–35 & 52.
67 As above.
68 S 3(1)(b) of the RCMA.
69 1976 2 All SA 529 (W). See also *Mgenge* (n 3) paras 33–34.
70 2021 ZAMPMHC 21 (24 May 2021). *Gumede* did not deal with customary marriages.
71 *Mgenge* (n 3) paras 36-40.
72 As above.
73 *Mgenge* (n 3) para 41.
74 As above.

Although this 'submission was not based on the contents of the founding affidavit',[75] Rome AJ indulged this averment and commented that on the evidence, he was satisfied that the integration, or handing over, requirement was fulfilled on 17 November 2018.[76]

Rome AJ also commented that it had to be borne in mind that integration, or handing over, comprises a series of events, and *some* of these events under the banner of integration may be waived, condoned, or abbreviated by the parties.[77] Rome AJ concluded that 'what is required is that the bride must at least be handed over to her in-laws in compliance with the customary integration requirements.'[78]

Citing *Sengadi v Tsambo*,[79] the Court indicated that where the handing over consisted of a part-payment of *lobola* and, on the same day, changing the bride into traditional attire, giving her a traditional dress, slaughtering a lamb, and the smearing of the bile, a bride would have been successfully handed over.[80] In *Mgenge*, the handing over was signified symbolically by allowing the parties to cohabitate after the conclusion of the *lobola* negotiations.[81]

Rome AJ also mentioned that the 'handing over of the bride is not an "indispensable sacrosanct *essentialia*" for a lawful customary marriage'.[82] Some authors however, argue that this requirement is *not* dispensable and that the handing over of the bride *cannot* be waived.[83] South African courts are also divided on this issue.[84] For purposes of present discussion, it is worth noting that whether handing over is a requirement, was not in dispute in *Mgenge*. For this

75 As above.
76 As above.
77 *Mgenge* (n 3) para 42. See also Sibisi (n 2) 98.
78 As above.
79 2019 1 All SA 569 (GJ) (*Sengadi* GJ) as cited in *Mgenge* (n 3) para 43.
80 As above.
81 *Mgenge* (n 3) para 45, see also Sibisi (n 2) 384: the payment 'of *ilobolo* following cohabitation seems to strengthen the idea of a symbolic handing over'.
82 *Mgenge* (n 3) para 44 with reference to *Sengadi* GJ (n 79), see also Sibisi (n 2) 98, Koyana (n 46) 15, F Osman 'Precedent, waiver and the constitutional analysis of handing over the bride [discussion of *Sengadi Tsambo* 2018 jdr 2151 (GJ)]' (2020) 31(1) *Stellenbosch Law Review* 84 (with reference to *Msutu v Road Accident Fund* GPPHC 10-07-2014 case no 18174 of 2014 para 44): '[h]anding over of the bride was thus not required by the court in *Msutu* as the couple had lived together with the knowledge of both spouses' families'.
83 See Sibisi (n 2) 100-102 with reference to *Moropane v Southon* (755/2012) [2014] ZASCA 76 (*Moropane v Southon*), and *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) (*Mbungela v Mkabi*). See also Sibisi (n 2) 103: 'living customary law […] still requires that the bride should be integrated into her in-laws; failing this, there is no customary marriage […] judgments that follow the narrative that integration of the bride is dispensable have not enjoyed the benefit of proof to this effect'. See also Bakker (n 34) 4.
84 Sibisi (n 2) 103: '[t]he SCA in *Moropane v Southon* (n 83) has held that integration of the bride is mandatory in customary marriages; whereas the very same court in *Mbungela v Mkabi* (n 83) decided the opposite'.

reason, I do not delve into the detailed debates surrounding if the handing over requirement is unconstitutional or dispensable *in toto*.[85] I agree with Sibisi's suggestion on this point — the way forward is that the High Court 'must take each case on its facts', and the Supreme Court of Appeal or Constitutional Court must pronounce on this uncertainty.[86] Bakker and Sibisi suggest that the bride's handing over, or integration, *is* a requirement.[87]

Despite Rome AJ's observation that the 'handing over of the bride is not an "indispensable sacrosanct *essentialia*" for a lawful customary marriage',[88] Rome AJ accepted the handing over of the bride as a requirement.[89] This is perhaps so, as Bakker correctly points out because Mokgoathleng J[90] possibly meant that 'the physical act of transferring the bride to the bridegroom's family' is not an indispensable sacrosanct *essentialia* and symbolic handing over may suffice.[91] Hence, the bride's handing over (or integration) remains a requirement, but it need not necessarily be the *physical* handing over — symbolic handing over may suffice.

As commented above, 'celebrated' falls under the auspice of 'integration' in this case. Rome AJ commented that the RCMA is silent on the requirements of 'celebration'.[92] This is perhaps an intentional and purposeful omission by the legislature to defer to living customary law.[93] Here, the requirement seems to be that the 'celebration' requirement is fulfilled 'when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances.'[94]

Accordingly, it is accepted that physical handing over of the bride is not required,[95] and symbolic handing over may suffice.[96] According to Rome AJ, 'integration', as part of the ceremony, merely marks the 'beginning of the couple's customary marriage' and 'introduces the

85 Sibisi (n 2) 98; Osman (n 82) 80–90.
86 Sibisi (n 2) 103.
87 As above. See also Sibisi (n 2) 380; and Bakker (n 34) 17: '[f]amily participation, a *lobolo* agreement, and the bride's integration into the husband's family are the living customary law requirements for a valid customary marriage under [s] 3(1)(b) of the Act'.
88 *Mgenge* (n 3) para 44. See also Sibisi (n 2) 98.
89 *Mgenge* (n 3) para 41.
90 *Sengadi* GJ (n 79) para 18
91 Bakker (n 34) 5.
92 *Mgenge* (n 3) para 46 with reference to *Sengadi* SCA (n 13) para 15.
93 As above.
94 *Mgenge* (n 3) para 46 with reference to *Sengadi* SCA (n 13). However, it is worth noting that a celebration that follows *lobola* negotiations does not automatically constitute a marriage, see Sibisi (n 2) 383: 'the fact that a celebration ensues after the *ilobolo* negotiation does not make an event a marriage'.
95 *Mgenge* (n 3) para 47.
96 Sibisi (n 2) 380: '[i]t is unclear what constitutes a symbolic handing over'. See also Osman (n 82) 84, and Bakker (n 34) 6: '[w]here the actual physical handing over did not occur, they had to devise another way to recognise the marriage — symbolic or constructive handing over'.

bride to the groom's family'.[97] For example, accepting the *makoti* (daughter-in-law) is sufficient for the handing over of the bride.[98]

Accepting that the bride's physical or symbolic handing over (or integration) is a requirement, the issue, in this case, pivots around the applicant's involvement and participation regarding the handing over or integration of the bride. Worded differently, was the handing over requirement met, despite the applicant's lack of knowledge and participation in the events? The short answer is yes, as the integration requirement was satisfied.[99]

Although the applicant did not participate in the bride's handing over, the groom's estranged biological father did. The groom's father 'had travelled to QwaQwa as part of the delegation that would represent the deceased [groom] in their meeting with the first respondent's [the bride's] family'.[100] Rome AJ held that the integration requirement had thus been met.[101]

Rome AJ also added that the applicant's failure to object to the cohabitation of the groom and the bride after the events of 17 November 2018 cast doubt on the applicant's version that the 'customary requirement of the integration of the applicant [*sic*] into the deceased's [the groom's] family had not been satisfied'.[102] Rome AJ considered various factors to determine whether the *integration* requirement was satisfied. These factors, or events, include the

> successful conclusion of a *lobola* agreement, part payment of *lobola*, the observance of customary rituals such as the slaughtering of a sheep, the rubbing of fat on the groom, the families thereafter partaking in a celebratory meal and the gifting of the remaining part of the sheep.[103]

The factors mentioned above and the series of events which resulted in the conclusion of a customary marriage on 17 November 2018, together with the applicant's failure to object to the cohabitation,

97 *Mgenge* (n 3) para 47 with reference to *Sengadi* SCA (n 13), per Molema JA, paras 26–27. See also Sibisi (n 2) 380: '[i]ntegration of the bride takes place at the groom's home'.

98 *Mgenge* (n 3) para 47. See also Sibisi (n 2) 381 with reference to *Sengadi* SCA (n 13) para 26: 'the appellant had embraced the respondent — thus welcoming her into his family. This was, according to the court, a declaration of acceptance of the respondent as his daughter-in-law, in compliance with the "flexible" requirement of the handing over'. See also Osman (n 82) 88.

99 *Mgenge* (n 3) para 50.

100 *Mgenge* (n 3) para 37.

101 *Mgenge* (n 3) para 50.

102 As above. The court perhaps made a typo by referring to the integration of the '*applicant* into the deceased's family' when it is in fact the integration of the *first respondent* (the bride). See also Osman (n 82) 87: 'it is arguable that the cohabitation coupled with the celebrations where the applicant was introduced as the customary-law wife suggest that handing over had been waived by the families'.

103 *Mgenge* (n 3) para 48.

satisfied the Court that the customary requirement of the integration into the groom's family had been met.[104]

In light of the above, it is clear that the Court considered the participation of the groom's father (who travelled to QwaQwa as part of the delegation that would represent the groom in their meeting with the bride's family), in addition to the applicant's failure to object to their cohabitation as husband and wife. As mentioned above, the integration, or handing over, comprises a series of events, and some of these events under the banner of integration may be waived, condoned, or abbreviated by the parties.[105] Rome AJ did not expressly stipulate or explain if these events were shortened or if the applicant's failure to object to their cohabitation constituted a condonation or waiver. However, in *Sengadi*, the deceased groom's family tacitly waived the physical handing-over requirement by allowing the parties to cohabitate.[106] This case must be distinguished from *Mgenge*. In *Sengadi*, the parties cohabited some three years before the *lobola* negotiations.[107] Sibisi suggests that when the cohabitation takes place after the marriage, it is more indicative of the consummation of the marriage (like in *Mabuza v Mbatha*[108] if cohabitation followed the formal handing over of the bride).[109]

The Court in *Mgenge* did not expressly attach any more weight to one factor (like the slaughtering of the sheep, the part-payment of *lobola*, or the failure to object to their cohabitation, etcetera) in finding that the customary requirement of the integration into the groom's family had been satisfied. It would appear that all these factors were collectively indicative of a valid customary marriage. In the following paragraphs, I briefly reflect on the role of Sesotho custom in this case, before concluding this case note.

5 The role of Sesotho custom

As explored above, the RCMA is silent on the requirements of 'celebration'[110] and this omission by the legislature defers it to living customary law.[111] In light of this, it is unfortunate that Rome AJ did

104 *Mgenge* (n 3) para 50.
105 Sibisi (n 2) 98.
106 *Sengadi* GJ (n 79) para 17. For criticism of the court's approach in *Sengadi* GJ (n 79), see Sibisi (n 2) 98. See also Bakker (n 34) 17 fn 94: 'the SCA rejected the decision of the court *a quo* because it did not find that integration can be waived, although it did support the factual decision of the court *a quo* that physical handing over can be replaced by symbolic handing over'.
107 Sibisi (n 2) 98.
108 2003 (4) SA 218 (C).
109 Sibisi (n 2) 99. See also Osman (n 82) 87: 'it is arguable that the cohabitation coupled with the celebrations where the applicant was introduced as the customary-law wife suggest that handing over had been waived by the families'.
110 *Mgenge* (n 3) para 46 with reference to *Sengadi* SCA (n 13) para 15.
111 As above.

not specifically consider Sesotho custom and the testimony of Professor Nhlapo when deciding the question of integration and handing over.

I submit that even if it was not 'necessary on the facts of this matter definitively to determine the outcome of the dispute on the basis that Sesotho customs applied',[112] the Court could have meaningfully considered Sesotho custom in addition to the 'more general considerations'[113] like the physical handing over and the *prima facie* proof.

I do not suggest that Rome AJ should have relied on Sesotho custom only, but it could have been meaningfully considered in addition to the more general considerations. For example, Rome AJ could have ruled that according to Sesotho custom and the prescripts of ascertaining living customary law, the slaughter of a sheep, at the time when the *lobola* was concluded, signified the conclusion of the marriage between the families of the bride and groom. This is so because Sesotho customs did not require anything more than the ceremonial slaughter of a beast after the conclusion of the *lobola* agreement.[114]

I do not suggest that Sesotho custom be the only consideration.; Sesotho custom, in this case, merely reaffirms the correctness of a finding that the marriage was in fact valid, in addition to the more general considerations. Considering Sesotho custom in this case does not exclude the consideration of more general considerations, and *vice versa* — both approaches indicate that the marriage was valid. These two approaches to determining the validity of the customary marriage are not mutually exclusive and Sesotho custom could have been used in addition to, or complementary to, the more general considerations.

6 Concluding remarks

This case makes an important contribution to the existing case law on customary law, especially in the context of the participation in and knowledge of the events leading up to the wedding (like the negotiations) and the entering into or celebration of the customary marriage.

This case illustrates the dynamic and evolving nature of living customary law in South Africa and the approaches adopted by the judiciary when exploring customary law issues like the validity of a customary marriage.

112 *Mgenge* (n 3) para 31.
113 *Mgenge* (n 3) para 32.
114 *Mgenge* (n 3) para 30.

Rome AJ concluded that 'the marriage certificate correctly recognises the existence of a marriage between the first respondent [bride] and the deceased [groom] *during the lifetime of the deceased*.'[115] This implies that the groom's death dissolved the customary marriage, and it was unnecessary to consider *ukungena*, *kungena*, or *kenela*.[116]

In conclusion, the evidence presented by the applicant did not 'cast any doubts on the validity of the marriage certificate and the correctness of its contents'.[117] By relying on more general considerations, Rome AJ correctly held that the marriage was valid and that the certificate correctly recognised the existence of the marriage between the bride and the groom during his lifetime.[118] The application was accordingly dismissed with costs.[119]

115 Own emphasis.
116 P Maithufi et al *African customary law in South Africa* (2014) 260. Perhaps a point for further discussion elsewhere would be if the participation and knowledge, similar to that under inspection in this case, is necessary for the continuance of a customary marriage, after death, as in the case of *ukungena*, *kungena* or *kenela*. Rautenbach (n 9) 113 explains that levirate (also known as *ukungena*, *kungena* or *kenela*) refers to the 'practice where a man's widow cohabits with one of his brothers or some other nominated male relative, for the purposes of raising an heir.'
117 *Mgenge* (n 3) para 52.
118 *Mgenge* (n 3) paras 51-52.
119 *Mgenge* (n 3) para 53.

DO ORDERS OF LAW ENFORCEMENT OFFICIALS SUPERSEDE THE PROVISIONS OF THE CONSTITUTION AND JUSTIFY A COMMAND OF 'SKOP, SKIET EN DONDER'?

***Khosa & Others v Minister of Defence & Military Defence & Military Veterans & Others* (21512/2020) [2020] ZAGPPHC 147**

https://doi.org/10.29053/pslr.v17i1.5099

*by Dashia Govinden**

Abstract

In Khosa and others v Minister of Defence, *the High Court was tasked with assessing whether the use of force by Police and Military personnel was lawful and justifiable in enforcing the COVID-19 Lockdown Regulations. The Court declared that when executing Regulations developed to address the COVID-19 pandemic, law enforcement officers are bound by the Constitution, the law, and international law. Mr Collins Khosa was accused by members of the Police and South African National Defence Force (SANDF) of having violated the Lockdown Regulations. Consequently, Mr Khosa was assaulted in his home by military personnel assigned to enforce the COVID-19 Lockdown Regulations. Hours after the assault Mr Khosa succumbed to his injuries and died. The Court found that the use of force against Mr Khosa was unlawful and violated his fundamental constitutional rights. The court emphasised the significance of protecting constitutional rights, especially during times of a national state of disaster, and emphasised that the Police and Military forces must act within the bounds of the Constitution and respect the rights of all individuals. Additionally, the*

* Final year LLB student.

Court highlighted numerous inflammatory public comments made by the Minister of Defence that impacted the enforcement of the Regulations by law enforcement. The Court specified the measures that the Minister of Defence and Police had to implement to effectively investigate the assault on Mr Khosa and prevent further instances of abuse at the hands of Police and Military personnel enforcing the COVID-19 Lockdown Regulations.

1 Introduction

The founding provisions of the Constitution envisage the values of human dignity, the advancement of human rights, and the achievement of equality.[1] The Bill of Rights contained in Chapter 2 of the Constitution is the cornerstone of democracy, as it reinforces the values of human dignity, equality and freedom which must be fulfilled, promoted, protected, and respected by the state and all organs of state.[2] South Africa's democratic society is founded on the supremacy of the Constitution and the rule of law, an essential precept which ensures that the exercise of public power is within the ambit of the law and the Constitution while guarding the rights in the Bill of Rights.[3] The emergence of the COVID-19 pandemic presented a unique challenge for the rule of law, as it entailed the introduction of restrictive measures by the government to combat the pandemic. It granted the government extensive powers which, given the relatively few checks on the powers, resulted in abuses of human rights and, threatened the constitutionalism of South Africa.[4] In *Khosa and others v Minister of Defence* (*Khosa*),[5] the court confirmed that all law enforcement officials are bound by national and international law obligations prohibiting torture and the violation of human dignity, even during a state of disaster. Further, the court reasserted the non-derogable rights contained in sections 10 and 11 of the Constitution. This case note will provide an overview of the facts and judgement of the *Khosa* case while discussing the extent of the unconstitutional powers that were granted to law enforcement officials, while considering the aptness of the judgement of the court in condemning the infringement on human rights by law enforcement officials during a state of disaster.

1 Constitution of the Republic of South Africa, 1996.
2 The Constitution (n1) sec 7.
3 I Currie & J De Waal *The Bill of Rights Handbook* (2013) at 13.
4 CM Fombad 'Editorial introduction to special focus: Assessing the implications of COVID-19 pandemic regulations for human rights and the rule of law in Eastern and Southern Africa' (2020) *African Human Rights Journal* at 327.
5 *Khosa & others v Minister of Defence & Military Veterans* 2020 7 BCLR 816 (GP).

2 Facts

On 15 March 2020, as a result of the COVID-19 pandemic, the President of the Republic of South Africa declared a national state of disaster, regulated through the Disaster Management Act 57 of 2002 (Disaster Management Act).[6] On 25 March 2020, the Minister of Cooperative Government and Traditional Affairs introduced regulations in terms of the Disaster Management Act to combat the spread of the virus.[7] The implementation of this legislation placed numerous restrictions on the lives of all South Africans, including the restriction of movement of people and the prohibition of alcohol sales including the restriction of public consumption of alcohol.[8] In terms of the Disaster Management Act, the President announced the deployment of the South African National Defence Force (SANDF) in order to assist the South African Police Service (SAPS) in enforcing Lockdown Regulations.[9] On 10 April 2020, two members of the SANDF questioned the occupants of a house in Alexandra, Johannesburg about a half-full cup of alcohol that was found on the premises. The SANDF members accused the occupants of violating Lockdown Regulations and raided the house while confiscating items of alcohol and damaging property. One of the occupants, Mr Collins Khosa, objected to the SANDF's actions and was met with numerous acts of violence. The brutal assault against Mr Khosa was witnessed by various residents, who attempted to record the incident on their cellphones, which were later confiscated by members of the SANDF.[10] The SANDF members called for reinforcements and continued to assault Mr Khosa — beer was poured over his head, he was choked with his hands behind his back, he was slammed against a wall and steel gate, he was kicked, slapped, punched, and hit with the butt of a machine gun. The assault led to Mr Khosa's subsequent death.[11] Before the assault on Mr Khosa, there were multiple inflammatory public remarks made by the Minister of Police, ordering law enforcement officials to 'push South Africans back into their homes' and advocating for the use of violence in the enforcement of Lockdown Regulations.[12] Following his death, Mr Khosa's spouse informed the Minister of Defence about the sequence of events that led to his death and she urged the SANDF and the JMPD to furnish them with comprehensive details of the identities

6 President Cyril Ramaphosa: Measures to combat Coronavirus COVID-19 epidemic 15 March 2020 https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-covid-19-epidemic-15-mar-2020-0000 (accessed 21 October 2023).
7 *Khosa* (n 4) para 3.
8 Disaster Management Act 57 of 2002 (Disaster Management Act) secs 27(2)(f) & (i).
9 *Khosa* (n 4) para 29.
10 *Khosa* (n 4) para 60.
11 *Khosa* (n 4) para 34.
12 *Khosa* (n 4) para 39.

of all Police and Military personnel who were present and who engaged in the assault against Mr Khosa.[13] Additionally, she also demanded the President, Minister of Defence and the Chief of the JMPD to publicly condemn the behaviour of the law enforcement officials.[14] After receiving an inadequate response, she approached the court directly to properly address the matter and curb further occurrences.[15]

3 Judgment

The High Court affirmed that this case is not concerned with the justification for the Lockdown Regulations, but rather about contesting Lockdown brutality by members of the SAPS and SANDF. The High Court argued that such conduct by members of law enforcement was unconstitutional and violated the Bill of Rights as well as the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UN Torture Convention).[16] It was held that despite the declaration of a State of Disaster under the Disaster Management Act, all persons within the territory of the Republic of South Africa are entitled to rights enshrined in section 37(5) of the Constitution. Such rights include the right to human dignity in section 10 of the Constitution, the right to life in section 11 of the Constitution, the right not to be tortured in any way in section 12(1)(d) of the Constitution, and the right not to be treated or punished in a cruel, inhuman, or degrading way in section 12(1)(e) of the Constitution.[17] The Court asserted that section 4(4) of the Prevention and Combating of Torture of Persons Act 13 of 2013 (Torture Act) stipulates that no circumstance, including a declaration of a National State of Disaster, warrants any form of torture.[18] The court noted that the Lockdown Regulations did not confer powers unto law enforcement to damage property or the use of unjustified excessive force.[19] Fabricius J held that leaders are to communicate responsibly, watch their tone and convey clear orders to their members about the use of force.[20] The Court criticised the comments made by the Minister of Defence which essentially instructed law enforcement officials to exercise powers of punishment which they did not have.[21] Fabricius J reiterated that as organs of state, the SANDF, SAPS and MPD including the Defence

13 Khosa (n 4) para 50.
14 Khosa (n 4) para 50.
15 Khosa (n 4) para 51.
16 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 art 2.
17 Khosa (n 4) para 146.
18 Khosa (n 4) para 55.
19 Khosa (n 4) para 74.
20 Khosa (n 4) para 93.
21 Khosa (n 4) para 38.

Minister and the Police Minister, under section 7(2) of the Constitution, are obligated to respect, promote, protect, and fulfil the rights in the Bill of Rights.[22] The court reached the following conclusion and ordered that all SANDF and SAPS members who were present at Mr Khosa's residence are to be placed on precautionary suspension.[23] The relevant authorities were obligated in terms of the judgment, to develop a Code of Conduct regulating the conduct of SANDF and SAPS members during the State of Disaster, which had to be widely published. The court concluded that the Minister of Defence and Police had to initiate investigations into the treatment of Mr Khosa, and any other person whose rights had been infringed, prescribing strict timelines for the completion of such investigations.[24]

4 Commentary

4.1 Powers and functions of the State

The right to human dignity, equality and freedom are repeatedly emphasised in the Bill of Rights as it places an obligation on the state to protect and fulfil such rights.[25] The founding values of the Constitution, contained in section 1(c), establish a democratic government under the supremacy of the Constitution and the rule of law, to guarantee accountability, transparency, and responsiveness in the functions of all courts and organs of state.[26] The Constitution is the supreme law of the land and according to Section 172(1) of the Constitution, courts must declare all conduct, laws and regulations that contradict the provisions of the Constitution invalid.[27] The preamble to the Constitution states that government must be 'based on the will of the people' thus implying that the relationship between the government and the people must not merely be established on the unilateral exercise of power by the government.[28] The public must be able to place their trust in the government to act within the confines of the Constitution and the rule of law while promoting the rights of all individuals within the Republic and working towards the constitutional aim of achieving equality.[29] It is the judiciary's responsibility to impartially apply the Constitution without fear, favour or prejudice.[30] The Constitution must grant the government

22 Khosa (n 4) para 146.
23 Khosa (n 4) para 146.
24 Khosa (n 4) para 146.
25 The Constitution (n 1) sec 7(1).
26 I Currie & J De Waal (n 3) at 348.
27 Khosa (n 4) para 77.
28 I Currie & J De Waal (n 3) at 14.
29 Khosa (n 4) para 7.
30 The Constitution (n 1) sec 165(2).

sufficient power to govern the country effectively, but it must also control the state's power to ensure that it does not violate the law or the rights of citizens.[31] Constitutionalism entails the clear definition and limitation of the state's power in order to protect the interests of society by firstly, constraining the scope of actions that various organs of state can execute and secondly, by prescribing measures that they must adhere to within their competence and in the exercise of their functions.[32] The granting of an urgent application is indicative of the court's responsiveness in protecting the constitutionality of the Republic as per their constitutional obligation in section 165(2) of the Constitution. Thus, the court in *Khosa* upheld their duty to promote the rights in the Bill of Rights, as it reiterated and affirmed the concept of democracy and the rights of all South Africans while reasserting that the Constitution is the highest law in the land and all people, organisations and organs of state are subject to it.[33]

4.2 Applicable legislation

The COVID-19 pandemic has provided novel challenges for the state and the people of the Republic. The Regulations issued in terms of the Disaster Management Act are aimed at regulating civilian behaviour to reduce the spread of the pandemic.[34] However, this increased the powers vested in government and law enforcement officials, allowing them to fulfil their subjective interests, and ultimately resulted in infringement of the rights of people.[35] Ensuring fundamental human rights and constitutionalism under a state of disaster can be problematic and challenging.[36] Even under a declaration of a national state of disaster, any limitation of rights is subject to the limitation clause, as per section 36 of the Constitution. Constitutional rights may only be limited by a law of general application provided that it is reasonable and justifiable in an open and democratic society based on the values enshrined in the Bill of Rights.[37] However, the Disaster Management Act affirms that all persons within the territory of the Republic of South Africa are entitled to their Constitutional rights even during a state of disaster as discussed above.[38] International human rights standards should be adhered to during states of

31 The Constitution (n 1) sec 41(1)
32 I Currie & J De Waal (n 3) at 8.
33 The Constitution (n 1) sec 2.
34 Disaster Management Act 57 of 2002: Amendment of Regulations issued in terms of section 27(2).
35 L Wessels 'Derogation of human rights: International law standards: a comparative study' LLD thesis, Rand Afrikaans Universiteit, 2001 at 13.
36 CM Fombad 'Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa' (2020) 20 *African Human Rights Journal* at 398.
37 *Moise v Greater Germiston Transitional Local Council* 2001 8 BCLR 765 (CC).
38 Khosa (n 4) para 19.

disaster.[39] In this regard, the Torture Act ratified and domesticated the provisions of the United Nations Torture Convention. Furthermore, the South African security services[40] must act in accordance with and instruct their members to act within the ambit of the Constitution, law and international agreements which are binding on the republic.[41] As organs of state the SANDF, SAPS and MPD are obligated to respect, promote, and fulfil the rights in the Bill of Rights as per section 7(2) of the Constitution.[42] The inherent responsibility of the defence force is regulated by section 200 of the Constitution which describes their main objective as defending and protecting the Republic and the people in accordance with the Constitution and values of international law regulating the use of force.[43] The exemplary declarations made by the court in *Khosa* reinforced the rights of all people within the Republic and directly condemned any conduct in contradiction of the Constitution.[44] Furthermore, the court pinpointed the specific rights of Mr Khosa that have been infringed and threatened by unconstitutional actions of law enforcement officials.[45] The Torture Act places an obligation on the state to take functional administrative, legislative, judicial, and other distinct courses of action to prohibit and prevent acts of torture.[46] The Torture Act has no express provision regulating the reporting or investigation of complaints against torture. The Independent Police Investigative Directorate (IPID) is the only body responsible for investigating complaints of torture against members of the SAPS and MPD.[47] The Office of the Military Ombud is the only organisation tasked with investigating complaints of torture against members of the SANDF.[48] Section 4(4) of the Torture Act declares that 'no exceptional circumstances whatsoever, including but not limited to, a state of war, threat of war, internal political instability, national security or any state of emergency may be invoked as a justification for torture.' Consequently, section 10 of the Torture Act places a duty on the state to promote awareness and combatting of all forms of torture, such includes the training of law enforcement officials to combat torture.[49] In *F v Minister of Safety and Security,* the court held that it is the state's duty to protect the public against crime.[50] Additionally, it held that the constitutionalism of the Republic is threatened when there is distrust between the public and the

39 Wessels (n 6) at 16.
40 The SANDF, SAPS and Metropolitan Police Departments (MPD).
41 The Constitution (n 1) sec 199(5).
42 Khosa (n 4) para 23.
43 Khosa (n 4) para 11.
44 Khosa (n 4) para 146.
45 Khosa (n 4) para 75.
46 Khosa (n 4) para 54.
47 Khosa (n 4) para 132.
48 Khosa (n 4) para 132.
49 Khosa (n 4) para 55.
50 *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 2.

police.[51] According to section 13 of the South African Police Service Act (SAPS Act), all law enforcement officials must operate within the ambit of the Constitution heeding the fundamental rights of all persons. Section 13(3)(b) provides that members 'may only use minimum force which is reasonable'.[52] The SAPS Act strictly states that no police officer, under this act, has a general licence to use force, and may only use minimum force in their line of duty.[53] The court in *Khosa* explicitly concluded that the conduct of law enforcement officials subjected Mr Khosa to grievous acts of torture which grossly threatened and infringed his rights to life and dignity.

Constitutional democracy entails that the exercise of public power must comply with the Constitution and the rule of law, meaning that officials of the government, such as Ministers, can only exercise powers and perform functions which they are empowered to exercise by legislation.[54] As per section 92(2) of the Constitution the Minister is accountable to Parliament for the exercise of powers conferred unto them.[55] Section 199(5) of the Constitution obligates security services to act and teach their members within the ambit of the Constitution. Under section 7(2) of the Constitution the Defence Minster and the Police Minister, as organs of state are obligated to respect, protect, and fulfil the rights of civilians in accordance with international laws.[56] The Minister of Defence has a duty to convey clear commands to law enforcement officials when dealing with civilians, however, the Defence Minister acted outside her scope of powers as her use of 'mixed messages' such as 'skop, skiet en donder' tacitly 'imbued' law enforcement officials with unconstitutional powers of punishment which they were not empowered to exercise. Her failure to condemn the violent acts of security services seemed to serve as justification for the unconstitutional acts of law enforcement officials.[57] The court's judgment in *Khosa* appositely criticised the comments made by the Minster of Defence encouraging gratuitous acts of violence and the use of excessive force by law enforcement, while also commenting on her failure to act within the scope of her power and to uphold her constitutional obligations.

51 *F v Minister of Safety and Security.*
52 The South African Police Service Act 68 of 1995.
53 Khosa (n 4) para 61.
54 *Fair-Trade Independent Tobacco Association v President of the RSA* 2020 (246) ZAGPPHC.
55 P De Vos & W Freedman South African Constitutional Law in Context (2014) at 315.
56 *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC).
57 Khosa (n 4) para 89.

5 Conclusion

The court was cognisant of its duty of preserving constitutionality and the human rights of all people within the Republic. The court scrutinised the actions of organs of state and law enforcement officials, and its findings were based on pertinent and well-founded national and international laws that govern the Republic. The need to act swiftly during states of disaster gives the government justification for the exercise of broad powers, which can be destructively used to abuse fundamental rights and censor opponents of the government.[58] In spite of the beneficial developments in law and international conventions, human rights are still grossly violated, especially in states of disaster.[59] Despite a national state of disaster the public is entitled to be treated with dignity, respect and rights, such as the right to life which cannot be limited, even during a state of disaster. The court in *Khosa* concluded that organs of state, such as law enforcement officials and the Minster of Defence, are obligated to respect and protect the rights of all citizens enshrined in section 7(2) of the Constitution while acting within their scope of power.[60] The judgement served as a warning to law enforcement officials to recognise the limits of their authority while enforcing Lockdown Regulations. The Court further reaffirmed that state brutality in any expression of torture, inhuman or cruel treatment is a clear violation of the Constitution as well as other international human rights law conventions.[61] The judgment passed by the High Court is to be applauded as a significant turning point in the manner in which Lockdown Regulations were and are enforced. The judgment emphasises the priority enjoyed by the fundamental rights of every person and enhances the crucial promotion and protection of human rights. It warns government and law enforcement officials to act within the ambit of the Constitution regardless of circumstance. Although this will not prevent all instances of abuse against human rights during a state of disaster, it could significantly limit the occurrences of human rights violations at the hands of law enforcement officials. The court addressed the need to introduce mechanisms to rapidly deal with abuses of emergency powers and violations of human rights and to hold perpetrators accountable to prevent further violations which ultimately challenge democracy, the rule of law and the achievement of equality within the Republic.

58 Fombad (n 7) at 385.
59 Wessels (n 6) at 19.
60 Khosa (n 4) para 78.
61 Khosa (n 4) para 54.

INCORPORATING THE INCORPOREAL: THE POTENTIAL CLASSIFICATION OF BITCOIN AS A 'THING' UNDER SOUTH AFRICAN COMMON LAW

https://doi.org/10.29053/pslr.v17i1.5100

*by Brigitte Geyer**

Abstract

This article aims to determine whether Bitcoin could be classified as a 'thing' in the South African common law of things. The key motivation behind this article is to determine whether the Pandectist focus on the corporeality requirement in the classification of things is outdated in the modern, technologically driven era. Bitcoin, which is classified as a decentralised convertible virtual currency has been received positively in South Africa over the course of the last few years, as Bitcoin adoption has grown exponentially. South Africa has also seen the implementation of important regulatory reforms surrounding virtual currencies; primarily the recognition of virtual currency as a financial product and its traders as financial service providers. Given the positive reception of virtual currencies, particularly Bitcoin, in South Africa, this article explores the recognition of Bitcoin as a 'thing' in South Africa law, as well as the significance of this classification. From this evaluation, it will become clear that the incorporeal nature of Bitcoin poses a challenge to its common law recognition, albeit not an insurmountable one. In this regard, two arguments — the doctrinal argument and the exception argument — are proposed whereby Bitcoin could be recognised as a thing despite its incorporeality.

* This paper is a shortened version of my LLB dissertation, under the supervision of Dr Clireesh Joshua, see B Geyer 'The legal status of Bitcoin in South African and Namibia: A property law perspective' unpublished LLB dissertation, University of Pretoria, 2022. ORCID ID: 0000-0002-0651-4745.

1 Introduction

Bitcoin is indeed becoming local and brings with it novel challenges and places pressure on established legal and regulatory frameworks that were not developed to respond to it. Certain challenges may potentially be managed within the existing South African legal and regulatory framework, while other unique legal and regulatory concerns may be incapable of such reconciliation.[1]

The above assessment by Nieman serves as the foundation for evaluating the proprietary law position of virtual currencies in South Africa, with a specific focus on Bitcoin. This focus on Bitcoin stems from the fact that, aside from being the first virtual currency that gained widespread adoption,[2] it remains one of the two most widely used cryptocurrencies globally,[3] dominating over half of South Africa's virtual currency market by 2021.[4] Over its 14-year lifespan, Bitcoin has had an undeniable impact on the world's financial markets.[5] While the passionate praises of Bitcoin's decentralised algorithm continue to grow — especially in South Africa[6] — concerns regarding its volatile nature and lack of regulation have also been a cause for concern.[7] This increased interest, together with the fear that Bitcoin can be used to facilitate illegal activity,[8] raises questions regarding the legal status, responsibilities and remedies afforded to Bitcoin users.

The central thesis of this article is to address the dilemma surrounding the common-law status of Bitcoin in South Africa. The relevance of this inquiry stems from the fact that Bitcoin is novel technology, especially in South Africa, and scholars have only recently begun grappling with its proprietary law implications.[9] The Roman-Dutch common law, which serves as an important source of law in

1 A Nieman 'A few South African cents' worth on bitcoin' (2015) 18 *Potchefstroom Electronic Law Journal* at 1999.
2 Congressional Research Service 'Introduction to Cryptocurrency' 2023 at 1.
3 As above.
4 IT News Africa 'Report: South Africa ranks 21st in crypto ownership' (2022) at https://www.itnewsafrica.com/2022/01/report-south-africa-ranks-21st-in-crypto-ownership/ (accessed on 2 August 2023).
5 See Chainalysis '2021 Geography of Cryptocurrency Report' 2021 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://go.chainalysis.com/rs/503-FAP-074/images/Geography-of-Cryptocurrency-2021.pdf (accessed on 2 August 2023).
6 As above.
7 W Erlank 'Introduction to virtual property: *Lex virtualis ipsa loquitur*' (2015) 18 *Potchefstroom Electronic Law Journal* at 2542.
8 M Lehmann 'Who owns Bitcoin? Private law facing the blockchain' (2020) 21 *Minnesota Journal of Law, Science & Technology* at 96.
9 See R Cloete 'Ontstoflike sake in die nuwe Suid-Afrikaanse sakereg' unpublished LLD thesis, University of Pretoria, 2001 at 1-392; F Giglio 'Pandectism and the Gaian classification of things' (2012) 62 *University of Toronto Law Journal* at 1-28 & M Njotini 'Examining the 'objects of property rights — lessons from the Roman, Germanic and Dutch legal history' (2017) 50(1) *De Jure* at 136-155.

South Africa,[10] is a principle-based (and therefore adaptable) source of law designed to adapt in congruence with the evolving needs of society.[11] Therefore, the current socio-economic relevance of, and regulatory frameworks surrounding Bitcoin in South Africa should be investigated in relation to the contemporary tenets and attitudes regarding the law of things to assess the common-law status of Bitcoin.

2 The definition and classification of Bitcoin

2.1 The definition of Bitcoin

In 2008, Satoshi Nakamoto proposed a new payment system named Bitcoin.[12] Nakamoto's paper, published in the wake of the 2008 Global Financial Crisis,[13] presented an entirely new currency with the chief objective of eliminating central governing and mediating authorities within financial transactions.[14] In simple terms, Nakamoto presented Bitcoin as a decentralised electronic payment system, which means that two parties can transact directly with one another, via the internet, without the interference of a third-party intermediary,[15] such as a financial institution.[16] This system also functions without requiring a regulating body since Bitcoin transactions are verified and recorded by 'nodes', an extensive network of independent computers.[17] As this network of computers verifies these transactions, a transparent ledger is created, which keeps track of every Bitcoin transaction, which are authenticated by the sender's unique signature.[18] The nodes creating and storing this ledger forms part of what is referred to as the 'blockchain'.[19] By keeping an inalterable and verifiable record of all previous transactions, the blockchain effectively combats the looming threat of the double-spending problem,[20] whereby individuals may attempt to duplicate their digital money fraudulently.[21] Bitcoin is also pseudo-

10 See s 7 the Constitution of the Republic of South Africa, 1996 (the Constitution); see also T Humby et al 'Introduction to law and legal skills in South Africa' (2016) 6 *Oxford University Press South Africa* at 144.
11 JA Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies* at 175.
12 S Nakamoto 'Bitcoin: A peer-to-peer electronic cash system' 2008 available at www.bitcoin.org (accessed 31 March 2022).
13 TG Massad 'It's time to strengthen the regulation of crypto-assets' (2019) *Economic Studies at Brookings* at 9.
14 DLK Chuen 'Introduction to Bitcoin' in DLK Chuen (ed) *Handbook of digital currency* (2015: Academia Press) at 9.
15 Nakamoto (n 12) 1.
16 As above.
17 Nakamoto (n 12) 3.
18 Nakamoto (n 12) 2.
19 As above.
20 See Chuen (n 14) p 15-17 for more information on the double-spending problem.

anonymous since all verified transactions are trackable, but neither the identity of the sender nor that of the receiver is revealed to the public.[22]

Bitcoin is stored in and transferred between wallets'. Bitcoin wallets can be explained as follows:

> [Bitcoin] wallets utilize elliptic curve digital signatures to handle the transfer of ownership rights and ensure that unauthorized spending of the cryptocurrency is infeasible. Each wallet randomly generates a private key (Pr) that is used to derive its corresponding public key (Pub) that is shared among all users. The Pub is used to generate the address of the wallet needed to make payments to it while Pr is used to generate a digital signature corresponding to Pub in order to claim payments made to the wallet and use them in later transactions.[23]

Bitcoin, furthermore, intends to act as an alternative to fiat money. Fiat money can be defined as a government-issued and regulated legal tender backed by the government itself, such as the South African Rand.[24] Fiat money is founded upon the premise that the government controls and regulates the supply of banknotes to avoid hyperinflation.[25] Therefore, the value of fiat money is regulated by governments and financial institutions, while the value of Bitcoin is essentially determined purely by supply and demand.[26]

2.2 The classification of Bitcoin

To understand the significant differences between Bitcoin and fiat currencies within the South African context, it is imperative to understand how Bitcoin is classified within the country's financial system. Nieman indicates that Bitcoin is classified as a decentralised convertible virtual currency (DCVC).[27] To fully comprehend this multi-faceted classification, it is important first to understand what a virtual currency (VC) is. Like all other payment methods, VCs stand as a substitute for value.[28] Referencing the South African Reserve Bank's (SARB) Position Paper on Virtual Currencies, Nieman defines VCs as:

21 Nakamoto (n 12) 1.
22 As above.
23 E Zaghloul et al 'Bitcoin and blockchain: Security and privacy' (2020) 7(10) *IEEE Internet if Things Journal* at 10291.
24 For more information on fiat currencies, see K Bankov 'From gold to futurity: A semiotic overview on trust, legal tender and fiat money' (2019) 29 *Social Semiotics* at 344.
25 Chuen (n 14) 33.
26 See J Bouoiyour 'What determines Bitcoin's value?' (2015) 16 *Centre d'Analyse Théorique et de Traitement des Données Économiques* at 1-14 for more information on the fluctuating value of Bitcoin.
27 Nieman (n 1) 1980.
28 Nieman (n 1) 1981.

> [d]igital representations of value that can be digitally traded and functions as a medium of exchange, a unit of account or a store of value, but does not have a legal tender status.[29]

Legal tender is defined as any method of payment that is 'lawfully in circulation in the Republic [of South Africa]'.[30] VCs can be subdivided into convertible and non-convertible currencies, which refers to the possibility of such currencies being exchanged for tangible money and goods, as well as services.[31] Bitcoin is not recognised as a legal tender in South Africa but as a convertible VC that can be exchanged for fiat money.[32] Finally, VCs that are convertible are categorised as either centralised or decentralised.[33] As previously mentioned, decentralisation means that a currency is not subject to any mediating or governing authorities but rather math-based peer-to-peer systems run by a vast network of independent computers.[34]

On the other hand, centralised currencies are controlled by a third-party administering authority, such as a financial institution that issues, authorises and oversees the operation and functioning of the currency and its payment ledger.[35] Thus, while fiat money is centralised and tangible legal tender, Bitcoin is classified as a decentralised, convertible virtual currency (DCVC).[36] Because of its virtual nature, Bitcoin would be classified as incorporeal under South African proprietary law. Objects that exist in virtual worlds are, by this definition, incorporeal as they do not exist in terms of people's understanding of real-world physics.[37] Corporeal objects are, in modern terms, defined as those object that occupy space and are capable of sensory perception by any of the five senses.[38] According to Erlank, VCs are 'something that one cannot touch, cannot taste, and cannot pick up and take home … however, it is still property, and it still exists'.[39] The implications of Bitcoin's incorporeality will be expanded on in paragraph 4.3.2.

29 South African Reserve Bank National Payment System Department's 'Position Paper on Virtual Currencies' 2014 at 2.
30 Section 17(2) of the South African Reserve Bank Act 90 of 1989.
31 Nieman (n 1) 1982.
32 As above.
33 As above.
34 Nakamoto (n 12) 3.
35 As above.
36 Nieman (n 1) 1980.
37 W Erlank 'Things' in G Muller et al (eds) *General principles of South African property law* (2019) 13-35 at 25.
38 G Muller et al *Silberberg and Schoeman's: The law of property* (6th Edition: 2019) at 19.
39 Erlank (n 7) 2526.

3 The relevance and recognition of Bitcoin in South Africa

3.1 The relevance of Bitcoin in South Africa

To contextualise the debate around the recognition and regulation of Bitcoin, it is necessary to acknowledge the relevance and value of DCVCs in the South African socio-economic sphere. There are significant economic consequences of owning virtual property in the modern world.[40] Erlank uses the example of Bitcoin withdrawals from ordinary ATMs, which creates various new possibilities and complications within the financial sector.[41] He also notes that, left unregulated, VCs could open the door for schemes of money laundering and tax evasion.[42] Thus, governments will have to start formulating regulations for the sale and use of VCs. This call for regulation will be discussed below.

Spruyt illustrates that the global rise in VC usage ushers in a new era which challenges perceptions of money, payment, and property.[43] As people and organisations come to terms with the rapidly evolving nature of money, technology and work brought about by the fourth industrial revolution, their actions and habits are also changing. According to Brookings, Africa has seen an exponential growth of interest in cryptocurrencies over the last few years.[44] Between 2020 and 2021, Africa saw a 1 200 per cent increase in crypto payments valued at US$105,6 billion.[45] Aside from this, Chainalysis ranked South Africa as one of 2021's top 20 countries in cryptocurrency adoption.[46] This illustrates how rapidly Bitcoin is gaining popularity and pertinence in Sub-Saharan African countries, where hyperinflation and failing economies have resulted in citizens distrusting their respective governments.[47] This can partially be ascribed to the fact that Bitcoin's decentralised algorithm provides the citizens of these countries with the option to store and trade their financial assets on a platform that is inaccessible to their nation's financial and governmental institutions and which is unaffected by the state of their national economy.[48]

40 Erlank (n 7) 2542.
41 Erlank (n 7) 2542.
42 Lehmann (n 8) 96.
43 W Spruyt 'An assessment of the emergent functions of virtual currencies' (2018) 4 *Journal of South African Law* at 707.
44 Brookings Africa Growth Initiative 'Foresight Africa 2022' 2022 at 96.
45 As above.
46 Chainalysis (n 5).
47 See K Omoteso 'Corruption, governance and economic growth in Sub-Saharan Africa: a need or the prioritisation of reform policies' (2014) 10 *Social Responsibility Journal* at 316-330.
48 Bankov (n 24) 2.

Another reason for DCVCs increasing relevance in South Africa is that they provide much-needed relief to individuals in impoverished environments, especially those excluded from the existing financial system.[49] According to the World Bank Group, the number of unbanked adults in Sub-Sahara Africa is 350 million – approximately 17 per cent of the global total.[50] This means that they cannot access conventional modes of financial independence,[51] since 'no one in the household [has] a checking or savings account at a bank or credit union'.[52] According to 27 per cent of the individuals surveyed, the main reason for not belonging to a recognised financial institution is a lack of access, primarily due to their remoteness.[53] Many others also cite a mistrust in recognised banks, as they have historically been untrustworthy.[54] The steep incline in Bitcoin usage within this region is promising since independent virtual currencies can provide much-needed financial inclusion and independence to those who do not have access to traditional financial facilities without having to vest their trust solely in banks or the government. However, crypto scams may also lead to the exploitation of Bitcoin users.[55] This issue necessitates the debate surrounding the regulatory oversight of Bitcoin.

3.2 Bitcoin regulation in South Africa

Several stumbling blocks present themselves when it comes to applying the rules of private property law to blockchain transactions. Lehmann identifies how these issues could be addressed through regulatory oversight.[56]

First, the blockchain is an entirely decentralised, autonomous algorithm.[57] This means that when, for instance, a thief obtains the key to a victim's wallet and successfully transfers the stolen Bitcoin into their wallet without the holder's consent, the algorithm will

49 Chuen (n 14) 13.
50 The World Bank Group *The Global Findex Database* 2014 at 1.
51 As above.
52 FDIC '2021 FDIC National Survey of Unbanked and Underbanked Households' 24 July 2023 https://www.fdic.gov/analysis/household-survey/ (accessed on 24 August 2023).
53 It is admitted that VCs may not be a viable replacement for all unbanked individuals, since they may also struggle with access to the necessary digital infrastructure required to access VCs, such as computers and internet access. This being said, for those who do have access to such facilities and remain unbanked for other reasons, VCs could provide significant financial freedom. See V Lawack-Davids 'The legal and regulatory framework of mobile banking and mobile payments in South Africa' (2012) 7 *Journal of International Commercial Law and Technology* at 323.
54 World Bank Group (n 50) 3.
55 See M Bartoletti et al 'Cryptocurrency scams: Analysis and perspectives' (2021) 9 *IEEE Access* at 148353-148373.
56 Lehmann (n 8) 108.
57 See para 2.1.

recognise this transaction as valid and irreversible, despite the lack of a legal basis for such a manoeuvre.[58] Alternatively, a person who lawfully inherits Bitcoin but does not receive the private key to access the wallet would have no way to access the currency to which they are entitled.[59] In other words, that which the law recognises as lawful and fair may not always be readily enforceable on Bitcoin.

Secondly, Bitcoin transactions are irreversible.[60] This means that even if the law recognises a particular transaction's unlawfulness, there is no way to remedy the situation by deleting that transaction from the blockchain.[61]

Thirdly, Bitcoin is anational and not subject to one particular legal system, which means that it is not regulated under a particular government or legal system.[62]

To reconcile Bitcoin with South African private law, these problems will have to be addressed. Lehmann's proposal in this regard is that the nature of Bitcoin should not be tampered with, as its decentralised nature is quintessential to the benefit it provides, but that the law must still play a regulatory and corrective role with regard to blockchain transactions.[63] Rather than attempting to recode the blockchain algorithm to avoid mistakes, fraud and ownership issues, the law should find unique external solutions for these issues that apply to users within a specific jurisdiction. Therefore, Bitcoin regulation is not about removing transactions from the Bitcoin ledger or altering the autonomous nature of the blockchain but rather about how the legal system could potentially address the individual needs of users concerning their cryptocurrency.[64] If Lehmann's solution is applied to stolen Bitcoin, this would mean that while the illegal transfer cannot be physically removed from the blockchain, the thief could be legally obligated to make a new transaction wherein they pay the stolen currency back to the rightful holder.[65] Lehmann thus suggests that Bitcoin regulation is the best way to oversee the rights and responsibilities of those involved in trading DCVCs.[66] While this solution has challenges, it is a good place to start in addressing these obstacles.

There are differing schools of thought surrounding the regulation of Bitcoin.[67] On the one hand, proponents of deregulation claim that

58 Lehmann (n 8) 98.
59 Lehmann (n 8) 108.
60 Lehmann (n 8) 110.
61 As above.
62 Lehmann (n 8) 113.
63 Lehmann (n 8) 117.
64 Lehmann (n 8) 120.
65 As above.
66 Lehmann (n 8) 93.
67 See R Khan 'Cryptocurrency: usability perspective versus volatility threat' (2022) 2 *Journal of Money and Business* at 16-28.

the genius of Bitcoin is that it allows ordinary people to manage their finances without any form of external interference.[68] Bitcoin has no senior authoritative body that can freeze your account, increase the available amount of Bitcoin or interfere with your freedom to transact.[69] In other words, buying Bitcoin is a risk you take without the opportunity of legal recourse in the event of financial loss. Those that are in favour of minor regulation, on the other hand, contend that a complete lack of government control renders individuals, especially those uneducated and uninformed about the risks intrinsic to this technology, vulnerable to exploitation.[70] Cryptocurrencies are also known to increase the risk of fraud and money laundering.[71]

In light of this debate, evaluating Bitcoin regulation in South Africa is necessary. Until recently, the SARB did not regulate or oversee any VCs. It thus did not provide recourse for victims of fraud or financial loss within the VC landscape.[72] In its 2022 Budget Review, however, the South African Treasury set out its approach to VC regulation in line with the recommendations of the Intergovernmental Fintech Working Group (IFWG).[73] First, the amendments to Schedules 1, 2 and 3 of the Financial Intelligence Centre Act 38 of 2001 (FICA) were finalised in 2022 to include all crypto asset providers as accountable institutions.[74] This aligns FICA better with the international standards regarding VCs as set out by the Financial Action Task Force (FATF), an intergovernmental organisation with the aim of combatting fraud, money laundering and the financing of terrorism at both a local and international level.[75] In this regard, on 20 October 2022, the Financial Sector Conduct Authority (FSCA) also declared that the recently promulgated Financial Advisory and Intermediary Services Act[76] (FAISA) includes crypto assets under the definition of a financial product.[77] Accordingly, all crypto financial service providers (FSPs) exchanges, platforms, advisors, brokers and any other entity providing intermediary services relating to VCs will have to be licensed as financial service providers and act in accordance with the requirements for such service providers.[78] This amendment intends to limit the risk that crypto assets and activities

68 Khan (n 67) 19.
69 Chuen (n 14) 8.
70 Khan (n 67) 24.
71 As above.
72 Nieman (n 7) 1989.
73 IFWG 'Position Paper on Crypto Assets' 2021 at 21.
74 SAICA 'Schedule 1, 2 and 3 of the FIC Act amended' 2022 https://www.saica.org.za/resources/153240 (accessed on 2 August 2023).
75 Financial Action Task Force *Virtual Currencies: Key Definitions and Potential AML/CFT Risks* (2014).
76 37 of 2002.
77 Financial Sector Conduct Authority 'Declaration of crypto assets as a financial product' 2022 at 1.
78 Financial Sector Conduct Authority 'Policy document supporting the declaration of a crypto asset as a financial product under the Financial Advisory and Intermediary Services Act' 2022 at 3.

pose to financial customers.[79] These commitments were confirmed by the Deputy Governor of the SARB, Kuben Naidoo.[80] In a nutshell, Naidoo expressed the SARB's commitment towards the regulation of cryptocurrencies in order to make the cryptosystem in South Africa safer.[81] The Treasury also described these new regulations as measures aimed at 'promoting financial innovation to improve competition and inclusion'.[82] In light of this commitment to VC regulation, a 2018 report by the international law firm, Baker McKenzie,[83] classified South Africa as a 'green' country in the context of Bitcoin acceptance, indicating that South Africa has adopted a friendly and progressive approach towards Bitcoin.[84]

In light of the above, it is submitted that the South African government and public have been particularly welcoming towards Bitcoin technology. What remains to be determined is whether the South African proprietary law system is equally accommodating towards incorporeal, virtual assets, such as Bitcoin.

4 The common-law classification of Bitcoin

4.1 The distinction between property and things

Different types of property are afforded different levels of recognition, as well as different protective measures.[85] The question at the heart of this inquiry is whether Bitcoin can be classified as a 'thing'. In order to understand the nature and role of 'things' within the broader scope of property law, one should begin by distinguishing between 'property' and 'things'. Erlank states:

> Recognition of property in private law (things) differs from recognition in constitutional law since the purpose of recognition in private law is to enforce protection against other private actors, while the corresponding

79 FSCA (n 78) 8.
80 See 'Future of money, banking and crypto' 2022 https://video.search.yahoo.com/search/video;_ylt=AwrFG.8fEDtjJgwESVVXNyoA;_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZANMT0NVSTA1NENfMQRzZWMDcGl2cw--?p=psg+webinar+%2B+the+future+of+money+banking+and+crypto&fr2=piv-web&type=E210US714G0&fr=mcafee#id=1&vid=49847fb28f47d755a8d57aa16220ecc1&action=view (accessed on 3 October 2022).
81 Cliffe Dekker Hofmeyr 'Finance and Banking Alert' 4 August 2022 at *Future of money, banking and crypto* 2022 https://video.search.yahoo.com/search/video;_ylt=AwrFG.8fEDtjJgwESVVXNyoA;_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZANMT0NVSTA1NENfMQRzZWMDcGl2cw--?p=psg+webinar+%2B+the+future+of+money+banking+and+crypto&fr2=piv-web&type=E210US714G0&fr=mcafee#id=1&vid=49847fb28f47d755a8d57aa16220ecc1&action=view (accessed on 3 October 2022).
82 As above.
83 Baker McKenzie 'Blockchain and cryptocurrency in Africa: a comparative summary of the reception and regulation of blockchain and cryptocurrency in Africa' 2018 at 2.
84 Baker McKenzie (n 83) 5.
85 Erlank (n 85) 15.

> purpose in constitutional law is to enforce protection against state intervention.[86]

Furthermore, 'property' refers to 'a wide variety of assets that make up a person's estate or belongings and which serve as objects of the rights that such a person exercises in respect thereof'.[87] At the same time, things simply amount to 'the object of a right, in the restricted meaning of referring only to corporeal or material objects'.[88] Du Bois also confirms this distinction between constitutional and private law property protection.[89] In private law, the focus is on the competing rights of private parties, while the Constitution of the Republic of South Africa, 1996 (Constitution) insulates property against a certain measure of state interference, as well as the constitutional rights of other parties.[90]

Furthermore, private property law, generally focuses on the objects of rights, known as things. In contrast, constitutional property law emphasises rights held by individuals, known as constitutional property.[91] In light of this, 'things' can be defined as the objects of real rights, and fall within the realm of private law rather than public law.[92] In summary, while property describes the constitutional right to both corporeal and incorporeal legal objects, things are traditionally defined more narrowly as the physical objects of real rights.[93]

Ownership is the most comprehensive real right that a person can have over a thing.[94] According to Lehmann, determining the meaning of Bitcoin ownership in a private law context poses various challenges.[95] First, there is the fact that defining ownership of Bitcoin is significantly harder than determining the ownership of physical assets. While Bitcoin is often colloquially referred to as property and to the holders of private keys as 'Bitcoin owners', it is still uncertain whether crypto-assets can realistically be recognised as such within the ambit of the South African common law.[96] Aside from the fact that Bitcoin is, by its nature, 'completely delocalised and a-national',[97] it also introduces an entirely new concept of property which challenges the traditional conceptions of ownership. This is the question this inquiry aims to answer — whether Bitcoin can be

86 As above.
87 Muller et al (n 37) 1.
88 As above.
89 M Du Bois 'Intellectual property as constitutional property right: the South African approach' (2012) 24(2) *South African Mercantile Law Journal* at 177-193.
90 See s 25 of the Constitution.
91 Erlank (n 85) 16.
92 The Constitution of the Republic of South Africa, 1996.
93 Erlank (n 85) 16.
94 Muller et al (n 37) 103.
95 Lehmann (n 8) 101.
96 As above.
97 Lehmann (n 8) 98.

recognised as property regulated by South African common-law provisions. The answer to this question would then facilitate future inquiries into the various private law concerns affecting Bitcoin, including the ownership of stolen coins, the right of a Bitcoin user to reverse an erroneous transfer and the impact that bankruptcy or succession may have on Bitcoin holders.[98]

The first central question is thus whether Bitcoin can be classified as a 'thing'. If so, the door may be open for further inquiry into how such rights and responsibilities may be practically enforced. For an owner of an object to enjoy the rights and remedies prescribed in the law of things, however, the object must first meet a set of specific requirements.[99]

4.2 The characteristics of things

Traditionally, a 'thing' is defined according to a specific set of criteria, namely that it is an object which is external, independent, appropriable, of use and value and, most importantly, corporeal.[100] Furthermore, things can be subcategorised by their classification in relation to persons and their nature.[101]

First, the fact that things ought to be external to persons and of an impersonal nature indicates that the object cannot be a physical extension of the human body, such as organs or limbs, which are considered to be part of a person's individuality and to fall outside the scope of legal commerce (*res nullius*).[102]

Secondly, independence refers to the fact that the object in question has a distinct and definite nature, which enables it to exist entirely on its own, taking up its own space.[103] While this excludes, for instance, natural resources which are incapable of being isolated, controlled or individually sold, such as air or rivers, it does include things such as demarcated land.[104]

Thirdly, the appropriability of things means they ought to be susceptible to human control or submission.[105] This definition includes things such as cell phones or vehicles. However, it excludes those phenomena beyond the scope of human power and which are not divided into manageable parts, such as the natural elements, such as space.[106]

98 Lehmann (n 8) 93.
99 Muller et al (n 37) 19.
100 Erlank (n 85) 23-29.
101 Erlank (n 85) 29-35.
102 Erlank (n 85) 26.
103 Erlank (n 85) 27.
104 As above.
105 Erlank (n 85) 28.
106 As above.

Fourthly, things have to be of use and value and meet the needs of legal subjects for a legal relationship to arise between them. This includes both economic and sentimental value.[107] To determine whether this element is present, an objective test is applied to determine whether the item in question carries the potential to be of use or to contribute value to a hypothetical person.[108] In other words, while one person may subjectively regard something as useless, another person may find great use and value for it. The example presented is a leaf, which one person may regard as lacking any use and value, while another may utilise it for their composting business.[109]

Finally, the corporeality requirement first refers to the possibility of being observed with the five human senses: sight, hearing, taste, touch and smell. However, it is sufficient if at least some of those senses could perceive the thing.[110] The second condition for corporeality is that the thing ought to occupy a physical volume of space. This implies that, while at least some senses can observe natural phenomena such as loud noises or warm gusts of wind, they cannot be defined as 'corporeal' since they do not occupy any space in the physical world.[111] There are, however, select, legally recognised exceptions to the requirement of corporeality, which will be elaborated upon shortly.[112]

What is important to understand about the corporeality requirement, however, is that its application is not rooted in pure physics but rather in a theoretical context which is informed by the views of society and scholars of proprietary law.[113] The contentious debate around the present-day relevance of this requirement, which pertains to the central question regarding the classification of Bitcoin, will be discussed in detail below.[114]

4.3 Bitcoin and the law of things

4.3.1 The individual characteristics of things as applied to Bitcoin

To understand the scope of the common-law definition of a thing, each fundamental requirement will first be evaluated individually concerning Bitcoin. Since not much research has been done on

107 Erlank (n 85) 28.
108 As above.
109 As above.
110 Erlank (n 85) 23.
111 As above.
112 See para 4.3.2 below.
113 Erlank (n 85) 23.
114 See para 4.3.2 below.

applying these concepts to virtual currencies, scholarly views pertaining to the internet and other virtual assets will be relied on to extrapolate general principles regarding virtual property. What follows is an evaluation of each element of a 'thing'.

First, things must be external and impersonal.[115] It is submitted that virtual property meets this requirement, as it is completely removed from the physical bodies of users. Another way of understanding this requirement is to regard it as distinguishing between objects considered *in commercio* and those that are not. In the virtual realm, external things can be found in the form of avatars, which can be bought, sold, edited and discarded by a real-world user.[116] This reasoning applies to Bitcoin also, which is linked to a real-world monetary value and can be bought and sold using a virtual account.[117]

Secondly, things should exist independently.[118] Incorporeals may also be regarded as independent if they are recognised as such in legal practice. In other words, the independence of incorporeals may be determined on an *ad hoc* basis.[119] Erlank argues that virtual property gains independence when data is converted into identifiable virtual items.[120] While the abovementioned analysis refers specifically to lifelike objects used by avatars in video games, such as crops or minerals, it is submitted that this could equally apply to the Bitcoin system, whereby individual virtual currency is stored in separate, identifiable wallets, transactions are coded onto a visible ledger through machine learning systems etcetera.

Thirdly, things should be susceptible to human control.[121] This means that a user can protect and enforce their entitlement to a specific asset.[122] It is argued that, within the broad interpretation of things, both corporeals and incorporeals may be satisfactorily susceptible to human control.[123] Bitcoin arguably complies with this requirement in that each Bitcoin user has a wallet exclusively accessible through their unique key.[124] This, coupled with the fact that Bitcoin users can use their virtual currency to conclude transactions and purchase real-world items according to their own

115 See 4.2 above.
116 Erlank (n 85) 26.
117 See para 2.1 above.
118 See 4.2 above.
119 Muller et al (n 37) 25.
120 Erlank (n 85) 27.
121 See para 4.2 above.
122 See Schindlers Attorneys '*Are crypto assets property in South African law*? 2021 https://www.schindlers.co.za/news/are-crypto-assets-property-in-south-african-law/(accessed on 5 October 2022).
123 Muller et al (n 37) 26.
124 See Schindlers (n 122).

will, indicates that such DCVCs meet the appropriability requirement.[125]

Fourthly, things should be of use and value to persons.[126] It is important to note that incorporeals can hold just as much economic value as corporeals.[127] According to Erlank, this is paramount for courts regarding the classification of virtual property.[128] Bitcoin is a representation of tangible money, as well as proof of the transfer of ownership of tangible assets. Therefore, despite its intangibility, Bitcoin is of genuine commercial use and value to its users.[129] Furthermore, as will be discussed shortly, scholars have suggested that, due to the evolving nature of society's understanding of property, the primary focus regarding the classification of things should shift towards the use and value of property rather than its corporeality.[130]

Finally, and of significant importance in the Pandectist common-law interpretation, things can only be corporeal.[131] Bitcoin does not meet this corporeality requirement since it exists virtually. However, the validity of this requirement is a matter of debate. What follows is a discussion of the various arguments regarding the corporeality requirement of things under South African common law.

4.3.2 Contentions surrounding the corporeality requirement

As discussed above, the dominant, traditional Pandectist understanding of the law of things is that it only protects objects that meet all five requirements, focusing on corporeality. There is a convincing argument to be made that the restrictions on incorporeal things are founded upon systematic and dogmatic considerations rather than concrete logic or the rules of physics.[132] If this is true, then the basis of the traditional view should be re-evaluated to determine if such a view is still relevant and applicable in the current legal system.

Cloete provides an in-depth analysis of the two contesting approaches to defining a thing in the South African common law.[133] On the one hand, there is the narrow, traditional view which holds that the essence of a thing lies in its corporeality and that the law of things strictly excludes any incorporeal assets, save for some select

125 See para 2.1 above.
126 See 4.2 above.
127 Muller et al (n 37) 27.
128 Erlank (n 85) 29.
129 Schindlers (n 122).
130 Cloete (n 9) 343.
131 See 4.3.2 below.
132 Erlank (n 85) 23.
133 Cloete (n 9).

exceptions.[134] However, the rapid rate of technological innovation and recent constitutional property law developments have led contemporary scholars to reject the dogmatic view in favour of a broader, more modern understanding of things as is reflected in traditional Roman law.[135]

According to Cloete, South African law's narrow, traditional definition of things is blatantly incorrect and derives from a relatively recent legal interpretation.[136] To understand this critique of the narrow conception of things, one should first understand the historical context of this legal development. Naturally, the scholars discussed below were not referring to virtual property, such as virtual currencies, but rather to other intangible rights, such as usufructs. The object of this discussion is nonetheless to show that the corporeality requirement of things is not deeply ingrained in the Roman-Dutch legal tradition but rather a modern interpretation.

In traditional Roman law, jurists recognised three distinct categories of private law: persons, actions and things.[137] In other words, all aspects of private law, whether corporeal or incorporeal, which could not be classified as actions or persons, were classified as 'things' or '*res*'.[138] Incorporeal things (*res incorporales*) were thus explicitly recognised in Roman times and later during the Middle Ages.[139] Roman-Dutch common-law writers continued with this approach.[140] Voet, for instance, defined 'things' as 'everything of which the courts take cognisance'.[141] Voet argued that incorporeals could be recognised as things since they are equally capable of having 'an inherent value to the person who had an interest in them'.[142] In other words, the most essential characteristic of a thing in old Roman-Dutch law was economic use and value.[143]

In contrast with the Roman-Dutch approach, German Pandectists, who were also scholars of Roman law, adopted an interpretation of the concept of things which significantly differed from that of the Roman jurists by arguing that corporeality is a requirement of things.[144] Pandectism started in the nineteenth century in Germany and focused on 'a systematic and dogmatic classification of Roman law'[145] — an approach sometime criticised as 'exaggerated

134 Erlank (n 85) 17.
135 See Cloete (n 9), Giglio (n 9) & Njotini (n 9).
136 Cloete (n 9) 4.
137 Muller et al (n 37) 18.
138 As above.
139 Cloete (n 9) 4.
140 Muller et al (n 37) 18.
141 Voet Elem Jur 2 1 1.
142 Voet (n 141) 1.8.11.
143 Njotini (n 9) 154.
144 Cloete (n 9) 316.
145 Giglio (n 9) 1.

dogmatism'.[146] Pandectists were keenly interested in the work of Gaius, a Roman jurist who introduced the distinction between corporeal and incorporeal things.[147] That being said, it is contended that the Pandectist reading of Gaius' distinction between corporeals and incorporeals is not a true reflection of the intention behind the distinction itself.[148] The Pandectist interpretation of Gaius' scheme led to the belief that incorporeals are distinguished from corporeals in the sense that they do not form part of the definition of a thing but rather exist purely as an exception to the corporeality requirement.[149] Giglio, however, argues that the Pandectist interpretation is incorrect and should therefore be discarded in its entirety.[150] Giglio argues that Gaius's distinction between corporeals and incorporeals did not intend to impact the recognition or ownership of such objects[151] and that the true nature of Gaius's scheme was philosophical rather than legal-analytical.[152] Therefore, the Pandectists' legal interpretation of Gaius's didactic scheme resulted in consequences within the law of things which Gaius would not have i[153]ntended.

While South African law was primarily influenced by the view of the Roman-Dutch scholars during its early development, the post-1950 Pandectist view increasingly influenced the South African interpretation.[154] Before the 1950s, South African jurists underscored Voet's broad interpretation of things as 'everything which can be the object of a right [and which has] monetary value',[155] thereby acknowledging the existence of incorporeal things. In the years since, South African scholars, such as Van der Merwe and Joubert,[156] began to adopt narrower Pandectist views and subsequently inspired the opinion that corporeality stands at the centre of private property law and that incorporeals may merely be included as exceptions in specific circumstances.[157] In other words, a shift can be observed from a broad, pragmatic approach to a narrower, doctrinal approach to classifying things in the South African common law.[158]

In contrast with this narrow approach, South African scholars such as Kleyn and Boraine have subsequently reverted to the original

146 As above.
147 Giglio (n 9) 3.
148 As above.
149 Muller et al (n 37) 18.
150 Giglio (n 9) 3.
151 Giglio (n 9) 5.
152 Giglio (n 9) 8.
153 Giglio (n 9) 9.
154 Cloete (n 9) 316.
155 Muller et al (n 37) 18.
156 See CG Van der Merwe Sakereg (2nd ed 1989) and CG Van der Merwe 'Ownership' in WA Joubert & JA Faris (eds) *The law of South Africa* volume 27 (1st reissue 2002) at 217-355.
157 As above.
158 Cloete (n 9) 316.

Roman law stance by arguing that the concept of a thing transcends the distinction between corporeal and incorporeal and is dependent on the commercial use and value of the particular asset.[159] Kleyn argues that including incorporeal things within the law of things does not threaten the doctrine of subjective rights.[160] In addition to this, modern French authors also depart from the unnecessary distinction between corporeals and incorporeals.[161] This movement was initiated by Ginossar, who presented the notion that 'a patrimony comprises corporeal and incorporeal things, and ownership is the link between the person and all the elements present in his patrimony'.[162] In other words, ownership establishes a relationship between a person and their thing, whether that thing is a car (corporeal) or an usufruct (incorporeal).[163] The implication being that not all incorporeals will qualify as things, only those which could be the object of ownership, provided that it is of use and value to its owner.

In addition, it is submitted that there is no legitimate reason for corporeals to enjoy preference over incorporeals in the legal sense.[164] Giglio argues:

> Law … is a social science, a creation of the human intellect to the organization of a social community. Tangibles exist for the law only insofar as they form the objects of legal interests and legal relations. Factual, corporeal things are only that, facts of nature, until the law takes notice of them and incorporates them into its system of ideas by attaching legal interests to them. Through this passage, physical things lose their corporeality and become legal things. Legal things are not physical things They are concepts.[165]

In light of these arguments, it is submitted that the corporeality requirement should not be accepted as an undisputed, inherent legal principle in South African law but rather as a very recent, narrow and dogmatic interpretation of proprietary law which does not necessarily serve the developing needs of South African legal subjects in the era of VCs.[166] This approach is preferable, as it is more pragmatic and aligns with the traditional Roman concept of a thing.[167]

159 DG Kleyn & A Boraine *Silberberg and Schoeman's the law of property* (3rd Edition: 1992) at 19.
160 See DG Kleyn 'Dogmatiese probleme rakende die rol van ontstoflike sake in die sakereg' 1993 (26) *De Jure* at 11.
161 Giglio (n 9) 14.
162 As above.
163 As above.
164 Giglio (n 9) 7.
165 As above.
166 As above.
167 Cloete (n 9) 92.

5 Arguments for the common law recognition of Bitcoin despite its incorporeality

It is clear that the corporeality requirement poses a significant obstacle for virtual assets, such as Bitcoin, to be recognised as property under the South African common law. In light of this, Cloete's evaluation of the historical development of the corporeality requirement[168] demonstrates the need transform the law of things within the modern age of rapid technological development. Rethinking the corporality requirement and aligning the law with technological advancement is thus required.

The corporeality requirement presents dogmatic problems, which can be resolved in various ways: One solution is to disregard the requirement altogether, while another is to recognise incorporeals as 'patrimonial rights serving as the object of limited real rights', thus classifying them as an exception to the requirement of corporeality.[169]

It Is submitted that the first proposal, namely the altogether elimination of the corporeality requirement, can be achieved by emphasising 'use and value' rather than 'corporeality', which would allow for incorporeal assets, such as VCs to gain recognition as 'things'. This argument will be described as the 'doctrinal argument'. Secondly, it will be argued that a compromise could be struck by recognising incorporeal assets as an exception to the corporeality requirement.[170] This is referred to as the 'exception argument'.

5.1 Doctrinal argument

It has been argued that the corporeality requirement may be eschewed, and the 'use and value' requirement preferred. It is argued that:

> There seems to be no reason why an immaterial property right cannot also be the object of a real right, considering the economic value implicit in such immaterial property rights.[171]

As previously stated, Bitcoin is a commodity subject to private ownership, which meets all four of the other requirements of a thing aside from corporeality, including socio-economic use and value.[172] In terms of use and value, Bitcoin is entirely subject to the personal control of its owner, using a wallet and key without any external

168 See para 4.2.
169 Muller et al (n 37) 41.
170 As above.
171 Muller et al (n 37) 20.
172 See para 4.3.1 above.

interference. Moreover, the primary objective of owning Bitcoin is to put the user in a superior financial position by allowing them to invest and spend their finances free from (excessive) governmental control. Finally, the last couple of years have seen the use of crypto transactions increase exponentially due to a rising interest in DCVCs and a growing awareness of the access to commercial and economic freedom that it provides. Therefore, it is not only clear that Bitcoin's use and value are prominent, but the argument can be made that the large-scale adoption of Bitcoin should weigh more than its intangibility. The fourth industrial revolution has brought about unprecedented developments and requires that we re-assess the way in which the law functions. As Njotini puts it:

> Property or the objects that are or should be accorded the status of property for legal purposes seem to depend on the social circumstances of a specific society during a particular point in time … because property seems to amount to those things that a particular society during a particular period regards as of interest to it.[173]

Njotini argues that modern society is information and technology-driven and that this *status quo* should affect society's perception and classification of things.[174] Kleyn and Boraine underscore this view by stating that 'no worthy purpose can be served by denying present-day realities and needs through unquestioned acceptance of a dogmatic structure'.[175]

The doctrinal argument is thus based on three sub-arguments: First, it is argued that the corporeality requirement in the law of things is a recent and incorrect interpretation of Roman law.[176] Secondly, it is purported that proprietary law should adapt to the interests and needs of a specific society at a specific point in time.[177] Thirdly, it has been argued that society is continuously influenced by technology and an increased interest in VCs.[178] In light of this, it would be justifiable to return to the classic understanding of 'things' by focusing on the use and value that both corporeals and incorporeals hold for individuals. In light of this, it is that Bitcoin has a distinct economic value that should be recognised and protected.[179]

5.2 Exception argument

One argument against the doctrinal argument is that by completely discarding the corporeality requirement, the definition of a thing may

173 Njotini (n 9) 136.
174 Njotini (n 9) 137.
175 Kleyn & Boraine (n 159) 14.
176 See para above.
177 Njotini (n 9) 137.
178 See para above.
179 See para 4.2 above.

'become too vague to have a scientific meaning'.[180] In light of this, a second argument, known as the exception argument, entertains the possibility of circumventing the issue of Bitcoin's incorporeality altogether by recognising VCs as an official exception to the corporeality requirement.[181] The benefit of this requirement is that it does not upset the *status quo* in any significant way, while the corresponding negative aspect is that it merely makes another exception to the narrow, traditional perspective on things rather than actively adapting the common law to address the needs of modern society. Therefore, while this proposal is arguably not ideal, it serves as a safety net should the doctrinal argument fail.

As the common law developed in South Africa, the judiciary has made exceptions to incorporate certain incorporeals under the law of things.[182] These exceptions usually pertain to patrimonial rights, which are subject to real rights in the same way a tangible object would be.[183] It can thus be argued that incorporeal assets, such as Bitcoin, may be regarded as an exception to the corporeality rule if they are recognised as patrimonial rights, which can be defined as a property right corresponding with a legal object.[184]

Importantly, Cloete rejects the 'exception argument' and states that such an attempt to broaden the scope of the common law of things whilst still operating within the ambit of the incorrect Pandectist view that corporeality is paramount is unsound.[185] It is submitted that such an argument is not historically justifiable and is not be the optimal solution to the issue.[186] South African common law has developed a relatively new conception of the law of things which does not serve the needs of the modern, technologically driven society. In light of this, while the exception argument may seem more convenient, the dogmatic argument ought to be preferred.

6 Conclusion: The potential legal classification of Bitcoin in South Africa

This article determines that Bitcoin is classified as a DCVC, which implies that Bitcoin usage is not overseen or regulated by a central government or financial institution but rather by a complex network of Bitcoin user[187]s. The central question of this article is subsequently to determine whether Bitcoin, as a DCVC, could enjoy common-law

180 Muller et al (n 37) 23.
181 Erlank (n 85) 24.
182 As above.
183 As above.
184 Muller et al (n 37) 23.
185 Cloete (n 9) 131.
186 As above.
187 See para 2.

recognition as a 'thing'. It has been argued that Bitcoin meets four of the five requirements, with the requirement of corporeality being the only subject of contention. According to the Pandectist view, VCs cannot be classified as things because they are incorporeal and no specific exception is made for their inclusion. In this article, however, two arguments have been set out whereby VCs could be regarded as things despite their incorporeal nature.

What is clear is that some form of legal development, whether disruptive or not, is essential to reframe our modern understanding of the common law by rejecting the Pandectist school of thought and returning to the Roman conception of things in order to avoid the dogmatic and unnecessary exclusion of incorporeal things — especially in the modern context. This stance also opens the door for more robust discourse surrounding the proprietary law implications of such a classification in the context of succession, insolvency, theft, etcetera, to determine the common law rights, responsibilities and remedies of Bitcoin users in Southern Africa.